

*Google Spain and its* Effects on  
Korean Online Intermediary  
Regulation

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# Korean intermediary liability regime

- Network Act 44-2 : “take out all rights-infringing material upon demand”
- Seems Innocuous? → Asymmetry in Incentives -> always errs on the side of deleting than keeping it → private censorship of lawful material in Korea
- Special Aggravation 1: “Upon demand, intermediaries MAY temporarily blind NON-PREJUDICIAL material” (reminding of “non-prejudicial” in Google Spain?)
- Special Aggravation 2: “Upon G’s demand, Intermediaries MAY take down materials if necessary for maintenance of SOUND COMMUNICATION ETHICS” (reminding of “inadequate, irrelevant, inappropriate” of Google Spain?)

# Result: rampant private censorship

- 2012 Rights-infringing takedown: about 100,000 in Korea vs. 2,000 in whole world (Google) vs. less than 10,000 Korean gov takedowns
- A posting critical of a Seoul City mayor's ban on assemblies in the Seoul Square
- A posting critical of a legislator's drinking habits and introducing his social media account;
- Clips of a television news report on Seoul Police Chief's brother who allegedly runs an illegal brothel-hotel;
- A posting critical of politicians' pejorative remarks on the recent deaths of squatters and police officers in a redevelopment dispute
- A posting calling for immunity from criminal prosecutions and civil damage suits on labor strikes.
- A posting by an opposition party legislator questioning a conservative media executive's involvement in a sex exploitation scandal related to an actress and her suicide.

# Korea's online intermediary landscape

- Search engine: Naver 75% Daum 20% Google 10%, etc.
- Twitter : decreasing use, political fatigue?
- Facebook : dominant but vs. Kakao Story)
- Application platform: 90% Google Play
- UCC
  - Uploading : Naver 70% Miscellaneous 10%
  - Viewing: Youtube 60% Miscellaneous 40%
- Korea special: KakaoTalk, is it private or public?

# Solution:

## Let's relearn why Internet is Good

- Individual's ability to post and download UNAPPROVED -> always possibility of ILLEGAL CONTENTS –
- “must take out noticed illegal content” → asymmetry of incentives -> also need a rule “must restore if noticed legal content.”
- But this double liability too risky for Intermediaries → DO NOTHING?
- HOW ABOUT DOUBLE IMMUNITY (e.g., DMCA):
  - (1) no liability for taking down LEGAL CONTENT
  - (2) no liability for RESTORING ILLEGAL CONTENT
  - In the end, let the Court decide → Asymmetry of Incentives problem solved!

# Lesson

- Liability-imposing regime always incentivizes intermediaries into taking down lawful contents:
- Do not make intermediary an ADJUDICATOR (i.e. party responsible for evaluating content) but MEDIATOR (i.e. party responsible for mediating between people - "InterMEDIARY"). → Marco Civil: "take down possible only upon court order"

# What does Google/Spain do to Korea?

- No liability for authoring but only for including in search results i.e., the first decision recognizing independent liability of intermediary → “must take out NON-PREJUDICIAL AND OTHERWISE LAWFUL CONTENT (from search results)” → Compare to Korea’s “may delete” language, and FEEL THE PRESSURE TO EXCLUDE. . . . → even worse private censorship
- **SOLUTION:** AGAIN GOOGLE SHOULD NOT BE MADE ADJUDICATOR. → NEEDS DOUBLE IMMUNITY which equally incentivizes for take-down and restoration.
- SERENDIPITY: Notice: Full notice-and-takedown based on DOUBLE IMMUNITY regime is neutral to legality of contents anyway. So, thorny issues of right to be forgotten is avoided at intermediaries. Court will deal with them.

# Is *Google Spain* itself Ok?

- Internet = intermediaries mass-processing data with one another. Holding Intermediaries liable for mass-processing itself will kill the Internet.
- Can it be understood as "Intermediaries shall NOT mass-produce PERSONAL DATA?"
- What is special about personal data? concept of DATA OWNERSHIP ("You own data about oneself")



# Peculiar idea of one's owning data about oneself

- Distinguish
  - (1) "X was built by someone who built Y, which had ugly cracks (no personal data)."
  - (2) "X was built by Gonzales. Y which had ugly cracks was built by Gonzales" (personal data)
- Most of times, (2) is the only way to get (1). Shutting down (2) just b/c of being personal is loss of a lot of valuable information
- Also, we are "born into" a society"
- Conclusion: One's ownership data about oneself is impossible

# Then, why data ownership?

- Alan Westin, the inventor of data ownership, thought it up as a prophylactic response to “data surveillance” → applies only data you kept private before submitting to govt’ agencies or companies → Data ownership requires LIMITING INTERPRETATION
- LIMITING INTERPRETATIONS: “Publicly available data” exception and “journalistic activities” exception - should have been applied to Google OR NOT?