



INTERMEDIARY ACCOUNTABILITY IN THE DIGITAL AGE

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Agenda

1. Introduction to Internet Intermediaries
2. Online Reputation
3. Cambridge Analytica and Facebook
4. Competition Law





1. Introduction to Internet Intermediaries

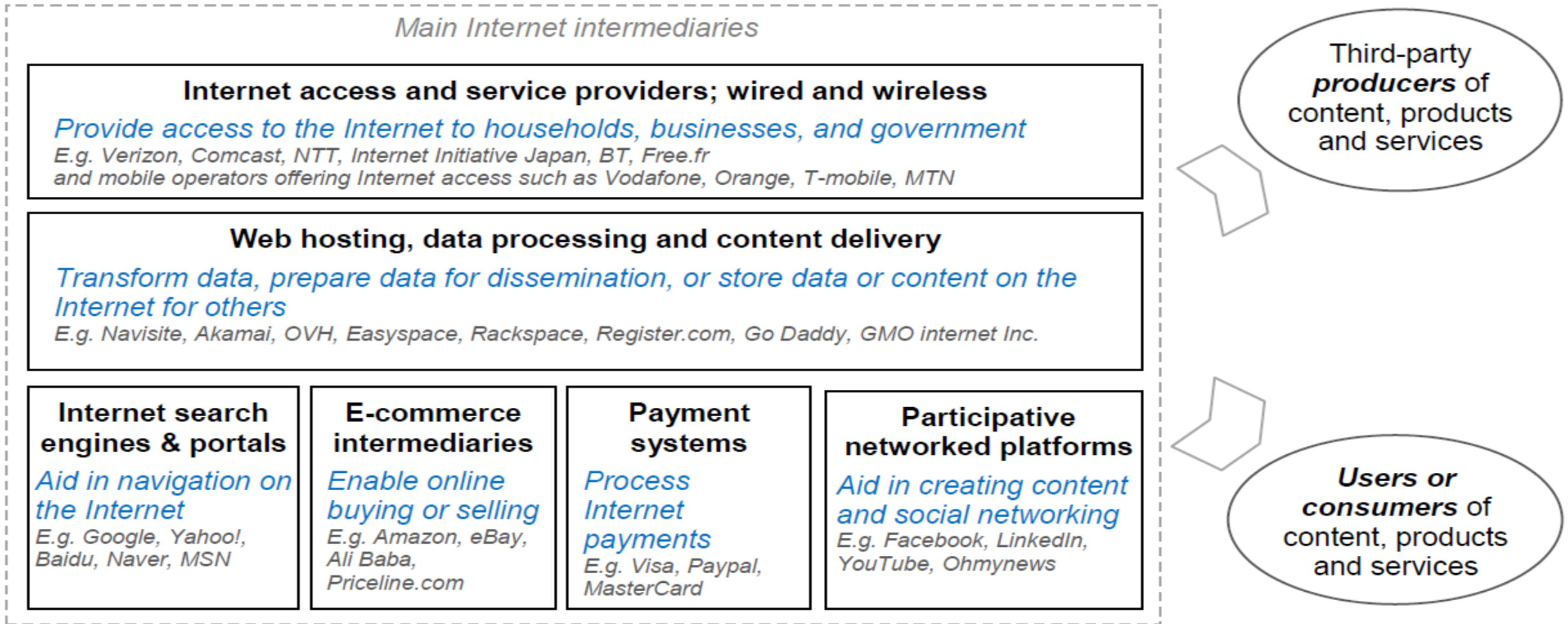
“The term ‘internet intermediaries’ commonly refers to a wide, diverse and rapidly evolving range of service providers that facilitate interactions on the internet between natural and legal persons. Some connect users to the internet, enable processing of data and host web-based services, including for user-generated comments. ...Importantly, they may carry out several functions in parallel, including those that are not merely intermediary. Internet intermediaries also moderate and rank content, mainly through algorithmic processing, and they may perform other functions that resemble those of publishers. As a result, different regulatory frameworks can apply, respectively, to their intermediary roles and to their other functions.”

Council of Europe, *Brief Overview of the Roles and Responsibilities of Internet Intermediaries*

Internet Intermediaries	
Internet access and service providers (ISPs)	Data processing and web-hosting providers
Internet search engines and portals	e-commerce intermediaries
Internet payment systems	Participative networking platforms



Figure 1. Stylised representation of Internet intermediaries' roles



Organization of Economic Cooperation and Development, *The Economic and Social Role of Internet Intermediaries*, 2010



The Internet Economy

Box 1. The OECD Declaration for the Future of the Internet Economy

Ministers agreed in their *Declaration for the Future of the Internet Economy* of June 2008 that their challenges and associated goals with regards to the Internet economy are, through an appropriate balance of laws, policies, self-regulation, and consumer empowerment, to:

1. Expand Internet access and use worldwide.
2. Promote Internet-based innovation, competition, and user choice.
3. Secure critical information infrastructures, and respond to new threats.
4. Ensure the protection of personal information in the online environment.
5. Ensure respect for intellectual property rights.
6. Ensure a trusted Internet-based environment which offers protection to individuals, especially minors and other vulnerable groups.
7. Promote the secure and responsible use of the Internet that respects international social and ethical norms and that increases transparency and accountability.
8. Create a market-friendly environment for convergence that encourages infrastructure investment, higher levels of connectivity and innovative services and applications.

Organization of Economic Cooperation and Development, *The Economic and Social Role of Internet Intermediaries*, 2010



Intermediary Accountability

Intermediaries originally subject to limited regulation, e.g. U.S. safe harbour protections under *Communications Decency Act* and *Digital Millennium Copyright Act*

“The United States success in developing the Internet intermediaries sector confirms the legislative reasoning behind the enactment of both the CDA and the DMCA. Industry observers generally indicate that an important reason for the success of U.S. intermediaries on a global scale is due to the space for innovation and application created by these safe harbors. Consequently, any changes that would diminish the robustness of the safe harbors would injure the U.S. economy.”

Dippon, Christian, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, 2017 at 4

Increasing pressure to regulate Internet Intermediaries coming from:

- Expansion and omniscience of Internet economy
- Economic weight of intermediaries
- Social issues and incidents
- Political and legal pressure





The choice is not between regulating or not regulating. If there is a binary choice (and there are often many shades in between) it is between settled laws of general application and fluctuating rules devised and applied by administrative agencies or regulatory bodies; it is between laws that expose particular activities, such as search or hosting, to greater or less liability; or laws that visit them with more or less onerous obligations; it is between regimes that pay more or less regard to fundamental rights; and it is between prioritising perpetrators or intermediaries.

Smith, Graham, *Regulating the internet: intermediaries to perpetrators*, June 5, 2018





2. Online Reputation

How do you solve reputational problems?

- Reputation means something to everyone.
- Key differences
 1. SMEs vs large corporations vs individuals
 2. Evolving role of intermediaries
 3. Types of speech
 4. Types of harm





Online Reputation cont'd

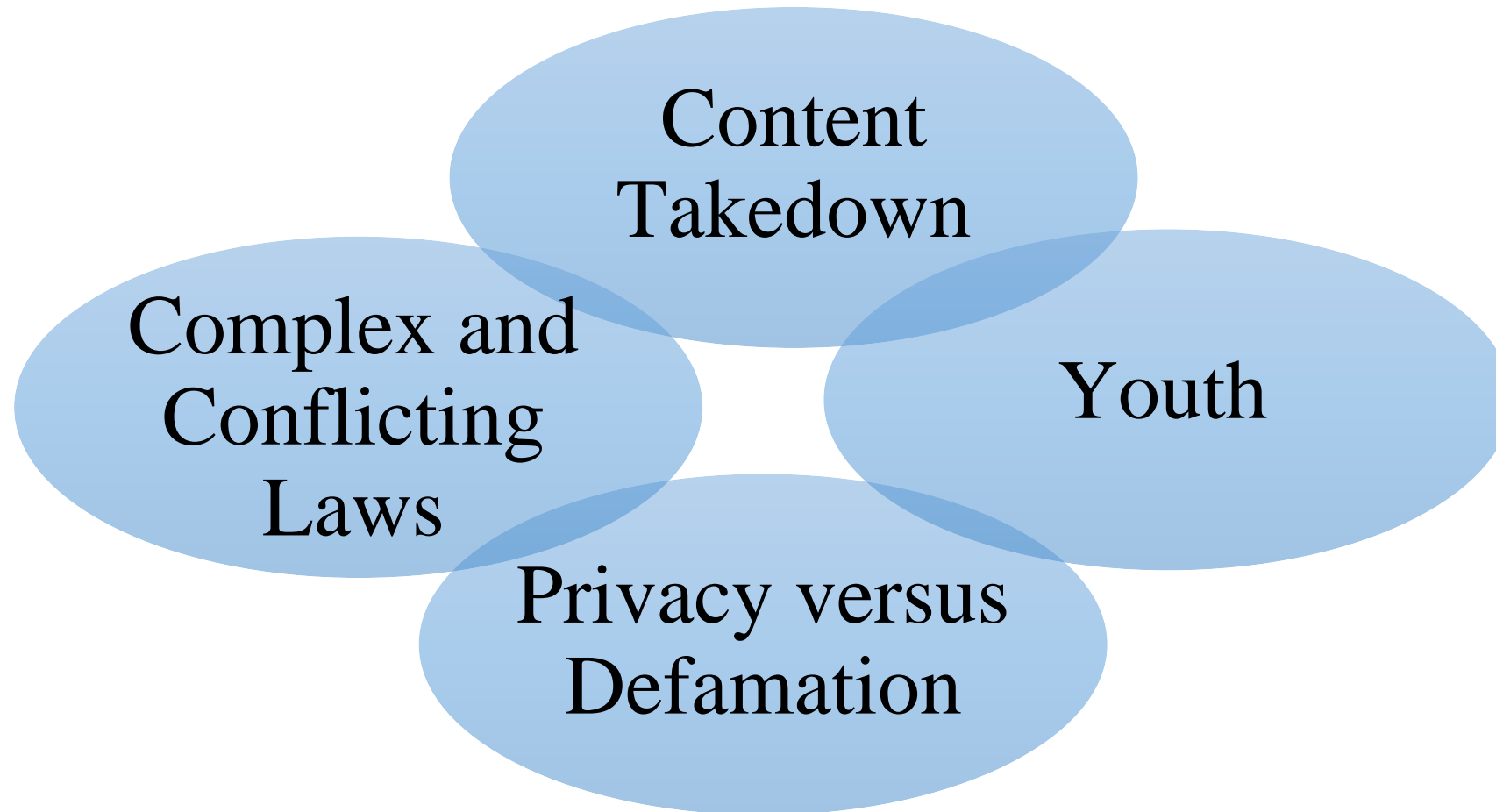
SCENARIO:

A business or individual is defamed online and it goes viral. It ends up in search results.

1. What are the responsibilities of intermediaries?
2. What challenges does it highlight about resolving online reputational harms?



Issues to Explore





Issue 1: Content Takedown





Issue 2: Complex and Conflicting Laws





Issue 3: Privacy and Defamation overlap





Issue 4: Youth





3. Cambridge Analytica and Facebook

- Aleksandr Kogan, data scientist at Cambridge, developed a survey app, "This Is Your Digital Life".
- App required Facebook login credentials, used an informed consent process, for research in which 270,000 Facebook users agreed to complete a survey in exchange for \$4.
- Facebook's design allows the App to collect, in addition to the personal information of those who agreed to take the survey, personal information of all the people in those users' Facebook social network.
- Reports suggest that Cambridge Analytica acquired personally identifiable information of 87 million Facebook users.
- Cambridge Analytica used this data to determine what kinds of political campaign advertisements would be most effective in persuading a particular person in a particular location.



Cambridge Analytica and Facebook cont'd

- In 2015, when Facebook learned of the situation, it removed Kogan's App and demanded that he and all parties he had given data to destroy the data.
- In March 2018, the Guardian and the New York Times publish articles stating Cambridge Analytica still possessed the data and that it had used the data to influence voters in the US and the UK.
- U.S. \$37 Billion drop in market capitalization of Facebook in March 2018 when Cambridge Analytica situation becomes public
- Investigations into Facebook by:
 - Office of the Privacy Commissioner of Canada
 - U.S. Federal Trade Commission
 - United Kingdom's Information Commissioner's Office
- Cambridge Analytica files for insolvency proceedings and closes operations on May 1, 2018



Cambridge Analytica and Facebook Issues

- Whether Cambridge Analytica's use of personal information was for an inappropriate purpose generally (PIPEDA, s. 5(3))

Intermediaries should not disclose personal data to a third party unless required by law or requested to do so by a judicial or other competent authority whose decisions are subject to judicial review, that has determined that disclosure is consistent with law.

Council of Europe, *Brief Overview of the Roles and Responsibilities of Internet Intermediaries*

- Transparency
- Responsibility for use of personal information in complex, multi-party transactions (gaps in legislative frameworks)





Cambridge Analytica and Facebook Issues cont'd

➤ Availability of effective remedies under Canadian privacy legislation:

- Reactive versus proactive
- Availability of fines
- Jurisdictional issues



➤ Content Moderation:

Any interference by intermediaries with the free flow of information and ideas should be based on clear and transparent policies and be limited to specific legitimate purposes, as determined by law, through instruction by a competent authority, or in accordance with the company's own content restriction policies or codes of ethics. When restricting access to content in line with their own content-restriction policies, intermediaries should do so in a transparent and non-discriminatory manner.

Council of Europe, *Brief Overview of the Roles and Responsibilities of Internet Intermediaries*

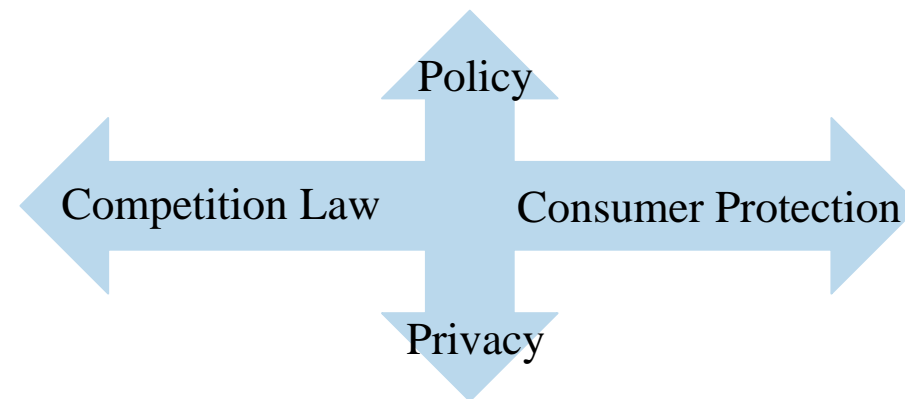


4. Competition Law

Challenges

Combination of:

1. Big Data (mass collection of data, algorithms and artificial intelligence);
2. Intersection of competition law and policy, privacy and consumer protection.





Competition Issues

How do these challenges play out in competition law context?

Among others:

1. Abuse of dominance
2. Anti-competitive Agreements
3. Deceptive Marketing





Issues to explore in Big Data

1. How should market power be assessed?
2. What factors are critical to assess efficiency and anti-competitive effects?
3. What is deceptive marketing in an era of big data?





List of References

1. Council of Europe, *Roles and Responsibilities of Internet Intermediaries* available at <https://rm.coe.int/leaflet-internet-intermediaries-en/168089e572>
2. Dippon, Christian, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, 2017 at <https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf>
3. Organization of Economic Cooperation and Development, *The Economic and Social Role of Internet Intermediaries*, 2010 at www.oecd.org/internet/ieconomy/44949023.pdf
4. Smith, Graham, *Regulating the internet: intermediaries to perpetrators*, June 5, 2018 at <http://blogs.lse.ac.uk/mediapolicyproject/2018/07/03/regulating-the-internet-intermediaries-to-perpetrators/>



QUESTIONS?



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