

THE SHIFTING PARADIGM OF INTERMEDIARY LIABILITY: THE EVOLUTION OF INTERMEDIARY LIABILITY IN INDIA

Experts claim that Internet intermediaries cannot self-regulate and fail to properly police their platforms. In addition, the business models they pursue are directly at odds with the public good. Some jurisdictions like Thailand and China hold intermediaries strictly liable for user-generated content. Others like the European Union and the United States grant them conditional immunity from liability, depending on the availability of certain conditions. The safe-harbor model is characterized by the existence of “notice-and-takedown” processes, and by the installation of some form of technology-based or self-regulatory content filters designated to prevent the publication of unlawful content. Regulatory rules, however, should not be overbroad and violate basic digital rights such as privacy and free speech online. For instance, YouTube’s “Content ID” system for detecting content that infringes copyright, has been deemed notorious for over censoring innocent material. Use of AI without human intervention for detecting hate speech, misinformation, disinformation, trolling, etc., which is even more nuanced than identifying copyrighted material, may prove to be catastrophic for freedom of expression on the Internet.



In India, public accusations of intermediary platforms for spreading rumors or fake news have resulted in changes of existing rules initiated by the government. On 24th December, 2018, MeitY released the Draft Information Technology (Intermediaries Guidelines (Amendment) Rules), 2018 (“the Draft Rules”) that aimed to introduce stricter requirements such as tracing out of originator of information for assistance to law enforcement, deploying of automated tools for proactive filtering of unlawful content, and taking down of illegal content within 24-hours, etc. Such a step may have negative effects on the rights of free speech and privacy.

The reaction of intermediaries was that the current legislative framework is adequate in principle. India’s own Information Technology Act (IT), 2000, was amended in 2008 to introduce a safe-harbor regime. The Information Technology (Intermediaries Guidelines Rules), 2011, specified a number of due-diligence criteria that intermediaries were to observe in order to qualify for

immunity. Some of the requirements pertain to the publication of rules/regulations; privacy policies, user agreements and terms and conditions to specify prohibited content as being grossly harmful -- harms minors, infringes intellectual property rights, and contains virus to mention several.

According to Section 2(1)(w) of the IT Act, virtually any website that features user-generated content and a large number of Internet service providers, fall within the definition of an intermediary. The Section provides a non-exhaustive list of entities that includes examples such as online payment sites, online auction sites, online marketplaces, cyber cafes. social media websites, blogging platforms, message boards, and consumer review websites.

Section 79 of the IT Act, in conjunction with the ruling of the Supreme Court of India in the seminal case of Shreya Singhal, allowed intermediaries to takedown content only on instructions by courts or authorized government agencies, which paved the way to a more proportionate intermediary liability regime.

Subsequently in matters concerning the infringement of IP rights, in order for intermediaries to keep their safe-harbors protection under the IT act, courts have replaced the ‘actual knowledge’ requirement with a ‘specific knowledge’ requirement. In its landmark judgment in Myspace v. Super Cassettes Industries[66] the Delhi High Court stated that “in the case of copyright laws it is sufficient that MySpace receives specific knowledge of the infringing works in the format provided for in its website from the content owner without the necessity of a court order.” In another matter before the same court under the Designs Act, 2000, the court rejected the claim of the rights owner, who wanted the intermediary (eBay) not only to remove existing infringing products but to screen similar listings in future and remove infringing products without the intimation of the owner. The arguments were that intermediaries are liable to only remove infringing content that is specifically asked for and are not obliged to do pre-screening and active monitoring of content, which may result in a chilling effect on free speech (as observed in the Myspace judgment).

Transparency and accountability of platforms is the need of the day, but governments should enact a less invasive and proportional means of regulation of the Internet.

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