

# DECODING THE ROLE OF THE ‘GATEKEEPERS OF CYBERSPACE’ IN THE INTERNET ECONOMY: ANALYZING THE LEGAL FOUNDATION OF INTERMEDIARY LIABILITY OF ONLINE PROVIDERS\*

*Arvin Kristopher A. Razon\*\**

## INTRODUCTION

When fake news is uploaded and widely shared on Facebook, is Facebook legally bound to take immediate action, or should it simply allow public opinion to correct itself? Is a reporting mechanism, through which users can flag nudity, false news, spam, and similar content sufficient for an online platform to meet its responsibility as an intermediary? When a product purchased online turns out to be a counterfeit, do online shopping sites like Lazada and Zalora have warranties that they should fulfill? As the Internet economy rapidly evolves and touches on virtually every sector of the economy from commerce to basic health services, the list of questions pertaining to intermediary liability goes on.

From ensuring sustained public access to the Internet to allowing commercial entities to offer their services online, Internet intermediaries are the backbone upon which the Internet is built and continues to evolve. Known by different names, some broad and others inaccurate—internet intermediaries, online intermediaries, digital platforms, information society services providers, online platforms—they enable connectivity on the Internet. As the Internet is by and large a decentralized network, with no government able to singlehandedly influence its direction, the Philippines must not miss the opportunity to benefit from the economic opportunity that the Internet promises.

---

\* *Cite as Arvin Kristopher A. Razon, Decoding the Role of the ‘Gatekeepers of Cyberspace’ in the Internet Economy: Analyzing the Legal Foundation of Intermediary Liability of Online Providers*, 91 PHIL L.J. 741, (page cited) (2018).

\*\* Associate, SyCip Salazar Hernandez & Gatmaitan (2015-present); Assistant Professorial Lecturer, De La Salle University (2017-present); LL.M., University of Melbourne (ongoing); J.D., Dean’s Medalist for Academic Excellence, University of the Philippines (UP) College of Law (2014); B.A. Organizational Communication, *magna cum laude*, UP Manila Department of Arts and Communication (2010); Editor, Student Editorial Board, PHILIPPINE LAW JOURNAL Vols. 87 & 88; Member, Order of the Purple Feather (2011-2014).

By the sheer number of Filipinos accessing the Internet, it has become a matter of national interest that warrants public debate. As of 2018, 67 million Filipinos out of a population of 105.7 million are connected to the Internet. This means that 63% of Filipinos are connected to the Internet against a global internet penetration rate of 53%.<sup>1</sup> For the third year in a row, the Philippines also leads in terms of social media usage as Filipinos on average spend four hours on social media every day.<sup>2</sup> Overall, Filipinos spend nine hours and 29 minutes a day on the Internet, with activities such as visiting YouTube and accessing news sites, aside from browsing through social media.<sup>3</sup> In terms of driving up revenues, e-commerce shows promise: USD 2.16 billion was spent by Filipinos online for travel (USD 642.6 million), electronic goods (USD 543 million), and digital music (USD 12.9 million).<sup>4</sup> Based on these figures, the driving force behind Internet use in the Philippines are the online intermediaries or the so-called “gatekeepers of cyberspace.”

Considering how deeply entangled Filipinos’ lives are with the Internet, there is a pressing need for a comprehensive national policy on Internet usage that would promote its growth and development (and therefore the growth of the national economy), recognize its contribution to the national economy, and accord due protection to the rights of Filipinos. A survey of Philippine laws, however, would reveal very little by way of a declared national policy on the Internet economy, let alone a basic framework on intermediary liability. There is likewise not much incentive that the Philippine government can offer for online intermediaries to establish their presence in the country.

Intermediary liability in particular is a decisive factor that will determine whether foreign investors will establish a presence here in the Philippines. There are sector-specific laws that may apply in ascertaining intermediary liability for certain situations. But these are by no means sufficient in helping online intermediaries decide whether to do business in the Philippines. This paper thus proceeds as follows: Part I conceptualizes a working definition of online intermediaries. Part II then compares the various intermediary liability regimes of three legal systems: the European Union, the United States, and the Philippines. Part III discusses the

---

<sup>1</sup> Simon Kemp, *Digital in 2018: World’s Internet Users Pass the 4 Billion Mark*, WE ARE SOCIAL WEBSITE, available at <https://wearesocial.com/blog/2018/01/global-digital-report-2018> (last accessed May 27, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

economic role of intermediaries. Part IV emphasizes the importance of approaching intermediary liability as a transnational issue.

## I. TOWARDS A WORKING DEFINITION OF ONLINE INTERMEDIARIES

### A. Information Society Services under the EU's eCommerce Directive

The Electronic Commerce Directive,<sup>5</sup> adopted by the EU in 2000, lays down a legal framework for providing online services “[i]n order to ensure legal certainty and consumer confidence” and “to lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.”<sup>6</sup> Both procedural and substantive rules are provided for in the eCommerce Directive, an integral component of which is a framework on the liability of information society services, or online intermediaries.

Recognizing the rise of the Internet economy and the role that e-commerce plays in offering significant employment opportunities, stimulating economic growth and investment, and enhancing competitiveness,<sup>7</sup> the EU sought to clarify and classify online intermediaries and the services that they perform. Referred to in the eCommerce Directive as “information society services,” they are defined as “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient or service.”<sup>8</sup>

Information society services include selling goods, e.g. an online marketplace, and even services that are not paid by people who receive them, such as commercial advertisements, search engines, communication networks, and information hosting and access.<sup>9</sup>

The eCommerce Directive further emphasizes that the place at which a service provider is established is “not the place at which the technology supporting its website is located or the place at which its website

---

<sup>5</sup> EU Directive No. 2000/31/EC (2000) [hereinafter “eCommerce Directive”]. The Electronic Commerce Directive of the European Parliament and the Council of the European Union.

<sup>6</sup> eCommerce Directive, Recital 7.

<sup>7</sup> Recital 2.

<sup>8</sup> Recital 17.

<sup>9</sup> Recital 18.

is accessible but the place where it pursues its economic activity.”<sup>10</sup> To reconcile this principle with a situation where a service provider is located in different places of establishment, the place of establishment would be “the [center] of [its] activities relating to this particular service.”<sup>11</sup>

The eCommerce Directive specifies three types of online intermediaries, termed service providers, as follows:

### 1. *Mere Conduit*

A mere conduit is an information society service whose function consists of the transmission in a communication network of information provided by a recipient of the service.<sup>12</sup> This covers the automatic storage of information and includes traditional internet access providers (which connect their subscribers to the Internet using dial-up modems, DSL modems, cable connections or fixed lines) and backbone operators (which interconnect various parts of the Internet).<sup>13</sup>

### 2. *Caching*

Defined as the “transmission in a communication network of information provided by a recipient of service,” caching is in essence the automatic, intermediate and temporary storage of information to achieve a higher speed of communication networks and allow faster access of such information.<sup>14</sup> In this regard, the provider “acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled [...]”<sup>15</sup> The typical service of a caching provider is a “proxy server,” which stores local copies of websites accessed by a customer. When the same website is then visited again by the same user, the proxy server will simply deliver the locally stored copy of the website, doing away with the

---

<sup>10</sup> Recital 19.

<sup>11</sup> Recital 19.

<sup>12</sup> Art. 12.

<sup>13</sup> European Commission Information Society and Media Directorate-General (EC Information Society and Media Directorate), *EU Study on the Legal Analysis of a Single Market for the Information Society* (2009), ch. 6 (Liability of online intermediaries), at 7.

<sup>14</sup> eCommerce Directive, art. 13. See also Talat Fatima, *Liability of Online Intermediaries: Emerging trends*, 49 J. INDIAN LAW INST. 161 (2007), available at [http://14.139.60.114:8080/jspui/bitstream/123456789/12812/1/004\\_Liability%20oF%20Online%20Intermediaries\\_Emerging%20Trends%20%28155-178%29.pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/12812/1/004_Liability%20oF%20Online%20Intermediaries_Emerging%20Trends%20%28155-178%29.pdf).

<sup>15</sup> eCommerce Directive, art. 13(1)(e).

need to contact the original web server again, thereby speeding up the delivery process.<sup>16</sup>

### 3. *Hosting*

Hosting refers to the storage of information at the request of a recipient of the service.<sup>17</sup> The data uploaded by the user is meant to be stored by the hosting provider for an unlimited duration, as in the case of a webhosting company that allows customers to upload website content.<sup>18</sup>

## **B. Online Intermediaries under US Law**

Like the eCommerce Directive, US law considers mere conduit, caching, and hosting services as intermediaries under Section 512 of the Digital Millennium Copyright Act<sup>19</sup> (“DMCA”). The DMCA however added a fourth category of intermediaries: information location tools or search engines.

The Communications Decency Act (“CDA”), enacted in 1996, is more expansive. While the law refers to a “provider or user of an interactive computer service,”<sup>20</sup> courts have expanded “interactive computer services” to cover hosting services, e-mail service providers, auction websites, general web shops, personal home pages, company websites, dating websites, chat rooms, and internet access points.<sup>21</sup>

## **C. Online Intermediaries under Philippine Law**

In the Philippines, an online intermediary appears to fall under the concept of a service provider as defined by the Electronic Commerce Act<sup>22</sup> and the Cybercrime Prevention Act.<sup>23</sup>

---

<sup>16</sup> EC Information Society and Media Directorate, *supra* note 13.

<sup>17</sup> eCommerce Directive, art. 14(1).

<sup>18</sup> EC Information Society and Media Directorate, *supra* note 13, at 9.

<sup>19</sup> *Id.* at 28.

<sup>20</sup> 110 Stat. 56 (1996), title V, § 230.

<sup>21</sup> H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 100, 106-107 (2008).

<sup>22</sup> Rep. Act No. 8792 (2000) [hereinafter “E-Commerce Act”]. The Electronic Commerce Act of 2000.

<sup>23</sup> Rep. Act No. 10175 (2012) [hereinafter “Cybercrime Prevention Act”]. The Cybercrime Prevention Act of 2012.

Under the Electronic Commerce Act, a service provider is a provider of online services or network access, or the operator of facilities, including entities that offer transmission, routing, or providing of connections for online communications between or among points specified by a user, of electronic documents of the user's choosing. The definition includes a provider of the necessary technical means by which electronic documents of an originator may be stored and made accessible to a designated or undesignated third party.<sup>24</sup>

The Cybercrime Prevention Act, on the other hand, refers to "any public or private entity that provides to users of its services the ability to communicate by means of a computer system"<sup>25</sup> and "any other entity that processes or stores computer data on behalf of such communication service or users of such service."<sup>26</sup>

The two definitions seem broad enough, and at first glance may even encompass the definitions of an intermediary under the eCommerce Directive and US laws. However, the definitions of a service provider under both the Electronic Commerce Act and the Cybercrime Prevention Act are inadequate in laying the foundation for intermediary liability of online platforms for a number of reasons.

*First*, the definition of a service provider under the Electronic Commerce Act suffers from restrictiveness. While the definition includes the transmission, routing, or providing of connections by a user (and thereby, a third party), it is expressly limited to electronic documents. An electronic document refers to "information or the representation of information, by which a right is established or an obligation extinguished, or by which a fact may be proved and affirmed, which is received, recorded, transmitted, stored, processed, retrieved or produced electronically."<sup>27</sup> This excludes any other online intermediary that does not deal with electronic documents, which online intermediaries, as a general rule, do not do in the first place. Even information services providers under the eCommerce Directive do not envision dealings in electronic documents. Also, the concept of a service provider under the CDA refers to an "interactive computer service" which has allowed US courts to continually expand its definition to adapt to current digital technologies.

---

<sup>24</sup> E-Commerce Act, § 5(j).

<sup>25</sup> Cybercrime Prevention Act, § 3(n)(1).

<sup>26</sup> § 3(n)(2).

<sup>27</sup> E-Commerce Act, § 5(f).

*Second*, both definitions are confined to the applicability of the laws that define them. While the definition of a service provider under the Cybercrime Prevention Act seems broad enough, it is only relevant in the context of cybercrimes defined under the law. These cybercrimes are narrowly grouped into cybercrime offenses against the confidentiality, integrity, and availability of computer data and systems,<sup>28</sup> computer-related offenses,<sup>29</sup> and content-related offenses.<sup>30</sup> In defining service providers, other possible cybercrimes not defined by the Cybercrime Prevention Act are naturally excluded, as well as administrative and civil offenses that a service provider may be liable for. How a service provider should be defined under all other possible liabilities of an intermediary is therefore unclear.

*Third*, the definitions are incapable of being expanded to include online intermediaries that form the bulk of Internet activity in the Philippines. Search engine tools, social media sites, news platforms, app stores, cloud stores, sharing services apps, crowdsourcing sites, payments systems, and video streaming platforms are only a few of the intermediaries that are not defined under Philippine law.

There is no shortage of online intermediaries in the Philippines, so the lack of a general definition that covers them results in instability and legal uncertainty. Without visibility as to the risks associated with intermediary liability, online intermediaries are unlikely to consider the Philippines as an attractive place to invest and conduct business in. The lack of a clear definition likewise makes it difficult to create a basic legal framework on intermediary liability. The Philippines will benefit by adopting, even as a stopgap measure, the definitions under the eCommerce Directive and US laws.

Any definition must be declared in a national policy on intermediary liability, not in a case before the Supreme Court. Creating a legal definition of online intermediaries is a legislative responsibility that requires thorough research, debate, and investigation before Congress, and leaving the question for the courts to decide will only result in even more uncertainty on the part of online intermediaries, who would not want to be the test case.

#### **D. Internet Intermediaries under the OECD**

---

<sup>28</sup> § 4(a).

<sup>29</sup> § 4(b).

<sup>30</sup> § 4(c).

Absent a clear definition of online intermediaries, the Philippines should consider adopting the definition conceptualized by the Organisation for Economic Co-operation and Development<sup>31</sup> (“OECD”). In its report<sup>32</sup> (“OECD report”), the OECD adopted a definition of Internet intermediaries, their economic function and economic models, and their various economic and social uses.<sup>33</sup> This was designed with an economic, social, and environmental policy in mind, and is largely policy-based and reflective of market realities. Because Internet intermediaries are borderless and transnational in character, and the working definition proposed by the OECD is based on official industrial classifications to ensure consistency across countries, there is an incentive for the Philippines to adopt it and use it as a basis for building a basic framework on intermediary liability.

Internet intermediaries essentially “intermediate,” or bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.<sup>34</sup>

The following are the Internet intermediaries defined in the OECD report:

1. Internet access and service providers (“ISPs”) are commercial organizations that typically charge their users a monthly fee on a contractual basis and provide their subscriber base with a data connection allowing access to the Internet.<sup>35</sup> This requires physical transport infrastructure and equipment and telecommunication network access.

---

<sup>31</sup> The Organisation for Economic Co-operation and Development is a forum where governments “work together to address the economic, social and environmental challenges of globalisation.” The OECD provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

<sup>32</sup> OECD, *The Economic and Social Role of Internet Intermediaries* (2010), available at <https://www.oecd.org/internet/ieconomy/44949023.pdf>.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 2.



They also typically rely on the government for the availability of spectrum bandwidth. In the Philippines, some ISPs include Globe Telecom, Sky, and PLDT.

2. Data processing and web hosting providers, including domain name registrars, provide hosting or data processing services, and are also known as “cloud computing” platforms. There are web hosting service providers that provide web server space to allow content providers to exhibit their content on the Internet, or provide specialized hosting activities, such as streaming services or application hosting.<sup>36</sup> Web hosting services in the Philippines include Philwebhosting.net, Zoom.ph, and Hostinger.ph.
3. Internet search engines and portals maintain databases of Internet addresses and content and index them into an easily searchable format. Often offered for free as the huge investment required is primarily funded by advertising revenues, search engines provide other Internet services, such as e-mail, auctions, and news.<sup>37</sup> Google is a prime example of an Internet search engine tool in the Philippines.
4. E-commerce intermediaries maintain platforms that connect buyers and sellers of goods or services. The goods are typically ordered through the online marketplace and are delivered offline. Internet retailers may not take title to the goods, and may simply facilitate the consummation of a contract of sale. E-commerce intermediaries may also have a business-to-business model, which facilitates business-to-business electronic sales of merchandise.<sup>38</sup> Philippine e-commerce intermediaries include Lazada and Zalora.
5. Internet payment systems may rely on a credit or bank account or involve non-bank institutions operating online that are only indirectly associated with a bank account. Visa, Mastercard, and PayPal are examples of Internet payment systems that are available in the Philippines.<sup>39</sup>

---

<sup>36</sup> *Id.* at 12.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 12-13.

<sup>39</sup> *Id.* at 13.

6. Participative networking platforms facilitate social communication and information exchange. They include Internet publishing and broadcasting platforms that do not by themselves create or own the content being published or broadcast.<sup>40</sup> Participative networking platforms comprise the bulk of Internet activity of Filipinos, who utilize social networking sites such as Facebook or access video content sites such as Youtube. Other participative networking platforms include blogs, wikis, instant messaging, mobile versions of websites, aggregation sites and web-based fora, podcasting, photosharing sites, and online video games.<sup>41</sup>

With these definitions, the OECD emphasized the intermediary role of these platforms in connecting third-party producers and consumers of content, products, and services.

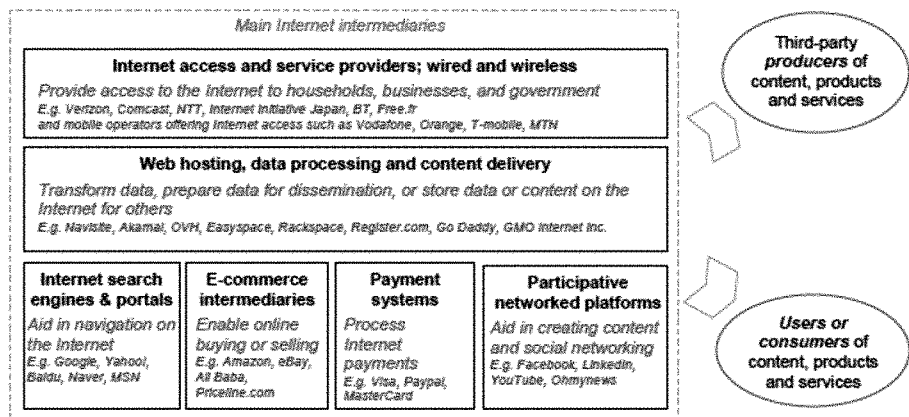


FIGURE 1. Stylized representation of Internet intermediaries' roles.<sup>42</sup>

## II. A COMPARATIVE ANALYSIS OF INTERMEDIARY LIABILITY UNDER EU, US, AND PHILIPPINE LAW

### A. Intermediary Liability under the eCommerce Directive

The underlying principle in the eCommerce Directive is that online intermediaries, i.e. mere conduits, caches, and hosting providers, should not

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Id.* at 9.

be held liable for the content that they transmit, store or host, as long as they act in a strictly passive manner.

The eCommerce Directive provides “safe harbor clauses” through which mere conduits, caches, and hosting providers avoid liability under certain conditions. The following rules of the special liability regime emphasize that the role of the service providers must be passive and intermediary in order for them to benefit therefrom:<sup>43</sup>

1. A mere conduit service provider is exempted when it does not initiate the transmission, does not select the receiver of the transmission, and does not select or modify the information contained in the transmission.<sup>44</sup> In other words, the mere conduit service provider is passively involved in the transmission of data.<sup>45</sup>
2. A caching provider is similarly exempted when it does not modify the information, complies with conditions on access to the information, complies with rules regarding updating of the information, does not interfere with the lawful use of technology, and acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network or access to it has been disabled.<sup>46</sup> Of these conditions, the most important are that the cached copy must be identical to the original information, and that the caching provider must comply with the access conditions.<sup>47</sup>
3. Hosting providers are exempted from liability when they have “no actual knowledge of illegal activity or information and [are] not aware of facts or circumstances from which the illegal activity or information is apparent.”<sup>48</sup> Further, the hosting provider, upon obtaining knowledge or awareness of such illegal activity, must act expeditiously to remove or to disable access to the information.<sup>49</sup>

---

<sup>43</sup> EC Information Society and Media Directorate, *supra* note 13, at 7.

<sup>44</sup> eCommerce Directive, art. 12.

<sup>45</sup> EC Information Society and Media Directorate, *supra* note 13, at 7.

<sup>46</sup> eCommerce Directive, art. 13.

<sup>47</sup> EC Information Society and Media Directorate, *supra* note 13, at 8.

<sup>48</sup> eCommerce Directive, art. 14.

<sup>49</sup> *Id.*

The safe harbor clauses in the eCommerce Directive shield the mentioned service providers from “contractual liability, administrative liability, tortuous or extra-contractual liability, penal liability, civil liability or any other type of liability, for all types of activities initiated by third parties, including copyright and trademark infringements, defamation, misleading advertising, unfair commercial practices, unfair competition, and publication of illegal content, among others.”<sup>50</sup>

The eCommerce Directive likewise declares that the three types of service providers do not have the obligation to monitor the data in transmission, nor the obligation to actively investigate facts indicating illegal activity.<sup>51</sup> However, this does not prevent member states from requesting service providers, generally through injunctions, to terminate or prevent infringements.<sup>52</sup>

Information society services also include search engine tools, domain registration, news portals, and web shops (which are relatively new technologies known as “Web 2.0”).<sup>53</sup> While the eCommerce Directive recognizes the existence of these other online intermediaries, it stops short of qualifying the liability regime applicable to them. This results in legal uncertainty as to which rules apply when the services do not qualify as traditional internet access, caching, or hosting services as contemplated by the eCommerce Directive.<sup>54</sup> This is a gap that member states of the European Union have been given the discretion to fill, often when the question is presented before their courts.

The European eBay decisions illustrate how this gap has been supplemented by member states. In June 2008, the French Civil Court of Troyes held eBay, an e-commerce auction website, liable for damages in the amount of EUR 20,000 for allowing the sale of counterfeited luxury goods on its platform.<sup>55</sup> Soon after, the Commercial Court of Paris held eBay liable for damages in the amount of EUR 3,052,000 for infringing upon the selective distribution agreements of perfume producers by allowing the sale

---

<sup>50</sup> EC Information Society and Media Directorate, *supra* note 13, at 8.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Sam Murugesan, *Understanding Web 2.0*, IT PROF. MAG., Jul. 2007, 35-7 (2007), available at [https://91-592-722.wiki.uml.edu/file/view/understanding\\_web\\_20.pdf](https://91-592-722.wiki.uml.edu/file/view/understanding_web_20.pdf).

<sup>54</sup> EC Information Society and Media Directorate, *supra* note 13, at 25.

<sup>55</sup> *Hermès International v. eBay*, Docket No. 06/02604 (Tribunal de grande instance 2008).

of counterfeit perfumes.<sup>56</sup> eBay was also ordered to remove all advertisements relating to the perfumes of producers. Interestingly, the Court of Brussels held differently in July 2008, when it said that eBay could not be held liable for the sale of counterfeited products, and that its efforts to suppress their sale were sufficient.<sup>57</sup> The Brussels Court also pronounced that eBay cannot be required to actively monitor the auctions on their website.<sup>58</sup>

In the European cases, eBay attempted to argue that it merely acts as a hosting provider, and that, therefore, the safe harbor clauses under the eCommerce Directive should apply. However, the exact scope of these clauses, and whether they apply to e-commerce websites are unclear. Consequently, courts of member states have interpreted the gap in different ways.<sup>59</sup>

Another gap in the eCommerce Directive is the lack of a formal notification procedure in requiring hosting service providers to take down content upon actual knowledge or awareness of facts or circumstances regarding illegal information. Is a court order necessary to order a service provider to take down content? Should the notice-and-takedown procedure be legislated upon or is case law sufficient? Should a request for information be included in an injunction? These are questions which the eCommerce Directive cannot answer.

## **B. Intermediary Liability under US Law**

In the US, online intermediaries are generally defined by three laws: case law on vicarious or secondary liability, the DMCA, and the CDA.

Secondary liability in the context of intermediary liability may either be contributory or vicarious, with particular focus on copyright violations. Contributory liability refers to a situation where a party has knowledge of another party's infringing conduct, and has materially contributed to such conduct. Vicarious liability refers to the liability of a party who has the right

---

<sup>56</sup> S.A. Louis Vitton Malletier v. eBay Inc., Case No. 200677799 (Tribunal de Commerce de Paris 2008).

<sup>57</sup> Lancome Parfums at Beaute (L'Oreal) v. eBay, Unreported (Tribunal de commerce de Bruxelles 2008).

<sup>58</sup> EC Information Society and Media Directorate, *supra* note 13, at 2.

<sup>59</sup> *Id.*

and ability to supervise the violator.<sup>60</sup> Secondary liability has been interpreted by the US Supreme Court in the context of copyright infringement. In the 1984 landmark Sony Betamax case,<sup>61</sup> the court held that video cassette recorder (“VCR”) manufacturer Sony could not be held liable for copyright infringement. Sony’s VCR system was capable of substantial non-infringing uses, and the fact that third parties used it to illegally copy content from television shows did not result in liability on the part of Sony.<sup>62</sup> This ruling was contextualized in the 2005 case of *MGM Studios Inc. v. Grokster, Ltd.*,<sup>63</sup> where the US Supreme Court held that a platform that “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties”<sup>64</sup>—even if the device is capable of legal uses. This is because of the inducement of the platform to infringe third party rights. In this case, the platform was a peer-to-peer software manufacturer.

Under the DMCA, which was enacted in 1998, the conditions for safe harbor are similar to those found in the eCommerce Directive, except that the DMCA is limited to copyright violations. Mere conduit service providers should not initiate transmission, caching service providers must comply with the rules on updating information, and hosting providers (and additionally, search engines) must comply with takedown requests by authorities. There is likewise no requirement to actively monitor content on their respective platforms.<sup>65</sup>

The gap in intermediary liability caused by tort law and the DMCA is filled by the broad scope of the CDA. Under the CDA, safe harbors are granted to virtually all kinds of service providers. The liability exemption on publishers provide that “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.”<sup>66</sup> Accordingly, online service providers under the CDA are exempt from tort liability, defamatory

---

<sup>60</sup> EC Information Society and Media Directorate, *supra* note 13, at 26, *citing* Mike Scott, *Safe harbors under the Digital Millennium Copyright Act*, 2005 N.Y.U. J. LEGIS. & PUB. POLY 104; and Peter Menell & David Nimmer, *Legal realism in action: indirect copyright liability’s continuing tort framework and Sony’s de facto demise*, UC Berkeley Public Law Research Paper 26 (2007).

<sup>61</sup> Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

<sup>62</sup> *Id.*

<sup>63</sup> 545 U.S. 913 (2005).

<sup>64</sup> *Id.* at 937.

<sup>65</sup> DMCA, § 512(m). *See also* EC Information Society and Media Directorate, *supra* note 13, at 28.

<sup>66</sup> § 230.

speech, and all other content published by third parties on its platform—making the CDA an omnibus shield of sorts for service providers. Further, service providers are generally allowed to make minor alterations to the information, without having to give up its exemption from liability.<sup>67</sup> The protection of the CDA extends to claims regarding defamation, but also sale/distribution of (child) pornography, sexual assault, distribution of incorrect information and privacy infringements—except intellectual property infringements.<sup>68</sup>

The US courts have also had the occasion to answer the question on whether counterfeited goods sold on an e-commerce website may make the intermediary liable. In *Tiffany, Inc. v. eBay, Inc.*,<sup>69</sup> the District Court of New York ruled that eBay cannot be held liable for the sale of counterfeited jewelry on its platform, without considering any other issues outside trademark law. Thus, the common perception is that in comparison to the eCommerce Directive, US laws on intermediary liability veer towards broad protections for the online service providers.

### **C. Philippine Laws on Intermediary Liability**

In the Philippines, there is no basic framework on intermediary liability similar to the broad protections guaranteed by the eCommerce Directive and CDA. There is likewise no case law on the matter. This gap can be filled by an examination of content- and sector-specific laws that vaguely describe the features of an online intermediary and its potential liability. However, while most of these laws are clear-cut in ascribing liability, they are by and large unexamined in the courts of law.

#### *1. The “Doing Business” Barrier*

What makes an analysis of intermediary liability even more problematic in Philippine law is the question of whether these online intermediaries are “doing business” within Philippine territory in the first place. If these online intermediaries do not have a juridical presence, but are somehow able to offer services to Filipinos, Philippine courts may never acquire jurisdiction over online intermediaries in case a complaint is lodged against them; online intermediaries would theoretically be held liable for *in*

---

<sup>67</sup> EC Information Society and Media Directorate, *supra* note 13, at 32.

<sup>68</sup> *Id.*

<sup>69</sup> 600 F.3d 93 (2<sup>nd</sup> Cir. 2010).

*personam* actions, to which extraterritorial service of summons does not apply.<sup>70</sup>

The first step in laying the foundation of intermediary liability in the Philippines is a clear definition of what an online intermediary is.<sup>71</sup> Thereafter, the government must satisfy the question of whether nationality restrictions apply to them. Finally, it must adopt a basic legal framework on intermediary liability that balances the rights of Filipino citizens and offers online intermediaries an attractive environment for investment.

The Securities and Exchange Commission (SEC), which regulates corporations and partnerships in the Philippines, has considered as a mass activity the act of providing a digital platform for the client to reach out to target audiences by which third-party websites may sell and monetize their online inventory.<sup>72</sup> The SEC has also characterized the act of subleasing digital space for advertising,<sup>73</sup> as well as the marketing and operation of a voucher platform,<sup>74</sup> as mass media activities. The rationale for this conclusion is the capacity of the Internet and mobile technology to influence individuals and the use of modern mass media techniques such as advertising and propaganda.<sup>75</sup> The SEC also resorted to an opinion of the Department of Justice (DOJ) that stated that mass media “refers to any medium of the communication designed to reach masses and that tends to set the standards, ideals and aims of the masses, the distinctive feature of which is the dissemination of information and ideas to the public, or a portion thereof.”<sup>76</sup> The SEC reiterated this stand in recent opinions when it declared that providing a platform by which messages and advertising content are transmitted to clients is mass media.<sup>77</sup>

Mass media activities, under the Philippine Constitution, can be undertaken only by entities that are wholly owned and managed by Filipino citizens.<sup>78</sup> Therefore, the activities mentioned above—providing an online platform by which third parties may sell their products, subleasing digital

---

<sup>70</sup> *Perkin Elmer Singapore Pte Ltd. v. Dakila Trading Corp.*, G.R. No. 172242, 530 SCRA 170, Aug. 14, 2007.

<sup>71</sup> *See* Part I.C, *supra*.

<sup>72</sup> SEC Office of the Gen. Couns. [hereinafter “SEC-OGC”] Op. No. 14-06 (June 2, 2014).

<sup>73</sup> SEC-OGC Op. No. 16-21 (Aug. 31, 2016).

<sup>74</sup> SEC-OGC Op. No. 15-10 (Sept. 2, 2015).

<sup>75</sup> *Id.*, *citing* SEC-OGC Op. No. 14-06 (June 2, 2014).

<sup>76</sup> SEC-OGC Op. No. 14-06 (June 2, 2014), *citing* Op. of the Sec. of Justice 40, (1998).

<sup>77</sup> SEC-OGC Op. No. 17-07 (July 24, 2017).

<sup>78</sup> CONST. art. XVI, § 11.



space for entities to advertise their products and services—can be undertaken only by an entity that is 100% Filipino-owned, as these activities are considered mass media. How exactly such online platforms “[set] the standards, ideals, and aims of the masses” so as to be deemed engaged in mass media is unclear, considering that they primarily exist only as intermediaries for the sale of goods and services.

Digital platforms for selling products are e-commerce intermediaries, a subset of online intermediaries.<sup>79</sup> Arguably, the rationale for characterizing such digital platforms—that they may be used for the “dissemination of information and ideas to the public” and to “set the standards, ideals, and aims of the masses”—is in danger of being applied to online intermediaries indiscriminately. Hence, the position of the SEC appears to be that online intermediaries cannot operate in the Philippines without a license, and only if they are Philippine-owned, considering their nature as “mass media.” While the SEC has not made such a sweeping announcement applicable to online intermediaries, this is the direction in which the regulatory policy is heading insofar as online merchants are concerned. Characterizing e-commerce intermediaries may lead to a slippery slope that will result in the illogical conclusion that online intermediaries *as a whole* are mass media activities. As discussed, online intermediaries are more nuanced than regulators appear to realize.

If the position of the SEC remains the same and is consequently applied to online intermediaries as a whole, then an online intermediary may be subjected to non-negotiable risks. Under the Corporation Code, a foreign corporation doing business in the Philippines without a license is not permitted to maintain or intervene in any judicial or administrative action in the Philippines, though it may be proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognized under Philippine law.<sup>80</sup>

Further, under Section 144 of the Corporation Code, the foreign corporation may be held liable for a fine of not less than PHP 1,000 but not more than PHP 10,000 or by imprisonment for not less than 30 days but not more than five years, or both, in the discretion of the court. This is, however, a general provision which applies to all violations of the said law. The penalty assumes that the courts will acquire jurisdiction over the person of such director, trustee or officer. Under the Foreign Investment Act, a person who violates any provision of such law or aids or abets in any

---

<sup>79</sup> See Part I.D, *supra*.

<sup>80</sup> CORP. CODE, § 133.

manner any violation will be subject to a fine not exceeding PHP 100,000. If the offense is committed by a juridical entity, it shall be subject to a fine in an amount not exceeding  $\frac{1}{2}$  of 1% of total paid-in capital but not more than PHP 5,000,000. The president and/or officials responsible therefor shall also be subject to a fine not exceeding PHP 200,000.<sup>81</sup>

However, exposure to Philippine laws on intermediary liability and the burdensome process of incorporation here in the Philippines is the least of the worries of an online platform. Perhaps it would even be wise to establish a juridical presence in the Philippines, if only to be able to avail itself of the protections and benefits guaranteed by Philippine laws. The real problem is how, by characterizing such online platforms as mass media, they would effectively need to be 100% owned by Filipinos. This is a policy that needs to be revisited, considering the tenuous reasoning behind it.

To stress, the question of whether online intermediaries are mass media (and should therefore comply with the applicable nationality requirement) has not been conclusively characterized by the SEC, or by any other relevant regulatory body or law for that matter. At this point, considering the exposure of online intermediaries to the penalties of doing business without a license, and considering their possible exposure to intermediary liability, the government cannot afford to ignore this question any longer.

In any case, without prejudice to a more thorough discussion on the matter, the position that online intermediaries should *not* be considered mass media merits consideration. Unlike traditional mass media, which has complete control over the tone, content, and overall style of a message, online intermediaries serve the purpose of connecting different sectors of the public, who more or less have equal control over information content.

## 2. *The Revised Penal Code and the Civil Code*

Like the EU and US, there is no law or regulation in the Philippines that specifically imposes liability on intermediaries for illegal content (defamatory content, violence, sexual content, political speech, etc.).

The Philippine Revised Penal Code<sup>82</sup> generally imposes criminal liability on the principal, to wit: (a) those who take part in the execution of the act, (b) those who directly force or induce others to commit it, and (c)

---

<sup>81</sup> Rep. Act No. 7042 (1991), § 14.

<sup>82</sup> Act No. 3815 (1932).

those who cooperate in the commission of the offense by another act without which it would not have been accomplished.<sup>83</sup> Can an intermediary be held criminally liable, for instance, for libel as a principal that cooperated in the commission thereof because the libelous post would not have been disseminated without its act of operating as an intermediary? The answer is not clear, and the Philippine Supreme Court has not had the occasion to rule on this issue. The only reasonable conclusion, consistent with international norms and following standards set by other jurisdictions, is that online intermediaries like Facebook should *not* be held liable as they operate as a mere passive intermediary. As previously discussed, however, the Philippine government should not wait until this question is presented before the Supreme Court; this is a matter of legislation that must be unequivocally declared.

Another possibility is to hold online intermediaries liable for vicarious liability. Contributory negligence under Philippine law refers to negligence that is caused by both plaintiff and defendant; if the plaintiff contributed to his injury, the damages that may be recovered by the plaintiff will be mitigated:

When the plaintiff's own negligence was the immediate and proximate cause of his injury, he cannot recover damages. But if his negligence was only contributory, the immediate and proximate cause of the injury being the defendant's lack of due care, the plaintiff may recover damages, but the courts shall mitigate the damages to be awarded.<sup>84</sup>

Contributory negligence does not therefore seem applicable in the context of intermediary liability, unless the intermediary sues the offender.

Vicarious liability, on the other hand, refers to the liability of one person over another because the former is responsible for the latter. The Civil Code provides that damages for acts or omissions, by virtue of fault or negligence, "is demandable not only for one's own acts or omissions, but also for those of persons for whom one is responsible."<sup>85</sup> The responsibility is borne by the relationship between the two persons: father and the minor children, guardians and the minors or incapacitated persons under their authority, owners and managers of an establishment and their employees, the State and its agent, and teachers and their pupils. This liability will cease when the person has proven that he has observed the "diligence of a good

---

<sup>83</sup> REV. PEN. CODE, art. 17.

<sup>84</sup> CIVIL CODE, art. 2179.

<sup>85</sup> Art. 2180.

father of a family to prevent damage”—this is the standard duty of care under civil law.

As in the Revised Penal Code, courts have not had the occasion to rule on the civil liability of intermediaries over illegal content uploaded or made available by third parties on their platforms. Arguably, no vicarious liability exists: in the first place, online intermediaries in the first place do not exercise control over third parties who post on a social media website, or sell goods or services on an online marketplace, or otherwise commit illegal acts on their platforms. Moreover, there is no law that imposes a standard duty of care on intermediaries. These rationalizations are naturally theoretical and will have to yield to actual situations that call for their application.

### *3. Content-Specific Intermediary Liability*

A number of laws may remotely refer to the imposition of direct liability on intermediaries. Such content-specific intermediary liability does not appear to be a divergence from the concept of passive liability:

1. Cybercrime Prevention Act—offenses such as cybersex, lascivious exhibition of sexual organs or sexual activity for favor or consideration, production of child pornography, cyberlibel (with respect to the original author), and aiding or abetting, or attempt in the commission of a cybercrime may be directly imposed on intermediary liability absent clear standards set by the law.
2. Anti-Child Pornography Act—imposes liability on persons who: (i) publish, offer, transmit, sell, distribute, broadcast, advertise, promote, export or import any form of child pornography; (ii) possess any form of child pornography with the intent to sell, distribute, publish or broadcast; or (iii) engage in pandering of any form of child pornography.<sup>86</sup>

Republic Act No. 9775 criminalizes the act of publishing, offering, transmitting, selling, distributing, broadcasting, advertising, promoting, exporting or importing any form of child pornography. In addition, the mere possession of child pornography is considered a criminal offense. “Child pornography” refers to any representation, whether visual, audio or written combination thereof, by electronic,

---

<sup>86</sup> Rep. Act No. 9775 (2009), § 4.

mechanical, digital, optical, magnetic or any other means, of a child engaged or involved in real or simulated explicit sexual activities.<sup>87</sup>

3. Anti-Child Abuse Act<sup>88</sup>—imposes liability on any person who shall engage in trading and dealing with children including the act of buying and selling of a child for money. Liability is also imposed on enterprises that promote or facilitate child prostitution and other sexual abuse, child trafficking, obscene publications and indecent shows, and other acts of abuse.

There are also laws that require intermediaries to comply with takedown procedures, failure to comply with which may result in liability:

1. Anti-Child Pornography Act—requires an internet content host: (i) not to host any form of child pornography on its internet address; (ii) to report within seven days the presence of any form of child pornography, as well as the particulars of the person maintaining, hosting, distributing or in any manner contributing to such internet address, to the proper authorities; and (iii) to preserve such evidence for purposes of investigation and prosecution by relevant authorities.<sup>89</sup> An internet content host is one who “hosts or who proposes to host internet content in the Philippines.”<sup>90</sup> Violation by an internet content host of the foregoing obligations is punishable by both fine and imprisonment.
2. Data Privacy Act—law enforcement agencies may request the production of user data (personal information or other user data) in compliance with relevant laws, insofar as the personal information controller (that is, the online intermediary) has such user data in its possession or control.<sup>91</sup> Further, under the Rules of Court, law enforcement agencies and courts, in a duly filed case, could require the production of documents or things (including user data) under the control of a person within the

---

<sup>87</sup> § 3(b).

<sup>88</sup> Rep. Act No. 7610 (1992). This is the Special Protection of Children Against Abuse, Exploitation and Discrimination Act.

<sup>89</sup> Rep. Act No. 9775 (2009), § 11. The Anti-Child Pornography Act of 2009.

<sup>90</sup> § 3(f).

<sup>91</sup> Implementing Rules and Regulations of Republic Act No. 10173, § 9(e)(2).

jurisdiction of the agency or court, pursuant to an application for a subpoena or in compliance with a discovery procedure sanctioned under the rules of procedure.<sup>92</sup>

3. Cybercrime Prevention Act—the service provider must comply with the following obligations, which pertain to the notice-and-takedown obligation of a service provider in reference to the commission cybercrimes:
  - (a) The integrity of traffic data and subscriber information relating to communication services provided by a service provider must be preserved for a minimum period of six months from the date of the transaction;
  - (b) Content data must be preserved by the service provider for six months from the date of receipt of the order from law enforcement authorities requiring its preservation;<sup>93</sup> and
  - (c) A service provider must disclose or submit subscriber's information, traffic data or relevant data in its possession or control, within 72 hours from receipt of a search warrant, in relation to a valid complaint.<sup>94</sup>

Failure to comply with the obligations of a service provider under the Cybercrime Prevention Act may hold the service provider liable for imprisonment for a period of four years, two months and one day (to be imposed on the persons who knowingly committed the offenses on behalf of or for the benefit of the service provider, based on the authority or representation of such person or the authority to take decisions on behalf of the service provider), or a fine of PHP 100,000.00, or both, for every instance of non-compliance.<sup>95</sup>

4. Copyright—under the Intellectual Property Code,<sup>96</sup> any person may be held liable when, at the time when copyright subsists in a work, he has in his possession an article which

---

<sup>92</sup> RULES OF COURT, Rule 21.

<sup>93</sup> Cybercrime Prevention Act, § 13.

<sup>94</sup> § 14.

<sup>95</sup> § 20.

<sup>96</sup> Rep. Act No. 8293 (1997). Intellectual Property Code of the Philippines.

he knows, or ought to know, to be an infringing copy of the work for the purpose of:

- (a) Selling, letting for hire, or by way of trade offering or exposing for sale, or hire, the article;
  - (b) Distributing the article for purpose of trade, or for any other purpose to an extent that will prejudice the rights of the copyright owner in the work; or
  - (c) Trade exhibit of the article in public.<sup>97</sup>
5. Trademark—injunctive relief may be sought by the trademark owner against the online intermediary, insofar as the online intermediary qualifies as a publisher or distributor of electronic communications, assuming that it is an “innocent infringer.”<sup>98</sup> The latter would be one that did not intentionally cause or upload the publication or distribution of the infringing content.

Under the Intellectual Property Code, where the infringement complained of is contained in or is part of a paid advertisement in an electronic communication, the remedies of the owner of the right infringed as against the publisher or distributor of such newspaper, magazine, or other similar periodical or electronic communication shall be limited to an injunction against the presentation of such advertising matter in future issues of such similar periodicals or in future transmissions of such electronic communications.<sup>99</sup> Failure to comply with the injunctive relief may make the cloud service provider liable for damages or indirect contempt under general laws.

#### *4. Safe Harbor Clauses under Philippine Law*

The Electronic Commerce Act limits the liability of service providers that merely provide access to data electronic messages. The law exempts service providers from liability in respect of the electronic data message or electronic document for which these entities merely provide access to and the liability is founded on: (1) obligations and liabilities of parties under the electronic data message; and (2) under certain

---

<sup>97</sup> INTELL. PROP. CODE, § 217.3.

<sup>98</sup> § 165.3

<sup>99</sup> § 159.3.

circumstances, the publication or dissemination of electronic data messages.<sup>100</sup>

On the other hand, under the Cybercrime Prevention Act, service providers, their officers, employees and agents cannot be held liable for interception, disclosure, and use of communication transmitted through their facilities when such activities transpire in the normal course of the performance of the lawful objectives of the service provider.

However, these safe harbor clauses have to yield to their obvious limitations, as discussed.<sup>101</sup> Because of the restrictive definition of service providers under the Electronic Commerce Act (which makes specific reference to electronic documents) and the Cybercrime Prevention Act (which only applies to certain crimes), it is unlikely for these safe harbor clauses to be successfully availed of by service providers or online intermediaries outside the scope of these two laws.

Worse, the existence of safe harbor clauses in these limited situations may be taken by the courts to mean that no safe harbor exists for all other situations involving online intermediaries as a matter of legislative policy.

### III. THE ECONOMIC ROLE OF ONLINE INTERMEDIARIES

Understanding the various kinds of Internet intermediaries and recognizing their presence in the Philippines will help legislators understand

---

<sup>100</sup> Under the E-Commerce Act, a service provider that merely provides access is generally not civilly or criminally liable in respect of an electronic data message, if such liability is founded on:

- i. The obligations and liabilities of the parties under the electronic message or electronic document; or
- ii. The making, publication, dissemination or distribution of such material or any statement made in such material, including possible infringement of any right in relation to such material, provided that:
  - a. the service provider does not have actual knowledge or is not aware of the circumstances from which it is apparent that the making, publication, dissemination or distribution of such infringing material;
  - b. the service provider does not knowingly receive a financial benefit directly attributable to the unlawful or infringing activity; and
  - c. the service provider does not directly commit any infringement and does not induce the commission of the infringement or other unlawful act (Section 30).

<sup>101</sup> See Part I.C, *supra*.



the concept of online intermediaries. One of the roadblocks to creating a framework on intermediary liability is a lack of understanding as to what they are, and consequently, how they work. To date, there is no pending legislation that attempts to broadly define the concept of Internet intermediaries.

A central feature of the Internet is its open and decentralized nature, allowing any service provider anywhere in the world to interconnect.<sup>102</sup> This, along with the fact that Filipinos are among the most avid Internet users despite clear barriers to efficient and speedy Internet access, presents an opportunity for the Philippines to compete in the digital economy.

That online intermediaries and their concomitant liabilities are not recognized under Philippine law is puzzling because they play a central role in economic growth and development. The urgency of instituting a basic framework on intermediary liability is highlighted by the estimate that “[w]ithin less than a decade, most economic activity will depend on digital ecosystems, integrating digital infrastructure, hardware and software, applications and data.”<sup>103</sup>

By acting as the middleman that fosters communication, Internet intermediaries play a crucial role in creating economic and social value. In particular, online intermediaries are responsible for providing infrastructure (as this is required for ISPs to operate), aggregating supply and demand (as they generally provide a single meeting point where buyers and suppliers can meet), facilitating social communication and information exchange (as they allow borderless communication), and facilitating market processes (among others, by providing an alternative means for the purchase of goods and services).<sup>104</sup> They generate employment and provide alternative means to traditional business models.

According to the OECD, the advancement of information and communication technologies (“ICTs”), enabled and spurred by online intermediaries, has benefited economics in several ways. The direct contribution of intermediaries to productivity and growth is considered as their most significant impact. They are recognized to have brought market efficiencies by bringing suppliers and demanders closer together, decreasing

---

<sup>102</sup> OECD, *supra* note 32, at 39.

<sup>103</sup> European Commission (EC), *A Digital Single Market Strategy for Europe* (2015), available at [https://ec.europa.eu/commission/priorities/digital-single-market\\_en](https://ec.europa.eu/commission/priorities/digital-single-market_en), at 13.

<sup>104</sup> OECD, *supra* note 32, at 15.

transaction costs in the process. Intermediaries have likewise paved the way for market globalization and the customization of goods and services.<sup>105</sup>

Intermediaries also play a significant role in ICT infrastructure development and in ensuring that there is sufficient infrastructure to meet the demands of Internet usage.<sup>106</sup> ICT development is not limited to infrastructure alone, as the development of applications and technologies that provide value to end users is likewise the result of the efforts of online intermediaries.

On a more concrete level, intermediaries have also generated opportunities for entrepreneurship and employment.<sup>107</sup> Uber and Grab alone are responsible for 45,000 drivers in Metro Manila, Bulacan, Rizal, Laguna, and Cavite.<sup>108</sup> In addition, they have eased the process of setting up a business in the Philippines, with the abundance of online sellers making available their products and services on e-commerce platforms or even social media sites, and entrepreneurs who have ventured into hospitality services through sharing economy suppliers such as Airbnb. On a micro level, e-commerce intermediaries such as OLX have facilitated point-to-point e-commerce transactions by, for instance, allowing Filipinos to dispose of personal items that would not otherwise have been circulated in the marketplace.

Online intermediaries have made possible the consummation of transactions that could not have existed in the traditional marketplace. Netflix, for instance, allows for low-cost legal viewing of video content. Buyers from provinces are able to purchase goods from Metro Manila via online marketplaces. Online intermediaries have allowed consumers to find information about business online and exploit the advantages of e-commerce, challenge traditional business models, and in many cases, surpass their traditional counterparts.<sup>109</sup> Industries that online intermediaries touch upon, such as the transportation industry in the case of Grab and Uber and the retail industry in that of Lazada and Zalora, have been massively transformed by the innovations presented by intermediaries.

---

<sup>105</sup> *Id.* at 37.

<sup>106</sup> *Id.* at 38.

<sup>107</sup> *Id.* at 39.

<sup>108</sup> Jovic Yee, *LTRFB limits Uber, Grab cars plying Metro Manila, nearby provinces to 45,000*, PHIL. DAILY INQ., Jan. 20, 2018, available at <http://newsinfo.inquirer.net/961942/ltrfb-limits-uber-grab-cars-plying-metro-manila-nearby-provinces-to-45000#ixzz5GsdlLghW>.

<sup>109</sup> EC, *supra* note 103, at 11.

The significant contribution that Internet intermediaries is poised to make, given the right economic conditions, must however be balanced by the inherent risks posed by their existence. In particular, the open environment of online intermediaries makes them a space for the proliferation of terror, illegal hate speech, child abuse, and human trafficking. While there are a number of sector-specific laws that tackle this, a liability regime for online intermediaries is by all means necessary to attract them and strengthen their confidence in the Philippines.

The reality, however, is that despite the availability of these online platforms in the Philippines, most of them do not have a business presence here because of insurmountable legal barriers (such as nationality restrictions) and confusion as to whether they are required to have a physical establishment in the Philippines. In other words, the lack of a legal framework has resulted in a significant opportunity cost for the Philippines.

The EU presents an ideal that the Philippines must strive towards. On May 6, 2015, the EU adopted the Digital Single Market Strategy,<sup>110</sup> an initiative of the European Commission that ensures access to online activities for individuals and businesses, fair competition, and a high level of consumer and personal data protection. The Digital Single Market Strategy is built on three pillars:

1. *Better access for consumers and businesses to online goods and services across Europe* – the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity.
2. *Creating the right conditions for digital networks and services to flourish* – high-speed, secure and trustworthy infrastructures and content services, supported by the right regulatory conditions for innovation, investment, fair competition and a level playing field.
3. *Maximizing the growth potential of our European Digital Economy* – investment in ICT infrastructures and technologies such as Cloud computing and Big Data, and research and innovation to boost industrial competitiveness as well as better public services, inclusiveness and skills.<sup>111</sup>

The Philippine national policy on intermediary liability must likewise take into consideration these pillars of economic development. It must

---

<sup>110</sup> *Id.* at 13.

<sup>111</sup> *Id.* at 3-4.

emphasize access and intermediation of consumers and businesses across the Philippines and throughout the world, create a favorable investment climate for intermediaries to flourish (by removing unnecessary legal barriers, and re-casting regulatory opinions that do not help the economic agenda and serve no useful legal purpose, and providing incentives for intermediaries to establish their presence in the Philippines), and maximize the growth potential of the Philippines, as an archipelagic country whose physical barriers can be bridged by online interconnectivity.

#### IV. SHIFTING GEARS: FROM A REGIME OF INTERMEDIARY LIABILITY TO GLOBAL RESPONSIBILITY

To maximize the potential of the Philippines as an investment hub for Internet intermediaries, this Article has argued for a need to adopt a more inclusive definition of Internet intermediaries and a basic framework for intermediary liability, taking into account the principles discussed thus far.

But aside from the need for the government to institute a policy of passive intermediary liability applicable to online intermediaries, there must also be a recognition of their roles in the protection of freedom of expression.

Online intermediaries have been called the “gatekeepers of expression”<sup>112</sup> and “sovereigns of cyberspace.”<sup>113</sup> Considering how they mediate communication and enable various forms of expression, there is credence to these terms. In essence, they provide the very means by which people may exercise their freedom of expression. The exchange of information and ideas on the Internet is in large part facilitated and determined by how intermediaries regulate their platforms via their terms and conditions, their filters, and their policies both declared and concealed from the public. It would therefore be unwise, and even dangerous, to characterize online intermediaries as mere corporate vehicles. They are certainly imbued with public interest because of the ways in which they improve or undermine the right to freedom of expression.

---

<sup>112</sup> Rebecca MacKinnon et al., *Fostering Freedom Online: The Role of Internet Intermediaries* (2014), United Nations Educational, Scientific and Cultural Organization (UNESCO) Series on Internet Freedom, available at <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>.

<sup>113</sup> *Id.* at 15., citing REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 6, 115–68 (2012).

In the Philippines, the right to freedom of expression is enshrined in the Constitution:

No law shall be passed abridging the freedom of speech, of expression, or the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.<sup>114</sup>

The right to freedom of expression occupies an important role in democratic institutions, as it is “an indispensable condition to the exercise of almost all other civil and political rights.”<sup>115</sup> Freedom of expression guarantees free, open, and democratic discussion of all social, economic and political issues.<sup>116</sup> The right to freedom of expression demands that speech may not be subject to prior restraint or censorship. To protect this right, the Supreme Court has allowed speech to be subjected to prior restraint only in cases where it is necessary to protect a compelling state interest. Examples of such narrowly drawn exceptions are pornography, false or misleading advertisement, advocacy of imminent lawless action, and danger to national security.<sup>117</sup>

As the constitutional protections guaranteed by the Bill of Rights are directed against the State and do not govern relations between private persons,<sup>118</sup> the right to freedom of expression does not immediately appear to be the concern of online intermediaries. However, international law has recognized the human rights responsibilities of private businesses such as online intermediaries.

Under the Universal Declaration of Human Rights: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>119</sup>

The United Nations Human Rights Council has then recognized that the same rights that people have offline must also be protected online,

---

<sup>114</sup> CONST. art. III, § 4.

<sup>115</sup> *Chavez v. Gonzales*, G.R. No. 168338, 545 SCRA 441, 528, Feb. 15, 2008 (Carpio, J., *concurring*).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 529-30.

<sup>118</sup> JOAQUIN BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 105 (2009).

<sup>119</sup> Universal Declaration of Human Rights, art. 19.

including the right to freedom of opinion and expression exercised through the Internet.<sup>120</sup>

There are various ways by which online intermediaries may restrict freedom of expression. Mere conduits, such as ISPs, may implement filtering mechanisms that block access to entire websites or specific keywords. An example would be China, with its government-instituted “Great Firewall” that has blocked user access to platforms like Facebook, Instagram, and Whatsapp,<sup>121</sup> primarily through ISPs.

Search engines may also regulate freedom of expression by manipulating search rankings, like prioritizing sponsored advertisements in search engine results or de-listing specific websites from its index such that these websites do not appear on search results. There are also social media websites that have the capacity to remove content from its platform, or deactivate or even permanently ban users from its platform.

Online intermediaries also hold personal data over its users which it can use for a variety of commercial and non-commercial purposes. In the Philippines, the processing of such personal information by online intermediaries is regulated by the Data Privacy Act.<sup>122</sup>

Online intermediaries must also be held to same standard imposed under international human rights law for the protection of freedom of expression. The framework for intermediary liability not only has to take into account the crucial role Internet intermediaries play in the development of the economy, but must also recognize their role in upholding the right to freedom of expression.

With this foundation, the UN laid down the Guiding Principles on Business and Human Rights (“UN Guiding Principles”) implementing the “Protect, Respect, and Remedy” framework. The framework emphasizes the duty of states to protect human rights and fundamental freedoms and the responsibility of business enterprises to respect human rights. The latter is done by avoiding causing or contributing to adverse human rights impacts and by seeking to prevent or mitigate adverse human rights impacts. The

---

<sup>120</sup> United Nations Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet, *available at* <https://undocs.org/A/HRC/RES/20/8>.

<sup>121</sup> *China is now blocking WhatsApp as well as Facebook and Instagram*, THE INQUIRER, Sept. 26, 2017, *available at* <https://www.theinquirer.net/inquirer/news/3018065/china-is-now-blocking-whatsapp-as-well-as-facebook-and-instagram>.

<sup>122</sup> Rep. Act No. 10173 (2012).

UN Guiding Principles stresses that this responsibility is distinct from issues of legal liability, which is defined by national jurisdictions.<sup>123</sup> Both the state and the business enterprise must ensure access to remedies caused to aggrieved parties.

Currently, online intermediaries in the Philippines are not vested with such responsibility. To the question of how they may satisfy their obligation to uphold the right to freedom of expression, the answer is not regulation. Because online intermediaries usually operate in various jurisdictions, it makes sense to impose to propose a solution based on international law.

In order to meet its responsibility to respect human rights, the UN Guiding Principles propose that business enterprises put in place the following measures:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.<sup>124</sup>

A shift in focus from liability to responsibility would be a recognition of the inherent difficulty in obtaining jurisdiction over online intermediaries that may not even have a physical presence or establishment in the Philippines. This would also necessitate transparency on the part of intermediaries, as they would no longer be able to afford to conceal business practices that have an impact on the freedom of expression of users. This duty of transparency must not, however, be enforced on a national level as this would result in intermediaries simply closing shop or resorting to strategies to avoid responsibility. For instance, in order to avoid liability under the recently implemented EU General Data Protection Regulation (“GDPR”), Facebook has announced that it will make changes to its terms of service that will effectively remove around 1.5 billion of its members, or more than 70% of its member database, from the scope of the GDPR.<sup>125</sup>

---

<sup>123</sup> UN Guiding Principles, arts. 12-13.

<sup>124</sup> UN Guiding Principles, art. 15.

<sup>125</sup> David Ingram, *Exclusive: Facebook to put 1.5 billion users out of reach of new EU privacy law*, THOMSON REUTERS BUSINESS NEWS, Apr. 19, 2018, available at <https://www.reuters.com/article/us-facebook-privacy-eu-exclusive/exclusive-facebook-to-put-1-5-billion-users-out-of-reach-of-new-eu-privacy-law-idUSKBN1HQ00P>.

With a global accountability mechanism that will bind online intermediaries wherever they may be, based on the principles of good faith and transparency and buoyed by incentives rather than penal liabilities, the economic growth promised by online intermediaries, with due respect for freedom of expression, will not be stifled.

At the EU level, with the adoption of the Digital Single Market Strategy, there has been a shift from a liability-based framework to self-regulation embedded with responsibilities. The emphasis is on the development of cybersecurity strategies and regulation by harnessing industry and technological resources relating to online network security. Proposals on cybersecurity are enshrined in several EU-led initiatives such as the Network and Information Security Directive,<sup>126</sup> European Cybersecurity Strategy,<sup>127</sup> and the European Agenda on Security.<sup>128</sup>

## V. CONCLUSION

Digital technologies evolve at a near constant pace—and enterprises have only become more cautious in taking on potential risks when conducting business. Cyber threats, including illegal content, are recognized as a borderless problem that results in significant economic losses and a violation of users' fundamental rights and trust in online activities.<sup>129</sup> Taking all these into account, the Philippines must urgently adopt a regime on intermediary liability, carefully assessing all the factors discussed in this Article, including a formalized definition of an online intermediary and general (not sector-specific) safe harbor clauses under which online intermediaries may seek protection. Moreover, online intermediaries must recognize their responsibility to respect and uphold the rights of their users and not shirk from their status as state agents.

This burden should not be borne by online intermediaries alone. It is likewise the responsibility of the Philippine government to attract online

---

<sup>126</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security across the Union (2013), *available at* [http://eeas.europa.eu/archives/docs/policies/eu-cyber-security/cybsec\\_directive\\_en.pdf](http://eeas.europa.eu/archives/docs/policies/eu-cyber-security/cybsec_directive_en.pdf).

<sup>127</sup> *Id.*

<sup>128</sup> European Commission, A European Agenda on Security, (2017), *available at* [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20170412\\_a\\_european\\_agenda\\_on\\_security\\_-\\_state\\_of\\_play\\_april\\_2017\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20170412_a_european_agenda_on_security_-_state_of_play_april_2017_en.pdf).

<sup>129</sup> EC, *supra* note 103, at 12.



intermediaries to establish their presence in the Philippines, foremost by removing legal barriers such as a myopic interpretation of the Internet as a mass media platform subject to a nationality restriction. From a purely economic viewpoint, such a restriction prevents the growth and development of critical IT infrastructure that would make the Philippines a competitive hub for online intermediaries.

Moreover, the Philippine government has to take the lead in embracing these new technologies in delivering public services by funding their development and willingly becoming the “test case” for intermediary liability in yet unclear situations. In the EU, for instance, a specific recommendation is to provide innovative entrepreneurs with access to financing, and, if necessary, create regulatory vehicles such as the European Venture Capital Funds Regulation. No similar calls for funding or creation of such government agencies can be found in the Philippines.

While economic development is certainly an important consideration in determining the proper legal framework for intermediary liability, it should still be weighed against other legal considerations in the increasingly complex digital environment in which platform providers operate. A balance between economic development and these considerations, such as the security of the state, public interest (like protection of minors and protection of truth and fairness in dissemination of information), and protection of economic rights (like trademark and copyright protection), would best be achieved by a global accountability mechanism arrived at on an international level.

**COLLEGE OF LAW  
UNIVERSITY OF THE PHILIPPINES**

**FACULTY**

FIDES C. CORDERO-TAN, B.S., LL.B., *Dean & Professor of Law*  
CONCEPCION L. JARDELEZA, B.A., LL.B., *Associate Dean*

**PROFESSORS OF LAW**

ELIZABETH H. AGUILING-PANGALANGAN, B.A., LL.B., LL.M.  
DANTE B. GATMAYTAN, B.S., LL.B., M.S.E.L., LL.M.  
RAUL C. PANGALANGAN, B.A., LL.B., LL.M., J.S.D. (*Secondment*)  
PATRICIA ROSALIND P. SALVADOR-DAWAY, A.B., LL.B.

**ASSOCIATE PROFESSORS OF LAW**

VICTORIA A. AVENA, B.F.A., LL.B., LL.M.  
JAY L. BATONGBACAL, B.A., LL.B., M.M.M., J.S.D.  
EVELYN (LEO) D. BATTAD, B.S., B.A., LL.B., LL.M.  
ROWENA E.V. DAROY-MORALES, B.A., LL.B.  
JOSE JESUS M. DISINI, Jr., B.S., LL.B., LL.M.  
MA. GISELLA N. DIZON-REYES, B.A., LL.B., M.P.A., *College Secretary*  
FLORIN T. HILBAY, A.B., LL.B., LL.M.  
VIRGILIO S. JACINTO, A.B., LL.B., LL.M.  
HECTOR DANNY D. UY, B.A., LL.B., M.N.S.A

**ASSISTANT PROFESSORS OF LAW**

EMERSON S. BAÑEZ, B.A., LL.B., LL.M.  
ROMMEL J. CASIS, B.A., LL.B., LL.M.  
SOLOMON F. LUMBA, B.S., LL.B.  
RYAN P. OLIVA, B.A., J.D.  
NICHOLAS FELIX L. TY, B.S.B.E., LL.B.  
EDGARDO CARLO I. VISTAN III, B.S., LL.B.

**LECTURERS & PROFESSORIAL LECTURERS**

EDUARDO JUAN F. ABELLA, B.S.C., LL.B.	CARINA C. LAFORTEZA, B.S.B.A.A., LL.B.
EDWIN R. ABELLA, B.S.B.A., LL.B., LL.M.	JOSE C. LAURETA, A.B., LL.B., LL.M.
PACIFICO A. AGABIN, B.S.J., LL.B., J.S.D.	JOSE M. LAYUG, Jr., B.S., LL.B., LL.M.
OSWALDO D. AGCAOILL, B.S., LL.B.	MA. CAROLINA T. LEGARDA, B.A., LL.B.
LEANDRO ANGELO Y. AGUIRRE, B.S., J.D., LL.M.	ANNA THERESA L. LICAROS-LIM, B.A., J.D.
JESUSA LORETA A. ARELLANO-AGUDA, B.S., J.D., LL.M.	EDUARDO P. LIZARES, A.B., LL.B., LL.M.
AUGUSTO JOSE Y. ARREZA, B.A., LL.B.	VICTORIA V. LOANZON, B.A., MA., LL.B.
HERMINIO C. BAGRO III, B.A., J.D.	ELIZABETH P. LORIEGA, B.S.B.A.A., LL.B.
REUBEN F. BALANE, A.B., LL.B.	JHOSEF Y. LOPEZ, A.B., LL.B.
CARLOS G. BANIQUED, A.B., LL.B., LL.M.	DINA D. LUCENARIO, B.A., LL.B.
PETER DONNELLY A. BAROT, A.B., LL.B., LL.M.	MARISSA MACARAIG-GUILLEN, B.A., LL.B.
MARIA GRACIELA D. BASE, B.A., J.D.	MERLIN M. MAGALLONA, A.A., LL.B.
CHRYSILLA CARISSA P. BAUTISTA, B.A., LL.B., LL.M.	MA. SOLEDAD D. MAWIS, A.B., LL.B.
ROSA MARIA J. BAUTISTA, A.A., LL.B., LL.M.	CRESCENCIO T. MENESES I, B.S.B.A.A., LL.B., LL.M.
ARMY BEATRIZ E. BAYOT, B.A., J.D., LL.M.	ALFREDO B. MOLO III, B.A., LL.B., LL.M.
MARK R. BOCOBO, B.S., LL.B.	RAFAEL A. MORALES, B.A., LL.B., LL.M.
PURISIMO S. BUYCO, A.B., LL.B.	ALBERTO T. MUYOT, Jr., A.B., LL.B., LL.M.
BERNARDO O. CALDERON, A.B., LL.B.	SANDRA MARIE G. OLASO-CORONEL, B.A., LL.B.
DAN P. CALICA, B.A., LL.B.	ANDRE C. PALACIOS, B.S., LL.B., LL.M.
OTHELLO C. CARAG, B.A., B.S.B.A., LL.B., LL.M.	RENATO M. PAMBI, B.A., LL.B.
BARTOLOME S. CARALE, A.A., B.A., LL.B., LL.M.	ELIZABETH R. PULUMBARIT, B.S., LL.B.
JAIME FORTUNATO A. CARINGAL, A.B., LL.B., LL.M.	ROGELIO V. QUEVEDO, A.B., LL.B., LL.M.
SALVADOR T. CARLOTA, B.S.F.S., LL.B., LL.M.	GRACE P. QUEVEDO-PANAGSAGAN, A.B., LL.B.
ARNEL PACIANO D. CASANOVA, B.A., LL.B., M.P.A.	MARIE CECILE R. QUINTOS, B.A., LL.B.
CELESTE RUTH L. CEMBRANO-MALLARI, B.A., LL.B., LL.M.	SALMA PIR T. RASUL, B.S., LL.B.
GERARD L. CHAN, B.S., LL.B., LL.M., M.B.A.	JANNET C. REGALADO, B.A., LL.B.
MA. GABRIELA R. CONCEPCION, B.A., LL.B.	GILBERT RAYMUND T. REYES, B.S., LL.B.
CARLO L. CRUZ, B.A., LL.B.	RAFAEL DANILO RANIL, M. REYNANTE, A.B., LL.B.
HECTOR M. DE LEON, Jr., A.B., LL.B., LL.M.	RODERICK R.C. SALAZAR III, B.A., LL.B.
JOAN A. DE VENECIA, B.S., LL.B., LL.M.	SERAFIN U. SALVADOR, Jr., A.B., LL.B.
GABRIEL A. DEE, A.B., LL.B.	TRANQUIL S. SALVADOR III, A.B., J.D.
NILO T. DIVINA, B.A., LL.B.	MICHELLE B. SAN BUENAVENTURA-DY, B.A., LL.B.
ANZEN P. DY, B.A., LL.B.	AUGUSTO A. SAN PEDRO, B.A., LL.B.
VICTOR Y. ELEAZAR, B.A., LL.B., LL.M., M.P.A.	DIONNE MARIE M. SANCHEZ, B.S.B.A.A., LL.B.
EDUARDO C. ESCAÑO, B.A., LL.B.	ARNO V. SANIDAD, B.A., LL.B.
ELVIRA V. ESCUETA-DUAVIT, B.S.B.A., LL.B.	AVELINO M. SEBASTIAN, Jr., A.B., LL.B., LL.M.
RAMON S. ESGUERRA, B.A., LL.B.	MA. FILOMENA D. SINGH, J.D., LL.M.
JACQUELINE JOYCE F. ESPENILLA, B.A., J.D., LL.M.	MAXIMO PAULINO T. SISON III, B.S., J.D.
MYRNA S. FELICIANO, B.S.L.S., M.L., LL.B., LL.M.	FRANCIS V. SOBREVINANS, B.S., LL.B., LL.M.
ALEX FERDINAND S. FIDER, B.A., LL.B., LL.M.	RONALD O. SOLIS, B.S.B.A., LL.B.
ANNA TERESA M. GOZON, B.S., LL.B., LL.M.	STEPHANIE G. SOMERA, B.A., LL.B.
GWEN B. GRECIA-DE VERA, A.B., LL.B., LL.M.	MARY ROSE S. TAN, B.A., LL.B., LL.M.
JAMES DENNIS C. GUMPAL, M.D., LL.B.	CRISOSTOMO A. URIBE, B.A., LL.B.
IBARRA M. GUTIERREZ III, B.S., LL.B.	RAUL T. VASQUEZ, A.B., LL.B.
LINDA M. HORNILLA, A.B., LL.B.	SUSAN D. VILLANUEVA, A.B., LL.B., LL.M.
ILDEFONSO R. JMENEZ, B.S., LL.B.	ERNESTINE CARMEN JO D. VILLAREAL-FERNANDO, A.B., LL.B.
MARK DENNIS Y.C. JOVEN, B.S.B.A.A., LL.B., LL.M.	RODOLFO R. WAGA, Jr., A.B., LL.B.
ANTONIO G.M. LA VINA, A.B., LL.B., M.M.M., J.S.D.	ANTHONY CHARLEMAGNE C. YU, B.A., LL.B., LL.M.
EDUARDO A. LABITAG, A.B., LL.B., LL.M.	

UNIVERSITY OF THE PHILIPPINES  
COLLEGE OF LAW

ADMINISTRATION

BOARD OF REGENTS

HON. J. PROSPERO E. DE VERA III,

*Chairperson, Commission on Higher Education*

HON. FRANCIS G. ESCUDERO,

*Chairperson, Senate Committee on Education, Arts, & Culture*

HON. RAMON M. MARONILLA, *Alumni Regent*

HON. PATRICIA B. ARINTO, *Faculty Regent*

HON. ANALIZA S. FULVADORA, *Staff Regent*

HON. ROBERTO M. J. LARA,

*Secretary of the University and the Board of Regents*

HON. DANILO L. CONCEPCION,

*Co-Chairperson, President of the University*

HON. ANN K. HOFER,

*Chairperson, House Committee on Higher & Technical Education*

HON. ANGELO A. JIMENEZ

HON. FRANCIS C. LAUREL

HON. FREDERICK MIKHAIL I. FAROLAN

HON. MA. SHARI NIÑA G. OLIQUIÑO,

*Student Regent*

THE UNIVERSITY

OFFICE OF ADMINISTRATION — UP SYSTEM

DANILO L. CONCEPCION, B.S., LL.B., LL.M., *President*

TEODORO J. HERBOSA, M.D., F.P.C.S., F.P.C.E.P., *Executive Vice President*

CYNTHIA ROSE B. BAUTISTA, B.A., M.S., Ph.D., *Vice-President for Academic Affairs*

NESTOR G. YUNQUE, B.S., M.S., *Vice-President for Administration*

JOSELITO G. FLORENDO, B.S.B.A.A., I.M.S.M.Es., *Vice-President for Planning & Finance*

ELVIRA A. ZAMORA, B.S.B.A., M.B.A., D.B.A., *Vice-President for Development*

JOSE Y. DALISAY, JR., B.A., M.F.A., Ph.D., *Vice-President for Public Affairs*

HECTOR DANNY D. UY, LL.B., M.N.S.A. *Vice-President for Legal Affairs*

ROBERTO M.J. LARA, B.A., LL.B., LL.M., *Secretary of the University and of the Board of Regents*

OFFICE OF ADMINISTRATION — UP DILIMAN

MICHAEL LIM TAN, D.V.M., M.A., Ph.D., *Chancellor*

EVANGELINE C. AMOR, B.S., M.S., Ph.D. *Vice-Chancellor for Academic Affairs*

FIDEL R. NEMENZO, B.S., M.S., D.Sc., *Vice-Chancellor for Research & Development*

JERWIN F. AGPAOA, B.A., M.A., *Vice-Chancellor for Student Affairs*

NESTOR T. CASTRO, B.A., M.A., Ph.D., *Vice-Chancellor for Community Affairs*

VIRGINIA C. YAP, B.S., M.A., *Vice-Chancellor for Administration*

MA. THERESA T. PAYONGAYONG, B.A., M.A., Ph.D., *University Registrar*

UP LAW COMPLEX

FIDES C. CORDERO-TAN, B.S., LL.B., *Dean*

CONCEPCION L. JARDELEZA, B.A., LL.B., *Associate Dean*

MA. GISELLA N. DIZON-REYES, A.B., LL.B., M.P.A., *College Secretary*

ROMMEL J. CASIS, B.A., LL.B., LL.M., *Officer-in-Charge, Institute of International Legal Studies*

PATRICIA ROSALIND P. SALVADOR-DAWAY, A.B., LL.B., *Director, Institute for Administration of Justice*

ELIZABETH H. AGUILING-PANGALANGAN, B.A., LL.B., LL.M., *Director, Institute of Human Rights*

NICHOLAS FELIX L. TY, B.S., LL.B., *Director, Institute of Government & Law Reform*

JAY L. BATONGBACAL, B.A., LL.B., M.M.M., J.S.D., *Director, Institute for Maritime Affairs and Law of the Sea*

ROWENA E.V. DAROY-MORALES, A.B., LL.B., *Director, Office of Legal Aid*

RENE B. MANLANGIT, B.S., *Head, Law Librarian*

FLORDELIZA C. VARGAS-TRINIDAD, LL.B., *Head, Administrative Division*

# PHILIPPINE LAW JOURNAL

Published by the College of Law, University of the Philippines,  
Diliman, Quezon City, Philippines

---

VOLUME 91

OCTOBER 2018

NO. 4

---

## EDITORIAL BOARD

JONAS MIGUELITO P. CRUZ

*Chair*

GABRIELA VICTORIA A. TIMBANCAYA

*Vice Chair*

JOSE MARIA L. MARELLA

KARINA MAE P. GARCIA

SAMANTHA CARISSA D. CRISOSTOMO

FRANZ ALBERT A. LANTIN

JOSE ANGELO D. MANUEL

KEVIN GABRIEL S. FERRER

DEANNA CLARISSE M. HECETA

THEODORE JOSEPH M. JUMAMIL

*Members*

RAFAEL A. MORALES

*Faculty Adviser*

THE CLASS OF '74

*Alumni Adviser*

ROWENA E.V. DAROY-MORALES

*Business Manager*

ARMIE O. CRISOSTOMO

*Administrative Assistant*

NORMA A. FRANCO

*Circulation Manager*

---

The Editorial Board, under the aegis of the University of the Philippine College of Law, publishes contributions of interest and value to law students and the legal profession, but the views of the contributions to the PHILIPPINE LAW JOURNAL do not necessarily reflect those of the College of Law or the Editorial Board.

Communications of either an editorial or business nature should be addressed to the PHILIPPINE LAW JOURNAL, Malcolm Hall, University of the Philippines, Diliman, Quezon City, Philippines, faxed to 927-0518 (Phone: 920-5514 loc. 207), or emailed to [plj@up.edu.ph](mailto:plj@up.edu.ph). It will be assumed that a renewal of subscription is desired unless a notice of discontinuance is received by the Editorial Board on or before the expiration date.

## ACKNOWLEDGMENTS

The Editorial Board of the PHILIPPINE LAW JOURNAL Volume 91 would like to acknowledge the editorial assistants for this volume. Participants in the PLJ Editorial Assistants Program help out the members of the Editorial Board in their regular editorial and administrative tasks. Because membership in the JOURNAL is purely on the basis of academic qualifications and the annual competitive examinations, participants in the Editorial Assistants Program are not members of the publication. However, participation in said program is especially encouraged for students interested in membership in the Board, as it exposes them to the work of student editors.

### VOLUME 91 EDITORIAL ASSISTANTS

*Joel Adrian Alarde*  
*Roilan Rigil Kent Alonzo*  
*Aleyza Asis*  
*Bertrand Matthew Belen*  
*Carmerlita Capili*  
*Dianara Capito*  
*Antonio Ramon Castillo*  
*Rey Alan De Juan*  
*Daniel Al Delfin*  
*Joseph Lwen Ebalobo*  
*Rica Rae Gamboa*  
*Annika Mykaela Lapidario*  
*Louise Gabrielle Limpin*

*Patrizia Adeline Lucindo*  
*Alberica Manuel*  
*Francis John Masiglat*  
*Bianca Isabella Ortiz*  
*Justin Paras*  
*Elaine Pineda*  
*Shiela Marie Rabaya*  
*Anna Regina Regalado*  
*Jayson Edward San Juan*  
*Jose Carlo Sevilla*  
*Jose Miguel Solis*  
*Trixia Marie Vergara*