

## DISCLAIMER:

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>>Komathi Ale: Ladies and gentlemen, welcome back. I hope you had a good lunch.

Before we continue with our second plenary for the day, we have three forum attendees who would like to make an announcement on the latest development on IG scene in the region. I like to call upon Prof Hong Xue.

>>Hong Xue: It's a short announcement. There will be an Asia Pacific leadership project to be held in Beijing next month, 6 to 8 July in Beijing. You are welcome.

OK, the next announcement will be from our Japanese friend.

>>: I would like to announce the first meeting of the IGF in Japan. We are under creation of a kind of organisation to continue this activity. Mr Watanabe of Japan Internet Providers Association will be the chair and two Vice-Chairs, Dr Mori of KO University and Mr Kato from Intellectual Ventures, who I think used to be a frequent attendant of ICANN.

We formed a Secretariat which will support the activities, but basically all the positions we hold in this organisation are voluntary.

What we plan is an annual meeting. The first meeting will be on July 21 and 22 in Kyoto research park, which is in the centre of Kyoto, so you might be able to do some sight seeing if you come.

We have two-day meeting and agenda will include firstly of course the introduction of the IGF activities and then we want to focus on the internet and ICT usage under disaster.

Also, we want to talk about IPv4 address exhaustion and then we'll have several sessions on security and child protection and some blocking or filtering issues.

We have some various companies presenting cloud computing and its usage.

Then protection of private information is also on the agenda.

So we have a couple of professors and some people from the industry to talk about -- of course the governance issues and also the benefit of introducing all these onto the internet.

Hopefully I'll see some of you in Kyoto very soon.

Thank you.

>>Hong Xue: There will be another announcement from

Indonesian friends.

Please come to the podium.

>>Sammy Pangerapan: Thank you. My name is Sammy Pangerapan.

I'm from Indonesia Internet Association. We would like to announce that we are going to initiate the Indonesian IGF in November this year. So we think we need to gather all the resources to discuss what is the problem and cure in Indonesia regarding the internet.

The topic that were going to talk about is first about internet security, internet access and internet resources and other related subject. We like you to support us.

We will like to welcome also, if you want to participate.

Thank you.

APPLAUSE

>>Komathi Ale: The final announcement, for now.

In your package, in the book that you received, you'll find there is a press statement from the Asia Internet Coalition.

For more information, you can speak to Mr Kuek Yu-Chuang. He's a representative from AIC, who is also with us today, so you can refer to him.

Now we can proceed with our second plenary session, which is Intellectual Property, ACTA and other

controversy, which will be chaired by Prof Hong Xue from the Beijing Normal University.

>>Hong Xue: Thank you. I'm so sorry for the delay of the program. Logistic issues.

Welcome back, welcome to the afternoon session. This session, we are going to talk about intellectual property. About this different to what we have been discussing, it is not internet protocol, it is internet property. Just now Kuo-Wei used a videos to show the interestingness of the subject. I sort of learning from him.

In the felt work is working, we can see this short video about copyright.

For your information, it is released by CC licence. It is very much legitimate for me to show this video.

VIDEO PLAYED

>>Hong Xue: OK, this is a short video. There is an even shorter one created by my friend from Consumer International. It's called: When Copyright Goes Bad.

Why we are talking about intellectual property on IGF, in a governance forum? That is because intellectual property has become a critical issue, as shaping the internet and we all remember the definition of internet governance. So it seems as far as involves the norms, rules and the principles, development and

application, the shaping the internet u it serves the attention of internet governance or that.

It is no stranger to internet governance at all. As early of phase 1 of the process, intellectual property has been identified as one of the key issues that deserves research and also in February 2011, at APRICOT this year, Dr Vinton Cerf, the father of the internet, specifically mentioned we need to do research on intellectual property issues we took his words very seriously, because he's the leader of technical community. It seems there is a sector, a stakeholder group, which is not so relevant to the legal issue in intellectual property has become so aware of this critical issue.

Of course, we should be aware of that, we should pay special attention to this, because intellectual property has become a critical issue that is changing our knowledge production and management in this knowledge economy and the Information Society.

If this statement is true, everybody, all the stakeholders groups are very much relevant to this issue.

So not only the traditional stakeholder groups, such as the government, intellectual property, industry, such as the patent holders, those technical experts, but also

the other people has long been ignored in this area, such as consumers and library, public media, they should all have a say on IP policies, because this is very much relevant to their interest, to their use of knowledge products.

So intellectual property is an issue that's really deserved to be examined in the context of internet protocol. This is the reason we bring it here and actually put it in a main session, much thanks to the program chair and also for his academic interest.

Today, we have a very distinguished panel, we are so privileged to bring these top experts right here.

I think that all experts, it's difficult to set the sequence. I made a rough setting and hopefully it can make everyone happy.

Today we are going to talk about several issues about intellectual property, not only the specific and concrete issue, but also the general and the principal issues.

From my left to the other side, we can see two ladies, very pretty ladies, they are all from Singapore, the flower of Singapore, blooming right here and four gentlemen. They are equally beautiful.

We have totally five speakers and one kind ... to join us. We are going to split this panel into two

parts, the first part we have two ladies plus one gentleman. We are going to talk about the specific issues in intellectual property. They are all very critical ins and hotly debated in the international IP circle, such as the liability of intermediaries. This is a critical issue. There is no international treaty law on this issue. So each country has its own law and rules and norms.

They are going to talk about cloud computing. They are going to talk about the new legal initiative, such as Mary is going to talk about what is happening right now in the United States, such as a very innovative IP project to use domain name to enforce copyright. It's really not thinkable before this new legislative initiative was mentioned.

After the three presentations, we are going to open the floor for two minutes for the other panellists to comment on the presentation and 10 minutes for the audience to raise questions. We hope to make it a real discussion session.

After the Q and A session, there will be two presentations from Dr drake and Mr Carter. They are going to talk about exactly the title of the session, that's ACTA, but from different perspective, one from the more theoretical institutional perspective and

another from the domestic response to the interesting negotiation process of ACTA.

This setting is very much to be -- is going to be very much an interesting panel, I do believe.

Now let's welcome Prof Mary Wong, who is a professor at the University of New Hampshire and also the leader of a very important IP centre. In her very young life, she achieved so many things. Don't be fooled by her young face. She is now the director of the Franklin Pierce Centre at the University of New Hampshire.

>>Mary Wong: I think next time I will agree to speak remotely, so that people really think I look very young and am very young, but it's very kind.

Welcome even and Hong has already set the stage very nicely for some of the issues that we are going to talk about, more fundamentally, why intellectual property is an important issue for us involved in the IG space.

I wanted to start by noting that May this year has been a very interesting month and not just because of the Singapore general election, for those of you from Singapore, where some exciting and momentous things happened.

But specifically, in the United States, where I'm now based, there were several developments of note that are pertinent to the issues we are talking about this



afternoon.

ACTA, the anti counterfeiting trade agreement that bill and Jordan and others will speak on more specifically, was open for signature, I believe, on 1 May.

As you may know, the final text was finalised late last year and so being open for signature, we can probably see implementation in the various countries that negotiated ACTA very shortly.

The second thing of note -- and I am going to try and cover all three things, is that the US Immigration and Customs Enforcement agency known as ICE, have seized more domain names as part of what has been termed operation in our sites -- S-I-T-E-S -- which is a very interesting pun on firing in your sights -- s-i-g-h-t-s.

As you may know, this is an effort that started late last year, through the ICE department, where domain names were seized as a species of property because they were associated with internet websites that were dedicated to infringing and counterfeiting activities.

The third development of note related to the ICE seizures in some respects is the existence of a bill pending before the US congress which is known semi-affectionately as the son of COICA.

If you have heard of COICA that was an effort last

year in the US Congress to counter counterfeiting infringement and piracy on the internet and COICA is an acronym for I think, I hope I don't get this wrong, Combating On-line Infringement and Counterfeiting Act. That sounds about right.

So son of COICA, it's not called COICA junior, it is called the Protect IP Act and that stands for -- I'm going to try to get this right again -- protecting real on-line threats against economic creativity and the theft of intellectual property.

It's interesting. We like our acronyms in the IG space, but clearly also the US Government has gotten in on the act, very clever names, very interesting issues, very serious issues, in terms of power, politics and really who should be making policy in the IP space when so much of intellectual property today deals with on-line activities, legitimate and illegitimate and there have, impacts on activities occurring on the internet, whether it is through governance or technical document.

I'm going to try and touch on all these things, but I thought it would be useful to set a bit of background.

As you may know, there have been harmonisation efforts in the intellectual property or that that have occurred over the past 100 years, but what was really

significant was when in the 1990s, as you recall, the world trade organisation, WTO, was established through the 1994 Uruguay Round. That round also saw the agreement that IP lawyers know as TRIPS, trade related aspects of IP rights. Why this is significant is because for the first time, enforcement mechanisms were agreed upon by the international community where countries that are not compliant with their international IP treaty obligations could be brought before the dispute settlement body of the WTO.

So in other words, international IP standards gained some teeth and gained some bite.

Where is the US in all of this? Some years before that round, the United States finally joined a harmonisation treaty for copyright known as the burn convention. Since then, that was the late 1980s, as you probably know, the US has been the primary driver for changing intellectual property standards in a number of different forums.

A lot has been written about the fact that this kind of dispute or negotiation and treaty standards and harmonisation seems to have shifted forums from the multilateral platform that is the WTO or other internationally recognised government to government forums, to more bilateral arrangements between the US

and its trading partners, for example,.

As those of you who are from Singapore know, we had a free trade agreement with the United States that was signed also in the early 2000s, that pretty much imposed certain standards relating to digital copyright and other enforcement issues on Singapore as it did on subsequent bilateral treaties entered into by the United States.

What's then happened is that not just the United States, but a number of other countries have joined in the bilateral fray, as it were, it's become quite a large sand box for different countries to negotiate with each other and with a group of other people.

It's against this background that we got ACTA and there are a couple of other trade agreements in the works that may be similar to ACTA.

If you're wondering who are the countries that agreed to ACTA and are probably going to sign onto the final text, we have Australia, Canada, the European Union, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States.

Quite a broad representative sampling across the globe, coming together out of common interests to strengthen the enforcement of intellectual property right, not just in their own countries, but this terms

of information sharing and collaboration across the different partners.

That's the backdrop against which we're talking about intellectual property and enforcement and why that is a problem for those of us in the IG space.

Let me talk a little bit about protect IP to try to illustrate why this is important.

I'm not going to say the whole name again, I'm just going to call it protect IP. Some people like to call it son of COICA.

Essentially what protect IP would allow two parties in the US to do and the first party or the first kind of party would be rights holders, so copyright and trade mark owners.

They can commence an action against an owner, operator, a registrant of a domestic co-domain name with respect to infringing activity that occurs in those domains.

It also allows the Attorney-General of the United States to commence such actions which are known as in personam actions, but what's interesting to this audience, you might find, of some interest and it's certainly somewhat new, both to domestic US legislation and in my view, to international IP and international standard making, is that it will allow the

Attorney-General, if after due diligence, he or she fails to discover the registrant or if it is a non-domestic domain name, to pursue what we call an in rem action, which is property based action, against the domain name itself and that would be a non-domestic domain name that is registered or operated by a registry outside of the United States.

Obviously, to the lawyers, this creates all kinds of extra territorial and all kinds of legal problems, but leaving it at a very general area, what you obviously are seeing is an effort on the part of the United States to in some ways, make more effective the rights of their domestic rights holders in the copyright and trade mark or na, by allowing action not just against websites based in the United States, website operators based in the United States or registries based in the United States such as ver sign, but also against foreign domain names, foreign domain operators and of course foreign domain name registries.

That's, I think, the main thing that's of interest in terms of protect IP, but there are other things that are also equally compelling that I think we need to pay attention to the we are looking at this as an international effort.

It is possible under the protect IP act for the

Attorney-General to actually request, if you like, verified by a court, to financial transaction providers and to search engines like Google that will ask them to disable access or to remove links to websites that are dedicated to infringing activity.

The phrase dedicated to infringing activity is actually defined by -- was an issue with COICA is defined by the protect IP act, basically if it is a website that is good for nothing else but the promotion of copyright and trade mark infringement and that can be proven with some reasonable standard, you may be within the reach of protect IP.

I know I'm running out of time, so there's a lot more I can say about protect IP, but I do want to make a couple of observations of my own, speaking purely in my personal capacity.

I want to say that it seems to me to be unfortunate that a lot of the debates about ACTA on the international stage about COICA and protect IP within the United States, has been a lot of what I think is shrill rhetoric, in that it's always phrased as a black and white debate.

You have the right holders on the one hand who are portrayed as greedy capitalists, if you like, for want of a better word, always wanting more protection, more

enforcement, we need you to help us, we need intermediaries and governments to be on our side, not that it's not true, there is some truth in the fact that there are a lot of requests for -- is somebody getting excited over there?

I'm sorry. I'll concentrate on my speech.

I assume that there will be a face off at some point this afternoon.

There is a portrayal, that is an stream and there are various degrees of that and other we have advocates for free speech, consumer protection, they have extremely legitimate public interest arguments to make.

I'm not criticising either side or anybody in between, what I'm saying is it's very unfortunate that a lot of the rhetoric has obscured the need for real engagement and serious discussion on a number of things.

First of all, what is the proper forum for these kinds of discussions? Should it be a matter of domestic legislation, as the US is trying to do? Should it be something that's taken internationally but then it probably cannot be an international treaty which will take forever, or that might actually exclude certain participants from the table which I think has been something levelled as an accusation against ACTA.

That's one concern that I have and that's the



reality, how do we deal with it?

There are lots of other specific allegations, whether about ACTA as a secret treaty or about COICA and protect IP, as problematic because they are unconstitutional, they are against the due process and prior restraint protections of the first amendment and the fifth amendment of the United States.

That is an issue that is very important, not just for legal scholars and constitutional implication in the United States, but certainly in the sense of a model for free expression elsewhere in the world.

We need to have a serious civilised discourse about these issues and not just people hundredkerred down in their bunker, one on one side, one on the other side, trading slings and barbs through blog posts and newspaper articles.

What I would like to do is conclude my remarks and hopefully I have thrown enough flames up there so that we can have some sort of discussion going after I am done, is to make a plea to try to make that happen.

It seems to me that for those of us working in the IG space, whether it's through the IGF or the different groups and events that have sprung up around it, to really take that multi-stakeholder model that we are experimenting with and pioneering with and say to the

players: we recognise that IP is important in the on-line environment, it is an international global issue, we recognise that everyone with some stake in it has serious issues and legitimate concerns. Why don't we talk about it and try to figure out what kinds of solutions could work either domestically for certain countries or perhaps in terms of best practices or some kind of harmonised model. That might sound kind of unrealistic and idealistic to some of you, but I will remind you that I'm an academic and that is what I'm paid to do.

Thank you very much.

APPLAUSE

>>Hong Xue: Thank you very much Mary. This is very insightful presentation, especially we understand this is not a simple game of throwing tomatoes at each other, taking sides. Of course we are civilised, we are getting together to talk about this critical issue, especially Mary mentioned a perspective, it's important for internet governance, that is what we can do with respect to intellectual property

What we can impact. So that's the task of our next speaker and there is a housekeeping issue. We are 10 minutes late and we have only a short time left. So for all the other speakers, please be strictly limited

to 10 minutes.

>>Lim Yee Fen: Good afternoon, everyone. I just have to make a small erratum. I'm not from Singapore, I'm from Australia, but thank you to Hong for referring to me as a flower of Singapore. It's very flattering.

I'm a lawyer, so I'm afraid that my talk is going to be somewhat legalistic, although I will try and address some of the governance issues.

What I want to talk about is the intermediary liability law for copyright infringement in Australia and Singapore and just look at the recent cases.

As Hong said, I have 10 minutes.

Just to give you an idea, the recent Australian cases, there has been two. The first one -- well, not the first one, the most recent one was decided in February this year and it was 265 pages long. That was the full Federal Court of Australia. The First Instance decision was 192 pageses, so I think you will be appreciative that I do not go through both those cases with you in any great detail, because otherwise we will be here until next week.

What I do want to focus on is the situation in the Commonwealth countries of UK, Singapore and Australia.

In these countries, we have developed and utilise add concept of authorisation. It's one of the rights

belonging to the copyright owner, just like a reproduce right is a right to the copyright owner.

Over the century, it has been about 100 years, the concept of authorisation of infringement of copyright has come about.

To make sense of the recent cases, we need to go back to the century about a century ago, when the first cases were decided.

If we go back to the original cases in the UK, one of the earliest cases was the case of falcon and famous players company.

The reason I bring this case up is it's important in two respects. The first is that it actually said that the reason the whole idea of authorisation of infringement of copyright was introduced into the legislation, the copyright act, is because it was meant to deal with the previous decisions that said that third-party liability for copyright infringement could only be levied where there is a relationship of employment or agency. Otherwise a third party could not be liable.

In falcon, they basically said that's the whole point of the legislative changes and that's why we have the authorisation and so it is no longer necessary to be in a relationship of employment or agency before one is

held liable for copyright infringement.

That was the first thing that was really important, because it broadened the liability area for third parties.

The second thing -- well, I have just mentioned that. Basically, it's not meant to be only restricted to a definition of grant or purport to grant, but I'll come back to that.

The second thing that falcon and famous players is important for is the meaning of the word "authorise", because in this particular case, to definitions of authorise were put forward by two different judges, sanction, approve or countenance or grant or purport to grant. Both judges said they were not inconsistent with each others and these concepts were quite similar and it depends on the factual scenario. If there was a case of employment or agency, then obviously the grant or purport to grant definition would kick in automatically, whereas in other types of situations, sanction, approve and countenance would need to be used as a meaning.

In terms of the subsequent cases, from the 1920s to about the 1980s, it depended very much on the facts which definition the courts would take.

They would basically accept that both definitions were acceptable.

That was until in the 1980s, with a case of Aimes, where the court strangely enough just came down and said that authorise meant grant or purport to grant, which is actually completely wrong, because in terms of the cases that have gone before it, it said that it was framed in the positive, so if you grant or purport to grant somebody to do something and it was a copyright infringement, then you were held liable, but just because you did not grant or purport to grant does not mean that you were not liable for do authorising copyright infringement.

They kind of shifted the ground a little bit.

It was subsequent to that there was a House of Lords case in Amstrad, which tried to move the definition back to a more balanced stance, where approved the grant or purport to grant definition, but also endorse the countenance interpretation, but it was one of the first case that is dealt with technology and it was the twin deck tape recording machines, if you remember those machines, for some of you who are old enough to remember. It was a big ambiguous because the Lord Justice in that particular case said both meanings could stand.

But one thing that was drawn out very clearly by Lord Templeman is the control factor, regardless of

which definition of authorise you use, you must be able to control the infringer before you can be liable before authorising copyright infringement.

Even back in those days, I'm not going to go through this, this is just a quote by Lord Templeman which elucidate the fact that he was also looking at the issues from a policy and a governance point of view, because he was basically saying that the three groups of stakeholders were all interdependent on each other and therefore, whatever decision that had to be made, it had to take account of all three groups.

As a result of those two cases, from 1990s onwards in the UK, the grant or purport to grant definition of authorise was pretty much used across the board.

Then we come to Singapore. Again, the first case in Singapore in terms of grant or purport to grant, in terms of authorisation, is the case of Ong Shue Peng. In this particular case, the court in Singapore followed the UK position and took the definition which is a very narrow definition that you can only be liable for authorising copyright infringement if you grant or purport to grant somebody the authority to do something.

But they did also mention in this particular case that it is important to have control over the infringer.

This brings us to the case of Record TV which was

decided in December last year. This case I have to say, as a caveat, is very fact specific. It was on the issue of on-line time shifting, record TV provided a facility where subscribers in Singapore could actually record TV programs using record TV's internet service and then it could be streamed back to them within the next 14 days.

Media corp, which was one of the owners of the television stations which was stream, of course took issue with that.

To make it very short, because I have been told I have 2 minutes or something like that, the Court of Appeal made a very sensible occasion, because it followed the grant or purport to grant definition, but rather than just making the whole definition meaningless, because it was originally intended to be a bit broader than that, they authorised four authorisation factors. First of all control, nature of relationship, reasonable steps to prevent or avoid infringement and the fourth is whether there is actually or constructive knowledge.

The first three in black are actually from the Australian legislation, but I'll come back to that in a minute, because the Australian legislation was codifying the common law position.

Anyway, in terms of the outcome of that decision,



the courts were -- the Court of Appeal in Singapore was very clear that it would take a policy stance.

I just quoted one of the photographs from the judgment:

"Where the Copyright Act is unclear as to how much copyright protection ought to be granted to a copyright owner, the courts should not be quick to construe a statutory provision ... in a manner which would benefit the public without harming the rights of the copyright owners."

Basically, the approach of the Court of Appeal in Singapore is that we will tread cautiously and we will balance and weigh up all the stakeholders rights before we make any decisions, especially if it's to deal with advancing technological innovations.

Just very briefly, Australia, again, is a Commonwealth country, so follows much of UK, but in Australia, we have taken on the original definition of sanction, approve and countenance.

The original case was the university of as well as and Moorhouse in 1975. These were the four authorisation liability factors I showed you that the Singapore court dealt with and out of these four, the first, the third and the fourth were specifically raised back in 1975 by Moorhouse. In effect, the position in

Singapore is moving more towards the position in Australia, whereas previously prior to the judgment in December, it was probably very much a position that was aligned with the UK.

In terms of the second factor there, the nature of relationship, that was mentioned in Moorhouse, but only implicitly.

In Moorhouse, it was said that these factors are not exhaustive, so there are other factors that the courts can talk about.

In terms of probably one of the most important things in Moorhouse is that they again said that you have to have a power to prevent or some sort of control over the means of infringement before you can be held liable for copyright infringement. In my view, the only exception to this requirement is the bound to infringe case, which I have written about just earlier on this year.

I am just going to -- this is my second last slide.

I'm just going to touch on very briefly a couple of points that were raised in the full Federal Court decision of Roadshow. This is actually Roadshow v iiNet, which is actually the first case in the world where an ISP has been taken to court for secondary infringement, if you like, as a third party.

This was the first case. I actually don't think too much of the decision, because the judges wrote three different occasions and the case is being appealed to the High Court, which will be heard later on in August.

There were two things glaringly wrong with the decision, which we have just been talking about, in terms of Mr Justice Emmet, he said that any power to prevent copyright infringement is sufficient, that's clearly incorrect, because as I wrote 14 years ago, that is not the case. If you look at all the case law in the UK and Australia, up until even today, it's not just any power to prevent infringement is sufficient. It's a power that is meaning that only means that you have to disconnect or stop accept selling the twin deck tape recording machine, that is not regarded as a power that's sufficient to prevent copyright infringement.

Also, for Mr Justice Nicholas, he basically made a statement that ISP has legal and technical power to prevent infringement and again 14 years ago, I already showed that that is not true, because they do not have the legal power and as I just checked the legislation again yesterday and what I wrote 14 years ago still stands. I'm not quite sure what is happening with the Australian courts.

I'm not going to talk too much about the other

things that the courts talked about, but basically they went through the four factors and they basically came to all sorts of funny conclusions about not enough evidence and it was not could be cluecy, but a lot of the times they were rebutting what the primary judge said because the primary judge made some really crazy statements as well.

Again, just another statement for me to leave you with, because it also shows that the Australian courts are also concerned about governance of when it comes to technology, because before they make any decision based purely on legal reasons, they do look at the policy.

In this case, it was more a policy decision that the ISP did not think that it was in the business of being the police for copyright holders and but then it was a bit ambiguous, but they finished off by saying we're not sure if that is legitimate or not legitimate claim.

That's all I have to say. If you're interested in any of the two articles I mention, I have copies of them.

Thank you very much.

APPLAUSE

>>Hong Xue: Thank you very much, Prof Lim. Prof Lim is Associate Professor of Business Law Division of Nanyang Business School of NTU, just for your information.

It is very interesting presentation, especially for the law professors and lawyers.

Our next speaker is actually Mr Goh Seow Hiong. He's the executive director of global policy and government affairs for Asia Pacific, CISCO.

I'm sure he's going to give a very interesting presentation on cloud computing and intermediate liability.

>>Goh Seow Hiong: Thanks again. I hope you can see the slides over there. I'm from Cisco Systems and I think most people are aware, we are technology vendor who provide products to the industry, in terms of providing communications as well as video and collaboration.

I'm going to shift gears a little bit from what our two previous speakers have talked about, this terms of the cases and the legislation.

I want to talk about cloud computing.

This morning, during the keynote that IDA gave, one of the things that broadband is going to be able to enable is new services such as cloud computing. Along with that, it also brings new questions. In my work, I deal with a lot of government officials around the region with in Southeast Asia in particular and they are all thinking about broadband and on top of that, when new computing models such as cloud computing comes in,

what do they need to do, what are the responses the government needs to deal with in terms of the policy, in terms of regulations?

Cloud computing is a word that catches a lot of attention, but sometimes you get some of the them get so carried away with the concept they think this is a band new thing that needs to be regulated separately, newly from what the existing rules are.

In fact, in many questions later I will run through some of these, the issues are not entirely new. The paradigm may to some people it is changing, there is a new focus, the way services are provided does provide new capability, but actually the policy issues hasn't changed all that much.

There are some minor tweaks that we need to do, but I think the message I want to leave you with is even though cloud computing is a nice buzz word, it's a thing on top of many people's minds. The issues are not all that different and the focus is perhaps in some of the challenges related to jurisdiction, relating to liabilities and of course what we are talking about today, at least in the first part, about intermediaries, what their roles and their responsibilities are.

I have this picture showing cloud computing with all the range of policy issues that we have been asked.

There are eight of them around this. Today, I just want to talk about one of them, which is content protection.

Within content protection, IPR is one of them, but there are also broader issues. I am also taking for granted that the audience here knows what cloud computing is and there is no need for me to spend any time defining what it is, but you can see here there are many related issues.

On content, of course, content protection call it intellectual protection, but I prefer the use the word content here, because it is more generic.

There are content is going to be put on the web that is available for the people that exists today.

Cloud computing paradigm doesn't really change at all that much, where some of the changes are is that your location of your data, the location of your intent may not be where you think it is. It may be hosted somewhere else out of your own premises, it could be not even in your own country.

But there are content owners who create content and these are being consumed by people out there and these need to be protected, no matter how you host it or where you host it.

Is governments or rather owner also rightly concerned about those.

But there is another aspect of content that is more on the minds of government, which is about illegal content. This is not necessarily about pirated content, but content that is bad: how do you create a bomb, how do you engage in illegal activities?

Those kind of content appear on the internet and governments are rightly very concerned about control of those content, making sure those content does not get onto the hands of the wrong people.

Also, there is a promotional element which also not many people think about, which is local content, in terms of your cultural or your local languages, type of content that sometimes there is a desire for governments to also preserve and promote these types of content.

That is why I call it content, because there is actually many other related issues when you talk about protecting some of these creations.

With that in mind, what are the types of questions that we then need to address in this environment? I list here down some technical questions and also some specific issues underlying it. The first is how is the content protected? This is where from a government perspective, if you think about this, the policy environment, are there rules, are there -- does the



country comply with international best practices in terms of protecting some of this intellectual creation, licensing rules, again, when we are talking about an environment that's cross-border, it is very important for there to be consistency across different countries, otherwise service provider finds it very difficult to operate in cross-border situation.

Second element, this is in terms of liabilities again. Cloud service providers, when they are providing these services on behalf of whoever owns the content, whoever is accessing the content.

What liabilities do they bear?

If they facilitate IPR infringement, we talk about this, to what extent are they responsible? What do they have to do when they discover infringing content? Take down to what extent they have to comply in this and then finally, custom, consumers, individuals, when they say things on their blogs, on Facebook, for example, to what extent can you hold Facebook for responsible for what one of its users said. These are questions that need to be answered.

The third cloud services, not talking about the content of the service itself, can they be stolen? Someone may be offering a particular service on-line, that is a paid service, but can you misappropriate it

and use it without paying for it? New content, this is what I just talk about just now, content is generally teamed as undesirable, child pornography would be another area. This is where government wants to filter or wants to sensor some of these things to the extent that they are comfortable with or they are willing to.

You see some movements in various countries articulated the world, thinking seriously -- we are not talking about just pornography, seriously bad content that we need to control against. What are the measures that can be taken against those?

Then again if they aren't illegal content, how do you remove them if you want to do that.

Finally, freedom of expression. I think tomorrow we will talk about the situation and countries we talk more about this, but, again, freedom of accessing the infrastructure, the cloud services for you to post information on these things, are there restrictions there? There are countries that actually prevent social services, social networking services from being accessed by their people for whatever reasons that they have. These kind of access, this kind of controls, how do we deal with them?

I want to leave you with some basic areas where governments should think about these questions.

Content protection legislation, what we are talking about intellectual property laws, those needs to be there and governments need to make sure for whatever they have in their country, they should be consistent with international norms. When it comes to content regulation, filtering of things that are undesirable, there is a balance that governments need to do, to draw, you cannot do too hot handed or otherwise you stifle the innovation, you stifle the ability for industry to grow.

Then the third point is similar point, the last point here, this I think is something that we had historically when filtering started as a practice, internet was seen as a specific medium and government started blocking specific websites, for example.

I think in today's world, where it is all converged, really you think about content, if you want to treat certain content as illegal and undesirable, it should not be because of the way it is delivered, it has to be because it's illegal in the first place and then you have rules and laws that deal with that from that perspective and not just target the media, otherwise you create an environment that is no good.

The last slide here I want you to leave with in terms of principles of government to think about.

Government regulations are important, but they need

to keep pace, be not stifle innovation. This element, in many things in history, you have seen areas where government has very heavily intervened in terms of regulation, areas where government has left it to grow on its own. The level of innovation is very clear in each environment.

While we recognise it is important for government to regulate, they must balance with the industry to be able to have enough flexibility to innovation.

International standards. I think that's something that is very important. In an environment like cloud, we have cross-border transactions. All the more you must have international consistent things, otherwise you will face a lot of obstacles.

Security, cyber crime, data protection we will talk about it a lot more tomorrow, again, we need frameworks to deal with that, because that's one of the primary concern that is people have about using the cloud.

Cross-border interaction, I did mention this a lot, but when services are hosted from overseas, there are concerns, this morning one was mentioned about IPv6 being blocked by some service provider. This is direct competition with your Skype with local provider. But if you think about globally, there is a foreign provider of a services that competing for local player, to what

extent do these cross-border interactions, can they be brought in some ways, that actually creates obstacles to innovation.

Finally, for CISCO, it is important that there is broadband infrastructure that enables all of this to happen. There is no point talking about cloud computing if your infrastructure is not good enough to support even basic transactions. A high quality broadband is very important to make sure cloud computing can grow.

I'll stop here for now in the interests of time and let our chairperson carry on from here.

APPLAUSE

>>Hong Xue: Thank you so much. We have heard three wonderful presentations. It's very much opened up our mind.

If you disagree, I summarise for the three key issues. First of all, Mary mentioned a very important issue on internet governance. There is actually territorial effects of domestic law enforcement. I think this still deserves research in Internet Governance Forum, because many legal issues cannot be handled domestically. It is going border effects, it goes beyond your border, internet is a global media.

So this is one issue, probably we need further discussion.

Second issue is mentioned by Prof Lim. She referred to intermediate liabilities, it is very interesting issue. I do agree with that a comparative study should be done, especially when there is no treaty law available. Not only the Anglo-American common law system, but also the civil law system. You see some cross study has been done, but is very much insufficient.

I see some Chinese translation of Australian cases, but the translation is not complete. It only translates the first part. It is not directly liable. But it didn't translate the part about authorising infringement.

This is very critical missing and it's really confusing the Chinese legal community. Another issue is authorising liability. Of course, it is very important one in the English legal system. It is tradition. What is relationship with the newly emerge American law concept of inducement infringement? This is third concept apart from contributory infringement and vicarious liability. These are issues need to be done by law professors.

The third issue is cloud computing.

I suggest we have some discussion on this, especially we want to link it to IP issues.

Now the new discussion on cloud computing is at, where that cache, we know Google has almost a second internet, it cache everything at the large data centre. It is a caching, safe harbour, that is subject to liability limitation to that. These are very critical issues, so it is very much close to our life, because we are using these services applications every day.

Now I open the floor, any comments on the podium?

OK. Anyone in the audience? You are very welcome, especially if you are a lawyer, law professor.

>>Mary Wong: I'm just going to say one thing and it's not the answer to your question about the American inducement one, because the quick answer to that is we don't know the answer ourselves.

I wanted to make the comment relating to the IP enforcement agenda going back to what I talked about, it's quite clear that in many countries and many forums, that there are a number of interests that are obviously pushing for certain things to be top of the agenda and what we see in the domestic US discussions about protect IP and the international negotiations over ACTA and others that are coming down the pike, is a focus on what we might, in this space, term a very narrowly tailored IP enforcement agenda.

As I have said just now, it's not that it is not

important, it is, they are legitimate interests and concerns, but in a sense of talking about IP, if we keep talking about IP enforcement internationally, whether it's at WTO or in the IG space, I think that we are focusing on the wrong thing, we are not focusing on emerging business models, we are not focusing on the economics of actually looking for different ways to reward content creators and incentivising them and that is part of a broader discussion that lawyers and policymakers need to be part of.

>>Hong Xue: Thank you.

>>Salanieta Tamanikaiwaimaro: Just a quick comment in relation to one of the comments in terms of one of the cases being the first in term of an ISP having secondly liability. I would just like to say that it's possible that there are jurisdictions where we probably don't access their judgments and we don't their language, but it has already been done before. Do know of a US case, the grossly case and it was sow any in terms of video recording, but quite aside, I understand that different contexts, you have Commonwealth, US, civil law. The other thing I would like to say also, bringing it back to the realm of internet governance, I think that if in terms of intellectual property, if we are going to discuss or engage into what sort of things do we want to



consider in terms of IG frameworks for intellectual property, I think a key thing that should be addressed is what is the critical information infrastructure? Who owns which bit?

I think the first speaker probably alluded to the different rights that the American courts sort of address, like in terms of rights in recommend, right in personam.

I think what we need to do is we need to also consider quite aside from the critical information infrastructure, we also need to look at things like what's the economic cost, who are the stakeholders affected and in terms of the extra territorial jurisdictional implications, what does some sort of considerations, what are some sort of considerations that policy writers should consider and is ACTA working or is ACTA an instrument that's just protects just multinationals or certain nation states. That sort of thing.

Whether it happens internationally, whether it happens regionally or whether it happens domestically, one thing is for sure. In terms of intellectual property, in relation to internet governance, how we did things in the traditional sense, in terms of IP generally, it won't work in the IG forum. So it needs

some sort of in my view and I would like to raise this, new philosophy. It needs -- like you have John Locke, Thomas Hobbs, Montesquieu, they talked about social contract theory, yada,yada, yada.

But we are coming into the realm of internet governance, we have never been here before, we are in a transition and I think Asia in a sense is pioneering and so there should be some sort of discussions, not limited to the Internet Governance Forums who discuss these sort of IP issues, I just thought I would raise that.

>>Hong Xue: Thank you so much.

>>Lim Yee Fen: I just want to mention the Grocksa case. It was not against an ISP, it was against Grocksa, which was a peer to peer network provider. It's not an internet service provider as such.

In terms of just a purely internet -- I mean, there was another case earlier in Australia called Cooper, where there was two co-defendants. One of them was an internet service provider. In that case, the internet service provider was active in helping infringement of copyright materials, like music downloading, but I stand by my statement earlier that this is actually the very first case anywhere in the world where an internet service provider has been sued for secondary liability.

>>Hong Xue: Thank you, but I do see the point presented by Sala. Our data is now in the cloud, up in the air, but our minds should be landed on the ground. It seems property law, even though it is developing very quickly, it has become very much irrelevant to the daily life. The young people don't care about this, the people's enemy. This is even danger to our career.

It seems we should go to ACTA, if no more questions.

>>Kuek Yu Chuang: Just a quick question for the panel. My name is Kuek and as mentioned just now, I sit on the board of the Asia Internet Coalition, but my day job is with Yahoo!

I think what is interesting about companies like Yahoo! and why a company like us would be so interested in ACTA, it's because we occupy a very special space. While being an IP owner, we are also firm believers in an open internet, so we look at treaties like this with a lot of interest.

I think Mary alluded to this just now, that there were other -- there are other FTAs being negotiated at the same time that might bring about the same results as ACTA.

For example, almost the same set of negotiators are reconvening in Ho Chi Minh for the trans Pacific partnership.

I would like to open a question to the panel, what are your observations on the TPP process and is there anything that we learn from ACTA since that it has gone through its whole cycle and we're at the stage of signatures? Are there any learning points that can be cast on the TPP process?

Thank you.

>>Hong Xue: Anyone comment on this? Mary perhaps?

>>Mary Wong: I can start, but I should tell you I have no answers, in the best tradition of academics.

One thing that I think we have learned and I think one thing that the US Government has learned somewhat grudgingly, from the ACTA process, is that although and here is where I think I might disagree with people who have commented on this, including possibly one person on the panel.

Government to government negotiations are conducted behind closed doors -- I don't use the word "secret"; I say behind closed doors. Traditionally, that has always been the case. Should that be the case, should that change, that's not my concern.

But I think what the governments have learned in the ACTA process is that with the global internet, with the amateur citizen journalists and activists media out there, transparency is very important.

So there is room for disclosure at some point without prejudicing the outcome of the negotiations.

I would hope that as the TPPA negotiations go forward, that that lesson is learned and we see some steps forward in terms of disclosure transparency and so forth, even if we are still a long way short of full involvement or fuller involvement of nongovernmental actors in that space.

>>Hong Xue: Thank you. Any more questions?

No more questions, we move to the second part of our session.

Our next speaker will be Dr Bill break, international fellow of university of Zurich, work in media centre with very long name. I don't have photographic memory.

Heck introduce himself. What's a very famous speaker. We all see his book, opportunity for all all Vilnius IGF. So this is very much respected governance scholar. We are privileged to have him in Asia Pacific IGF.

Bill, you have the floor.

>>William Drake: thank you. Hello, everybody. I'm very happy to be here. This is actually my -- I'm in a series this year. I'm going five IGFs. I did the ice LAN dik IGF, the European IGF, the US IGF that is coming

up, Nairobi, so Asia as well.

It's interesting to be able to compare and contrast these different environments.

Quote of the day: John Locke, Montesquieu, yada, yada, yada. I don't know if I can top that, but I'll try.

You know, I'm not an intellectual property lawyer, I'm actually a political scientist by background, so I tend to view these things from a very different perspective, I guess.

I'm not going to talk about the details of ACTA, although I'll say a few preliminary words about it. But I rather would talk about some of the larger architectural implications of ACTA from the standpoint of global internet governance, since that's my primary concern.

You will recall the kinds of dialogue that people were having about ACTA not too long ago. There was quite a lot of hand ringing going on all around the world. A nice summary of this was I thought a quote by Rob Pegoraro from the Washington Post, who called it:

"An intellectual property land grab that would cement some of the ugliest aspects of American law, export those provisions to other countries, possibly import even worse provisions back into the US and in the

bargain, spawn a new and largely redundant international bureaucracy."

Sounds good, huh? If you'll recall, a lot of the discussion was that this was going to be really bad for the internet environment, in particular with regard to ISPs having liability for all kinds of intellectual property violations and potentially even getting into using such remedies as three strikes measures and so on.

If you look at the final package that was officially published in October 2010, it's a lot less awful than was expected. The internet chapter was substantially softened and there is a number of balancing provisions in it that I think are important.

For example, when it says things like each party's enforcement provisions shall apply to infringement of copyright related rights, unlawful use of means, distribution for infringement purposes, then it says things like, however, any actions taken in this regard to deal with those kinds of problems must be consistent with the parties laws, preserve fundamental freedoms such as freedom of expression, fair process and privacy.

There's a lot of language like that in the internet chapter. It's curious. Each time a restriction is set down with regard to a liability or digital rights management or so on, it's then coupled with kind of

balancing language that says any actions must be consistent with each party's laws and fair process, privacy and so on.

One could read this as being essentially a lot more flexible, I think, than what people originally were worrying about it becoming. The digital rights management language is still pretty bad, as far as I can still, it is basically saying that all parties have to have protections against unauthorised circumvention, effective technological measures and they have two protections against the offerings to the public or marketing of devices or products including computer software, services that allow for circumvention.

So there are clearly some ways that that could be interpreted, that could be highly restrictive with regard to the internet and will raise questions.

But as I say, overall, it's a lot more cautious and even handed than what it started out to be, in the days when people were first confronting this text that was being leaked and so on, et cetera.

All that said, I want to talk about real briefly two aspects of this process that I think are troubling in terms of the larger global internet governance dynamics.

One is the secrecy.

There are clearly some exceptional circumstances in



which a measure of secrecy may be justified in international negotiations and the making of global governance arrangements, national security, high stakes foreign policy deals, even international trade negotiations where if you're trying to make concessions and tradeoffs between market access, between partners and so on, if everybody were to find out in advance my government is giving up access to this in exchange for that, people would jump up and down, it would make negotiations difficult.

You can understand secrecy arguments in those kind of cases.

In most other kinds of environments, most other kinds of negotiations and collective action environments, to me, secrecy is really a form of cowardice. Basically it's a way of saying that we lack the courage of our convictions that we can actually reason and persuade other parties that what we're suggesting needs to be done can be justified. We're saying we can't actually sell the argument to people through logic and so on, so instead, we'll take this kind of approach of saying we know best, the little people shouldn't be informed, they will cause trouble and so on.

I think this kind of approach to global governance

really can foster group think and delusional senses of self-importance that are not very helpful, particularly when it comes to imposing conditions on third parties.

It also facilitates policy laundering, which I think is fundamentally undemocratic and makes it impossible for people outside the agreement to find out who was articulating which case, who was making which concession, who was taking what position and so on. Everybody can kind of stand back and say, well, you know, it was the process and we had to make this kind of overall package.

That to me is undemocratic, it doesn't allow for any transparency to stakeholders, to Parliamentarians or other participants and is really not a good basis for forming any kind of global framework in my view.

If you look at the way most internet governance is done, it's really self consciously quite the opposite of this. After all, look at the IGF, the way -- I'm involved in planning the Nairobi meeting now, I'm involved in ICANN as is Mary, starting Saturday morning and the way we're approaching these things is not to hide information, keep people out of the loop.

The approach is rather to bring all parties together in the hope that you get buy-in, that you get everybody on board. If you don't get people on board, it's very

difficult increasingly in the internet environment to expect them to then toe the line, accept the rules, implement and live with what you have agreed to later.

There is a worldwide trend towards transparency and to have important internet agreements being made in ways that violate that trend is to me really kind of very strange.

The second point -- and Mary referred to this before -- has to do with the architecture of global internet governance and the fact that this is a plurilateral agreement, "plurilateral" being a sub-species of the category of "mini-lateral". You know, traditionally, people tend to use the word "multilateral" wrongly, but they do, to mean essentially universal inter-governmental agreements.

"Multi-lateral" actually, technically, just means more than two. But, OK, we do equate "multilateral" with sort of UN style global frameworks.

Mary listed the people who are the governments that are parties to this process. You may have noticed that ACTA does not include in its membership many of the countries that are considered to be the primary violators of intellectual property. That's curious. You might ask why is that? Why would you go forward and negotiate an intellectual property framework among this

limited set of players rather than including those that are thought to be the source of problems? Why is this not being done in which po or the WTO? The general answer is multilaterallism is hard and getting harder and the specific answer I would WIPO development general to. People may know in 2007, the world intellectual property organisation established this development agenda which institutionises within the WIPO framework the notion that intellectual property protections have to be viewed from the standpoint of development promotion and they have to be balanced, there has to be an assessment of global rule making implementation and so on in terms of the impact on development and that's been driven very much by a coalition of countries like Brazil, Argentina, a number of different developing countries as well as a coalition that worked with them of academics and NGOs from around the world.

This has frustrated many rights owners and the government that is serve them.

Big content players and in the US Government and others, tend to think -- I live in Geneva and I spend a lot of time around the UN and I can tell you, they think WIPO has been hijacked. They think WIPO no longer serves their interests because now we have all this crazy UN style development discussion going on. That's

not the place to be doing this. So they are very frustrated.

In fact, at a recent meeting, the US ambassador to the United Nations, Betty King, in referring to the WIPO development agenda, said if we get to a system with the protections of patents are aggregated in the name of development, we are going to kill the organisation.

Of course, nobody is arguing that we should abrogate all patents or anything like that and indeed the development agenda allows for a lot of more creative ways of thinking about the links between intellectual property and development as Mary was suggesting we need to, but the point is there is this frustration and that frustration is feeding into a larger dynamic, which I would argue is one where we are moving in a lot of cases towards what you might call non global global governance.

That might seem like an oxy moron, but it's actually a relevant concept here.

We're getting into a situation I think more and more where powerful players look around and forum shop and say we will push for what we're trying to get in whichever environmental lows us to get the farthest and if that means going outside the traditional multilateral international inclusive bodies towards coalitions of the

willing, the like minded and so on, we will do that.

We can use those smaller coalitions to pressure the larger bodies to move in the corrections that we would like them to go. This becomes a problem.

Plurilateral agreements have been used many times in internet context. People may not know all the prehistory of what's gone on in the Organisation for Cooperation and Economic Development, which is currently holding a global summit now on internet policy, just as the G8 recently did.

But the OECD which is a plurilateral body was the place where many of the issues involved in, for example, international trade in the goods and services over the international were worked out before being brought to the WTO, where many of the issues around intellectual property in a network environment were worked out before they were brought to WIPO, where many of the issues around information and network security were worked out before moving into other bodies.

Plurilateral bodies often before the incubators for a lot of the important initiatives that then get taken up in multilateral institutions.

Moreover, plurilateral agreements can be become global rules in a lot of other ways. For example, through piecemeal bringing other parties into the fold.

In the United States and other countries have often cut bilateral trade agreements that require parties to sign on to certain types of rule systems which then became generalised through the agglomeration of all these bilateral deals.

You have formal extensions of such agreements, where essentially states that have power and firms that have power that have worked out deals amongst themselves set de facto rules of the game for other player that is they then have to essentially follow.

I view this ACTA agreement as part of a larger trend, a shift away from traditional open universal multilateral type frameworks and towards a more fragmentary type of environment, one in which power will lead players to opt for different types of institutional solutions depending on what best lends itself to getting the outcomes they want and that can often include also the kind of unilateral thing that is Mary talked about.

I'm really disappointed to see pat lay, who is a great senator constantly sponsoring all these horrible pieces of legislation, like protect IP and so on, it's very depressing.

He's not alone, a lot of people in the American government think of the internet this way. Mad run Al bright, once made this wonderful quote where she said

what's the point of having this superb military you're always talking about if we can't use it?

I think a lot of people in the US Government increasingly look at the internet and the intellectual property community looks at the internet and says: what's the point of having this internet -- because they think they own it -- if we can't use it, if we can't -- we have control of the root zone file. We have legal control over ICANN. We have the registry and registrar market being concentrated in the US. We have all these levers, why don't we start pushing these things and see if we can't use them to get whatever the hell we want in the world?

Of course, when you say to them this is not necessarily a really good idea. We are trying to convince the rest of the world when they're going to the United Nations and saying we need inter-governmental control, we need a new UN agency, et cetera. We are trying to tell them the US has been a benign hegemon that hasn't abused its authority and so on and here you are arguing for precisely that.

I'll close by saying this is not, I would argue, some sort of just inherent genetic defect of the United States that people take this kind of approach. It's a natural function of power.



If you put another country into the same power position with the same concentration of control over these industries, the same set of flow of industry interest, et cetera, I think you would be very likely to be getting the same kinds of pressures coming out of them. Powerful countries push to promote their interests. That's what happens in the world. The US, in this case, happens to have a lot of power assets to leverage towards a really bad ends.

The point I would leave you with is we need to move towards a more multi-stakeholder, more inclusive global dialogue around these kinds of issues as Mary suggested and I would argue that Asia in particular needs to do this, because quite frankly, when we see many Asian countries being represented in the IGF and other international institutions, we hear primarily from the governments who are saying even democratically elected, that we need purely inter-governmental kinds of traditional models, et cetera.

We don't see enough of the nongovernmental actors, the kinds of technical community people, civil society community people, business people that you have here in this meeting coming into the international institutions and providing a broader perspective.

Unless you are involved in making governance, unless

you are a governance maker, you end up only a governance taker.

I don't think Asia, given that we are in a post-American world, where power has shifted and the internet is so important over here, can afford to be a governance taker. Thanks.

APPLAUSE

>>Hong Xue: Thank you, we only have 1 minute for two speakers.

The next speaker is Mr Carter, who is the chief policy director of InternetNZ.

>>Jordan Carter: I guess I have about negative 40 seconds.

Good afternoon, everybody. I'm going to be really quick and I'm also not a lawyer, so I don't know if that will help you listen to me or not, with apologies to our great lawyers comments on the panel.

I talking about the limits of global governance and many of the things I might have said have already been said, so I'm not going to repeat them, so what I say may not entirely match the slides, but that's OK because you're all paying vivid attention and you'll be fine.

Briefly, I'm going to talk about InternetNZ, talk about global governance, work out where IP fits and then talk about a briefcase study of what we did in New Zealand, with respect to ACTA, with a few final

thoughts.

InternetNZ is an NGO in New Zealand protect and promote the internet for New Zealand. It's a membership open for all. You can join if you would like to. We hold the delegation for the .nz domain name which we operate through two subsidiaries. I'm not here speaking for .nz, I'm here speaking for InternetNZ -- just to be claim, there's .nz domain name customers in the room.

I'm not sort of using political science terms, I'm trying to be using quite layman's language.

Governance at the global level comes in different flavours and ICANN itself, internet governance of names and numbers is a good example of global governance, a kind of bottom-up organic multi-stakeholder process, which I think is quite good, because it gets all of the views of all the of the relevant people on the table and everyone has to be listened to.

Multilateral governance, notwithstanding what the previous speaker said, is generally seen as a global gig, but it's governments and so while governments all claim especially in international fora to know everything about their citizen's interests and to be perfect representatives of them, I assume in a room like that most of you will agree with me that isn't actually the case.

Then you get these little sub-sets, these little pressure bubbles, when powerful states can't get their own way in multilateral and global governance fora, the plurilateral approach which is ACTA and is also the trans-Pacific partnership agreement, which I'll talk about a bit more soon.

I think one of the ideas I would like you to take away from this is in these governance discussions, we should be thinking about subsidiarity which is a horrible word that gets overused in the European Union a lot, but basically which means where you have to do something globally, do it globally. Where you don't have, don't.

It seems to me ICANN is a good example of something that has to be done globally. If you believe in a global internet, you have to coordinate its naming and numbering resources in an equal fashion all across the world, so it's useful to do it globally.

But with intellectual property, there is at least a case that that should be a matter of national determination, that the balance between rights holders and citizens uses of intellectual property is something that should be determined as a matter of cultural policy within the noble domain. That was generally the view that, for example, the United States took until it

signed up to burn, having started its life a few centuries earlier as a rampant pirate in the intellectual property sense.

I largely agree with Bill's points about the driver for this. The driver is power.

Especially in the United States, it is the amazing hold that the IP producing industries have on the United States trade representative. That's a whole separate talk, but you should think about the political economy of that.

Yahoo! and Google, for instance, have a lot less stay in US trade policy than Warner Bros does and that's a reflection of the past causing problems today and into the future.

Keep a view on that.

New Zealand's point of view always was that it didn't really think that there should be globally governed, New Zealand felt a bit bounced into the TRIPS agreement as part of the WTO formation.

We haven't signed the World Intellectual Property Organisation internet treaties and the New Zealand government in the TPPA negotiations was saying IP is overprotected. We have gone too far. That comes back to the power dynamic.

When you think about the United States and the

composition of its export industries, because no one should be under illusions that it's mainly the US that's pushing these things. They want to make more money out of these export industries that they are good at and they want us the rest of us, the consuming nations, to pay more.

Fine, they're a powerful country with interests, they're entitled to advance them, we're entitled to say no thanks. Keep that in mind.

So there is a case to be made that this is not something that is best dealt with at the global level, but that when multilateral fora frustrate the ambitions of those with power, they will leak out and they will do things wherever they can to get ahead.

ACTA what are already been described. The one point I would make is that the negotiators ended up he this silly game where they said it isn't about IP standards, its about the enforcement of them. We couldn't get them to realise that if the enforcement of a particular right is tightened up in real terms that changes it, it makes it a tougher hurdle for people to meet.

But as bill also mentioned and other speakers have said, by the end of the negotiation, the powerful countries didn't get their way and the teeth were pulled from this.

In the trans-Pacific partnership negotiations, another plurilateral but much broader trade agreement, the same game is on. The US tabled an IP chapter in March which was much more aggressive than ACTA ever was and it's managed to unite the other eight parties to those negotiations against it, because the demands are so outrageous.

A no one should be surprised that they are trying, but no one should be uncomfortable with the ideas that other countries who would be disadvantaged by this so-called global governance attempt can say no.

On ACTA, in New Zealand, we tried something that we called public ACTA. We didn't like the secrecy and we didn't like the lack of citizen perspective in this state led negotiation, so we convened a participatory forum, with about 120 people showed up to on a Saturday and they worked out all of us together in a massive 120 person session, a four page Wellington declaration, calling for transparency, calling for a citizen friendly ACTA. Our help to all of the negotiating parties and they managed to persuade/con all those parties into releasing the draft text after that round, which was great.

It succeeded in getting public attention on the issue and it succeeded in getting the text released.

I won't say more about that, this slide will go up later.

To points to leave you with.

The treasure from the US to tighten these law also not go away, they see it as a way to make money and they will continue to push that.

The two ways around it for us could be a real global governance exercise, where actually the claims that right holders industry are being destroyed by the videocassette or VHS or automatic piano players back in the 1890s are seen for the rubbish that they are and where there can be a proper critique of the claims that these rights holding industries make or to leave individual countries to make the law that suits them best.

Neither of these are going to suit the powerful countries and so we should all keep in mind that principle of subsetty and feel able to make arguments that say where it's in our own national interests to have things decided at the national level, that's OK, we don't have to globalise everything.

Thank you.

APPLAUSE

>>Hong Xue: Thank you very much. Last but not least we have a discussant, Mr Hiong, who is general counsel of Yahoo!



Southeast Asia. Please.

>>Siew Kum Hong: My name is Kum Hong. I'm the general counsel of Yahoo! Southeast Asia.

I have to apologise for not having a full speech, because of my travel schedule in the past two weeks, but I think it's a disguised blessing, because of timing.

I come at this from a somewhat unique perspective because I am a lawyer. I have been working in the internet and technology space for 10 year and two weeks. I'm also a civil society activist, more on human rights and politics in Singapore, not on internet governance. Having been in Yahoo! for four years, I think I have a little bit of industry perspective on these issues. So it's a little different.

I think starting from the final text of ACTA, it seems to me the provisions seem fairly reasonable, speaking as a Singapore trained lawyer, it did not seem too distant at all from existing Singapore law.

What I would call hygiene factors which are in the convention. For example, addresses, the concept that while it's important that IP has to be balanced, IP laws have to be balanced, while it's important to protect the rights holders, it's also important to have things like fair use and dealing and respect, free speech and rights to privacy, so I think it does strike that balance and

at the same time, I think as many of the speakers have mentioned, it's very important, especially dealing with the digital environment, to deal with issues of secondary liability and liability of service providers, like Yahoo!, clearly.

I do want to make one point, which is that generally, I actually do view harmonisation across countries as a good thing. The worst thing you can have would be 150 countries with 150 different laws.

In today's world -- look, I cover Southeast Asia and I also have some APEC responsibilities for Yahoo!. The worst thing is to deal with very different laws and different countries and he's what we encounter a lot.

Harmonisation is a good thing, of course, you do want to harmonise at a certain law which is good for everyone and which is balanced and sound.

Coming back to ACTA, I think there's some lessons that have been learned and I think many of the speakers have really kind of called out the lessons that should be learned.

It seems that it does come back to the questions of process and governance.

Obviously, there's a clear consensus that more openness and accountability and transparency in these processes are important, but at the same time, let's

remember that trade talks being what they are, some degree of confidentiality is required.

It's very easy to imagine your domestic political pressure, kinds of limiting countries from moving towards a reasonable compromise. We can see that with the climate change talks, which are completely deadlocked because of political pressures.

What's the future of plurilateral agreements like ACTA? I think we can see we can make a better prediction after when we see how the TPP process plays out.

If TPP ends up in the same place as ACTA, which means it end up in a praise where it end up looking fairly reasonable and balanced, then make our rights holders will understand that plurilateral mechanisms might not be the best way to advance their interests and they might look for something else to advance their interests, but I think that may not be a bad outcome, because ultimately, I think we all do want more openness and transparency in these kind of processes.

With that, I will hand us back to the chairperson.

APPLAUSE

>>Hong Xue: Thank you very much.

This is a wonderful presentations from the last three speakers, I can see at least three points, one is

about the process of ACTA, the secrecy is really not the right model, we need more openness and secondly regime shifting, as bill mentioned, that we don't need this non global global governance.

Especially if the multilateral is too difficult to work out real things such as development agenda hasn't produced any concrete result, plurilateral should not be the right direction either. It is even worse model.

The third thing I heard is that IP may need to be assessed in a wider context, not only limited to its legal regime, but think about the development perspective, the human right impact, such as privacy and free speech.

Any questions to the ACTA for the speakers?

We started 10 minutes late, so I believe I didn't occupy extra time.

Any questions or comments from the panel? You each can be 10 seconds.

>>Salanieta Tamanikaiwaimaro: I wanted to say that it was a very dynamic panel and I particularly enjoyed the presentation I never really thought about what Jordan said, but it does make sense. At first, when you were sort of talking about keeping the global issues global, and whatever is not global bringing it down to local, I sort of struggled a bit in trying to understand that.

But when you mentioned -- what was the word you used?

>>Jordan Carter: Subsidiarity.

>>Salanieta Tamanikaiwaimaro: Subsidiarity -- sorry, English is not my first language. Anyway, the subsidiarity emphasis, yada, yada, yada. Somebody might think I'm Yiddish.

Anyway, the point is it does actually make sense, I mean, in something as complex, as transnational, as novel, you know, and that sort of thing and just sort of tying it to the last speaker, Mr Hiong, just turning to Mr Hiong's presentation where he was saying that he's of the view that we should look into harmonisation and that sort of thing and again, it brings me back to the comment I made earlier, like in the past, Benedict Anderson, you know how they talked about nation states being imaginary boundaries. Nation states had sovereignty and you had solid boundaries.

But with something like the internet which is where it's a network of networks, like bringing it back to that, and understanding what's the critical -- again, what is the infrastructure, who owns which bit and how do you regulate that or even before trying to regulate it, what sort of issues, what are the implications and should new philosophy emerge?

I mean, Locke has had his time, Montesquieu has had

his time, but in the realm of internet governance, I think this is opportune time for jurists, philosophers to emerge to discuss what are some of the ways you can actually regulate that. I think that is what Jordan raised, in terms of subsidiary, so --

>>Hong Xue: I'm sorry, we are really behind schedule and we have several panellists who want to respond to your wonderful question.

>>Jordan Carter: Just briefly on that, in an ideal world, harmonisation would be great, it would be really nice to have a similar framework every where, but the problem with that is everyone has the same interests and I just don't buy it. While it would definitely be easier for a company like Yahoo! to have a single legal framework, or at least a really harmonised one, the fact that that might leave some people effectively as serfs in their own land is a real problem that democratic politics will not allow.

I think that's just something -- a balancing has to be arrived at. A reasonable harmonisation would be great, but what is being offered is not reasonable.

>>William Drake: I'm increasingly amazed. You have quoted Montesquieu, Benedict Anderson and Seinfeld all at one time. It blows me away.

What I just think that what we're moving towards is

a new kind of topography of global power, that essentially we are moving to a sort of new medieval type of situation, where power is going to be increasingly fragmented and shared and overlapping within different types of social spaces.

If you go back to the medieval age, when you had insipient nation states and the Roman Catholic church having trans-national authority and so on, it was all very complex in terms of who had power and jurisdiction over what type of area.

Increasingly, I think we're seeing that kind of fragmenttation, it's not a simple fragmenttation by issue area, it's not a fragmenttation by territory, it's a much more complexly defined set of fragmenttations that will raise all kinds of problems in terms of power and other concerns.

>>Hong Xue: Thank you, Bill. We would like Mary to conclude the session.

>>Mary Wong: That wasn't my intent, but I'll try.

Actually, I want to be pedantic and pedestrian coming down from the heights of Montesquieu at all. I want to assign homework, because on to counts, I think specific to the IP enforcement agenda and following up not just from my comments, but comments from my fellow panelists, it is critical that if there is a consensus,

that the IP enforcement agenda that currently dominates international trade talks and other fora is too narrowly tailored, is too overly focused on business model that is outdated, the empirical data and studies and economic impacts and other drivers and dynamics that are outside the strict IP legal field are produced.

There are some studies out there that we get every now and then from content owners and rights holders, they aren't always very thorough and obviously to some audiences they are suspect. So I think there is room for that kind of emperkle and other survey data that will be very helpful in pushing this broader agenda forward that we have talked about.

The second piece of homework is much more generic and it goes to what bill and others were saying. In terms of multi or plurilateral, either/or or both, this stuff is hard. A lot of folks who have been involved in civil society and other aspects of governance fought along hard fight a long time to even get to attend a WIPO meeting, for example.

That is a long road and it was hard getting there. Now is not really a matter of battering down the door, but participation, not just by getting a seat at the table, somebody alluded to powerful lobbyists in Washington, I think that was you, Bill, and that's



a fact of life that is true and I think those who have not, as yet, had the relationships with those who are, let's say it what it is, who are still in power, who will be the responsible people making those decisions, you have to find a way to get to them and built those networks and relationships and it is not easy.

>>Hong Xue: Thank you for all the speakers and discussion all the participants, thank you very much.

APPLAUSE

>>: Thank you once again. I would like Prof Ang to give a small token of appreciation.

Ladies and gentlemen, though we are initially scheduled to be back to start with our final plenary session at 4 pm, let's be a bit flexible here and target to come back after the coffee break at 4.15.

Thank you.

