DID THE PHILIPPINES JUMP IN TOO SOON AT THE E-COMMERCE LAW BANDWAGON?[1]

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I INTRODUCTION

Spurred by the 'Love Bug' virus attack, the Philippines enacted the *Electronic Commerce Act of 2000*[2] in June becoming the third country in Southeast Asia after Singapore and Malaysia with legislation to promote and protect electronic transaction. The bill took only three weeks to draft and two hours to get approval from the House of Representatives. The drafters of the original bill confessed that they were mostly concerned with the civil or commercial aspect of cyber-legislation and saw no need for cyber-crime legislation.[3] Ironically, the legislation, however, cannot be applied retroactively to the alleged creator of the virus which was released in May because Philippine prosecutors admitted that since there were no specific laws against computer hacking at the time the virus was launched, they have been forced to dismiss all charges.[4]

The Philippine e-commerce law is based on the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Electronic Commerce.[5] The United Nations adopted the model law in 1996 and urged its members to accept the law in 1997. While most developed countries accepted the law or cited adequate legislation of their own, some developing countries have yet to enact their e-commerce laws.

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[1] Electronic Commerce Law Research Paper for University of Melbourne LLM 29 May 2001

[2] Republic Act (RA) No. 8792 was signed by President Joseph Estrada on 19 June 2000.

[3] Rodolfo Noel S. Quimbo, 'Building Consumer Trust: Targetting Cyber-Crimes' (Paper presented at the Laws@Cyberspace: A Conference on E-Commerce Law, Quezon City, August 2000) 2. The author is the Chief of Staff of Senator Juan Flavier who drafted the original bill (Senate Bill No. 1184) that led to R.A. 8792.

[4] Robert Frank, 'Lacking Laws, the Philippines Throws Out 'Love Bug' Case', *The Wall Street Journal,* (New York City, USA) 22 August 2000.

[5] Through General Assembly Resolution 51/162 of 16 December 1996, the model law was adopted. In its thirty-first session in June 1998, UNCITRAL incorporated into the model e-commerce law Article 5: 'Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.'

The law stipulates that in its interpretation, regard to its international origin must be taken into account[6] and in an assessment of the law,[7] it was declared that that 'the law is not merely bowing to reality, it is committing the country to a mode of action that would move it closer to a universal set of rules for e-commerce.'

The *Implementing Rules and Regulations of the E-Commerce Act of 2000*, issued on 13 July 2000, added nothing to the law and in fact were *verbatim* copies of the statutory provisions.

This research paper argues that although the passage of the *E-Commerce Act* is a step in the right direction, still the Philippines has not laid down the preparation for the proper legal and physical infrastructure to enable the law to be fully implemented. While the legal community can always look up to the U.S. regulatory and case law precedents, it may fall into the pit of having an advanced legislation implemented amidst a backward setting as these precedents more often than not are the translations into political power of diverse and organised economic interests totally alien to the Philippine context.

This paper is organised as follows. Part II briefly narrates the development of the Internet in the country and sets out the policy of government regulators. Part III describes the provisions of the *E-Commerce Act* and identifies and discusses the legal issues attendant to such provisions. Part IV sets out the limitations of the physical infrastructure that hinders the development of the development of e-commerce in the country. Finally Part V concludes that the country may have joined the e-commerce legislation bandwagon too soon without considering the legal and physical infrastructure that is necessary for the law's proper implementation.

II INTERNET DEVELOPMENT IN THE PHILIPPINES

The Philippines, once a colony of the United States, has the advantage over other developing countries of a labour pool fluent in English. However, the country is

[6] *E-Commerce Act 2000,* s 37.
[7] Emmanuel C. Lallana and Rodolfo Noel S. Quimbo, 'The Philippine E-Commerce Law: A Preliminary Analysis'.

an archipelago of over 7,000 islands resulting to problems in internal telecommunications which until 1992 was controlled by a monopoly. Connections between the islands are carried out through microwave radio links instead of higher capacity submarine cable. There is a large overseas Filipino community who got together on the Internet prior to its existence in the country.

Prior to the advent of the Internet, the country did not have a publicly available TCP/IP data network and various data networks in operation were run by private companies or groups. Live Internet connections were enjoyed by the offshore offices of trans-national companies who got their access as part of their connectivity to private networks. On the other hand, connectivity for universities, research, and non-governmental organisations was done through batched dial-up connections or by the X.25 network.

The situation became conducive to the entry of Internet service providers (ISPs) with the deregulation of telecommunication. Prior to deregulation, the legal status of ISPs as to whether they were classified as telecom companies was not clear. As part of government's commitment to install basic telephone service, telecom companies that either operated mobile cellular or international gateway facilities were mandated by law to install 300,000 and 400,000 landlines respectively. *The Public Telecommunications Act*[8] enacted in 1995, lifted these restrictions for value-added service (VAS) providers that made use of the facilities of licensed carriers.

The National Telecommunications Commission (NTC) issued the *Implementing Rules and Regulations of the Public Telecommunications Act*[9] on 25 September 1995. The applicable rules and regulations on VAS are:

- A non-public telecommunication entity (PTE) VAS provider shall not be required to secure a franchise from Congress. A PTE is defined under the Act as an entity engaged in the provision of telecommunications services to the public for compensation.

[8] R.A. 7295 (1995) also known as 'An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunication Services.'
[9] *NTC Memorandum Circular No. 8-9-95.*

- A non-PTE VAS provider can utilise its own equipment capable only of routing, storing and forwarding messages in whatever format for the purpose of providing enhanced or augmented telecommunications services. It shall not put up its network and shall use the transmission network, toll or local distribution of the authorised PTEs.

- Entities intending to provide VAS only shall submit to the NTC an application for registration for approval. The application form shall include documents showing, among others, system configuration, mode of operation, method of charging rates, lease agreement with the PTE, etc.

With this move, the government made it clear that the playing field was open to anyone who wanted to jump into an industry initially thought to be capital-intensive and for established telecom and IT companies.[10] Other ISPs, instead of selling directly to individual users sold to companies with Local Area Networks (LANs). LAN connectivity was a harder sell for these ISPs because the investment required for these companies was not yet justifiable at that time when the Internet was new to the country. This became easier as companies with existing e-mail and networking systems wanted to merge these with Internet connectivity.

Some providers sold bandwidth to other ISPs which became second-tier providers or resellers. Some companies worked by offering franchises to prospects on the basis of their geographical area; others put restrictions on resale, while others placed no conditions on their customers' provision of Internet connectivity.

Though the effort to put additional landlines is already producing results, basic telephone service is still lacking particularly in areas outside the urban areas. Nevertheless, the overall interest in the Internet is pushing those who are limited by

[10] Alma J. Buelva, 'Deregulation to Bring More Network Services', *Computerworld Philippines* (Manila, Philippines) 31 March 1995.

infrastructure challenges to take up other alternatives such as software development and integration and content development.[11]

Amidst this commercial environment, the Philippine Government aspires to turn the country into a regional e-services hub despite its otherwise sluggish economic growth and just 2%-3% of its population having access to computers.[12] The grand plan of an e-service hub or outsourcing haven for tech companies and multinationals aims to position the country as an ideal back office by attracting US companies looking to cut labour costs and to outsource clerical work, programming and call centres.[13] The country's software outsourcing industry is Asia's second biggest after India's while it exports around US$2 billion a month in electronics mostly personal computer parts.[14]

Information and telecommunications technologies are expected to be the leading investment sector for the Philippines in 2001. The Board of Investments expects investments in IT services to reach US$ 80 Million per quarter. An AC Nielsen research places Philippine e-commerce transactions at about US$ 100 per user. The estimate for this year is around US$ 80 Million for the entire Internet-using population of the country.[15]

The government hopes that the *E-Commerce Act*, will attract fresh investments to the IT industry. The plan is to first expand the strongest part of the sector – the back-office jobs Filipinos are already doing, such as maintaining legal records, or delivering engineering designs and audio-visual content over the Internet to companies overseas. Further down the track, as confidence and investment grow, the

[11] Miguel A. L. Paraz 'Developing a Viable Framework for Commercial Internet Operations in the Asia-Pacific Region: The Philippine Experience' (1997) <http://cad.ntu-kpi.kiev.ua/events/inet97/E6/E6_1. HTM> 2-4.
[12] According to the Asian Development Bank, in mid-1999 the Philippines had only 1.3 Internet hosts for every 10,000 people. By contrast, Thailand—not exactly a giant in the IT world—boasted 4.5.
[13] Robert Frank, 'Official Pitches Country to Executives Abroad As Ideal Back Office', *The Wall Street Journal,* (New York City, USA) 3 October 2000.
[14] Deidre Sheehan, 'Advantage in Jeopardy', *Far Eastern Economic Review,* (Singapore) 19 October 2000.
[15] Forecast 2001, E-Magazine, Vol. 1 No. 9. <www.sourcepilipinas.com>

government hopes that the industry will start to cultivate more jobs in the sophisticated field of software development, currently dominated by India.[16]

III LEGAL FRAMEWORK

A *BASIC LEGAL PRINCIPLES*

The UNCITRAL Model Law and the *E-Commerce Act* both rely on the 'functional equivalent approach.' This approach is based on an analysis of the purposes and functions of the traditional paper-based requirement to determine how those purposes or functions could be fulfilled through electronic-commerce techniques.[17] This functional equivalence approach is applied to the following situations subject to compliance with the requirements applicable to electronic documents,[18] electronic signatures[19] and original documents:[20]

1. Those in which contract is required to be in writing and subscribed by the party charged such as those under the statute of frauds;[21]

2. Those in which the 'original' of the document, which is the subject of inquiry, is required to be presented as an element of admissibility as evidence;[22]

3. Those in which the law requires the retention of the originals of documents such as those evidencing taxable transactions like records to be kept by manufacturers,[23] wholesale dealers,[24] and dealers in leaf tobacco.[25]

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[16] Ibid.
[17] Vivente B. Amador, 'E-Commerce Act and UNCITRAL Model: Statutory Framework and Legal Issues' (Paper presented at the Laws@Cyberspace A Conference on E-Commerce Law, Quezon City, August 2000) 1.
[18] *E-Commerce Act 2000* s 7.
[19] Ibid s 8.
[20] Ibid s 10.
[21] *Civil Code of the Philippines* art 1403.
[22] *Rules of Court* r 130 s 3.
[23] *National Internal Revenue Code* s 153.
[24] Ibid s 161.
[25] Ibid s 162.

In these situations, the treatment of electronic documents, electronic signature and original documents as the 'functional equivalent' of manual signatures or 'original' or 'written' documents entails the following consequences:

1. The electronic data message and the electronic signature it contains satisfy the requirement under the statute of frauds that the contract be in 'writing' and to be 'subscribed' by the party charged, and the contract is therefore enforceable.

2. The electronic data message is considered an 'original' document and is admissible as evidence.

3. The retention of electronic data messages evidencing taxable transactions will be considered compliance with the statutory requirements to keep and maintain the paper documents.

To preserve the integrity of electronic signatures and electronic data messages, the *E-Commerce Act* provide for specific conditions/rules, which must be met such as: Rules for Equivalence,[26] Rules on Authorship and Attribution,[27] Rules for Authentication and Validation,[28] Rules on Admissibility and Evidential Weight,[29] Rules on Repudiation,[30] and Rules of Acknowledgement of Receipt and Time and Place of Dispatch.[31]

The UNCITRAL Model Law and the *E-Commerce Act* also adheres to the principle of autonomy of contracts. The *E-Commerce Act* is not intended to apply

[26] *E-Commerce Act 2000* ss 7,8 and 13. The rules for equivalence set forth the conditions under which electronic documents, electronic signatures and electronic data message retained in place of original documents may be treated in the same manner as paper documents signatures may be given legal recognition, validity or enforceability.
[27] Ibid ss 9 and 18. These rules determine when and under what conditions an electronic signature or electronic data message may be attributed to a particular person.
[28] Ibid s 11. These rules specify the conditions under which a person may be deemed to have approved of the electronic data message or electronic document.
[29] These rules define the conditions under which an electronic data message or electronic document may be admitted as the best evidence of the agreement and transaction contained therein and their evidential weight [Section 12 in relation to Section 6 and 7] and the proof by which this probative value is established [Sections 14 and 15].
[30] Ibid ss 18-19. These are rules, a subset of the rules on attribution, under which an electronic data message or electronic document may be renounced by the person to whom it is attributed.
[31] Ibid ss 20-23.

and does not in fact apply to the substantive terms and conditions of the parties' transactions, but only seeks to ensure the integrity and reliability of their contractual stipulations expressed or embodied in the form of electronic documents.

Although the parties may use existing technology to ensure the authenticity and integrity of their electronic communication, and may in fact be well advised to do so, they are not precluded from agreeing on their own method of verification of the authenticity and integrity of their communication.[32] The provisions apply only to the parties to an electronic communication in default of an agreement between them. Where such an agreement exists, they will be bound by it.

The third principle is the voluntariness of the use of electronic communication. Article 1 of the UNCITRAL Guide recognises that national legislation may provide for their exceptions to the application of the law. Section 9 of the *E-Commerce Act* also confirms that the use of electronic communication is not compulsory. It may be pertinent to mention that the recently enacted *US Electronic Signatures Act* more explicitly requires that the consumer should affirmatively consent to the use of electronic communication and even has the option of withdrawing such consent after it has been given.

The Model Law and the *E-Commerce Act* both recognise that legal requirements prescribing the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. To encourage electronic commerce, the Model Law and the *E-Commerce Act* only extends the notions of 'writing', 'signature', and 'original', to include computer-based techniques and electronic communication. These laws are not intended to effect the wholesale removal of the paper-based requirements or disturb the legal concepts and approaches underlying those requirements. The concept of 'functional equivalence' only means that electronic communication shall be treated legally in the same manner as, but not as a compulsory substitute for, paper documents.

[32] *E-Commerce Act* s 38; UNCITRAL Model art 4.

The fourth principle is the solemnity of contracts and the primacy of statutory requirements and judicial pronouncements respecting formalities of contracts.[33] The fifth principle is that being merely a law applicable to the form, rather than the substantive terms of contracts, 'an offer, the acceptance of an offer and other elements required for the formation of the contract' shall continue to be governed by existing laws.[34] The last principle is the primacy of consumer-protection laws. The Guide to the UNCITRAL Model recognises that consumer protection may take precedence over the provisions in the Model Law. Based on this recognition the *E-Commerce Act* provides that violations of the *Consumer Act*[35] and other relevant or pertinent laws through transactions covered by or using electronic data messages, shall be penalised with the same penalties as provided in those laws.[36] Thus when a fraudulent advertising is published with the use of electronic data message, the *Consumer Act* provision will apply.

B *ONLINE CONTRACT FORMATION*

The *E-Commerce Act* does not govern the substantive legal question of when a contract is formed online, and Sec. 16 only confirms that the offer, acceptance of an offer and such other elements required under existing laws for the formation of contracts still apply. It simply provides that these contract elements may be expressed and proved by means of electronic data messages and documents.

Under the *Civil Code*,[37] the formation of contract requires the consent of the contracting parties, certainty of the subject matter of the contract, and cause, which is understood as 'consideration' in common law jurisdictions. Consent means that there has been an offer and an acceptance of the cause and object of the contract. The acceptance must be conveyed to the party making the offer.

All parties should know whether information on a web site constitutes an offer, which could be accepted to form a contract, or whether it is merely an invitation to do

[33] *E-Commerce Act 2000* s 12.
[34] *E-Commerce Act 2000* s 16.
[35] R.A. 7394.
[36] *E-Commerce Act 2000* s 33(c).
[37] R.A. 386 art. 1318.

business. It is important to clarify whether the supplier intends to be bound by a positive response from the consumer or whether the supplier simply intends to solicit an offer, which the supplier would then need to accept.

Sellers over the Internet will need to ensure that they are not bound by an immediate acceptance of their goods or services since they may only have a limited supply. Prudent sellers will specify clearly that acceptance of their goods or services is subject to supply if they do not wish to find themselves in breach of a binding obligation where the demand exceeds the supply.

Sellers generally use standard order forms and terms and conditions so that they could control the terms of sale. These standard terms must be sufficiently brought to the attention of surfers before an offer is submitted to them. Though the Philippine Supreme Court has not ruled the enforceability of "web wrap' agreements, it is submitted that all requisites to a valid contract are present in such agreements. In *ProCD v Zeidenberg and Silkken Mountain Web Services*,[38] the Court of Appeals of the 7th Circuit held that shrink-wrap agreements are enforceable.

A contract is formed when the acceptance of an offer is communicated to the offeror. If communication is instantaneous (for example by telephone), acceptance is deemed communicated when perceived by the offeror. If communication is delayed (for example by post), acceptance is deemed communicated at the time of posting. It is unclear how e-mails should be treated. Terms and conditions should therefore state when acceptance would be deemed to have been communicated. One common approach is to provide that acceptance will not take place until payment (that is, when the goods are ready for dispatch).

Given the layers of security involved in creating electronic data messages and electronic signatures, the *E-Commerce Act* following the UNCITRAL Model, also creates so-called default rules[39] on the time of dispatch of the electronic data message and its time of receipt and the place of its dispatch and receipt. These rules may be important in situations where, for instance, a party is required to respond within a

[38] 86 F.ed 1447 (7th Cir.1996)
[39] *E-Commerce Act 2000* ss 20, 21, 22 and 23.

stipulated number of days from receipt without which the offer is considered withdrawn. However, these are default rules and they apply only where the parties themselves have not agreed on another procedure.

The statute of frauds raises problems for electronic commerce involving sales of goods. The party seeking to enforce the contract must show that there is a signed writing stating some of the most important terms of the contract. There is no requirement that the writing state all the terms of the contract, but it must be sufficient to indicate that a contract has in fact been made by the parties. While a court looking at the exchange of email messages between a vendor and a purchaser might find that one of the email messages could be considered a writing signed by the party against whom enforcement is sought, it is far from clear that all courts would come to that conclusion. As long as the parties cannot predict with confidence what interpretation a court would apply to their exchange of email messages, some parties will resist replacing paper forms with electronic messages even though the administrative expenses associated with paper processes are higher. The higher cost of paper-based administrative systems can be thought of as a sort of insurance premium paid to achieve more predictable legal outcomes.[40]

C *PROVISIONS ON CARRIAGE OF GOODS*

The UNCITRAL Model Law included special provisions on electronic commerce in carriage of goods. This was done on the belief that electronic communications are most likely to be used in the transport of goods and therefore it is necessary to provide a legal framework to facilitate such use. The *E-Commerce Act* followed this approach.[41]

D *ELECTRONIC TRANSACTIONS IN GOVERNMENT*

The *E-Commerce Act* requires the government and all its bureaus, offices and agencies as well as government-owned or controlled corporations, within two years

[40] Jane Kaufmann Winn, 'The Emerging Law of Electronic Commerce', 02 June 2000, <http://www.smu.edu/~jwinn/mbachapter.htm>.
[41] *E-Commerce Act 2000* ss 25 and 26.

from the date of effectivity of the Act, to issue permits, licenses or approval in the form of electronic data messages or electronic documents, and to accept the creation, filing or retention of such documents in the form of electronic data messages and electronic documents.[42] For this purpose, the installation of the RPWEB Network is mandated within two years from the effectivity of the Act.[43] Just as the *E-Commerce Act* does not alter the substantive legal provisions applicable to private contractual relations, the Act also does not change existing laws and requirement applicable to government contracts like the rules of bidding.

E *SECURITIES TRANSACTION*

Nowhere in the *E-Commerce Act* are the terms 'capital markets transactions' or 'securities transactions' mentioned or specifically dealt with. While implementing rules and regulations define 'commercial activities'[44] to include investment transactions and the 'manufacture, processing, purchase, sale, supply, distribution or transacting of tangible and intangible property such as…financial and banking products and shares of stock,'[45] there is not a single provision which deals squarely on securities transactions.[46]

Trends in developed countries have showed how technology has changed or has introduced new methods by which securities transactions are conducted, namely: (1) the disclosure process, through the introduction of the concept of electronic filings and disclosures; (2) the brokerage business, through the growing popularity of e-

[42] Ibid s 27.
[43] Ibid s 28.
[44] *The Implementing Rules and Regulations of the E-Commerce Act (2000)* s 6 (b).
[45] Shares of stock is just one type of security. The term 'securities' has a broader meaning which includes shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instrument, whether written or electronic in character. The term includes shares of stock, bonds, debentures, notes, evidences of indebtedness, asset-backed securities, investment contracts, certificates of interest or participation in a profit sharing arrangement, certificates of deposit for a future subscription, fractional undivided interest in oil, gas or other mineral rights, derivatives like options and warrants, certificates of assignments, certificates of participation, trust certificates, voting trust certificates or similar instruments, proprietary or non-proprietary membership certificates in corporations and other instruments as may be in the future be determined by the Securities and Exchange Commission. See *Securities Regulation Code 2000* s 3.1.
[46] Enrique I. Quiason, 'E-Commerce Law and the Regulation of Philippine Capital Market Transactions Done Through the Internet' (Paper presented at the Law@Cyberspace, a Conference on E-Commerce Law, Quezon City, August 2000) 1.

brokering and (3) the appearance of new players, through the introduction of new intermediaries in the market.

The effects of new technology, the mandate of the *E-Commerce Act*, and the maintenance of regulatory principles premised on the dissemination of information, will provide the primary regulator of the capital markets, the Securities and Exchange Commission (SEC)[47] with the opportunity to make rules or policies recognising electronic filings and dissemination of information.

1. Full Disclosure

The Internet is dramatically transforming how companies can disseminate information to its stockholders and the public. It allows individual investors more access to information by providing them with more timely and high quality information. In this respect, it furthers one of the most fundamental principles of securities regulation – transparency.[48] The use of electronic media also enhances the efficiency of the securities market by allowing for the rapid dissemination of information to investors and financial markets in a more cost-efficient, widespread, and equitable manner than traditional paper-based methods. Technology can, thus, assist in making the delivery of information faster, less expensive and widespread, help to level the playing field between large and small companies, help companies to raise capital more effectively by giving them better access to potential investors, and gives companies new avenues to communicate with shareholders.[49] Similarly, it enhances the ability of investors and their advisers to make informed investment and voting decisions by giving investors information faster, by giving investors information in electronic format so databases can be searched and financial information can be analysed more readily, by reducing disparities between large and

[47] The Philippines Securities and Exchange Commission is hereinafter referred to in this paper as the 'SEC' to differentiate it from the 'U.S. SEC'.
[48] Written Statement of Laura S. Unger, Commissioner U.S. Securities and Exchange Commission to the Subcommittee on Capital markets, Securities and Government Sponsored Enterprises, Committee on Banking and Financial Services, U.S. House of Representatives, on the Concerning Effect of technology on the Capital markets (25 March 1999), 3.
[49] U.S. SEC Report to Congress: The Impact of Recent Technological Advances on the Securities Markets, 6.

small investors' ability to access information and by helping investors communicate with each other and with companies.

The *E-Commerce Act* provides that information should not be denied validity or enforceability solely on the ground that it is in the form of an electronic data message or electronic document and a requirement under the law that information is in writing will be satisfied if the information is in the form of an electronic data message or electronic document.[50]

2. Electronic Delivery

The *E-Commerce Act* mandates agencies of the Government to accept the creation, the filing or retention of documents in the form of electronic data messages, issue permits, licenses or approvals in the form of electronic data messages, require or accept payments and issue receipts acknowledging such payments, through systems using electronic data or documents.[51] The SEC should, therefore, promulgate rules or adopt such policies that allow the use of electronic media and equate information delivered by this means to information delivered on paper. The Philippine Stock Exchange, having similar disclosure requirements, should also adopt similar rules or policies.

The regulation or policies will need to address only the procedural aspects of delivery and not change the circumstances under which delivery of information is required, thus preserving the fundamentals of the disclosure process. The securities law liability provision applies to electronic delivery. For those who do not have access, the traditional paper-based manner can be maintained. The regulation or policies should be technologically neutral, and should not only recognise the Internet but also audio tapes, videotapes, facsimiles, CD ROM, and proprietary computer networks as the means by which documents are electronically filed.[52]

[50] *Implementing Rules and Regulations of the E-Commerce Act 2000* s 7.
[51] *E-Commerce Act 2000* s 27; *Implementing Rules and Regulations of the E-Commerce Act 2000* s 37.
[52] Ibid.

The U.S. SEC has initiated its Electronic Data Gathering, Analysis and Retrieval (EDGAR) system way back in 1984 to automate the receipt, processing and dissemination of disclosure documents filed with the U.S. SEC under U.S. securities laws.[53] However, this is a proprietary system and is not web based.

The U.S. SEC has also published its views on the use of electronic media for information delivery purposes[54] and an issuer following the guidelines will have a degree of certainty that is satisfying the delivery obligations under the securities laws. The Philippine SEC can use these U.S. SEC pronouncements for guidance. As a general statement, the U.S. SEC believes that the extent to which required disclosures are made, as opposed to the medium for providing it, should be the most important analysis of whether sufficient disclosures has occurred under the securities laws.[55]

> The Commission believes that the question of whether delivery through electronic media has been achieved is most easily examined by analogy to paper delivery procedures. The Commission would view information distributed through electronic means as satisfying the delivery or transmission requirements of the federal securities laws if such distribution results in the delivery to the intended recipients of substantially equivalent information as these recipients would have had if the information were delivered to them in paper form.[56]

If an issuer delivers a paper document, for an example an annual report, by postal mail, the investor will most likely be made aware that information exists and that the investor might have to take some action within a specific period of time. Their guidelines provide that those providing electronic delivery should consider the extent to which the delivery provides timely and adequate notice and if necessary, consider supplementing the electronic communication with another communication that would provide notice similar to that provided by delivery in paper.[57] As with paper delivery, postal mail delivery of information in electronic form, such as a CD-ROM, audio tape or video tape, is sufficient notice. A web site posting of a document itself does not constitute notice. Separate notice for passive delivery systems such as

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[53] U.S. SEC Release No. 33-7233 (6 October 1995), 17 CFR Parts 231, 241,271, Use of Electronic Media for Delivery Purposes. 2.
[54] Ibid.
[55] U.S. SEC Release 33-7233, above at n 40, 7.
[56] Ibid.
[57] Ibid at 8.

the Internet is required unless the company can otherwise show that delivery has been effected. Separate notice can be made by e-mail or postal mail.[58]

When a document is delivered through the postal mail, a recipient generally is provided with access to the required disclosure. Under the U.S. SEC guidelines, access to electronic communication should be comparable to that provided by postal mail. Recognising the wide disparity in investor abilities to use electronic media, electronic medium must not be so burdensome that access is effectively denied. Investors should have the ability to retain or have an on-going access to the document. If disclosures are made available by posting it on a web site, making it available through online services, or making it available by similar means, the document should be accessible for as long as the delivery requirement applies.[59]

Those providing electronic delivery should have reasonable assurance that the investors received the information. For web site viewers, the evidence likely will be revocable informed consents, coupled with notice and access assurance. For consents to be considered informed, they generally must specify the medium of delivery and the period during which the consent is effective. The consent should also specify the information that will be delivered electronically and inform the viewer of any potential cost associated with web site delivery. Delivery evidence also consists of an e-mail return receipt or other confirmation of an investor's accessing, downloading and printing the document. If documents are disseminated through facsimile, delivery may be presumed. Other forms of delivery include the investor's accessing a required document by hyperlink or using forms available only by accessing a document.[60]

The *Implementing Rules and Regulations of the E-Commerce Act* provide rules on acknowledgement of receipt of electronic data messages, or electronic documents, time of dispatch of electronic data message or document and the time of receipt of electronic data message or document. If before the sending an electronic data message or electronic document, there is an agreement or there is a request by the

[58] U.S. SEC Report to Congress, above at n 48, 9.
[59] Ibid.
[60] Ibid.

originator for an acknowledgement of receipt of the electronic data or document, an acknowledgement may be given through any communication by the addressee, automated or otherwise, or any conduct of the addressee sufficient to indicate the electronic data message or document has been received.[61] If the originator stated that the effect of the data is conditional on receipt of the acknowledgement thereof, no receipt is presumed until the acknowledgement is received.[62] Where the originator has not stated the effect or significance of the electronic data, message or electronic document is conditional on receipt of the acknowledgement, and the acknowledgement has not been received within the time specified or agreed, or if no time has been specified or agreed, within a reasonable time, the originator may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which acknowledgement must be received.[63] If no acknowledgement is received, the originator may treat the electronic document or electronic data message as though it had never been sent.[64]

3. E-brokering

A challenge to the regulators is the regulation of offers of foreign securities to customers located in the Philippines done through the Internet. Internet technology allows a transaction to be conducted over many jurisdictions. It is wholly insensitive to geographic distinctions since Internet protocols were designed to ignore rather than document geographic locations; while computers on the network do have addresses; they are logical addresses on the network rather than geographic addresses in real space.[65] The ability to access markets electronically enables a Philippine investor to trade on foreign markets. While investors have always been able to buy and sell foreign securities, high transaction costs and relative difficulty limited this activity to a few generally sophisticated investors. Technology – and particularly the Internet – makes it easier for investors to cross national boundaries. Until recently, in order to obtain current information regarding foreign market prices or to purchase or sell a foreign security, an investor typically would have to call a foreign broker-dealer by

[61] *Implementing Rules and Regulations of the E-Commerce Act 2000* s 30(a).
[62] Ibid s 30(b).
[63] Ibid s 30(c).
[64] Ibid.
[65] *American Liberty Association v. Pataki* [1997] 969 F. Supp. 160.

telephone or facsimile. This entails substantial communications and transaction costs. The foreign broker-dealer would then give the investor current information and transmit the investor's order to a member of the foreign market on which the security was traded. Alternatively, the investor could contact a foreign broker-dealer directly. Today, however, it is possible for Philippine investors to obtain real-time information about trading on foreign markets from a number of different sources, and to enter orders electronically from their homes or offices in Manila.

Broker-dealer websites serve a variety of functions. They advertise the broker-dealers' services to potential investors, they offer market information and investment tools, some offer real time or delayed quote information, some provide market summaries and commentaries, analyst reports and trading strategies, and typically include information on commissions and fees, branch office locations.[66] In, short, the question arises whether the establishment and the operation of an Internet Web site by a dealer in a foreign jurisdiction offering for sale securities to anybody can be deemed to be an offering in the Philippines such that the securities being offered should be required to be registered under the SEC's rules. Another question is whether that foreign broker can be deemed to be doing business in the Philippines without a license.

Philippine laws, particularly our securities and criminal laws, are territorial by nature. The power of the SEC to regulate offerings of securities is limited to offerings only within the Philippines.[67] The SEC can only regulate persons who are engaged in the business of buying or selling securities in the Philippines as a broker or dealer or a salesman.[68] States are also hesitant to exercise jurisdiction over matters that take place in the territory of other states.[69] Under the principles of comity, states will ordinarily respect such actions and will be hesitant to interfere with what another state chooses to do within those limits.[70]

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[66] U.S. SEC Report to Congress, above at n 48, 51.
[67] *Securities Regulation Code 2000* s 8. This provision provides that securities shall not be sold or offered for sale or distribution within the Philippines without a registration statement duly filed and approved by the SEC.
[68] Ibid s 28.
[69] G. Blair Cowper-Smith, 'Issues and Trading in Securities, Recent Developments in Securities Law and Internet – Canada', 22 August 1999, 7.
[70] Ibid.

The *E-Commerce Act* is not helpful in this regard and in fact, it appears to muddle the issue. It provides that absent an agreement between the parties, the place of dispatch of an electronic data or document is deemed to be at the place where the originator of the document has its place of business and deemed to be received at the place where the addressee has its place of business.[71] It then provides that the same rules apply to determine the tax situs of the transaction. This provision does not help establish the question whether or not there has some conduct that will constitute a sale or an offer for sale of foreign securities in the Philippines.

The U.S. SEC has said that a foreign broker-dealer's advertising on a web site will not constitute an attempt to induce a securities transaction with U.S. persons if adequate measures are taken which are reasonably designed to ensure that it does not effect securities transactions with U.S. persons as a result of its Internet activities.[72] These measures include the posting of a prominent disclaimer on the web site affirmatively delineating the countries in which the services are available or stating that the services are not available to U.S. persons and refusal to provide brokerage services to any potential customer that it believes is a U.S. person based on residence, mailing address, payment methods or other grounds.[73]

4. New Intermediaries

The Internet has also given birth to non-traditional financial intermediaries that have never been regulated before. General web portals, more narrowly focused financial portals, online publishers, and chat rooms are competing with stockbrokers, dealers, and investment advisers for control of investors' attention. The regulation of these new intermediaries will pose a challenge to regulators.

A policy question to Philippine regulators is whether they will allow alternative trading systems to flourish under their regulation. The answer, in the affirmative, can

[71] *E-Commerce Act 2000* s 23.
[72] U.S. SEC Release No. 33-7516 (March 23, 1998), 17 CFR Parts 231, 271, 276, Statement of the Commission Regarding the Use of Internet Web Sites to Offer Securities, Solicit Transactions or Advertise Investment Services Offshore.
[73] Ibid.

be found in the *Securities Regulation Code* – if such alternative trading system shall encourage competitiveness in the market and will be for the national economic development.[74]

F *ISSUES AND PROBLEMS IN EVIDENCE*

In the Philippines, in contrast to the revolutionary development of information technology, the country's *Rules of Evidence* have stood still.[75] There is no reference at all to computer-generated evidence insofar as the best evidence rule, authentication, and the business records exception to the hearsay rule are concerned. The evidentiary issues inherent in the use of the Internet as the medium over which to do business are not yet clear and fully understood.[76]

1. Best Evidence Rule

In the United States, the *Federal Rules of Evidence* provided that for purposes of the Best Evidence Rule: 'If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".'[77] Decisions of the U.S. courts have liberally allowed the admission of computer-generated evidence upon a showing of their accuracy and reliability.

In the face of the recent advances in information technology, the Philippines' rules of evidence may be describes as 'archaic'. The present Best Evidence Rule, the rules in authentication and the business records exception to the hearsay rule are not even adequate to deal with simple computer-generated printouts, much less the new electronic documents where there are no 'writings' to speak of.

The provisions relating to the Best Evidence Rule are silent about computer-generated evidence. Under the present rules, it is highly doubtful whether a computer printout will be admissible if the opponent raises a Best Evidence objection. First, he

[74] *Securities Regulation Code 2000* s. 38.
[75] Rules 128 to 133 of the Rules of Court became effective on 01 January 2001 and were revised on 01 July 1989.
[76] Rogelio A. Vinluan, 'The E-Commerce Act: Evidentiary Issues and Problems' (Paper presented at the Laws@Cyberspace, A Conference on E-Commerce Law, Quezon City, August 2000) 1.
[77] *Federal Rules of Evidence 1975* r 1001(3).

may contend that the record on the computer (e.g. the hard disk or magnetic tape) is the 'best evidence' not the printout. Alternatively, he may argue that the original paper records of the transaction, not the computer records, are the 'original' and therefore the best evidence.

In the United States, the *Federal Rules of Evidence* expressly declare that 'if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".'[78] Thus, a printout, if shown to reflect the computer's data accurately, is an 'original' of the computer-stored data so that the hard disk need not be introduced. However, if the printout is being used to show the contents of an original record stored in the computer, it is a duplicate. But even if the printout is a duplicate, it makes little difference in practice because the printout is also admissible unless 'a genuine question is raised as to the authenticity of the original or in the circumstances, it would be unfair to admit the duplicate in lieu of the original.'[79]

2 Authentication

With respect to authentication, the Philippine *Rules of Court* requires that 'before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either: (a) by anyone who saw the document executed or written or (b) by evidence of the genuineness of the signature or handwriting of the maker.'[80] Any other document need only be identified as that which it is claimed to be.

Thus, the Philippine rules furnish no guide on the authentication of computer-generated evidence. In the United States, the authentication requirement is primarily addressed by the *Federal Rules of Evidence*[81] which requires a description of 'the process or system used to produce a result' and a showing that it 'produces an accurate result.' Based on the decisions of the U.S. courts, the standard can generally be satisfied by evidence that (1) the computer equipment is accepted in the field as

[78] *Federal Rules of Evidence 1975* r 1001(3).
[79] Ibid r 1003.
[80] *Rules of Court* r 139 s 20.
[81] r 901(b)(9).

standard and competent and was in good working order, (2) qualified computer operators were employed, (3) proper procedures were followed in connection with the input and output of information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly and (6) the exhibit is properly identified as the output in question. To avoid unfair prejudice, court sometimes require advance notice by a party of intent to use computerised evidence and an opportunity for pre-trial access to the program used to generate the output.[82] The authenticity witness must be someone generally familiar with the process by which the output was produced, but need not have been personally involved in the particular process generating the data.[83]

In view of the general and ambiguous provisions of the *E-Commerce Act*, a number of evidentiary issues which are likely to arise from the implementation of the statute will be difficult to resolve unless the Supreme Court revises the present rules of evidence to meet the requirements of modern-day communications and information technology, especially the Internet.[84]

Section 12 of the Act states that "in assessing the evidential weight of an electronic data message or electronic document, the reliability of the manner in which it was generated, stored or communicated, the reliability of the manner in which its originator was identified, and other relevant factors shall be given due regard.' This provision seems to confuse admissibility with the weight to be given to evidence. Authentication or the process of proving that the evidence is what its proponent claims it to be – a function of relevance – is required for the purpose of determining admissibility. The reliability of the manner in which the electronic data message or electronic document was generated, stored or communicated and the reliability of the manner in which its originator was identified are matters involved in the authentication of the evidence. Once evidence is properly authenticated and admitted, the weight to be given to it is an entirely different matter.

[82] Mueller and Kirkpatrick, *Modern Evidence,* 1995, section 9.17.
[83] Ibid.
[84] Vinluan, above at n 75, 7.

To cite another example: Section 14 of the *E-Commerce Act* provided that 'the matters referred to in Section. 12 on admissibility and Section 9 on the presumption of integrity may be presumed to have been established by an affidavit given to the best of the deponent's knowledge' subject to the right of cross-examination by the parties in interest. Does this provision repeal the requirement of Section 1, Rule 132 of the *Rules of Court* that the testimony of a witness must be given in open court and the ruling in *People v. Estenzo* et al.[85] that the mere presentation of the affidavits of witnesses subject to cross-examination is not allowed by the *Rules of Court*.

While electronic data messages or electronic documents may initially be in electronic form, as a practical matter, in any litigation proceeding involving them, printout of their contents will have to be submitted in court for evidentiary purposes. Under the existing Best Evidence Rule, computer printouts may not be admissible because they are obviously not the 'original' records of the transactions involved. The Philippines does not have a counterpart of Rule 1000(3) of the *Federal Rules of Evidence* which provides that 'if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'.

An interesting Philippine case involving authentication of an e-mail printout is that of *IBM Philippines, Inc. v. NLRC*[86] where computer printouts of e-mail messages were not admitted in evidence for lack of proper authentication. The Supreme Court held:

> 'The computer print-outs, which constitute the only evidence of the petitioners, afford no assurance of their authenticity because they are unsigned. Not one of the computer print print-out copies submitted by petitioners was ever signed, either by the sender or the receiver. There is thus no guarantee that the message sent was the same message received. As the Solicitor General pointed out, the messages were transmitted to and received not by the private respondent himself but his computer. Neither were the computer print-outs certified of authenticated by any company official who could properly attest that these came from IBM's computer system or that the data stored in the system were not and/or could not have been tampered with before the same were printed out. It is noteworthy that the computer unit and system in which the contents of the print-outs were stored were in the exclusive possession and control of petitioners since after private

[85] [1976] 72 SCRA 428.
[86] [1999] 305 SCRA 592.

> respondent was served his termination letter, he had no more access to the computer.[87]

The authentication of an electronic document poses serious difficulties which are not present in respect of traditional writings. A conventional paper letter, for example, unites a message and its record in a single, durable medium; authentication of the letter thus deals with the message and the record simultaneously. An electronic message identification, however, splits into two inquiries: (1) What is the genuine message? (2) Is this an authentic record of that message?[88]

Under Section 11 of the *E-Commerce Act*, it is provided that: 'The person seeking to introduce an electronic data message and electronic document in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic data message and electronic document is what the person claims it to be.' To sustain the proponent's burden under the *E-Commerce Act* for the admission of an electronic message or document into evidence, he must show who or what originated the message or document and whether its contents are complete and in the form intended, free from error or fabrication.

While the Philippine rules would seem to limit authentication of a private document 'by evidence of the genuineness of the signature or handwriting of the maker', authentication can actually be done in various ways. This is why the *Federal Rules of Evidence* state a simple rule of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'[89] By way of illustration, the *Federal Rules of Evidence* state that evidence may be authenticated by its appearance, contents, substance, internal patters, or other distinctive characteristics, taken in conjunction with circumstances.'

For this reason, the drafters of the *E-Commerce Act* could have just adopted Rule 901 of the *Federal Rules of Evidence*. Such a provision will give the proponent the widest latitude in presenting whatever evidence he deems necessary to prove the

[87] *IBM Philippines v NLRC* (1999) 305 SCRA 592, 601.
[88] B. Wright, *The Law of Electronic Commerce*, (1991) s 8.1.
[89] *Federal Rules of Evidence 1975* r 901(a).

identity of the party sought to be bound, the reliability of the information and communication system, and the integrity of the electronic data message or electronic document involved.

G *TAXATION*

There is hardly any provision on taxation in the *E-Commerce Act* despite the fact that the lion's share of e-commerce transactions currently take place among businesses, including related business entities. In addition to tangible products like books, flowers and apparel, e-commerce also offers intangible products, including video games, computer software, music, pornography, and digital versions of existing printed matter. Furthermore, intangible services are offered, including on-line gambling, travel services, stock brokerage and banking.

The U.S[90] and the European Commission[91] are of the same objective in ensuring that tax systems must provide legal certainty neutrality. The core concept of neutrality[92] in the context of e-commerce involves setting tax policy that neither favours nor disfavours a particular form of business activity or method for concluding a transaction. Economically similar transactions should be treated similarly so as not to interfere with the choice of the most efficient method of undertaking transactions.[93]

In an era of increased global competition, multinational firms are constantly looking for cost-saving opportunities to centralise operations by removing duplication of activities, expertise, or resources in the foreign markets where their customers exist. As a result, multinational companies with existing permanent establishments in source countries may begin to shift some or all of their business operations away from the permanent establishments into residence-based e-commerce operations.

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[90] William J. Clinton and Albert Gore, 'A Framework for Global Electronic Commerce', (1997), Washington D.C., 4.

[91] E-Commerce Commission Communication: Regulatory Framework, 'A European Initiative in Electronic Commerce', (1997) 6.

[92] This discussion will not extend to embrace three specific forms of neutrality with respect to a country's international tax system, namely, the principles of capital export neutrality, capital import neutrality and national (efficiency) neutrality. For a discussion of these principles, see Daniel J. Frisch, 'The Economics of International Tax Policy: Some Old and New Approaches' (1990) 47 *Tax Notes (TA)* 581.

[93] Adrian J. Sawyer, 'Electronic Commerce: International Policy Implications for Revenue Authorities and Governments' (1999) 19 *Virginia Tax Review* 73, 84.

These operations/business model shifts include the following:(1) replacing physical establishments with websites that transfer transaction costs to the customer (e.g., obtaining product information and selecting a product); (2) reducing source-country offices necessary for customer support and after-sales services; and (3) reducing the need to place intermediaries (e.g., distributors, agents and wholesalers) in foreign markets because their functions can be performed from remote locations via the Internet.

E-commerce importing countries as well as capital-importing countries – especially developing countries like the Philippines – should be very concerned with these developments. The emergence of e-commerce and these business model shifts have the potential to significantly erode the revenues currently derived from source-country taxation of business profits. Developing countries have often complained that the existing profit attribution rules work in favour of residence countries by permitting source-country taxes to be avoided or evaded through the conduct of a related business out of the permanent establishment.[94]

H *PROTECTION OF PERSONAL DATA*

The *E-Commerce Act* while criminalizing hacking and on-line piracy[95] does not contain any provision on privacy protection. While, this does not necessarily foreclose the application of the *Civil Code* provisions, Philippine regulators have not indicated whether they will take the approach taken by U.S regulators or the European Union in enforcing privacy law.

U.S. privacy law is a complex patchwork of provisions with widely varying degrees of protection for individuals and markedly disparate approaches to protecting privacy. U.S. privacy law is characterised by a much higher degree of concern with government interference and a much lower degree of concern with private sector interference than is found in Europe. In Europe by contrast, the basic concepts of

[94] Arthur J. Cockfield, 'Balancing National Interests in the Taxation of Electronic Commerce Business Profits' (1999) 74(1) *Tulane Law Review* 133, 159.
[95] *E-Commerce Act 2000* s 33 .

privacy protection are clearly and consistently articulated and directed with more vigour against parties in private sector than against public sector parties.[96] The E.U. perspective on information privacy is radically at odds with the laissez-faire approach that has prevailed in the U.S. until very recently. In the global e-commerce arena, Australia, New Zealand, Canada, Hong Kong, Japan, Singapore and many other countries are following the E.U. lead in providing clear protections for the privacy of personal information.[97]

J *JURISDICTIONAL ISSUES*

Due to the nature of commerce conducted through the Internet, it is vital to establish which law governs a contract formed and concluded online. Without an express choice of governing law, complex issues can arise. For example, the Philippine Judiciary should be able to resolve court jurisdiction over a computer server with disputed electronic data if the server is located outside the country.

Cyberspace presents two related choice-of-law problems. The first is the problem of complexity. This is the problem of how to choose a single governing law for cyberspace activity that has multi-jurisdictional contacts. The second problem concerns *situs*. This is the problem of how to choose a governing law when the locus of activity cannot easily be pinpointed in geographical space.

A clear point is the *E-Commerce Act* that following the trend in both the U.S. (safe-harbour provisions of the *Digital Millennium Copyright Act*) and E.U. (*Directive on Electronic Commerce*), intermediaries such as ISPs are excluded from civil and criminal liability where they merely provide access and electronic meeting facilities as opposed to taking part in the substantive commercial transactions and information exchange.[98]

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[96] see Paul M. Scwartz and Joel R. Reidenberg, Data Privacy Law cited in Jane Kaufmann Winn. 'Is the E.U. the U.S. Online Consumer's Best Friend, Draft dated 21 January 2001, 31.
[97] Ibid, 32.
[98] *E- Commerce Act 2000* s 30 .

K *DIGITAL CONVERGENCE ISSUES*

The present regulatory framework also has to be re-examined like the case of convergence of data, voice and video on a single network which is already a technological reality. To a certain extent, the onset of the Asian Crisis which started in 1997 was the impetus that pushed the present Philippine telecommunications operators to merge or consolidate among themselves, or with non-telecommunications like the broadcast and cable TV industries paving the way for the 'digital convergence' of telecommunications, broadcast and print media, and computers.

However, in almost every congressional franchise on telecommunications, there exists a statutory prohibition against merger and consolidation of telecommunications companies without the prior consent of Congress. Ditto with the congressional franchises of broadcast companies where a similar although differently worded statutory prohibition against the sale, lease and transfer of controlling interests of the controlling entity without the prior consent of Congress.

Furthermore, the telecommunication-broadcast company merger or consolidation will run against the policy under the *Public Telecommunications Act 1995* which provides that that: '[N]o single franchise shall authorise any entity to engage in both telecommunication and broadcasting, either through the airwaves or by cable.'[99] The merger or consolidation must also hurdle the one hundred percent nationality requirement in the ownership of broadcast companies or mass media under the Constitution[100] or even the prohibition against or regulation of monopolies in commercial mass media or combinations in restraint of trade or unfair competition.[101]

On the other hand, the telecommunication companies' nationality requirement under the Constitution allows foreign equity ownership to the extent of forty percent (40%) of the outstanding capital stock and participation in the Board of Directors in proportion to the said ownership.[102]

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[99] R.A. 7295 s 4[d].
[100] *Philippine Constitution 1987* Art XVI s 11(1).
[101] Ibid.
[102] *Philippine Constitution 1987* Art XII s 11.

Cable companies operate as a form of mass media in the same way as a broadcast company as provided by law.[103] However, it appears that *Executive Order No. 436, Series of 1997,* entitled 'Prescribing Policy Guidelines to Govern the Operation of Cable Television in the Philippines' attempted to repeal the enabling law by declaring that: '[T]he operation of cable television systems, as a subscriber service undertaking with a unique technology, shall be maintained separate and distinct from telecommunications or broadcast television…' It went on to further rule by executive fiat that: '[L]ocal exchange operators and/or broadcasters, as well as operators of direct broadcast satellite service, multi-point distribution service, television receive-only satellite program distribution service and other systems of providers of video programming utilising whatever technology, shall not operate cable television systems or any form of service involving the delivery of television programs and signals by wire or transmission systems without specific permits, licenses and/or authority to operate a cable television system…'[104]

The variance in the permissible foreign equity ownership between telecommunications and broadcast companies dictated no less by the Constitution is an impediment that even Congress in its legislative authority cannot remedy. Similarly, these issues present themselves in any merger or consolidation of telecommunication and cable TV companies.

Under the *Public Telecommunications Act of 1995* a VAS provider is defined as 'an entity which, relying on the transmission, switching and local distribution facilities of the local exchange and inter-exchanges operators, and overseas carriers, offers enhanced services beyond those ordinarily provided for such carriers.'[105] Computer technology may therefore provide enhancements to the basic telephony, which enhancements may not even be existing or foreseeable at present. These enhancements are invariably in technology although the content component especially when one looks at the entertainment market may also be an interesting focus. The

[103] *Executive Order No. 205, Series of 1987* preamble and ss 1 & 2. Pres. Aquino promulgated this law in the exercise of her express legislative powers then obtaining under the Freedom Constitution which modified the monopoly feature of the statutory franchise of a company called Sining Makulay granted by Pres. Marcos under *Presidential Decree No. 1512 (1978)*, and mandated the regime of taxation applicable to all grantees of Cable Antenna Television certificate of authority.
[104] *Executive Order No 437, Series of 1997 s*s 1 & 4.
[105] *Public Telecommunications Act (1995)* s 3.

merger of the VAS providers with the telecommunication companies does not need any congressional action provided that the telecommunication companies shall be the surviving entities and the controlling interest in the latter is not impaired; the consolidation however will definitely require congressional action as a new corporation will inevitably be established.

A telecommunication entity may provide VAS subject to the additional requirements that: (1) prior approval of the National Telecommunication Commission (NTC) is secured to ensure that such VAS offering is not cross-subsidised from the proceeds of their utility operations; (2) other providers of VAS are not discriminated against in rates nor denied equitable access to their facilities; and (3) separate books of accounts are maintained for the VAS.[106]

The merger or consolidation of the telecommunication companies shall require the prior approval and authorisation of the NTC.[107] Even before the SEC can consider the plan of merger or consolidation, the NTC's favourable recommendation must be obtained by the parties in interest through the conduct of a quasi-judicial proceeding on the matter in accordance with its rules.[108] However, even before the NTC can take cognisance of the case, there must be congressional approval of the plan of merger or consolidation as required by the franchises of the telecommunication companies, otherwise the petition on the merger or consolidation before the NTC shall suffer from a legal infirmity.[109]

There exists today the service area concept or scheme (SAS), which became the basis of granting licences for local exchange carrier service (LECS), international gateway facility (IGF) service and cellular mobile telephone system (CMTS) service.[110] The principles of cross subsidy and the allocation of the profitable and less profitable or unprofitable areas form the rationale of the SAS policy. These principles were established thru executive fiat and implemented by the NTC in the exercise of its administrative rule making authority. The SAS policy goes against the quasi-judicial

[106] Ibid s 3.
[107] *Commonwealth Act No. 146* s 20(g).
[108] *Revised Rules of Practice and Procedure Before the National Telecommunication Commission, Series of 1993.*
[109] Ibid r 7 s 2.
[110] *Executive Order No. 109, Series of 1993; NTC Memorandum Circular No. 11-9-93.*

nature of the NTC proceedings in applications for a public telecommunications authority. Proof of technical, financial, and legal fitness as well as the public need is primordial in these applications and must be established in accordance with rules of procedure.

In addition to the fact that the legal environment is not merger or consolidation friendly, these policies, which are forms of government intervention in a very competitive market may just be additional disincentives to merger or consolidation. It then appears that substantial policy and procedural constraints may deter the merger or consolidation of the telecommunication companies as between themselves or even with non-telecommunication companies. The constraints may be so serious that the technology driven industries may not achieve the very timeliness, efficiency and profitability desired in the merger or consolidation of their respective operations. While the liberalisation of the telecommunication industry brought forth rewarding achievements in increasing teledensity, the problems in interconnection and the duplication of the deployment of resources under the present policies particularly in the local exchange service and the wireless service still abound to the detriment of public service.[111]

IV PROBLEMS IN THE I.T. SECTOR

Low per capita income and the lack of a large listed IT sector have left some investors with the impression that the Philippines is an 'Internet black hole' for e-commerce and Internet-related businesses. Also the political overhang and the tame economic outlook relative to that of the region have earned the country an 'e-nothing' label as far as e-commerce activities are concerned.[112] Besides stinging poverty that has translated into few programming gigs for IT professionals in the country, the wrong kind of computer training has kept the country from following India as a beneficiary of low-cost Internet spin-off jobs, either in software or services like call

[111] Roberto Rafael V. Lucila, 'Merger and Consolidation Issues in the Telecommunications Industry', *Integrated Bar of the Philippines Law Journal and Magazine,* (Manila, Philippines) 2nd and 3rd Quarter 1998.
[112] Jose M. Galang, Jr., 'Market Forces: Getting Connected', *Business World,* (Manila, Philippines) 26 June 2000.

centres or technical support desks. Some 350,000 students are enrolled in computer colleges across the Philippines, but there are far fewer jobs to match their skills.[113]

The problem is more sociological than financial. The country's top universities – the University of the Philippines, Ateneo de Manila, De La Salle University – are dominated by students from rich and middle-class families who attended the top high schools. They eventually percolate into the elite jobs available for graduates. For less pedigreed programmers, the pickings can remain lean all their lives. Thus, these unemployed graduates turn on to hacking and cyber-piracy for livelihood.[114]

Another pressing problem is more of infrastructure like the lack of bandwidth. This applies for connections both external and internal to the country. The high cost of international links to the U.S. makes it necessary for the ISP with a direct link to oversubscribe and over-saturate the connection. Innovations such as proxy cache networks make it possible to squeeze better performance out of the available bandwidth, and ISPs also keep local resources of frequently accessed files to improve access time. The trend in developing locally housed content will also lead to more local accesses, bypassing the international links. At present many Web sites with local content are housed in the U.S. because the lack of local interconnection makes it faster for local users to connect abroad. Nevertheless, economies of scale allow ISPs to pay lower rates per kilobit/second for their international links if they order larger capacity. The installation of new international circuits over submarine cable also increases the supply of bandwidth, making it affordable.[115]

The ISP industry itself is beset with various threats from different sectors the most serious of which is the possible metering of phone lines initiated by the dominant carrier, Philippine Long Distance Telephone Company (PLDT), which has proposed phone metering even as early as 1996 when ISPs were just starting to proliferate. While PLDT has temporarily shelved plans for phone metering amidst stiff opposition from the ISP industry, once pursued and implemented it will badly affect the ISPs.

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[113] Daffyd Roderick, 'Hackers' Paradise', *Time Asia* (Hong Kong) 23 April 2001.
[114] Ibid.
[115] Paraz, above n 9, 6-7.

Another development that ISPs are tensely monitoring is the proliferation of non-traditional Internet service such as cable Internet and the prepaid card. As cable companies now start to offer Internet service, industry analysts are seeing tighter competition in the Internet provider market and consider cable operators to have the upper hand since cables are expected to carry wider bandwidth than the telephone lines the traditional ISPs are using. However, the narrow band market is still the choice among consumers because of affordability and portability. Nevertheless, with a number of ISPs also offering unlimited access, cable Internet becomes a potent competitor of ISPs in their higher-end packages. At the lower-end package, ISPs are also expected to be in tight sailing as prepaid Internet cards, because of their convenience, are now gaining popularity in the market.

With all these complications, plus the concern of being overcrowded, the ISP industry is seen to consolidate in the coming years, with the larger ISPs expected to survive.

An infrastructure, technology and policy task force of the expanded E-Commerce Promotion Council, a government-private sector council tasked to promote e-commerce in the Philippines was convened in April 2000 to identify and address problems and issues concerning e-commerce development in the country. One of the issues identified is the high cost of access, which the task force blamed on the restriction on foreign ownership of strategic public utilities like telecommunications. The task force declared that telecom companies have been circumventing constitutional and statutory restrictions by acquiring cable television firms and ISPs thus increasing cost and passing the cost burden to consumers.[116]

V *CONCLUSION*

Despite enactment into law of the *E-Commerce Act*, the legal infrastructure in the country is not yet ready to address the whole range of statutory and regulatory issues that spring from e-commerce transactions. A legal framework is still needed to

[116] 'Outdated Laws, Piracy Thwart E-Commerce, IT Development' *Business World,* (Manila, Philippines) 10 April 2000.

make e-commerce a reality and with technology evolving ever more rapidly and the Internet becoming more pervasive, we will increasingly see the law struggling to catch up with new e-business realities. While the enactment of the *E-Commerce Act* was regarded by business and government as a giant leap into the vast potential of Internet commerce, many in the judicial and legal profession have expressed misgivings about the sufficiency of the law in the settlement not only of major evidence and contract problems but also issues on security and privacy, intellectual property rights, taxation and territorial jurisdiction. These issues arise not only from the ambiguity of the provisions that appear to lean strongly on the side of the content providers while being silent on the rights of surfers and consumers. The *Implementing Rules and Regulations of the E-Commerce Act 2000* could have been an excellent opportunity to remove these ambiguities but unfortunately the delegated legislation was a mere reiteration of the ambiguities.

Most of the laws identified to be unworkable with the *E-Commerce Act* were passed when e-commerce was a reality in science fiction books and thus, have become inadequate or outdated because they do not contemplate the rapidly changing global economy that e-commerce bring. The basic goals of business in the digital revolution are efficiency and flexibility, or the capacity to adapt quickly to a rapidly changing global environment. The law often does not meet these expectations because the law is intended to be reactive and soberly deliberate. Also, the law is supposed to be the last resort in the case of failure of more flexible and market-related solutions to problems. The expansion of global electronic commerce also depends upon the participants' ability to achieve a reasonable degree of certainty regarding their exposure to liability for any damage or injury that might result from their actions. Inconsistent municipal torts laws, coupled with uncertainties regarding jurisdiction, could substantially increase litigation and create unnecessary costs that ultimately will be borne by consumers.

The haste in getting the *E-Commerce Act* passed, a move for international damage control because of the inability to prosecute a cyber-criminal, is probably the reason why the legal ramifications of the law were not fully deliberated by the Philippine Congress. Needless to say, the physical and social infrastructures, vital clogs to the success in importing capital to this new industry, were also not taken to

consideration. Until the country is able to develop these infrastructures paving the way for a software outsourcing industry and not a cheap source of labour for back office operations, the disadvantages of jumping into the e-commerce bandwagon far outweighs the advantages. Moreover, unless the country modernises its educational system, the Philippines will continue to remain a haven for hacking and cyber-piracy which unfortunately have not been curbed by the *E-Commerce Act*. In the first place, these activities were sought to be addressed with the law's enactment. The potential minefields that companies exposed themselves when investing in a country where hacking and cyber-piracy are persistent may not be overcome until the fledging industry acquires the necessary experience and confidence in settling all constitutional and statutory issues and the government assures the stability and neutrality of paperless transaction.