

# TISA Should Address Intermediary Liability Protections – A Cornerstone of the Digital Economy



Internet services have transformed trade and enabled small and medium-sized businesses to reach global audiences in ways never possible in the past. A fundamental reason that services have been able to play this role is their open nature: online services and/or intermediaries can facilitate transactions and communications among millions of businesses and consumers, enabling buyers and sellers to connect directly on a global basis.



This model works because intermediaries can host these transactions without being held liable for the vast amounts of content surrounding each transaction. As such, TISA should make clear that in order to allow global e-commerce, TISA parties must ensure that online services are not automatically considered liable for third-party content. This is a core principle necessary for digital trade today and tomorrow, recognized by most (including the U.S. and the EU) if not all TISA parties already, and should be memorialized in TISA. Intellectual property is outside the scope of TISA, and is often subject to different rules in TISA countries, so should be excluded.

## The Internet's Role in Unleashing Innovation, Investment, and Cross-Border Trade

Over the last decade, the internet has created new opportunities for cross-border trade and investment, enabling small businesses around the world to connect with customers and suppliers in the global market without building their own multinational supply chains. At the click of a button, an internet-connected entrepreneur can now sell products and services across borders.

## Internet Services Depend on User Reviews and Other Mechanisms to Build Trust

### With the help of internet platforms, small businesses:

-  Grow up to four times faster than businesses that do not embrace the web
-  Create twice as many jobs
-  Are 50 percent more likely to be exporters
-  Bring in twice as much revenue through exports as a percentage of sales.

Internet services enable small businesses to build trust and customer relationships in new markets. A decade ago, building global trust required companies to create a global marketing and customer support team – something that was out of reach for all but the wealthiest businesses. Today, a local business can build brand awareness by tapping into social media, search, and marketing tools.

Small businesses now compete internationally based on the strength of their products, as new services like eBay, Mercado Libre, Rakuten, Allegro, Zalando, and Vinted offer the opportunity to gather positive customer feedback and spread awareness through user reviews and positive word of mouth – at a global scale. With these user review systems, a business can leverage an entire suite of integrated feedback, review, and support mechanisms to manage its relationship with global customers and validate its products in new markets.

Consumers in turn use these tools to gain familiarity with new products and services and ensure they are making the right decision before traveling to a new location, purchasing a hand-made item from another country, visiting a new restaurant, or buying a piece of clothing. Local entrepreneurs are increasingly developing new apps and platforms that empower users to collaborate, communicate, or sell across borders, often scaling up quickly to reach millions of global users.

In short, small businesses, consumers, and startups have a common interest in the availability of services that enable buyers and sellers to connect directly on a global basis. Liability safe harbors are an essential precondition for these services, and the connections they facilitate, to scale and prosper. However, some of today's best known brands and companies have proven that limited liability does not keep them from acting responsibly and joining hands with public authorities to ensure a safe and trustworthy online environment.



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# Intermediary Liability Protections are Essential to Internet Trade

Intermediary liability protections are considered by many to be the cornerstone of the internet economy – and are present within many TISA countries. Intermediary liability laws like Section 230 of the Communications Decency Act in the United States and the E-Commerce Directive in the European Union enable internet services to host, process, and distribute user-generated content without being treated as the creator or originator of such content for purposes of determining liability.

These safe harbors are key to enabling digital trade. If a platform with millions of users faced the risk of being hauled into court each time a user said something that was remotely questionable, then it is very unlikely such services would ever launch in the first place – harming not just innovation within a country but also the ability of small businesses to use these services to export to global customers.

Recent studies show the positive relationship between sound intermediary liability rules and the growth of the digital economy, as well as the ability of startups to scale up and achieve profitability. According to one study, 81 percent of venture capital investors said they would be more likely to invest in a digital content platform if there are safe harbor protections from liability.<sup>1</sup> Another study found that 71 percent of investors are uncomfortable investing in intermediaries that can be held liable for third party content or actions.<sup>2</sup>

To promote digital trade and foster vibrant domestic internet economies, TISA parties should include a provision that addresses intermediary liability. These rules should clearly exclude intellectual property and criminal issues, which are more appropriately addressed under separate models. By providing safe harbor protections from liability, TISA parties will set an innovation framework for digital trade.



## Global Support

**WORLD ECONOMIC FORUM/INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT:** "The US has now included appropriate protections on intermediary liability in the intellectual property context - modelled on existing national safe harbours - as part of several bilateral free trade agreements and the TPP. This is important, as many countries do not have in place intermediary liability regimes. Similar protections from liability for non-IP content posted by users (e.g. defamation and other speech-related harms) should also be included in trade agreements."

**ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT:** "Appropriate limitations of liability for internet intermediaries have, and continue to play, a fundamental role, in particular with regard to third party content. Internet intermediaries, like other stakeholders, can and do play an important role by addressing and deterring illegal activity, fraud and misleading and unfair practices conducted over their networks and services as well as advancing economic growth. Limitations play an important role in promoting innovation and creativity, the free flow of information, and in providing the incentives for cooperation between stakeholders."

**MANILA PRINCIPLES ON INTERMEDIARY LIABILITY:** "Intermediaries must never be made strictly liable for hosting unlawful third-party content, nor should they ever be required to monitor content proactively as part of an intermediary liability regime. ... Broad variation amongst the legal regimes of the countries in which online intermediaries operate increases compliance costs for companies. It may discourage them from offering their services in some countries due to the high costs of localized compliance."

**UNITED NATIONS JOINT DECLARATION ON FREEDOM OF EXPRESSION AND THE INTERNET:** "Intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression."

**CENTER FOR DEMOCRACY AND TECHNOLOGY:** "Ensure strong protections for Internet intermediaries against liability for the expression and activities of users. Internet intermediaries are key enablers of the free flow of information online, because they provide the conduits, platforms, and tools for a robust variety of user-generated communication. Uneven treatment of intermediaries creates significant uncertainty for Internet-based businesses."

<sup>1</sup> <http://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>

<sup>2</sup> <http://www.fifthera.com/s/201603-Fifth-Er-Report-The-Impact-of-Internet-Regulation-on-Investment.pdf>



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