

**RIGHTS, DUTIES AND JUDICIAL PRONOUNCEMENTS
IN RESPECT OF 'INTERMEDIARIES' UNDER THE
INFORMATION TECHNOLOGY ACT**

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BIRTH OF INFORMATION TECHNOLOGY ACT IN INDIA

- With the advent of technological advancements and growing digital fraud, a need was felt to regulate and prevent offences and contraventions arising out of and linked to technology.
- Accordingly, Information Technology Act, 2000 was enacted on 9th June 2000.
- IT Act draws its inspiration from Model Law in Electronic Commerce adopted by the UNCITRAL, the object of both legislations being legal recognition of electronic records, and strengthening the business.
- The purpose of the Act is to provide legal recognition to electronic records, e-commerce and e-transaction, facilitate e-governance, and prevent computer-based crimes.

INTERMEDIARY

Intermediary under the Information Technology Act

Defined in S.2(1)(w) of the IT Act: with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes;

Thus, an *Intermediary* in respect of electronic records would be:

- Any person who receives/stores/transmits records on behalf of another person or
- Provides any service with respect to that record; and
- Includes TSPs, ISPs, search engines, online payment sites, online marketplaces, cyber cafes, online action sites, etc.

INTERMEDIARIES' LIABILITY UNDER THE IT ACT, 2008 (Pre-2009 Amendment)

Intermediaries' liability is described in Section 79 of the IT Act.

No person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third-party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

Here, "Network Service Provider" is the Intermediary;

"Third party information" means any information dealt with by a network service provider in his capacity as an intermediary;

Thus, the onus to prove lack of knowledge or exercise of due diligence was on the Intermediaries without any exemption given to any class of intermediaries

CASE DEFINING THE SCOPE UNDER IT ACT

AVNISH BAJAJ Vs. STATE

Delhi High Court, in a case relating to an obscene MMS video which was listed for sale on the website a **Website**, held that a prima facie case was made out against the Director of the Company for an offence under Section 67 of the IT Act, since the law recognizes the deemed criminal liability of the directors even where the company is not arraigned as an accused.

This is because, Section 85 of the IT Act provides that, when a company commits an offence under the IT Act, every person who was in charge of the company at the time may be proceeded against.

- **The Apex Court** however, in *Avnish Bajaj vs. State* (2012) 5 SCC 661, overturned the findings of Delhi High Court while holding that, vicarious liability cannot be fastened to the Director of the Website and he could not be held guilty under the IT Act provisions as the company was not arraigned as an accused.

INTERMEDIARIES' LIABILITY UNDER THE IT ACT, 2008 (Post-2009 Amendment)

The amendments introduced after the *Avinash Bajaj* (Delhi High Court case) case provided wider protection to the Intermediaries and hence now Sec. 79 is also known as “safe harbour” provision for the Intermediaries.

Now, Intermediary is not liable for any third party information, data or communication link made available or hosted by him, except for conditions stipulated in Section 79(2) and 79(3) of IT Act

Section 79(2): An Intermediary is not liable if-

- it's only role is to provide access to a communication system over which information is posted by third party and 'transmitted or temporarily stored or hosted'.
- it neither initiates the transmissions nor selects recipients and select or change the information contained in the message which is transmitted.
- it complies with due diligence requirements laid down by the Central government.

INTERMEDIARIES' LIABILITY UNDER THE IT ACT, 2008 (Post-2009 Amendment)

Section 79(3): An Intermediary is liable if:-

- it conspires or abets or aids or induces through threats or promises or otherwise to commit an unlawful act.
- on receiving actual knowledge or receiving a notice from the Government or its agency that any information residing in or connected to a computer resource which is managed by an Intermediary thereafter does not efficaciously remove that material without tampering or destroying the evidence in any manner.

'Third Party Information' shall mean any information dealt with by an intermediary in his position as an intermediary.

In Shreya Singhal v. Union of India, (2015) 5 SCC 1 it has been held that Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material.

My Space Inc. Vs. Super Cassettes Inc. Delhi High Court

- In the case of internet intermediaries, section 51(a)(ii) contemplates actual knowledge and not general awareness to attract liability for secondary infringement.
- Appreciating the difference between virtual and physical worlds, the judgment stated “*the nature of internet media is such that the interpretation of knowledge cannot be the same as that is used for a physical premise.*”
- Safe Harbor defence under Section 79 of the IT Act cannot be denied to the intermediary in the case of copyright actions and all three sections, i.e. Sec. 51 of the Copyright Act, Sections 79, 81 of the IT Act have to be read harmoniously.

Amazon Seller Services Pvt. Ltd. Vs. Modicare Ltd. & Ors. Delhi High Court

- There is no distinction between passive and active intermediaries so far as the availability of the safe harbour provisions is concerned and an Intermediary shall not be liable for any third-party information, data or communication link made available or posted by it, as long as it complies with Sections 79(2) or (3).

The Information Technology (Intermediaries Guidelines And Digital Media Ethics Code) Rules, 2021

MeitY took the first initiative to define the guidelines for Intermediaries in the year, 2011 which stood the test of time. Intermediary Guidelines Rules mandated Intermediaries to follow due diligence.

With advent of new technologies, fresh Rules were introduced in the year 2021 for

- (i) Intermediaries- Part II of 2021 Rules applies
- (ii) Digital Media including publishers of news and current affairs or publishers of online content- Part III of 2021 Rules applies

Objectives aimed at by the amendment:

- need to ensure that the interests and constitutional rights of netizens are not being contravened by big tech platforms,
- to strengthen the grievance redressal framework in the Rules,
- that compliance with these should not impact early stage Indian start-ups.

INTRODUCTION OF PERTINENT DEFINITIONS

News Aggregator:- entity performing a significant role in determining the news and current affairs content being made available, makes available to users a computer resource that enable such users to access the news and current affairs content which is aggregated, curated and presented by such entity.

Online Curated Content:- curated catalogue of audio-visual content, other than news and current affairs content; owned by, licensed to or contracted to be transmitted by a publisher of online curated content; made available on demand, through subscription, over the internet or computer networks and including films, audio visual programmes, documentaries, television programmes, serials, podcasts and other such content.

Publisher:- means a publisher of news and current affairs content or a publisher of online curated content

Social Media Intermediary [< 50 lakh registered Indian users] means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services;

Significant Social Media Intermediary [> 50 lakh registered Indian users] means a social media intermediary having number of registered users in India above such threshold as notified by Central Govt.

DUE DILIGENCE BY INTERMEDIARIES AND GRIEVANCE REDRESSAL MECHANISM [RULE 3 And 4]

All the social media intermediaries shall observe the following due diligence by discharging duties:

- publish on its website rules and regulations privacy policy and user agreement and shall periodically inform its user about the same.
- inform the user not to host display upload transmit or share any information which is harmful to child, infringe IPR, is defamatory, obscene violate any law threatens the security of India, contains software virus etc.
- shall insure online safety and dignity of users especially women users.
- Intermediary shall remove or disable access within 24 hrs of receiving the complaint.
- upon receiving actual knowledge in the form of an Court order or notification by appropriate govt. platforms, should not host or publish any information and remove unlawful information.
- shall retain information for a period of 180 days after any cancelation or withdrawal of registration on a computer resource by a user.

ADDITIONAL DUE DILIGENCE TO BE OBSERVED BY SIGNIFICANT SOCIAL MEDIA INTERMEDIARY

- Appoint a Chief Compliance Officer who shall be responsible for insuring compliance with the act and rules.
- Appoint a Nodal Contact Person for 24X7 coordination with law enforcement agencies.
- Appoint a Resident Grievance Officer who shall perform the function mentioned in grievance redressal mechanism. All These Officers should be resident Of India.
- Publish a monthly compliance report mentioning the details of complaints received and action taken on the complaints as well as details of contents remove proactively by the significant social media intermediary.
- While providing services primarily in the nature of messaging it shall enable identification of the first originator of the information however intermediary shall not be required to disclose the content of message or other information of the originator.
- Shall enable users who to voluntarily verify their accounts and provide such user demonstrable and visible mark of verification, which shall be visible to all users of the service.

The Information Technology (Intermediaries Guidelines And Digital Media Ethics Code) Amendment Rules, 2023

- Amendments have been introduced on 6th April 2023 to incorporate the aspect of “online gaming”
- Sec. 2(qa) introduces the definition of “online game” means a game that is offered on the Internet and is accessible by a user through a computer resource or an intermediary.
- Sec. 2(qb) introduces the definition of “online gaming intermediary” means any intermediary that enables the users of its computer resource to access one or more online games
- If the online game that can cause harm to the user, then it is the duty of the Intermediary and grievance redressal mechanism to inform the user of its computer resource not to host/display/upload/modify/publish/transmit/store/update/share any information of that harmful online game.
- If an online gaming intermediary has enabled the users to access any permissible online real money game, it will have to inform its users of such change as soon as possible, but not later than 24 hours after the change is affected.
- Online gaming intermediaries have to display a demonstrable and visible mark of verification of such online game by an online gaming self-regulatory body on such permissible online real money game.
- Online gaming intermediary will not itself finance or enable financing to be offered by 3rd party.

The Information Technology (Intermediaries Guidelines And Digital Media Ethics Code) Amendment Rules, 2023

- Rule 4A has been introduced to enable “**Verification Of Online Real Game**”. For this purpose:-
 - power vests in Central Govt. to designate as many online gaming self regulatory bodies as it thinks is necessary for verifying an online real money game
 - Regulatory Authority, on their website/mobile based application, have to maintain the details of the applicants, dates and period of validity of verification, dates of acceptance as member, their corporate/business related identity number, reasons of verification, details of suspension/revocation.
 - Every online gaming self-regulatory body will prominently publish on its website/mobile based application, the framework for redressal of grievances and the contact details of the Grievance Officer.
 - Upon making an application, if the self-regulatory body after conducting inquiry is satisfied that :
 - (i) It does not involve wagering on any outcome;
 - (ii) is in compliance with provisions relating to the age at which an individual is competent to enter into contract;
- It can declare the online real money game as a permissible online game.

THANK YOU

