LIBERTY AND PROSPERITY IN THE DIGITAL AGE:
DETERMINING THE PROPER TREATMENT OF
ONLINE INTERMEDIARIES IN LIGHT OF THE
UNITED NATIONS GUIDING PRINCIPLES ON
BUSINESS AND HUMAN RIGHTS

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DEDICATION

For my Jordan;
because of whom, something changed.
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With all I am, and all I will ever be, I thank God Almighty for sustaining me and giving me strength. He has been faithful to His word, and He prepares a table for me in the presence of my enemies.

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ABSTRACT

The Internet is part of today’s daily life. It is where we get the news, connect with friends and family, conduct business, or simply unwind. It has become a transformative tool for commerce and communication, providing a dynamic avenue for businesses to grow, and rights to be exercised. However, because of the wide reach of the Internet, its benefits do not come without risks. Due to its inherent connectivity with the entire world, violations of individual liberties often produce irreversible consequences, with trans-border impact. This subjects the players in the digital ecosystem at risk of incurring financial and reputational repercussions.

This paper inquires into the responsibility of businesses for violations of human rights done online. In this present age where liberty and prosperity are so uniquely intertwined in the digital landscape, this dissertation explores how the rule of law strikes a balance between human rights and business using the UN Guiding Principles.
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PART I
INTRODUCTION

Liberty is a right that inheres in every one of us as a member of the human family. When a person is deprived of his right, all of us are diminished and debased for liberty is total and indivisible.¹

Liberty takes on different shades. It is a universal concept with varying peculiar incarnations. To an innocent man accused of wrongdoing, it is exercising his right to be heard; while to a wrongdoer feigning innocence, it is enjoying his right to remain silent.

As human nature continues to evolve, new narratives affect the way society perceives and exercises human rights. Because they are inherent and indivisible, these rights necessarily adapt to the changing realities of the time.

In this Web 2.0 era², the average person transforms from being an ordinary citizen, encumbered by societal norms and burdened with rules of conduct, into a netizen—a virtual manifestation of one’s innermost desires; an avatar whose dominion is limited only by his imagination.

Cyberspace is today’s playground. It is where we get our information, ramble about the trivialities of daily life, speak out against oppressive rulers, make friends, even find love. With the transformative nature of the Internet, increasing an individual’s ability to access and disseminate information³, raw ideas, honest thoughts and candid opinions are catapulted into the public sphere with a mere press of a button, without fear or inhibition. At no other point in time

¹ Ordoñez v. Director of Prisons, G.R. No. 115576, 4 August 1994, 235 SCRA 152.
² Human Rights Committee, General Comment No. 34 (“General Comment 34”), UN Doc CCPR/C/G/34, 12 September 2011.
has society been able to exercise its freedom of expression\textsuperscript{4} with such ease.

As a convenient and potent medium for discourse and dissemination, it has now become imperative for multinational corporations and other business enterprises to have an online presence in order to be competitive in the global market.\textsuperscript{5}

Small-scale retailers without enough capital for a physical store are able to market their goods. Businesses are able to advertise and reach millions with online marketing tools. Entrepreneurs are afforded a rolodex of potential new clients and partners through networking sites. The Internet is the new center of trade.

In the United States for example, Internet Service Providers ("ISPs") accounted for $68 billion in revenue for 2008.\textsuperscript{6} Philippine e-commerce revenue accounted for $1.3 billion in 2016, and is projected to reach $9.7 billion by 2025.\textsuperscript{7} Social media platforms continue to grow exponentially, with major players like social networking site Facebook and microblogging site Twitter having 2 billion\textsuperscript{8} and 328 million users a month,\textsuperscript{9} respectively.

\textsuperscript{8} Josh Constine, “Facebook now has 2 billion monthly users... and responsibility”, Techcrunch, https://techcrunch.com/2017/06/27/facebook-2-billion-users/, (27 June 2017), accessed on 10 September 2017.
While the Internet is a powerful tool for commerce, collaboration, and connection, it also presents a considerable challenge\(^{10}\) because of its broad and worldwide reach.\(^{11}\) Although it enjoys a veil of protection under international law\(^{12}\), there is an increasing need for proper regulation because of the higher risk it poses to other protected rights.\(^{13}\)

**THE UNITED NATIONS FRAMEWORK**

International human rights standards have traditionally been the responsibility of States,\(^{14}\) but through global developments, non-State actors such as international organizations\(^{15}\) and transnational corporations play an increasingly important role both in the municipal and international levels.\(^{16}\)

Because of their expansive scope of influence -- blurring territorial borders and crossing jurisdictions, the United Nations ("UN") Human Rights Committee has been considering the extent of human rights responsibilities of businesses, as well as exploring ways for corporate actors to be held accountable for any adverse effects their activities may have on society.\(^{17}\)

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\(^{11}\) General Comment 34 supra n2; *Times Newspaper Ltd. v. UK* Application Nos 3002/03 and 23676/03 (ECtHR, 6 October 2009) ¶27.

\(^{12}\) Id.

\(^{13}\) Węgrzynewski and Smolczewski v. Poland, no. 33846/07, (ECtHR, 16 July 2013) ¶98; Editorial Board of Pravoye Delo and Shtekel v. Ukraine, Application no. 33014/05 (ECtHR, 05 May 2011) ¶52.


\(^{15}\) MALCOLM N. SHAW, supra n14 at 1295.

\(^{16}\) See generally KURT MILLS AND DAVID JASON KARP (Ed), *HUMAN RIGHTS PROTECTION IN GLOBAL POLITICS: RESPONSIBILITIES OF STATES AND NON-STATE ACTORS* (2015).

In 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights for Implementing the UN ‘Protect, Respect and Remedy’ Framework (“Guiding Principles”), providing a global standard for preventing and addressing the impacts of business activities on human rights.18

While society benefits from globalization, and we are afforded advantages our forefathers could not even begin to imagine, the sinister effects of a poorly-regulated digital landscape may just be lurking behind the next pop-up.

In this digital day and age, when liberty and prosperity are so uniquely intertwined in the Internet, how does the rule of law safeguard both?

**STATEMENT OF THE PROBLEM**

As the most valued and least restricted of the preferred rights19, one that is fundamental to any democratic society20, the qualitative significance of the freedom of expression arises from the fact that it is the indispensable condition of nearly every other freedom.21

Online communication is facilitated by parties called intermediaries.22 As it stands, some intermediaries are deemed capable of possessing the right to free expression - encompassing the right to

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impart information.\textsuperscript{23} However, current legal literature on the matter is only categorical in terms of the treatment of active intermediaries\textsuperscript{24}, or those intermediaries that create or exercise some degree of editorial control over the content they publish\textsuperscript{25}, such as online news outlets.\textsuperscript{26} Under the status quo, they may be considered publishers\textsuperscript{27} and are consequently held liable for unlawful content found in their platforms, similar to traditional publishers of print media.\textsuperscript{28}

On the other hand, there is yet to be a definitive framework for how passive intermediaries should be treated. Passive intermediaries are online platforms which do not exercise any form of editorial control over the content published\textsuperscript{29} since the content is always generated by their individual users.\textsuperscript{30} Examples of which include content hosting sites like YouTube, Vimeo and Imgur; social media

\begin{itemize}
    \item \textsuperscript{23}Autronic AG v Switzerland Application no 12726/87 (ECtHR, 22 May 1990) ¶47; General Comment 34, supra n2, ¶13; Delfi AS v Estonia Application no 64569/09 (ECtHR, 10 October 2013)¶69, 70; Cengiz v Turkey Application nos 48226/10, 14027/11 (ECtHR, 1 December 2015) ¶56; National Association for the Advancement of Colored People v Button (1963) 371 US 415, 428–449; First National Bank of Boston v Bellotti (1978) 435 US 765, 783; Pacific Gas & Electric v Public Utilities Commission (1986) 475 US 1, 8; Federal Election Commission v Wisconsin Right to Life Inc. (2007) 551 US 449, 454.
    \item \textsuperscript{24}Delfi AS v Estonia supra n23, ¶154; Magyar Tartalomzolgáltatók Egyesülete and Index.hu Zrt v Hungary, App No. 22947/13 (“MTE v Hungary”) (ECtHR, 2 February 2016) ¶60; see also ANDREJ SAVIN, EU INTERNET LAW: SECOND EDITION (2017).
    \item \textsuperscript{25}March 2011 Report supra n18; UN Human Right Council, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005; Principle 6, Declaration on Freedom of Communication on the Internet, Committee of Ministers, Council of Europe (28 May 2003).
    \item \textsuperscript{26}MTE v Hungary supra n24, ¶60-63; Seth F. Kreimer, Censorship by Proxy: The First Amendment, Internet Intermediaries and the Problem of the Weakest Link, 155 U. Pa. L. Rev. 11 (2006).
    \item \textsuperscript{31}See generally REBECCA ROWELL, YOUTUBE: THE COMPANY AND ITS FOUNDERS (2011); JEAN BURGESS AND JOSHUA GREEN, YOUTUBE: ONLINE VIDEO AND PARTICIPATORY CULTURE (2009).
\end{itemize}
platforms such as Facebook, Twitter\textsuperscript{32} and Instagram\textsuperscript{33}, and even search engines like Google\textsuperscript{34} and Yahoo!.\textsuperscript{35}

If a user publishes content on a social networking site, and such content infringes on a third person’s intellectual property, should the platform be held accountable? If an advertiser buys ad space, does the platform have a responsibility to determine the fitness of the collateral to be published? May an intermediary privatize censorship?

This dissertation therefore seeks to answer:

**Questions Presented**

*First*, does a passive intermediary have the right to the freedom of expression?

(1) Corollary, does the presence of such right carry any concomitant obligation to protect human rights, such that its failure triggers liability?

(2) What is the scope of that obligation?

*Second*, what type of intermediary liability, if any, should be imposed on a passive intermediary?

**Objective of the Study**

Though liability issues faced by passive intermediaries are caused by their users, they remain attractive targets for legal action because their visibility, notoriety and financial strength are likely to be greater than that of their clients’.\textsuperscript{36} This is also partly because the

\textsuperscript{32} JAANI RIORDAN, THE LIABILITY OF INTERNET INTERMEDIARIES (2016) 543.
\textsuperscript{33} Id at 275.
\textsuperscript{34} Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez, C-131/12, 13 May 2014.
\textsuperscript{36} I.J. LLOYD, INFORMATION TECHNOLOGY LAW, Oxford University Press (2008) 572
allocation of liability between intermediaries and the users who originally put the content online can be problematic.\textsuperscript{37}

This paper aims to strike a balance between the commercial interest of intermediaries and their responsibility towards protecting their users’ rights. This study aims to do so by identifying the proper treatment of intermediaries in light of human rights norms and the responsibility of businesses under the Guiding Principles.

\textbf{Significance of the Study}

Intermediaries build a critical mass of users. They facilitate the interaction between different actors in the cyber ecosystem, such as users and advertisers,\textsuperscript{38} and even between and among users themselves. Because of the key role they play, proper regulation must be in place for their guidance, protection and even incentive.

Allowing intermediaries to be complicit in human rights violations not only results to moral costs, but also business costs.\textsuperscript{39} Corporations open themselves up to reputational and operational risks, legal liability, even loss of investor and consumer confidence.\textsuperscript{40} Because of the dynamic, continuous and lucrative nature of online transactions, there is a pressing need to define the rights and obligations of intermediaries.

Further, courts experience difficulties applying a specific liability regime to intermediaries, so much so that even tribunals in Europe

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\item[38] Supra n6 at 6.
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where the e-Commerce Directive\(^{41}\) applies have issued conflicting rulings regarding the liability of online intermediaries.\(^{42}\)

Given the borderless nature of the Internet\(^{43}\), it is even more critical to determine and analyze the appropriate regime to govern intermediaries. If it be too restrictive, we run the risk of fostering a culture of self-censorship\(^{44}\), and by extension, producing a chilling effect on free speech.\(^{45}\) If it be too permissive, we run the risk of nurturing a culture of impunity, where irreparable harm may be done with the expediency of a click of a button.

**Methodology/Research Design**

**A. Black Letter Approach**

The Black Letter Approach will be used to address the questions presented. This method involves the study, examination and analysis of legal rules and norms found in a penumbrae of sources. It aims to collate, organize, describe and analyze relevant rules, and identify emerging norms, if any.

For this dissertation, and consistent with this approach, the following primary and secondary sources of law will be analyzed to support the position that even passive intermediaries have the right to

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the freedom of expression, particularly the right to publish, and thereby incurring a corollary legal obligation to protect the same:

(1) UDHR;
(2) ICCPR;
(3) European Convention on Human Rights (“ECHR”);
(4) International Covenant on Economic, Cultural and Social Rights (“ICESCR”);
(5) United Nations Guiding Principles on Business and Human Rights and its predecessors;
(6) Reports of the Special Representative and other relevant UN documents;
(7) General Comment 34 and Reports of the Special Rapporteurs;
(8) Other related human rights instruments.

Decisions rendered by municipal tribunals, including those made by the Philippine Supreme Court, as well as decisions of international tribunals such as but not limited to, the International Court of Justice (“ICJ”), European Court of Human Rights (“ECtHR”), Court of Justice of the European Union (“CJEU”) and United Nations Human Rights Committee (“UNHRC”) relating to freedom of expression and intermediary liability will be considered by this paper. A survey of relevant State practice will also be made as this may yield to possibly identifying progressive developments of international law, or even opinio juris.

**Scope and Limitation of the Study**

This paper is limited to the nature of passive intermediaries; whether they have rights under international law, and whether or not they may be held liable for content over which they did not exercise any editorial control.

It will not deal with the question of how a State may acquire jurisdiction over intermediaries operating outside its territorial jurisdiction. Neither will this thesis deal with the question of enforcing
a judgment over an intermediary headquartered or operating in a foreign territory.

**REVIEW OF RELATED LITERATURE**

A notable work on the issue of intermediary liability is Professor Marcelo Thompson’s, published in the *Vanderbilt Journal of Entertainment & Technology*. He introduced the ‘Normative Negligence Approach’:

… the responsibility of Internet intermediaries should neither be precluded nor taken to be strict. Rather, it should reflect a commitment of applying the best efforts reasonable - within intermediaries’ particular economic and technological possibilities - to get the facts and the law straight. It should be expected that intermediaries will fail, even miserably, at times to reach the best interpretation that can be reached regarding the disputes they settle.

In his proposal, liability should build upon the idea of *responsible communication* on matters in the sphere of public interest, and there must be a degree of deference to editorial judgment of editors and journalists. According to Thompson, intermediaries must accommodate “honest mistakes” and consider:

...the seriousness of the allegation, the urgency and public importance of the matter, the status and reliability of the source, the pursuit and accurate report of the plaintiff's view, the necessity and proportionality of the publication, the public interest in the making of the statement (rather than in its truth).46

While tackling the same subject matter, this paper differs from Professor Thompson’s for two reasons:

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First, Thompson places intermediaries in the same category as journalists. Concededly, there are intermediaries which produce its own content, but his paper operates on that singular plane, completely excluding intermediaries that neither produce content nor exercise editorial control over them.

Second, his approach places with the intermediary the burden of determining the legality or illegality of the content. Although more tame, it similarly results to a collateral censorship. While digital media companies have internal protocols, that mechanism is limited to the evaluation of whether or not a user violated the company’s terms and conditions. It does not extend to the determination of whether or not a violation of the freedom of speech has been committed, or will be committed by taking down content.

A prolific writer on the relationship of business and human rights, Professor Jena Martin Amerson’s work on the subject is illuminating. Of particular interest is her 2011 article entitled “What’s in a Name? Transnational Corporations and Bystanders Under International Law” which dealt with the impact of the Guiding Principles on transnational corporations.

In essence, Amerson posits that transnational corporations may be held liable for human rights violations even when it is a mere bystander. She draws a parallelism with American tort law: first, that an innocent third party may be held responsible for inaction, and second, that a corporation assumes liability for products it introduces, regardless of where that final market be located.

This first theory is one of nonfeasance. It presupposes that the relationship between the bystander and the victim creates a special duty which can then lead to liability for the former’s inaction.  

The theory on product liability, on the other hand, expounds on the premise that companies should bear some responsibility for the manner in which the products are produced in the same manner that they assume responsibility for the quality of their products wherever they are consumed.

Although Amerson’s work provides a thoughtful insight on corporate responsibility, her focus is on corporations with a physical presence in a particular territory. For example, in her proposal, corporations cannot disavow involvement for the rape, torture and death of villagers after it started its operations in a particular village, or for the death of 15,000 people from a plant explosion.

In stark contrast, since this dissertation focuses on relationships that occur exclusively in the digital world, physical presence and tangible harm are not primary considerations for corporate liability to apply.

**Organisation**

Having presented the general considerations of this dissertation, the study will proceed as follows: Part II will deal with Discussions and Analysis, presented in four sections: (A) will discuss the freedom of expression in the Internet, (B) will discuss online intermediaries, with a brief survey of the different regimes of intermediary liability existing in the status quo, (C) will present a case study of decisions made by various tribunals worldwide, and (D) will discuss the UN

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52 Jena Martin Amerson, supra n47.
Guiding Principles on Business and Human Rights. Finally, Part III will conclude the study and set forth policy recommendations for the proper treatment of passive online intermediaries.
PART II
DISCUSSION AND ANALYSIS

We are facing the genuine risk that the worldwide movement of peoples and commodities, news and information will create a permanent flow of individuals without commitments, industries without liabilities, news without a public conscience, and the dissemination of information without a sense of boundaries and discretion.55

In its Disini56 decision, the Supreme Court of the Philippines ruled on the constitutionality of certain provisions of Republic Act 10175 or the Cybercrime Prevention Act of 2012. Among the contested provisions was Section 5 on ‘Other Offenses’. While the main point of contention was whether or not a user who likes or comments on libelous material may be considered to be aiding or abetting the main offender, the Court briefly touched on the subject of intermediary liability:

...when “Google procures, stores, and indexes child pornography and facilitates the completion of transactions involving the dissemination of child pornography,” does this make Google and its users abettors in the commission of child pornography crimes? Byars highlights a feature in American law on child pornography that the Cybercrime law lacks – the exemption of a provider or notably a plain user of interactive computer service from civil liability for child pornography as follows:

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 and cannot be held civilly liable for any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be

55 Seyla Benhabib, as quoted in Marcelo Thompson, Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries, 18 Vand. J. Ent. & Tech. L. 783 (2016).
56 Supra n44.
obscene…whether or not such material is constitutionally protected. *(emphasis supplied).*

The Supreme Court did not categorically answer the question posed, dealing instead on possible liabilities of the content providers. It, however, underscored the importance of having a clear legal provision in order to define the rights and obligations of users “to relieve users of annoying fear of possible criminal prosecution.”

(A)

**Freedom of Expression in the Internet**

The Internet has become a key means by which individuals exercise free speech. 57 It is a vehicle for education, interpersonal communication, democratic participation, and access to information.58 As such, it plays a key role in mobilizing the population to call for justice, equality, accountability and better respect for human rights.59

The UDHR, and thereafter the ICCPR, were drafted with the foresight to include and accommodate future technological developments60 because of the intimate relationship between speech and the mode of its expression.61 The medium through which information is communicated and received is protected, in itself, by Article 19 of the ICCPR.62 Electronic and Internet-based modes of

60 UNHCR, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ (10 August 2011) UN Doc A/66/290.
62 Autronic AG v Switzerland App No 12726/87 (22 May 1990); De Haes and Gijsels v Belgium App No 19983/92 (24 February 1997) ¶48. See also Feldek v Slovakia App No 29032/95 (12 July 2001); Media Rights Agenda and Others v Nigeria, Constitutional Rights Project and Civil Liberties Organisation v Nigeria, Comm. No. 102/93 (ACommHPR, 1998); Gaweda v Poland App No 26229/95 (14 March 2002).
expressions are therefore guaranteed the same protection of freedom of expression as it applies offline.\textsuperscript{63}

Aside from being covered by the broadly worded ‘media clause,’ the Internet is protected because it constitutes an important tool for the exercise of the right to freedom of expression.\textsuperscript{64}

Though the freedom of expression is considered a preferred right, its exercise is not absolute. Even the ICCPR provides the possibility of restricting free speech for reasons of overriding general public interest or interest of others,\textsuperscript{65} thereby circumscribing the legal ambit of individual freedom.\textsuperscript{66} Restrictions on speech necessarily include limitations to the medium where such right is exercised.\textsuperscript{67}

\textbf{(B) \hspace{1cm} \textsc{Online Intermediaries}}

Internet intermediaries are privately owned websites, servers and routers\textsuperscript{68} which provide a free and virtual soapbox from which one may regale the public.\textsuperscript{69} All online communication happens through them. Similar to offline intermediaries, like book stores and mail carriers, it is near impossible for online intermediaries to screen the deluge of speech reaching them.

Even before the rise of e-commerce, internet intermediaries were already accused of defamation, copyright infringement, obscenity and indecency issues,\textsuperscript{70} but unlike traditional publishers, they generally

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\textsuperscript{63} UN Human Rights Council Resolution A/HR/20/L.13, 29 June 2012.
\textsuperscript{64} General Comment 34 supra n2, ¶15; \textit{Times Newspaper Ltd v United Kingdom}, supra n11.
\textsuperscript{65} Article 19(3), ICCPR.
\textsuperscript{67} Supra n62.
\textsuperscript{68} David S. Ardia, supra n46.
have a limited degree of knowledge about the data they transmit or store.

Despite this, they remain attractive targets for legal claims, as they are seen as the most effective point of control\(^{71}\) over Internet-related misconduct.\(^{72}\) Netizens have a lesser degree of control over content circulated online\(^{73}\) because the speed of communication\(^{74}\) allows dissemination of data in pursuit of goals that may differ from those originally intended by the user.\(^{75}\) Imposing liability on intermediaries recognizes the commercial interests they have in content hosting and distribution,\(^{76}\) and targeting the distribution network becomes the most strategic method of law enforcement.\(^{77}\)

Further, the anonymous nature of the Internet\(^{78}\) blurs the line between sender and receiver.\(^{79}\) Coupled with the permanent nature of online communication,\(^{80}\) human rights violations follows the victims to all corners of the web.\(^{81}\) It lends credence to the adage, “the Internet is forever.” By extension, any harm found online continues in perpetuity, haunting victims wherever they may be.


\(^{74}\) *Delfi AS v Estonia* App No 64569/09 (16 June 2015) ¶133.

\(^{75}\) ANDREW CHADWICK AND PHILIP N. HOWARD, *ROUTLEDGE HANDBOOK OF INTERNET POLITICS* (2010) 7

\(^{76}\) *Delfi AS v Estonia* App No 64569/09 (16 June 2015) ¶126


\(^{79}\) *American Civil Liberties Union v Reno* (ED Pa 1996) 929 F Supp 824, 843, 883.

\(^{80}\) Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace* 20 Colum J Gender & L 224, 245 (2011).

\(^{81}\) Sarah Bloom, *No Vengeance for ‘Revenge Porn’ Victims: Unravelling Why This Latest Female-Centric, Intimate-Partner Offense is Still Legal, and Why We Should Criminalize It* 42 Fordham Urb LJ 233 (2014).
REGIMES OF INTERMEDIARY LIABILITY

The Recommendation of the Committee of Ministers to the Member States of the Council of Europe discusses a “differentiated and graduated approach” to intermediaries. It requires that each actor whose services are identified as media or as an intermediary benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection.82

Different intermediaries exist in the digital world. They are ISPs, payment systems, search engines, auction sites, social networking sites and other platforms and application providers that offer infrastructure necessary for online activities.83

Current literature makes a distinction between active and passive intermediaries. The differentiation is important since each type of intermediary carries with it a certain set of rules regarding liability or immunity therefrom. When an intermediary does not alter the integrity of the information contained in the transmission, then it should properly be characterized as passive84, otherwise it is active.

States worldwide have enacted speech laws which govern the treatment of intermediaries. Liability is usually accompanied with an injunction to take down a particular unlawful content85, however, State practice is not uniform.

In the United States, for example, intermediaries are held liable only if they exercise editorial control over the contents of the website.86

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82 Appendix to Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new motion media (21 September 2011) ¶47.
85 Platform “Ärzte für das Leben” v Austria, App no 10126/82, A/139 (ECtHR, 21 June 1998), 401.
The Communications Defense Act (CDA) provides a safe harbor for intermediaries evolving from the system where intermediaries were automatically held liable for unlawful content if they hold out to the public that they control the websites’ contents. Under the Safe Harbor Model, intermediaries cannot be held liable if they are mere “distributors”. Unless they played a significant role in the creation or development of the content, they are found free from any liability.

Although seemingly ideal, the shield under the CDA has been abused to become a vacuum where Internet-based misconduct can thrive. Take for instance the case of Barnes v Yahoo!, where the immunity provision granted to Yahoo! as a neutral webhost made it impossible for a victim of revenge porn to compel the removal of her intimate photos uploaded by a former lover without her consent.

The European Union takes a similar approach to the CDA. Under the e-Commerce Directive, intermediaries whose role is “merely technical, automatic and passive” are protected from liability, save for those that play “an active role of such kind as to give knowledge of, or control over, the data stored.”

However, even that model has potential dire consequences. If liability is triggered by mere notice or is made contingent on the content’s takedown, intermediaries will have strong incentives to overcompensate and trade-off the possibility of censoring their user’s legitimate expression for the assurance of completely avoiding liability.

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87 Johnson v. Arden, 614 F.3d 785, 792 (8th Cir. 2010); Nemet Chevrolet, Ltd v. ConsumerAffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009); Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008); Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

88 Stratton Oakmont, Inc. v. Prodigy supra n88.

89 Michael L. Rustard & Thomas H. Koenig, Rebooting Cybertort Law, 80 WASH. L. REV. 335, 364 (2005), Johnson v Arden supra n89; Nemet Chevrolet, Ltd. v ConsumerAffairs.com, Inc supra n89; Doe v MySpace, Inc., supra n89; Chicago Lawyers’ Comm. For Civil Rights Under Law, Inc. v Craigslist, Inc. supra n90.

90 Barnes v Yahoo!, Inc., (9th Cir., 2009) 570 F.3d 1096.

91 Delfi AS v. Estonia supra n23, ¶43; Case C-236/08, Google France SARL v. Louis Vuitton Malletier SA, PP 113-14, 121 (Mar. 23, 2010).
altogether. More often that not, intermediaries would simply take down content upon receipt of a complaint by a user in due part to their “fragile commitment to the speech that they facilitate.”

This liberal approach taken by the US and Europe exists on one end of the spectrum, the opposite of which is occupied by States like Thailand and China where the presence of the illegal content on the website ipso facto makes the intermediary liable. This flows from the premise that intermediaries are expected to regulate content submitted by third parties.

This Blanket Approach, although criticized by modern democratic States, nevertheless continues to remain in force owing to what Joan Barata of the Organization for Security and Co-operation in Europe (“OSCE”) calls the “nationalization of human rights.” The danger in this rigid approach lies in its repressing effect. Scholars believe that intermediaries should not be made to assess the legality of the content themselves, but rather have the liability hinge on failure to act on

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94 Seth Kreimer at supra n26.


98 Id.

99 Joan Barata, NATIONAL AND INTERNATIONAL LEGAL STANDARDS, TECHNOLOGY AND SOCIAL CONTEXTS, 10th ANNIVERSARY CONFERENCE, PRICE MEDIA LAW CONFERENCE (2017).

knowledge of content judged unlawful by an external authority.\textsuperscript{101} Any decision made by intermediaries on the legality or illegality of content raises concerns on the protection of freedom of expression. Intermediaries must be neutral implementers of decisions, not decision makers themselves.\textsuperscript{102}

(C) \textbf{CASE LAW ON INTERMEDIARY LIABILITY}

In June 2008, eBay was found liable by the French Civil Court of Troyes for the sale of a counterfeited luxury bag.\textsuperscript{103} Although eBay was not actively involved in the transaction, the court held it liable because it found eBay’s efforts to suppress counterfeit insufficient. eBay was ordered to pay €20,000 in damages. A month later, the Court of Brussels had a contrary ruling. It found eBay’s efforts to be sufficient, holding that the company could not be required to actively monitor the auctions on its site.\textsuperscript{104}

Despite eBay’s claim that it had no sifting mechanism to effectively filter ads which infringe distribution agreements, the Commercial Court of Paris ordered eBay to remove from its systems all ads relating to the Louis Vuitton’s perfumes under pain of a daily penalty worth €50,000.\textsuperscript{105}

While the eBay cases concerned infringement of intellectual property, they show the temperamental nature of assessing intermediary liability. It is interesting to note that the eBay cases presented were decided by European courts where the e-Commerce Directive applies.

\textsuperscript{103} Hermès International v eBay, Tribunal de grande instance de Troyes (4 June 2008) no. 06/02604.
THE YAHOO! CASES: FRENCH INTERIM ORDER, AND AMERICAN DECLARATORY RELIEF

Perhaps the most controversial ruling involving intermediary liability and jurisdictional issues are the Yahoo! cases.\(^{106}\)

Because denying the Holocaust is illegal in France, advocacy groups UEJF and LICRA filed a case against Yahoo! and Yahoo! France for exhibiting Nazi objects for purposes of sale.\(^{107}\) According to UEJF and LICRA, Yahoo! violated the law when it made accessible to all French Internet users the auctions-page of Yahoo.com where thousands of Nazi objects were being offered. UEJF claimed that by hosting anti-Semitic literature on its site, Yahoo! and Yahoo! France promoted anti-Semitism in written form.

On May 2002, the French court issued an *interim* order for Yahoo! to restrict access to the Nazi artifact auction site and to all sites which may constitute Nazism apology or negativism. It was required “to cease all hosting and availability in the territory (of France) from the ‘Yahoo.com’ site of messages, images and text relating to Nazi objects, relics, insignia, emblems and flags, or which evoke Nazism”, and of “Web pages displaying text, extracts, or quotes from ‘Mein Kampf’ and the ‘(Protocols of Zion)’” at two specified Internet addresses. The order further required Yahoo! France to post a warning on fr.yahoo.com that viewing the site subjects the user to penalties. The order carried with it a penalty of €100,000 per day of delay.

Yahoo! argued that since their services were directed towards users in the United States, the “*coercive measures*” taken by France would violate the First Amendment of the United States Constitution which guarantees to every citizen the freedom of opinion and expression. The order of the court, according to Yahoo!, amounted to prior restraint on free speech, and should therefore be held unconstitutional.

\(^{106}\) *Union des Étudiants Juifs et La Ligue Contre le Racisme et l’Antisémistisme v. Yahoo!* supra n35.

\(^{107}\) Article 24 bis, 29 July 1881 Act.
Despite its arguments, Yahoo! voluntarily changed its policy to comply with the order of the court. The changes made by Yahoo! were taken by the French court as “substantial compliance” to the interim order.

Yahoo! however filed for declaratory relief with a court in California. The main discussions of the court related to matters of adjudicative and enforcement jurisdiction of the French tribunal which issued the order. It did not make a definitive ruling on any First Amendment-related concerns:

We are thus uncertain about whether, or in what form, a First Amendment question might be presented to us... There is some possibility that in further restricting access to these French users, Yahoo! might have to restrict access by American users. But this possibility is, at this point, highly speculative. This level of harm is not sufficient to overcome the factual uncertainty bearing on the legal question presented and thereby to render this suit ripe.

As to any monetary liability of Yahoo!, the court in California did not rule on the propriety or validity of the penalty, but merely made its suspicion known that the French court’s order threatening money sanctions will most likely not be enforced in the jurisdiction.

**Delfi AS v Estonia: Liability for User-Generated Comments**

For the first time, the ECtHR was called to rule on the issue of intermediary liability. Notwithstanding the protection of speech under Article 10 of the ECHR, the Grand Chamber of the ECtHR ruled that Delfi should be held liable for user-generated comments.

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109 Delfi AS v Estonia supra n23 ¶111.
Delfi is one of the largest news portals in Estonia, and it publishes up to 330 news articles a day. Delfi’s comment section is notorious for having provocative, sometimes offensive comments published by users who may post anonymously. Delfi does not edit the comments published by its users.

On 24 January 2006, Delfi published an article under the heading “SLK Destroyed Planned Ice Road”. It alleged questionable business practices by SLK, a ferry and shipping company in the area. In a matter of two days, the post had generated 185 comments, which was considered unusually high for Delfi’s online traffic. Twenty of the comments contained personal threats and offensive language against L, a member of the supervisory board of SLK.

Six weeks later, L requested Delfi to take down the 20 offensive comments, and to pay €32,000 as compensation for non-pecuniary damages suffered. On the same day, Delfi removed the comments but refused the claim for damages.

According to the Grand Chamber, given Delfi’s scale, and the notoriety attributable to the comments its posts generate, it was in a position to assess the risks related to its activities. As a large professionally managed commercial internet news portal which publishes news articles of its own and invited its readers to comment on them, to a reasonable degree, the consequences of having a comment environment would have been foreseeable to them.

The comments, as found by the Estonian Supreme Court and adapted by the ECtHR, amounted to hate speech and did not enjoy any protection under international law. Although the users themselves could be found liable under domestic law, because their identification would prove problematic, if not impossible, and given the financial superiority of Delfi over their users, the ECtHR agreed that Delfi should be made liable.

111 Id, ¶15, 117.
112 Id, ¶115.
113 Id, ¶62, 128.
The ECtHR also agreed with the damages assessed by the Estonian court of €3,200 after considering several factors: (1) the corporate standing of Delfi as one of the largest news portal operators in Estonia, (2) the extreme nature of the comments in question, (3) Delfi’s technical capacity to do more because of its awareness of the oftentimes hostile environment of its comments section, (4) the moderate sanctions imposed against Delfi (5) which was based on relevant and sufficient grounds.

Though no person should be made to answer for acts which he did not commit, the court in this case, however, expanded culpability to Delfi using an ‘economic interest test’, and a ‘control test’:

…in the comment environment, the applicant company actively called for comments on the news items appearing on the portal. The number of visits to the applicant company’s portal depended on the number of comments; the revenue earned from advertisements published on the portal, in turn, depended on the number of visits. Thus, the Supreme Court concluded that the applicant company had an economic interest in the posting of comments. In the view of the Supreme Court, the fact that the applicant company was not the writer of the comments did not mean that it had no control over the comment environment. (emphasis supplied)

Granted that Delfi was a news portal, and therefore could be considered an active intermediary, it is important to note that the liability attached not because of the content over which it exercised editorial control, but over comments which were posted by its users.

If the test to determine liability is not a question of whether or not an intermediary interfered with the content, but rather whether it had a commercial interest and control over it, there would be an incentive for neutral webhosts to create prior restraint as it forces
intermediaries to police itself and future content.\textsuperscript{114} This is a form of collateral censorship and violates its users’ freedom of expression.\textsuperscript{115}

**Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary**

After its bold pronouncement in the 2013 \textit{Delfi} case, the ECtHR’s 2016 \textit{MTE} decision was closely watched by the international community. While \textit{Delfi} involved a commercial news portal, \textit{MTE} involved a non-profit organization, Magyar Tartalomzolgáltatók Egyesülete.

\textit{MTE} is a self-regulatory body of Hungarian Internet content providers which monitors the implementation of a professional code of Internet content providing. Index, on the other hand, is a company which owns a major news portal in Hungary.\textsuperscript{116}

Both \textit{MTE} and Index had comment sections in their portals, but comments could only be posted by users after registration. Neither \textit{MTE} nor Index edited or moderated the comments. Any reader, however, may notify them of any comment they wish to be removed under a notice-and-take-down mechanism.\textsuperscript{117}

On 5 February 2010, \textit{MTE} published an opinion piece entitled “Another unethical commercial conduct on the net” concerning the allegedly unethical practices of two real estate management websites.\textsuperscript{118} Index picked up the article, re-publishing its full text, along with its own opinion on the matter. Both articles generated comments, including offensive sentiments from users.\textsuperscript{119}

\begin{enumerate}
\item \textit{MTE v Hungary} supra n24, ¶5.
\item \textit{Id}, ¶7-10.
\item \textit{Id}, ¶11.
\item \textit{Id}, ¶13.
\end{enumerate}
The company operating the beleaguered websites filed a civil action against MTE and Index for besmirching its good reputation with the allegedly false and offensive article, and the subsequent comments. Upon learning of the impending court action, both MTE and Index removed the impugned comments immediately. They argued that as intermediaries, they could not be held liable for the comments generated by their users. The Regional Court found the comments offensive, insulting, humiliating and beyond limits of the freedom of expression. The opinion itself, on the other hand, was found lawful as it had not exceeded the acceptable level of criticism.

The parties appealed the decision before the Budapest Court of Appeal, which upheld the decision of the lower court and ordered MTE and Index to pay 5,000 Hungarian forints. The same ruling was taken by the Kúria.

The ECtHR reviewed the context of the comments and found that they were made against the backdrop of an ongoing matter of public interest since the article which triggered them concerned the injurious and misleading business practice of websites. At the time MTE published the opinion piece, numerous complaints had already been lodged before consumer protection agencies. While the court noted that the comments were offensive, they did not fall outside the protection of freedom of expression.

The court further ruled that providing a comments platform for users to exercise their freedom of expression was a journalistic activity of a particular nature. MTE and Index could not be found liable for the comments since they took measures to prevent defamatory comments and they had take-down systems in place. According to the ECtHR, the real estate management websites could not claim any commercial

120 Id, ¶12, 14, 15.
121 Id, ¶16.
122 Id, ¶17.
123 Id, ¶18-21.
124 Id, ¶72-75.
125 Id, ¶76.
126 Id, ¶79.
127 Id, ¶8, 81, 91.
reputational damage because the opinion piece originally published by MTE was about a juridical person. As such, it does not suffer repercussions on one’s dignity which would have been suffered had the article been about a natural person.\textsuperscript{128}

The court made a nuanced interpretation of intermediary liability in \textit{MTE}. Contemporaneity with legitimate public concerns, context, the object of the expression, as well as the nature of the speech were of particular importance.

Taken with the doctrinal pronouncements in \textit{Delfi}, it would appear that while there may be several factors that courts may use as a yardstick to determine the propriety of imposing liability, ultimately it is a question of accountability. Stated differently, when intermediaries provide a particular service, they must take preemptive measures to ensure that no rights are violated. They may not exercise rights without expecting to comply with concomitant obligations.

This analysis finds further support under the UN Guiding Principles.

\textbf{(D) UNITED NATIONS FRAMEWORK ON BUSINESS AND HUMAN RIGHTS}

The development, as well as the application of technology, should be compatible with respect for individual rights.\textsuperscript{129} There is a struggle in determining the role corporations play in the international legal framework with respect to human rights violations.\textsuperscript{130} This is because the international community is still in the early stages of adapting the human rights regime in providing for a more effective

\textsuperscript{128} \textit{Id}, ¶84.
and responsive approach to protect individuals against corporate-related human rights violations.\textsuperscript{131}

The Human Rights Council recognizes that transnational corporations and related business enterprises have a part to fill in the exercise of human rights\textsuperscript{132} through investment, employment creation and stimulation of economic growth.\textsuperscript{133} Because of their capacity to foster economic development and technological wealth, they are also capable of causing adverse impacts on human rights.\textsuperscript{134}

Finding a regime of liability to hold corporations accountable under international law is challenging for many reasons.\textsuperscript{135} For one, many human rights violations happen in government systems that are either weak or non-functioning. Attempts to hold corporations liable become largely unworkable.\textsuperscript{136} There is also weak national legislation on the matter of corporate responsibility, rendering ineffective any mitigation efforts against the adverse effects of globalization.\textsuperscript{137}

A transnational approach often fails due to jurisdictional issues\textsuperscript{138}, as reflected in the Yahoo! cases.\textsuperscript{139} The rise of transnational


\textsuperscript{134} UN General Assembly, Draft Resolution of Bolivia, Cuba, Ecuador, South Africa and Venezuela, UN Doc A/HRC/26/L.22/Rev.1, 24 June 2014.


\textsuperscript{136} Id: Human Rights Council Resolution 8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporation and other business enterprises, A/HRC/RES.8/7, 18 June 2008.

\textsuperscript{137} UN General Assembly, Draft Resolution of Andorra, Argentina, Australia, Bulgaria, Colombia, France, Georgia, Ghana, Greece, Guatemala, Iceland, India, Lebanon, Liechtenstein, Mexico, New Zealand, Norway, Russian Federation, Serbia, the former Yugoslav Republic of Macedonia, and Turkey, UN Doc A/HRC/26/L.1, 23 June 2014.

\textsuperscript{138} April 2008 Report supra n126.

\textsuperscript{139} See discussion in Part D.1.
corporations that are subject to the laws of many jurisdictions has created a governance gap that international law has not yet filled.\textsuperscript{140} Relatedly, companies often have peculiar legal corporate infrastructures. Their capacity to limit liabilities through setting up subsidiaries make it difficult to prosecute.\textsuperscript{141}

Ironically, another reason attempts to hold corporations liable at an international level is thwarted by the framework of international human rights law itself, since the accountability mechanism was crafted by, and apply primarily to States.\textsuperscript{142}

**THE PROTECT, RESPECT REMEDY FRAMEWORK**

In 2000, the UN Global Compact was launched.\textsuperscript{143} In essence, it encourages businesses to honor the *Ten Principles* surrounding human rights issues. Then Secretary-General Kofi Annan challenged the international community, particularly the business sector\textsuperscript{144}, to take more proactive steps to ensure human rights abuses within its sphere of influence were being addressed.\textsuperscript{145} The initiative was criticized as it signaled a seismic shift from the previous stance of the UN against transnational corporations.\textsuperscript{146}

A staunch supporter\textsuperscript{147}, Dr. John Ruggie was appointed as Special Representative of the UN Secretary-General on Business and

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\textsuperscript{140} Supra n133.
\textsuperscript{141} Jena Martin Amerson, supra n130.
\textsuperscript{142} Jena Martin Amerson, supra n47.
\textsuperscript{143} Jena Martin Amerson, supra n136; See generally UN Global Impact, https://www.unglobalcompact.org.
\textsuperscript{144} UN Secretary-General Kofi Annan’s Address to the World Economic Forum in Davos (1 February 1999), http://www.un.org/News/ossg/sg/stories/statements_search_full.asp?statD=22.
\textsuperscript{146} Editorial, Taming Globalization, WASH. POST, 7 August 2000, at A20; Alan Cowell, Annan Fears Backlash over Global Crisis, N.Y. TIMES, 1 February 1999, at A14.
\textsuperscript{147} Robert A. Senser, Big Business and the UN: Towards New Framework for Corporate Responsibility, A.M. CATH. WKLY., 1 December 2008.
Human Rights\textsuperscript{148} after the UN Commission on Human Rights adopted a resolution asking Annan to create the position.\textsuperscript{149}

On 7 April 2008, Dr. Ruggie submitted his second official report entitled “\textit{Protect, Respect and Remedy, a Framework for Business and Human Rights}\textsuperscript{150}” which was approved and unanimously endorsed by the United Nations on 18 June 2008.\textsuperscript{151} By 2011, the UN Human Rights Council unanimously adopted the Guiding Principles implementing the United Nations ‘Protect, Respect, Remedy’ Framework.\textsuperscript{152}

While the Guiding Principles partake the nature of soft law, and is therefore non-binding,\textsuperscript{153} it evinces a progressive development of international law.

A consensus in the UNGA either reflect the emergence of a customary norm or generate new ones.\textsuperscript{154} The ICJ has taken the same tenor in its \textit{Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons}.\textsuperscript{155} It has even categorically cited UNGA resolutions in its judgment in \textit{Nicaragua},\textsuperscript{156} \textit{Western Sahara}\textsuperscript{157} and \textit{Namibia}.\textsuperscript{158}

\begin{thebibliography}{99}
\bibitem{153} supra n129.
\bibitem{155} \textit{Advisory Opinion Concerning the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion by the General Assembly of the United Nations)}, ICJ, 8 July 1996.
\bibitem{156} \textit{Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)}; Merits, ICJ, 27 June 1986.
\bibitem{157} \textit{Western Sahara Advisory Opinion}, International Court of Justice, 16 October 1975.
\bibitem{158} \textit{ADEMOLA ABASS, COMPLETE INTERNATIONAL LAW} 62 (2012).
\end{thebibliography}
In the *Nuclear Weapons Advisory Opinion*, the Court observed that:

General Assembly Resolutions, even if they are not binding may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule of law or the emergence of an *opinio juris*.\(^{159}\)

Under the premise that States adhere to the principles it declares,\(^{160}\) and considering the nature of the UNGA as an aggregation of all UN member states, UNGA resolutions are deemed to carry an inherent authority as normative standards.\(^{161}\)

*Mutatis mutandis*, the resolutions of the Human Rights Council should be given great weight as it is the byproduct of the UNGA, and its mandate as the chief human rights body of the UN is the promotion of protection of human rights.\(^{162}\)

The Guiding Principles’ normative contribution does not produce new legal obligations, but merely expounds on existing standards and sound business practices.

Principle 11 of the Guiding Principles states that:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

According to the Commentary\(^{163}\) to the principle, businesses have a responsibility to respect human rights, irrespective of the State’s abilities or willingness to fulfil their own human rights obligations.

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\(^{159}\) *Advisory Opinion Concerning the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion by the General Assembly of the United Nations)*, ICJ, 8 July 1996, ¶70.


\(^{161}\) *Id.*

\(^{162}\) UNGA Resolution 60/251; A/60/L/48, 15 March 2006.

\(^{163}\) Supra n17 at 11.
Corporate responsibility to promote and protect human rights is a universal standard that is expected for all business undertakings. That responsibility should not be based on any State policy, and must be pursued by corporation independent of a State’s compliance with its international obligations.

Although corporate acts could potentially affect the entire spectrum of internationally recognized human rights, and hence corporate actors must seek to protect all those rights, particular attention must be made as regards those rights at greater risk by the very nature of industry.

For intermediaries, no right is greater magnified than that of the freedom of expression. Thus, intermediaries must seek to protect that freedom, independent of the State’s inability or willingness to do so. While they operate within the State, they are not organs of the State, and in no circumstance may intermediaries take on censorship on the State’s behalf.

There is no silver bullet solution to address the multi-faceted challenges of reconciling business interests and human rights, particularly in a very fluid online environment, operational and cultural changes are necessary.
PART III
CONCLUSION AND RECOMMENDATIONS

The subject of intermediary liability will only get more complex with the continued evolution of the Internet. The variety and significance of so much online activity, and its impacts on pressing domestic issues such as crime, national security, economy and individual liberty, have necessarily compelled States to increase engagement with matters outside their traditional spheres of legal authority. Put simply, because of the nature of the Internet, States are faced with the need to regulate conduct in contexts where the repercussions may cause a chilling effect to the freedom of speech worldwide.

Just a few months ago, as of this writing, the Supreme Court of Canada issued a worldwide injunction against Google\textsuperscript{164}, ordering the passive intermediary to de-list a particular website worldwide. Despite Google’s argument that such a wide-reaching order may trample on the rights of other third parties to receive information, the Court upheld the decision of the Supreme Court of British Columbia, reasoning that anything less than a global injunction would render the order ineffective.

With the different rulings made by courts around the world on the proper regime of liability for intermediaries, there appears to be no difference regarding the rights and obligations of both active and passive intermediaries. Both have rights to publish, and impart information, and both have obligations to protect the freedom of speech.

expression. They foster human rights and to some extent, have the ability to prevent harms.

While domestic frameworks, such as the e-Commerce Directive, limit liability to active intermediaries, the contrary rulings in the eBay cases show that all intermediaries are expected to, to a certain degree, curate the content it publishes, or at the very least, install safety mechanisms so their infrastructures are not abused in order to violate individual liberties.

As the new media, intermediaries have the ultimate responsibility of imparting information and ideas on matters of public interest and concern. They must be made available for individuals to be able to comment on public issues without censorship. No State should use or force intermediaries to undertake censorship on its behalf.

An internet intermediary risks violating its users’ right to freedom of expression whenever it is required to take down, and thus censor, its users’ content. Fear of future liability may lead intermediaries to err on the side of caution and take down materials which may be perfectly legitimate and lawful resulting to self-censorship. For this reason, a hybrid of the Safe Harbor approach seems to be the most prudent method of imposing liability even on

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165 Ahmet Yildirim v Turkey, no, 3111/10, ¶48, ECtHR 2012, Times Newspaper Ltd. (nos. 1 and 2) v the United Kingdom, supra n11; UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative of Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information Joint Declaration on Freedom of Expression and the Internet, 1 June 2011.


168 UN Doc CCPR/C/21/Rev1/Add7; Charter of Fundamental Rights of the EU (1 December 2009) 20 2012/C 326/02 art 11.

169 Supra n60 at 47.

170 Supra, n60.

171 A. 19 2013 cl 2013 report of the UN Special Rapporteur on the right to freedom of expression, op cit., para. 42; Response to EU consultation on the e-Commerce Directive.

172 Supra n43.
passive intermediaries. Intermediaries must be absolved of any liability if it had provided for safeguards in the form of disclaimers, and take-down mechanisms consistent with the standards laid down in MTE.

Intermediaries should not be made to assess the lawfulness of content, for that is a judicial question best resolved by a court of competent jurisdiction. Passive intermediaries should remain neutral platforms in this respect. Only upon refusal to comply with a valid order of the courts should they be found liable.
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