Evolving Role of ISPS

Political Hot Potato

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Conduit to Gatekeeper
Disintermediation to Intermediary

Self-Regulation
Litigation
Legislation

De Facto
Strict Liability
Conditional Immunity
Notice Base Liability
Liability (or Threat of) for Failure to Implement Technical Protocols
Filtering Policy Through Litigation

Yahoo! required to block Nazi memorabilia from French (and later) German users

Pennsylvania court orders ISPs to block 400 child pornography sites (*Democracy & Technology v. Pappert*)

Turkish courts initially blocked controversial YouTube videos from Turkey, then later demanded that Google block all users in the world from such videos, then all Turkish ISPs were forced to block YouTube altogether.
Self-Regulation

Gates and Keepers
Separation of Powers

*Sub-optimal Filtering & Monitoring?*

- Lawmaker
- Judge
- Executive
- Editor
- Enabler (Google)

‘Be everywhere, get arrested nowhere and thrive in as many places as possible.’
Role of the State

- Abdication of the responsibility of the State
- Externalization of cost
- Limited transparency in State regulation
- Self-regulation is non-transparent
- Evasion of Public Law Norms (outsourcing to avoid human rights obligations)
- Right to Fair Procedures
- Filtering technologies may be shielded from bi-partisan security testing
- No incentive to find sub-optimal filtering – either OVERblocking or UNDERblocking
- Function Creep (malware, P2P copyright, gambling, pornography)
Externalization

- Abdication of the responsibility of the State
- Externalization of cost & discretion of policing is lost
  - Limited transparency in State regulation
  - Self-regulation is non-transparent
  - Evasion of Public Law Norms (outsourcing to avoid human rights obligations)
  - Right to Fair Procedures (Transparency of Application)
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Transparency

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- **Right to Fair Procedures (Transparency of Application)**
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No Such Thing as Sub-optimal Filtering

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Function Creep (malware, P2P copyright, gambling, pornography)
What’s Wrong with the Phone – 1 800 Google?

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McIntyre TJ. “Intermediaries, Invisibility and the Rule of Law”
Access Denied (ONI)
Schruers M. “The History and Economics of ISP Liability for Third Party Content”
Deibert R. & Villeneuve N., “Firewalls and Power: An Overview of Global State Censorship of the Internet”
Bambauer D. “Filtering in Oz: Australia’s Foray into Internet Censorship”