

A Fly in the Ointment; Undue Liability on E-commerce Platforms

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Abstract

Trade is now largely internet-centric, meaning the internet is the medium through which most commercial transactions occur in today's (information) economy. As e-commerce uptake has accelerated globally, it has opened new possibilities for buyers and sellers alike, helping them integrate into a global marketplace and promoting innovations across different business lines. E-commerce is considered one of the main drivers of recent economic and social developments. In Sri Lanka, e-commerce is emerging and in its infancy. The industry is expected to operate within the margin of the law and be self-regulated. In the absence of a separate law for e-commerce, e-commerce platforms (e-commerce marketplaces) meaning, digital storefronts that connect sellers and customers to transact online, are exposed to a higher risk of being unreasonably penalized by applying the existing laws without mitigation. On the other hand, the platform users are left in a desperate situation with no remedy for harm caused. However, there are many developments globally around e-commerce and platform liability. Therefore, this article explores the responses of advanced jurisdictions such as China, the EU, and the USA regarding platform liability. This concludes that facilitating a business-enabled environment with holistic and innovative strategies that are aligned with the social and economic status of the country with a business-friendly legal landscape that matches the reality of the industry is imperative.

Keywords: E-Commerce, Platform liability; Platform law; Policy consideration; Law reforms

Introduction

'Internet' is not a development of the business world. It is a result of big science, military research, and libertarian culture¹, but with the explosion of the World Wide Web (revolution of dot.com) in the 1990s, this technology-driven commerce known as "e-

commerce" originated. E-commerce is said to be "the retail phenomenon of the 21st century"². However, while this commerce in cyberspace, delivers unprecedented opportunities for consumers, businesses, and the economy, it poses many challenges. This

¹ M Castells *The Internet Galaxy: Reflections on the Internet, Business, and Society* (1st Edn, Oxford University Press 2001) 17.

² I J Lloyd *Information Technology Law* (9th edn Oxford University Press 2020) 393.

reminds Barlow's statement in his Declaration of Independence of Cyberspace that says "Cyberspace which is an illusion that has no physical presence gives rise to unique and unusual circumstances, rights, privileges, and relationships that are not adequately dealt with by traditional law"³.

Digital platforms are the emblematic form of organizations in this digital economy, which is a new legal category with its own characteristics. It does not fall into the conventional categories. They use information communication technology to interact with users, collect and use data, and benefit from the network effect. European Commission's public consultation on platform regulation defines a platform as an undertaking operating in two (or multi)-sided markets, which uses the internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups⁴. These platforms are generally considered intermediaries and thus enjoy legal immunity in some jurisdictions, which is, however, currently being criticized by many as an outdated concept. Nevertheless, some argue that stringent laws will hinder the industry's growth and favors autonomy. Still, some suggest a moderate approach and state that 'platform liability', should be shifted to 'platform responsibility'⁵.

Platform liability is a relatively new concept in Sri Lanka. Sri Lanka has passed certain legislation to validate e-commerce, but legal challenges in the industry remain untouched. There is a literature and empirical data gap in Sri Lanka in this field of study. Most of the existing studies related to e-commerce have focused only on consumer rights in the digital market and in the field of e-contracts and e-signature. Therefore, there is a necessity to conduct in-depth and systematic studies in the law related to platform liability for the convenience of policymakers. The end goal of this deliberation is to evaluate the gaps in laws in Sri Lanka, enhance a greater understanding of recent development in the law regime related to platform liability, and suggest policy considerations that would provide an impetus for forming an elaborated strategy for Sri Lanka to ensure its legal readiness for the e-commerce industry.

This study focuses only on platform liability that connects parties to transact online in goods and services such as Amazon.com, eBay, and AliExpress and excludes the service subscription platforms such as Uber Taxi and Airbnb, and content-based platforms such as Facebook, Twitter, Google, and Instagram. For this, contemporary developments in advanced jurisdictions were comparatively analyzed by way of a library-based critical review of the literature. Primary and secondary legal sources were extensively used.

³ A David, *The law of e-commerce* (1st Edn, Cambridge University Press 2009) 2.

⁴ European Commission, Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy (2015) 4.

⁵ F Giancarlo, 'Reforming Intermediary Liability in The Platform Economy: A European Digital Single Market Strategy' (2017) *Northwestern University Law Review* Vol 112, 19-46.

E-Commerce and Platform Law: Sri Lanka

The primary legislation applicable to e-commerce in Sri Lanka is Electronic Transactions Act No. 2006 (ETA). This was first enacted in 2006 based on UNCITRAL Model Law on electronic commerce (1996) and UNCITRAL Model Law on electronic signature (2001) which came into effect on 1st October 2017. ETA was further amended by Act No. 25 of 2017 recognizing the e-commerce and e-business providers and ensuring the validity of e-contracts⁶. The primary objectives of the ETA are the facilitation of domestic and international electronic commerce; encouraging the use of electronic commerce as a reliable mode of commerce, facilitation of electronic filings with government authorities and promoting efficient government service; promoting public confidence in the authenticity, integrity, and reliability of data, messages, electronic documents, electronic records or other communications and implementation of the provisions of United Nations Convention on the use of Electronic Communications in International contracts (however subject to certain restrictions)⁷ ETA applies to all electronic commercial transactions, excluding few specified categories identified in ETA⁸ and recognizes electronic communications and document⁹, e-signature¹⁰, and electronic contracts¹¹ and thereby validate e-commerce transactions.

Other related legislations are, Evidence Special Provisions Act No. 14 of 1995, Information and Technology Act No. 27 of 2003, Payment and Settlement Systems Act No. 28 of 2005, Payment Devices Frauds Act No 30 of 2006, Computer Crimes Act of No 24 of 2007, Intellectual Property Act No. 36 of 2003 (IP Act) and Personal Data Protection Act No. 7 of 2022 (PDP). The PDP is also long-awaited legislation. It addresses challenges with regard to the processing of personal data in the sphere of a digital platform where the data flows are highly induced.

Legal Recognition for E-Commerce Platforms

Existing laws provide greater certainty to e-commerce businesses in Sri Lanka but do not adequately address the field of platform liability and/or provide a distinct recognition for e-commerce platforms as intermediary service providers. ‘Service provider’ is defined under section 38 of the Computer Crime Act No. 24 of 2007 as “a) a public or private entity which provides the ability for its customers to communicate by means of a computer system; and b) any other entity that processes or stores computer data or information on behalf of that entity or its customers”. Electronic Transactions Act of 19 of 2006 provides two different definitions for ‘intermediaries’ and ‘network service providers’. Whereas the network ‘intermediary’ means ‘who acts as a service

⁶ SDB Abeyarathne, *Information & Communication Technology Law Lawyers handbook* (1st Edn, Author for ICT Lawyers Guild 2021).

⁷ Electronic Transactions Act, No 19 of 2006, s2.

⁸ Electronic Transactions Act, No 19 of 2006, s23.

⁹ Electronic Transactions Act, No 19 of 2006, s3,4,5,6.

¹⁰ Electronic Transactions Act, No 19 of 2006, s7.

¹¹ Electronic Transactions Act, No 19 of 2006, s11-17.

provider for another person in relation to sending, receiving, storing or processing of electronic communications or related services, 'network service provider' means who owns, possesses, operates, manages or controls a public switched network or provides telecommunication services. Still, no distinct recognition has been given for platforms such as e-commerce-marketplaces in any of the laws that exist currently. Besides, no specific and adequate liability exemptions such as 'mere conduit' are granted.

Platform Liability for Third-Party Intellectual Property Rights Violations

At present, any liability of e-commerce platforms is to be determined under the provisions of the IP Act. For example, a 'pirated copyright good' is taken into consideration. 'Pirated copyright goods' are defined in the IP Act as 'any goods which are made without the consent of the copyright holder or person duly authorized by the copyright holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right by the IP Act. These kinds of violations are inclined to happen more often in the e-commerce environment. As per IP Act, any 'reproduction' of such work without the consent of the right holder is a violation¹², where the reproduction is defined in the IP Act *inter alia* as reproduction includes

making one or more copies of a work including any permanent or temporary storage of a work in electronic means¹³. Therefore, if a 'pirated copyright good' is listed for sale by a third-party vendor on an e-commerce platform, it is likely that the platform could be held responsible unfairly.

Similarly, in case of trademark violations, any person who sells or exposes for sale, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged mark or false trade description is applied, may be guilty of an offense, unless it can be proved or otherwise demonstrated that it had no reason to suspect the genuineness of the mark and that it has taken all reasonable precautions against committing the offense and that otherwise it had at all times acted innocently¹⁴. Online-marketplaces host and expose thousands and millions of goods for sale once uploaded by third-party vendors and also may keep them in their possession if the customers' orders are fulfilled by the platform as a service to its users. Therefore, in line with the given provisions, it can be argued that e-commerce platforms are liable for infringements that are not attributable to them.

In such circumstances, it can however be argued that the liability upon intermediaries is contributory or secondary within the ambit of law where the liability levels would be different, yet the onus will be upon the platform to prove that it had no knowledge that the conduct is wrongful¹⁵.

¹² Intellectual Property Act No. 25 of 1991, S 9.

¹³ Intellectual Property Act No. 25 of 1991, S 5.

¹⁴ Intellectual Property Act No. 25 of 1991, S 186 (2).

¹⁵ F Fernando, 'The Liability of Internet Service Providers for Copyright Infringement in Sri Lanka: A Comparative Analysis' (2022) South Centre.

Platform Liability and Consumer Rights

Consumer Affairs Act of 19 of 2003 (CAA) was enacted with a broader sense to control the economy¹⁶ but was later amended to address consumer issues. However, it is true to mention that by this legislation consumers in Sri Lanka are not protected in the real sense in the digital market. In this context either e-commerce platforms are left without any liability leaving aggrieved consumers in a desperate situation or online marketplaces are forced to be unfairly responsible for actions that are not attributable to them. It is because CAA only deals with manufacturers, importers, and traders and does not recognize intermediaries such as e-commerce platforms. Trader as defined under CAA as a person who (a) sells or supplies goods wholesale to other persons ; (b) sells or supplies goods at retail rates to consumers ; (c) imports goods for the purpose of sale or supply ; (d) provides services for a consideration.¹⁷ CAA has no provision to deal with an e-commerce platform, which is neither the manufacturer, trader nor importer when the sale is effected by a third-party vendor as a “Trader” through an e-commerce marketplace. In this context, two possible scenarios exist; either platform would be wrongfully construed as a trader and held unreasonably responsible for actions that are not attributable to them, or the aggrieved consumers would be left with no remedy.

Concerning the second scenario mentioned, it is, however, right to expect that platform to be held liable for consumer rights. Before e-commerce, it was assured that the information was transparent in the real world, but the platform industry has transformed the same. A consumer who intends to purchase from an e-commerce market is unsure whom he is dealing with. Is it the platform? A local vendor? Foreign seller? or a Fly-by-night cheap seller?¹⁸ Therefore, it is argued that fiduciary law and platform power justify the platform’s liability. That is, the users connect and transact via e-commerce platforms based on trust, which in turn entitles them to the fiduciary responsibilities and duty of care from the platform. Any such responsibility should not be just ethical, or moral but should be a legal responsibility. In the absence of a law, the parties will struggle with judge-made laws such as vicarious liability, leaving everyone in an uncertain situation. Undoubtedly, this platform business is a new legal category with its own characteristics. This conundrum will not be resolved until the recognition of platform as a distinct legal category is incorporated into the laws.

A Global Perspective on Platform Liability

Platform’s Liability for Defective Products

¹⁶ Thanuja Rodrigo, 'Enhancing Sri Lankan Consumer Protection through Consumer Guarantees and Strict Liability for Defective Goods — Lessons from the Australian Model of Consumer Law' (22 July 2022) https://research-repository.griffith.edu.au/bitstream/handle/10072/57242/90867_1.pdf%3Bsequence=1 accessed 22 July 2022.

¹⁷ Consumer Affairs Authority Act S75.

¹⁸ Edward J. Janger & Aaron D. Twerski, 'The Heavy Hand of Amazon: A Seller not a Neutral Platform' (2020) 14 Brook. J. Corp. Fin. & Com. L. 259 <https://brooklynworks.brooklaw.edu/bjcfcl/vol14/iss2/3> accessed 20 July 2022.

The E-commerce platform is just the intermediary and is distinct from the third-party vendors selling through the platform. The conundrum is whether the e-commerce platforms be liable for a defective product sold by a third-party vendor. On many occasions, courts have held that Amazon is not the 'seller' within the meaning of respective product liability laws.¹⁹ In this aspect, a remarkable ruling was given by the Court of Appeal in *Oberdorf v. Amazon.com Inc.*²⁰ It has created controversy around the platform's liability. This case was filed by a consumer who bought a dog collar and retractable leash from a third-party vendor on Amazon. During a walk with the dog, the D-ring of the dog collar broke and the leash recollided and hit on *Oberdorf's* eyeglasses leaving her left eye blind. The third-party vendor who sold the product was uncontactable and both *Oberdorf* and Amazon failed to locate the seller. *Oberdorf* sued Amazon for strict product liability, negligence breach of warranty, misrepresentation, and loss of consortium under Pennsylvania law.²¹ The District Court judgment was delivered mainly based on two grounds. Firstly, Court concluded based on previous cases which held that Amazon is not the seller and hence not liable for faulty products sold by third-party vendors on Amazon under the Pennsylvania product liability law.²² Secondly, it was held that under section 230 of the Communication Decency Act²³ Amazon is not liable for third-

party content hosted on its platform. The Court of Appeal viewed otherwise on Amazon augment that it is a mere online marketplace that connects sellers and buyers. The court denied the application of the Pennsylvania Supreme Court decision in *Musser v. Vilsmeier Auction Co, Inc.*²⁴ to support Amazon's argument that it is not the 'seller'. In *Musser's* case, it was a product sold at an auction house where the Court held that the auction house is not a seller and only a market as an agent of the seller. This ruling was based on the policy rationale behind section 402 a of the Second Restatement of Torts²⁵. The court considered the application of the four factors that have been taken into consideration in *Musser's* case, to Amazon.

- a. Was Amazon the only party in the distribution chain available for redress
- b. Whether the imposition of strict liability upon amazon serves as an incentive for product safety
- c. Was it in a better position than a consumer to prevent the circulation of the product
- d. Whether Amazon can distribute the cost of compensation

In answering the above four factors court held that;

Firstly, in the case of an auction house, there is a seller for whom the auction house act as the agent, and a claim can be made against the seller. Amazon also argued that any claim

¹⁹ *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 399–400 (S.D.N.Y. 2018)

²⁰ *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 151 (3d Cir. 2019), 936 F.3d 182 (3d Cir.).

²¹ *Ibid.*

²² *Ibid.*

²³ US Communication Decency Act S230.

²⁴ *Musser v. Vilsmeier Auction Co, Inc* 562 A.2d 279 (Pa. 1989).

²⁵ Second Restatement of Torts S402 (a).

could be traceable to the respective third-party vendor. But Amazon failed to account for that by restricting direct communication between the seller and the customer, being the only party at the forefront to the customer. Under this scenario, it was concluded that third-party vendors could hide behind leaving consumers harmed without any recourse to the third-party vendor. It was further confirmed that Amazon has failed to carry out an adequate due diligence process on the third-party vendors before permitting them to enter the platform. Therefore, the first factor warrants Amazon's strict liability.

Secondly, the court denied Amazon's argument that it does not have any relationship with the manufacturer and distributor similar to the auction house in the case of *Musser*. The Court held that Amazon has significant controlling power over the third-party vendors based on the agreements in place, such as the right to remove the defective products from the platform at its sole discretion, and hence imposing strict liability on Amazon will serve as an incentive. Therefore, the second factor warrants Amazon's strict liability.

Thirdly, the auction house's relationship with a seller is tangential and the auction house is not in a better position to prevent defective product distribution. However, in the case of Amazon, its relationship with a vendor is a potential continuous relationship. Thus, Amazon is well-equipped and positioned to receive reports of defective products upon which the defective products could be

delisted from the marketplace. Further, since Amazon restricts direct communication between the seller and the customer, the vendor is ill-equipped to function the above task. Therefore, the third factor warrants Amazon's strict liability.

Fourthly, the court conclude that in *Musser's* case as well, the auction house was in a position to distribute the compensation, but it will merely provide another remedy for the injured customer but will marginally promote the policy consideration in section 402a. However, in the case of Amazon, it already possesses the right to be indemnified from the third-party vendor in terms of its contractual terms and conditions. Further Amazon can adjust its commission structure based on the risk level posed by the respective third-party vendors. Therefore, the fourth factor warrants Amazon's strict liability.

According, to all four factors evaluated against Amazon. Answering the application of the safe harbor rule under section 230 of DCA²⁶ the Court held that immunity is not applicable as Amazon's role is beyond mere hosting provider.²⁷

This ruling has undoubtedly created a controversy surrounding the platform's liability. When the case is thoroughly analyzed this ruling is based on the acknowledgment of the substantial controlling power of the platforms over their users. It is true that the Court in this case has very well evaluated the factual scope of Amazon; it connects third-party vendors and

²⁶ UD Digital Communication Act, S230.

²⁷ *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 151 (3d Cir. 2019), 936 F.3d 182 (3d Cir.).

buyers to transact in different categories of goods and services; it is not just a mere mediator; it determines the terms of use; it controls the entry and exit of the users; it promotes the platform and the products of the third-party vendors and induces the customers to purchase; it fulfills the orders; represent that the platform is safe and secure. Thus, it controls the user's activities substantially, and the users depend on the platform. Consequently, this ruling has challenged the exact status quo claimed by e-commerce platforms that they are neutral tech-based intermediaries.

In this context, it is worth examining the concept of ruling in the *Oberdorf case* with laws in the EU, in which law for e-commerce has been encapsulated into the legal system to a considerable level. The EU Product Liability Directive²⁸ extends the product liability to 'importers'²⁹ as well as to the 'supplier' if the manufacturer or the distributor cannot be located³⁰. 'Importer' is the person who imported the product directly. Order fulfillment through technical means by a platform would not be construed as an 'importer'. On the other hand, 'Supplier' is in broader meaning the person who supplies the products to the end consumer who is not the producer or the importer. Therefore, it can be argued that the mere facilitation of transactions by technical means by the platforms (as claimed by the platform providers) would not be interpreted as a supplier. As stated in the EU the online platform concept has already been

incorporated into other European legislations. The responsibility of fulfillment service providers is addressed in EU Regulation on market surveillance and compliance. Fulfillment service providers are among the list of entities against whom the enforcement measure can be taken by the authorities³¹. Further the Single Digital Market Strategy (SDMS) enhances the responsibilities of intermediaries related to copyright infringements and other wrongful and illegal content. Further enhancing the SDMS, the EU passed the Digital Market Act (DMA) and Digital Services Act (DSA) amending its e-commerce directive by removing the liability exemptions granted for intermediaries and imposing platform a responsibility and duty of care criterion instead. It further added an excessive liability for very large platforms beyond a value threshold to maintain fair competition and control the market monopoly, and ensure the development of smaller entities with fewer burdens. Further, the EU Model Rules on Online Platforms framed by the European Law Institute suggests that only platforms with a predominance control over users will be held liable for consumers for actions of the suppliers³² and the platform in general, should not have an obligation to monitor the actions of its users.³³

New China E-commerce Law is one of the first comprehensive e-commerce laws. It precisely conceptualizes and distinct different parties to e-commerce. It imposes stronger responsibilities on the online

²⁸ EU Product Liability Directive

²⁹ EU Product Liability Directive

³⁰ EU Product Liability Directive

³¹ EU Regulation on market surveillance and compliance, Art 4(2)(d).

³² EU Model Rules on Online Platforms, Art 20.

³³ EU Model Rules on Online Platforms, Art 8,9.

marketplace with a certain level of liability exemption by taking a sensible approach to platform liability and responsibility. The law ensures the transparency of e-commerce vendors. Anonymity behind the e-commerce veil is no longer allowed. Law has made it mandatory to disclose seller details, legal status, applicable licenses, etc. prominently and accurately through their webpage.³⁴ An unexpected sudden exit from the market is not permitted. Any e-commerce operator who intends to exit the market shall provide prior notice of at least 30 days.³⁵ Consumers' information and selection rights are assured. Deceiving and misleading consumers through any means such as promotions through fictitious sales and making up user reviews is prohibited.³⁶ If any targeted marketing is conducted, the consumers shall be communicated with other options as well for the protection of their interests and rights.³⁷ If any paid listings are provided by platform operators, the same need to be marked as 'advertised'. No bundled offers at default are restricted.³⁸ Personal information and user rights in that regard are ensured.³⁹ A proper refund and return mechanism is guaranteed.⁴⁰ Fair user review systems are mandated.⁴¹ Law ensures a secure electronic payment system in the e-commerce market by setting out minimum standards and imposing a certain level of liability toward electronic means of payment facilitation service providers. Implementation of a guarantee mechanism for products and services induced to the e-commerce market

development is encouraged by the law. It also proposes operators implement fair and impartial online-disputes resolution mechanisms based on the principle of willingness. However, these are left to be developed by open market strategies. Yet, consumer rights are sufficiently protected by mandating minimum measures such as making it compulsory for platform operators to have a convenient and effective compliance and reporting system, and responsibility mediates to ensure resolution in the interest of consumers.

Accordingly, in order to enjoy the liability exemption, the platform operators should adhere to the responsibilities as demanded by law. Article 38 states if the platform operator is aware that any operator on the platform meaning a third-party vendor fails to ensure their sales are performed in compliance with the law and violate the rights of the consumers but so do not take necessary measures to prevent the same, the platform operator will also be jointly and severally liable for such violations. It further extends to strict product liability in terms of applicable law.

³⁴ E-commerce Law of the Republic of China, Art 15.

³⁵ E-commerce Law of the Republic of China, Art 16.

³⁶ E-commerce Law of the Republic of China, Art 17.

³⁷ E-commerce Law of the Republic of China, Art 18.

³⁸ E-commerce Law of the Republic of China, Art 19.

³⁹ E-commerce Law of the Republic of China, Art 23,24.

⁴⁰ E-commerce Law of the Republic of China, Art 21.

⁴¹ E-commerce Law of the Republic of China, Art 39.

Platform Liability for Third-Party Intellectual Property Rights Violations⁴²

“IP is important because the things of value that are traded on the internet must be protected by IP laws and using technological security systems, or else they can be stolen or pirated and whole businesses can be destroyed.” (Ancona 2003). In this context worth remarking on the recital of the Treaty on Copyright and Performances and Phonograms;

“Technological development has multiplied and diversified the vectors for creation, production, and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.”

New laws are encapsulated into laws in some jurisdictions to tackle these challenges. For example, Articles 12 to 14 of the EU e-commerce directive⁴³ consider information service providers (ISP) such as e-commerce platforms as ‘mere conduits’ and grant a liability exception (safe harbor rule), similarly section 230 of the US Communication Decency Act (CDA)⁴⁴ and Digital Millennium Copyrights Act⁴⁵.

“A key provision of that legislation – section 230 – sought to encourage the development of Internet-based services by bestowing on the providers of these services a sweeping immunity from liability for speech undertaken by users of those services – for example, by users who might post to online bulletin boards or other platforms statements that were defamatory or fraudulent. By blocking any claim that would hold the service provider responsible for such legally actionable speech, CDA’s drafters sought to shelter the fledgling Internet sector of the economy from the specter of potentially huge damage claims for activities that the providers themselves had not undertaken, even though they might have been aware of them, and regardless of whether it would have been technologically feasible for the providers to prevent or curtail them.” (Metalitz, 2020)

These aspects are primarily governed in the EU by E-commerce Directive 2000/31 / EC 46 (EC22) and Copy Rights in Information Society Directive. Copy Rights Information Directive provides rightsholders the right to reproduce⁴⁷, the right to communicate to the public,⁴⁸ and the right to distribute⁴⁹. However, a proviso for reproduction is given under Article 5 with liability exemption for intermediaries, yet subject to certain conditions.⁵⁰ Article 12 to 14 of the E-commerce Directive is horizontal

⁴² IPR involved in making e-commerce work is not the subject matter in this section. This means software, systems, designs and so on.

⁴³ EU e-commerce Directive, Art 12-14.

⁴⁴ US Communication Decency Act, S 230.

⁴⁵ US Digital Millennium Copyrights Act.

⁴⁶ V Zhelyazkova ‘E-Commerce and Distance Selling in the European Union’ [International Conference

Knowledge-Based Organization Vol. XXVI No 2 2020] 262-267.

⁴⁷ Article 2

⁴⁸ Article 3

⁴⁹ Article 4

⁵⁰ Article 5

provisions for e-commerce platforms and provide legal immunity. It is directly dealt with liability with no consideration for the ground for liability⁵¹. So, the e-commerce platforms are not liable for the wrong-doing of their users. The rationale behind this protection was that any stringent liability would hamper the development of e-commerce.⁵² EU by implementing the e-commerce directive intended to ensure a well-functioning internal market for digital services, effective removal of illegal content in recognition of fundamental rights, and, an adequate level of information transparency for consumers. Nevertheless, moving on based on changing nature of the industry and the court pronouncements⁵³ on the applications of the e-commerce directive, the EU now has embraced further developments. The Digital Market Act and The Digital Services Act⁵⁴ is the latest development. The immunity granted for intermediaries by articles 12 to 15 of the e-commerce directive has been repealed and the responsibilities and duty of care criterion have been introduced instead.⁵⁵

The China e-commerce law also mandates that platform operators shall implement systems to protect IPR. A simple 'notice to action' mechanism has also been introduced. In this background, the platform operator will only be held liable for infringement of third-party IPR under two circumstances. Firstly,

if the platform operator fails to take the necessary action as stipulated under the 'notice -to action' process upon receipt of notice from the right holder. Secondly, if the platform operator fails to take necessary action where the platform operator is aware (should be aware) of any such infringement meaning if the platform operator fails to ensure a proper IPR protection mechanism such as the implementation of technical solutions to track violations, timely screening and policing of violations, etc. Consideration must also be drawn to the third para of Article 42 of the law which discourages wrongful practices by misusing this 'notice-to-action process' by imposing civil liability on anyone who uses this option maliciously and can cause losses to operators.

Conclusion

In the phase of evolving information technology novel means of connection, communication, consuming, and doing business are the sources of new legal challenges and risks, and therefore, shaping the ways in which people connect, communicate, transact, consume and do business, is vital for the growth of this digital economy. Digital platforms are neutral technological infrastructures that facilitate the commercial activities of their users via networking. They constitute a virtual market and intermediate sellers and buyers to

⁵¹ Robert P. Merges, Seagull Haiyan Song (eds.), *Transnational Intellectual Property Law: Text and Cases* (Elgar Publishing 2018).

⁵² Miriam Jakobson, "Copyright Liability of Online Service Providers after the Adoption of the E.C. Electronic Commerce Directive: A Comparison to U.S. Law", *Entertainment Law Review*, 11 (7) (2000).

⁵³ For instance, Judgment of 3 October 2019, *Glawischig - Piesczek* (C-18/18)

⁵⁴ European Union 'The Digital Services Act package' <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed on 6th October, 2021.

⁵⁵ EU Model Rules on Online Platforms, Art 8,9.

transact. They define their own rules. They profit from the network effect. Its network effect boosts its power. Platform power impacts the social-economic status of the economy in which it operates.

In Sri Lanka, legal challenges in the e-commerce environment remain untouched. The industry is currently expected to be operated at the margin of the law and self-regulated. Sri Lanka's e-commerce is in its infancy and therefore any immature stringent law may disrupt the development of the industry. Therefore, holistic and innovative strategies that are aligned with the social and economic status of the country need to be adopted to ensure a business-friendly legal framework. It will induce a sustainable, climate-neutral, and resource-efficient economy.

In this background, it is suggested that a healthy and durable governance framework to govern e-commerce in Sri Lanka should;

- provide legal certainty for all parties in e-commerce; It is imperative to conceptualize the roles, duties, and responsibilities of all parties (actors) involved in e-commerce; meaning online vendors (selling on its own e-commerce platform or on a platform operated by a third party), e-commerce platform providers (intermediaries who operate a platform open to sellers and purchasers to transact online) and consumers (end users of the e-commerce platform) and other service providers such as logistics and payment facilitation shall be interpreted and recognized with rights, responsibilities, and liabilities attributable to its true role.
- strengthen consumers' safety and rights in the digital environment; (a) an obligation for e-commerce platform providers to receive, store and reasonably verify information on third-party vendors using their services will ensure a safer and more transparent online environment for consumers. (b) it shall be obligatory for the e-commerce vendors to be compliant with all applicable laws and regulations as applicable to any offline seller operating in the market as per all applicable laws, rules, and regulations. (c) withdrawal from the market without notice / sudden exit of e-commerce vendors from the e-commerce marketplace shall be restricted. (d) All the information that the customer needs to know before the purchase decision is made should be sufficiently presented in an ineligible manner without any deceptive or misleading information (e) Implementing a systematic customer review system (reputation system) on e-commerce platforms shall be mandatory. Such a system shall be offered to all users and managed with professional diligence. (f) Algorithmic accountability and transparency around search engine recommender system, and target ad solutions. (g) If ad solutions are provided, paid ads need to be clearly marked as advertised (h) Accessibility of systematic, simplified, and free-of-charge dispute resolution and redress mechanism based on fair and impartial rules shall be obligatory to protect the consumer rights and interests.
- protect third-party intellectual property rights; a framework for all categories of content, products, services, and other activities on intermediary platforms shall

be implemented. Third-party vendors operating on e-commerce platforms shall assume responsibility for infringement of third-party intellectual property rights and e-commerce platforms shall be exempted from liability. A simplified and standard, 'notice to action process' shall be incorporated into the statute where the platform operators shall be obliged to take prompt action upon receipt of a notice to take down, from right holders. By doing so, the responsibility is assigned to the e-commerce platforms to take appropriate action to remove the disputed materials from the platform without any involvement from the Courts. This process will also encourage platform providers to implement fair and transparent procedures, systems, and processes internally to manage IP issues.

- frame responsibilities for e-commerce platforms; E-commerce platforms are the intermediaries of digital transactions and should be given with certain level of legal immunity and liability exemption for the misconduct of its users. However, responsibilities shall be assigned to the platform operators fairly and reasonably to ensure diligent and responsible behavior. When the abilities and responsibilities of different parties involved will be distinct, the authorities will have a straightforward process when dealing with legal issues. In this context the following are suggested (a) it shall not be a general duty of the e-commerce platform operator to monitor the conduct of its users (both vendors and consumers) (b) Platform operator however shall be responsible for i) carrying out a reasonable know your customer

verification process before onboarding any vendor ii) ensuring information retention (transaction details, vendor and consumer details, etc.) for a reasonable period of time (iii) taking appropriate action if the platform become aware of any misconduct by its user (iv) ensuring duty of care (take reasonable measures to maintain secure systems, prevent wrongdoings by the users) (v) cooperating with authorities in handling issues

- frame duties and liabilities for e-commerce vendors; e-commerce vendors shall be liable for all applicable laws and regulations as applicable to any off-line seller such as laws related to consumer rights, data protection, import/export control, other product licensing laws and regulations, etc.
- proscribe discrimination; both online and offline commercial activities shall be treated equally. The same will create a favorable environment for the growth of innovative digital commerce which in turn ensures healthy market competition.
- promote fairness, transparency, and accountability of the digital market; it shall call for fairness, transparency, information obligations, and accountability of digital marketplaces.
- impose civil liabilities for infringers; reasonable and adequate civil liabilities for violations of set out provisions should be incorporated for better regulation and maintaining market order.

To conclude, the law reform for Sri Lankan legal landscape presented by this article would greatly help find solutions to the ever-increasing challenges posed by the digital

economy by providing novel governance (future-proof) framework and preserving the rights and interests of all parties involved. When the law clears the uncertainties, the industry will follow and society will adopt it.

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