

Internet (Un)Immunity: Where does China Stand?

Presented by

Jie (Jeanne) Huang

Associate Professor

The University of Sydney Law School, Australia



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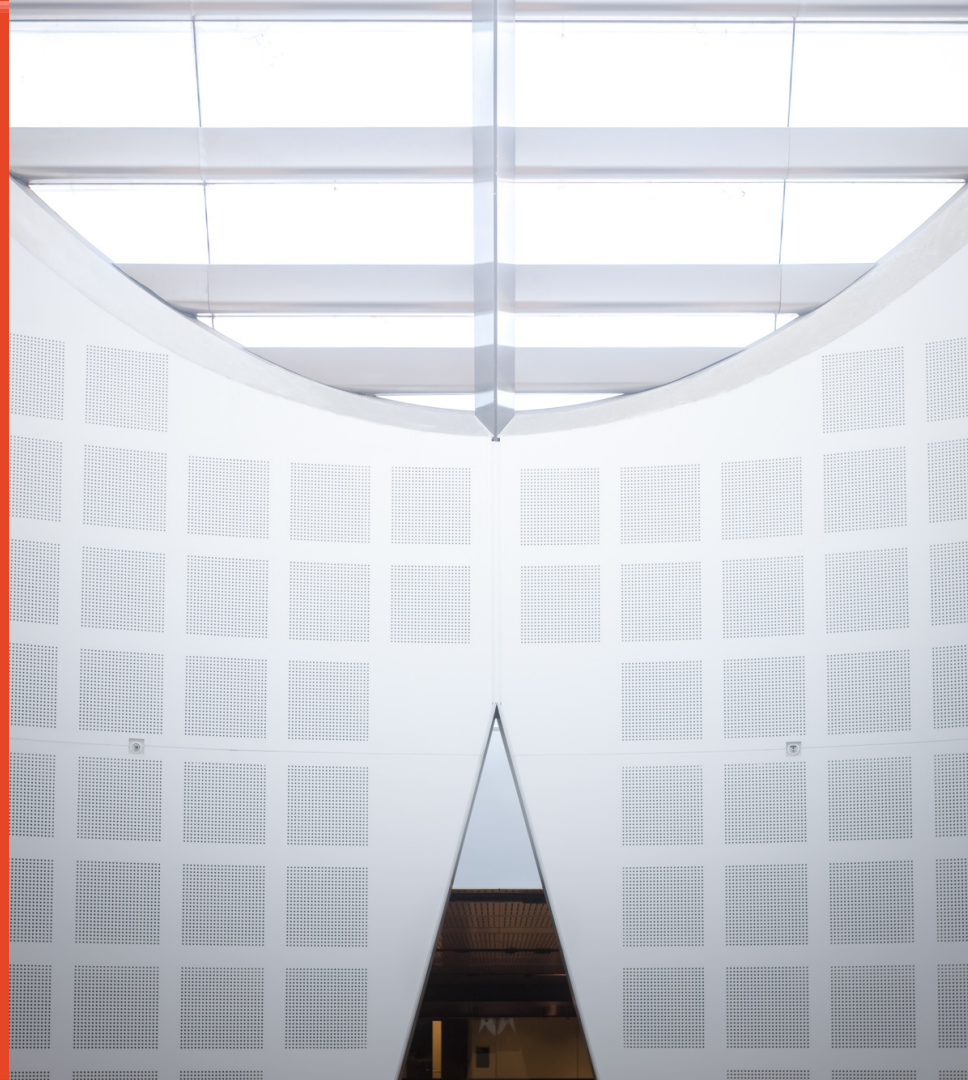
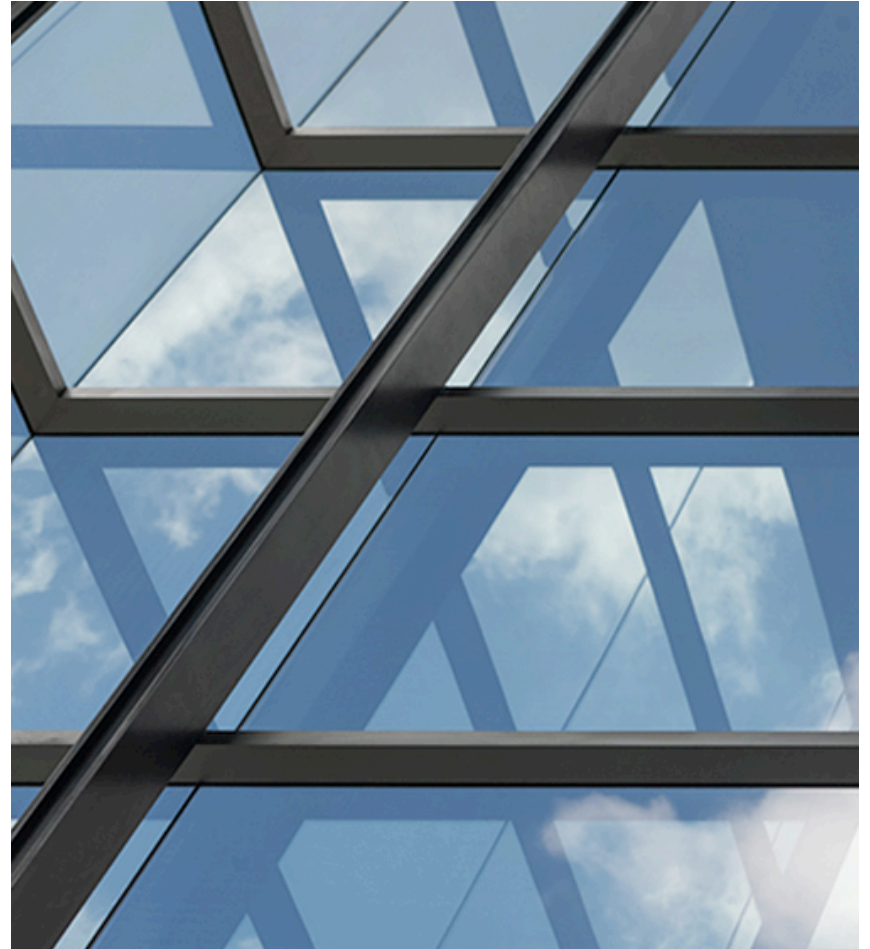


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1. The US: Internet Immunity

- **USMCA Art. 19.1 interactive computer service** means a system or service that provides or enables electronic access by multiple users to a computer server



Art. 19.17 Recognize the importance of the promotion of interactive computer services... **as vital to the growth of digital trade.**



USMCA Art 19.2:

- ICS retains **civil immunity** so long as a supplier or user of an ICS does not become "information content providers," or "has, in whole or in part, created, or developed the information."
 - Liability for harms related to information stored, processed, transmitted, distributed, or made available by the service

Art 19.3: Regarding **harmful or objectionable** material, no liability:

- on any voluntary action taken in good faith to restrict access to or availability of **information through its supply or use of the ICS**
- Any action taken to enable or make available the technical means to **restrict access to material**



- Exceptions:
 - IP
 - Criminal law
 - Complying with a specific, lawful order of a law enforcement authority
 - Public morals: Article 32.1 (General Exceptions), paragraph (a) of Article XIV of GATS

- *Stratton Oakmont, Inc. v Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)
- 47 U.S.C. § 230 (2012) (c) (1): "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"
- Tort-based lawsuits may threaten free speech in "the new and burgeoning Internet medium"



- Digital Millennium Copyright Act (DMCA): Sec 512 provides "conditional safe harbor from liability" as long as intermediaries do not have "actual notice-and-takedown policy in order to be granted for the legal immunity".
- SPEECH Act (2010, 28 USC § § 4101-05): a foreign court judgment for defamation cannot be enforced in the US if the result would have violated S230 if litigated in a U.S. Court
- Criticism
 - Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), H.R.1865 (115th Cong. 2017-18)

2. EU: Restricted Internet Immunity

- The EU Electronic Commerce Directive (2000/31/EC): offer safe harbors ([notice-and-takedown scheme](#)) to any kind of unlawful contents including copyright infringements or defamations
 - Art. 12: Mere conduits
 - Art. 13: caching
 - Art. 14: hosting
- L’Oreal v eBay (Case C324/09): eBay had played an “active role” in producing online contents which failed it to be exempted from liability

- The EU Electronic Commerce Directive “safe harbor” is qualified by *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*, Case No. C-131/12 (2014).
 - the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference” constituted “the processing of personal data.”



- Article 25(6) of Directive 95/46/EC and Article 45 of the GDPR (General Data Protection Regulation 2016/679) : **the official recognition by the European Commission** that a non-EU third country's data protection laws are “essentially equivalent” to those of the EU.



3. China

3.1. Contents of law: fractioned

<p>Goods or services (Art. 38 of E-commerce law, Art. 44 of the Consumer Protection Law)</p>	<ul style="list-style-type: none">• Goods and services fails to protect the personal and property safety: not take necessary measures---bear joint and several liability• Goods and services related to consumers' life and health: Not review the qualifications or certificates required for operators, or fails to fulfill the safety guarantee obligations for consumers, causing damage to consumers---liable correspondingly according to law
<p>IP</p>	<p>Art. 42 to 45 of Chinese E-commerce law: Notice & take down but with procedure requirements</p>
<p>Tort claims</p>	<p>Art. 36 of Chinese Tort Law and SPC Judicial Interpretations: notice & take down</p>

- **Randall Stoner v. Ebay Inc., et al.** 2000 WL 1705637, Civ. No. 305666 (Sup. Ct. Ca., November 7, 2000)
 - P alleged that eBay intentionally facilitated and profited from the sale of bootlegged music and unauthorized sound recordings.
 - eBay even added additional info on its site, such as logos, category headings, and seller ratings.
- **Schneider v. Amazon.com, Inc.** Case No. 46791-3-1, 31 P.3d 37 (Wash. Ct. App., September 17, 2001)
 - Amazon provided a forum for visitors to posted book reviews
 - P complained to Amazon but it failed to remove the review
- **Cai Jiming v. Baidu.com**, Beijing No. 1 Intermediate People's Court
 - P's personal information was posted by a third party on Baidu
 - Baidu did not remove this info until it received a P's lawyer's letter

3.2. No right to be forgotten

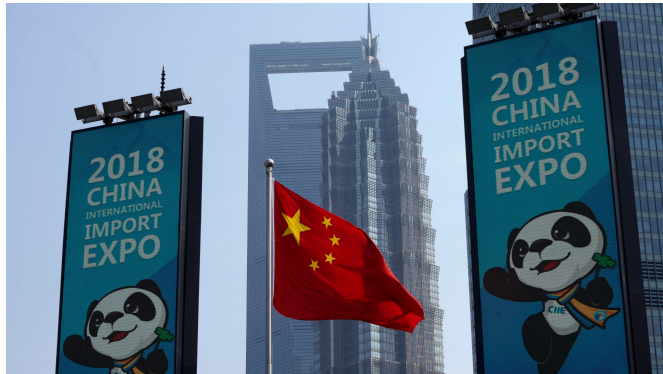
- *Jiayu Ren v Baidu.com*, the Beijing No. 1 Intermediate People's Court (2015)
 - No illegal use of P's name: objective combination of characters in cyberspace
 - No reputation damage: Personal subjective evaluation cannot be considered as insulting and defamation. The search agent has no fault.
- Remaining questions: what is the legal nature of personal information?

– 3.3. State interest

- Gov exercises powers through ICS providers. The latter has to carry out certain public power.
- By imposing liability to ICS providers to remove all objectionable content, they are subject to legal liability for everything it missed: create monopoly and business-ending for SMEs?

3.4. Approaches to Participate in Shaping Global Law for E-commerce

- a. Does China have the potential?
 - China: an emerging world IMPORT giant
 - Why e-commerce may leave spaces for China to shape global trade law by its purchasing power



– b. how to participate in law-making: multiple approaches

- China-New Zealand FTA, China-Australia FTA, China-South Korea FTA
- WTO e-commerce negotiation
- Digital “One Belt One Road”: Digital infrastructure construction
- International governmental organizations such as Shanghai Cooperation Organization: Cyber sovereignty is the idea that states should be permitted to manage and contain their own internet without interference.
- Non-governmental: Enterprises advocate, World Internet Forum in Wuzhen

Thank You and Questions

Jeanne.huang@sydney.edu.au

