

EVOLUTION OF INTERMEDIARIES AND INTERNET SERVICE PROVIDERS: AN OUTLINE

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ABSTRACT

The Internet's most salient characteristic is that it inserts intermediaries into relationships that could be, and previously would have been, conducted directly in an offline environment. Internet intermediaries contribute to and consequently co-responsible for all kinds of information flow. At the inception of the Internet era, the term “Internet intermediaries” was mainly synonymous with “Internet Service Providers”, referring generally to those telecommunication companies that offered access to the World Wide Web. However, the roles and functions of Internet intermediaries have since evolved and expanded considerably, and the term “Internet intermediaries” today is applicable to a diverse group of entities that are both technically and structurally more different and complex, and which take on more functions, than the traditional network access providers. Internet service provider is an entity that connects people to the Internet and provides other allied services such as Web site building and hosting.

The intermediary eco-system in India is still evolving. The liability of an intermediary for its various activities is generally determined by a court of law. Since the legislative provisions are evolving in this field, the extent varies from case to case and circumstance to circumstance.

Key Words- India, Intermediaries, Internet, , liability.

INTRODUCTION

Guided by the unique vision of computer communication in a world of calculating machine and driven by the desire to solve a series of complex problems, the internet emerged as an open architecture marvel of scientific cooperation.¹ The Internet is the result of dedication to a set of

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¹ Hossein Bidgoli, The Internet Encyclopedia , at 14 (2004).

core principles: that this communication system be the result of cooperation among interested parties, be open to new ideas, and the scalable. The vision was realized in a series of fits and starts, problems and solutions, ideas and the implementation of those ideas by pushing the boundaries of current technology. It is the result of intellectual and political argumentation and compromise, funded by the military- industrial complex, but realized in the world of academic.

Over a period of years, computers have evolved from the simple single-user computing environments that emphasized a stand-alone functionality to that which can now be characterized as largely distributed. Realizing tremendous benefits, advantages, and efficiencies gained from resource and information sharing, individual users, businesses, and governments have become functionally dependent on a network of ubiquitous connectivity and near absolute availability to operate at some of the most basic levels of social, political, and economic intercourse. Along with evolutionary changes in the computer processing capabilities and functionality, there has been an associated evolution in the computing environment that has shifted from a subscriber-centric emphasis to a network-centric approach that puts a premium on effective utilization of the information that resides on or passes between systems. Best articulated in the expression “the right information, at the right time, to the right person”, information is now described as the most valuable asset of organizations. Today, valuable information is largely exchanged across an infrastructure that fosters redundancy to eliminate single points of failure and to ensure the utmost reliability in transmission.

At the inception of the Internet era, the term “Internet intermediaries” was mainly synonymous with “Internet Service Providers”, referring generally to those telecommunication companies that offered access to the World Wide Web. However, the roles and functions of Internet intermediaries have since evolved and expanded considerably, and the term “Internet intermediaries” today is applicable to a diverse group of entities that are both technically and structurally more different and complex, and which take on more functions, than the traditional network access providers.

The Internet is the most well- known component of the information superhighway network infrastructure.² The Internet is an information distribution system spanning several continents. It is an engine of dissemination of information that can benefit the public. It is very general infrastructure targets not only one electronic commerce application, such as video User Service

² Asit Narayan & L.k Thakur, *Internet Marketing E- Commerce and Cyber Laws* at 1(2000).

Area. The Internet is a vast network of linked computers through which information is rapidly sent.³ People who desire access to the Internet must find some way to connect to this network. Individuals or businesses can connect directly to the Internet. However, such direct connections are expensive and generally remain the province of governments, large businesses, and universities. Most individuals and smaller organizations, therefore, opt for an Internet subscription from an Internet Service Provider. This generally involves the ability to connect to the Internet through the ISP's computers, an email account, and hosting of the subscriber's Internet web pages on the ISP's computers.

The global Internet has become a vibrant and essential platform for economic activity, human development, and civic engagement. Internet offers numerous new ways to communicate and share ideas, many of which we could not have imagined just a few years ago and many more to come that we cannot envision today. Innovative technologies combined with already existing features are used to form new Internet services which can be used by journalists and citizens alike. Every day, millions of journalists, educators, students, business people, scientists, government officials, politicians, and ordinary citizens go online to speak, access information, and participate in nearly all aspects of public and private life. Internet service providers (ISPs), telecommunications carriers, websites, online services, and a range of other technological intermediaries play critical roles in getting information and ideas from one corner of the online world to another.

The intermediary eco-system in India is still evolving. At a glance, it is apparent that the major online intermediaries in India are familiar global names. Accessing the Internet in India, digital access is concentrated in urban areas, and among literate people who are familiar with the languages used by international online platforms. The Internet's most salient characteristic is that it inserts intermediaries into relationships that could be, and previously would have been, conducted directly in an offline environment

The Internet technology requires the insertion of intermediaries between interacting parties in two ways: First, for all interactions over the Internet, the communication necessarily involves the Internet itself, as well as the parties necessary to facilitate the particular communication, with the exception of those relatively few entities sufficiently involved in Internet transmissions to be directly connected to each other. More importantly commercial transactions on the Internet

³ See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849-53 (1997) (describing the development and operation of the Internet).

require the use of other intermediaries. In commercial transactions, payment intermediaries must be used, because such transactions cannot use cash as payment. Auction intermediaries are also often employed to bring the parties together.

Identifying the individual who posts allegedly infringing material is not an easy task, whereas spotting the ISP is quite simple. Even if the offending individual is caught, there is no guarantee that he will have the resources to pay legal damages. ISPs, on the other hand, are in a position to pay with the profits the ISPs make from the pirates' use of the Internet. Therefore, copyright holders target ISPs out of sheer pragmatism.⁴ Additionally, in comparison to an independent publisher or author, an ISP is in a much better position to supervise how its subscribers make use of the Internet. Both of these factors make the ISPs especially culpable in the eyes of the law.

Ever more business deals (ranging from simple purchases of goods to complicated contracts) are done on the net. Some of those business deals go awry, spawning business litigation. Various forms of harassment, slander, fraud, and other "informational" torts and crimes may be committed on the Internet. Copyright infringement abounds on the Internet.

Intermediaries' liability has curved a lot of attention of the people in the recent times. This century surely stands as a synonym to the information and technology age and in this epoch of the present time e-mail services, social networking, creating websites and hosting information and using information have all become of frequently used entities. Now many contents feature on these social networking sites and websites and now if they are not considered to be fit for society and are found to be bad in nature then who has to be held liable for it and here comes in the question of liability in this case, the liability of the internet service providers. With the expansion of information and technology also expands the argument of who should be liable for hosting the unlawful contents on the internet and how far the internet service providers should be held liable for any misconduct or wrongful act. When there is such enormous creation of interest and application of the people of society, the laws relating to this becomes really significant. There are many problems which are faced and so the relation with law and information and technology in

⁴ Jidesh Kumar, Internet Service Provider's Liability For Copyright Infringement, 22 May 2003, (April 22, 2017, 11:28 a.m.), <http://www.mondaq.com/india/x/21249/Copyright/Internet+Service+Providers+Liability+For+Copyright+Infringement>.

the contemporary world becomes juxtaposition.⁵ The predicament towards proving liability of intermediaries is a basic problem of understanding that the person who created the unlawful and prohibited content should be solely held responsible for his content rather than alleging the internet service provider and intermediaries for the same, whose system just happen to automatically transmit what is commanded to it by the creator of the content rather than the intermediary and so to held intermediaries responsible is unjust.

In essence, internet intermediaries plays one of the two roles in an information transaction. They may provide services to one or more of the parties, including fundamental communication services such as access, information storage, etc. Alternatively, they may provide some additional service which facilitates the transaction between end users, eg identifying one of the parties, providing search facilities etc. liability for providing defective services of this kind will be based on established legal principles, although application of these principles to previously unknown types of service may not be obvious.

Many of the services are merely electronic version of services already provided in the physical world, and in those cases the law will require little development to provide an adequate framework for determining the rights and responsibilities of the parties. Services are intangible, like information, and the internet merely provides a new mechanism for delivering those services which can be provided solely by transferring information around the world.⁶ The legal difficulties which do arise will almost certainly arise not from the law regulating the service itself, but from the fact that services delivered via the internet can be supplied from foreign jurisdictions and via a distributed enterprise.

CONCEPT OF INTERMEDIARIES

In layman's parlance, an "intermediary" is understood as any person or entity that provides a connection between two other parties, such as by opening up a channel of communication or by mediating disputes or facilitating interaction. There exist intermediaries in various industries such as- financial, insurance and agriculture. Intermediaries exist in both physical and online world.

⁵ ShashankPathak , Information and Technology (Intermediaries Guidelines) Rules 2011: Thin Gain with Bouquet of Problems , (10 May 2017 , 11.40 a.m.) <http://www.manupatra.co.in/newline/articles/Upload/269ED933-8F47-4EB3-A6C3-DA326C700948.pdf>.

⁶ Chris Reed, Internet Law at 89 (2004).

Intermediaries are vital to commercial activity, including supplying ingredients and raw materials, distributing products, and providing retail space to conduct sales.

There are fundamental differences between physical world and internet intermediaries. Physical world intermediaries are conscious actors in the transaction, whereas internet intermediaries are often unconscious actors. Physical world intermediaries have a prior, legal relationship with one of the primary actors; internet intermediaries more commonly have no pre-existing relationship.⁷

Internet intermediaries

Internet intermediaries are, in the most generic form, those entities providing services that enable individuals to receive or impart information on the internet. “Internet intermediary” has been defined in a broad sense, including internet service providers (ISPs) as contained in the European Union Directive on Electronic Commerce (DEC) and the US Digital Millennium Copyright Act (DMCA), electronic platforms, social networks, “link-listing websites”, and internet search engines.⁸

“Intermediary” 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.

Given their instrumental role for individuals’ speech, intermediaries are a frequent target of legal actions aimed at preventing or stopping the publication of allegedly illegal material, even where such material was not produced or edited in any way by the intermediary. “Internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.”

⁷ Id at 93.

⁸ WIPO Standing Committee on Copyright and Related Rights (SCCR), “Internet Intermediaries and Copyright: Presentation of Paper Summarizing National Approaches”, April 2014, (2 May 2017., 07.43 pm.) cis-india.org/a2k/blogs/wipo-sccr-27-discussion-transcripts-day-3.pdf

Intermediaries are widely recognized as essential cogs in the wheel of exercising the right to freedom of expression on the Internet. Most major jurisdictions around the world have introduced legislations for limiting intermediary liability in order to ensure that this wheel does not stop spinning.

Applied to the Internet context, it can describe a wide array of agents defined and determined by function, which can involve several parties in a chain of intermediaries or one player performing one or more go-between function.

Internet Service Provider

A business that supplies Internet connectivity services to individuals, businesses, and other organizations is Internet Service provider .

Some ISPs are large national and multinational corporations that offer access in many locations, while others are limited to a single city or region.⁹ The service providers thus include originator of the information from whom information flows, access provider, who makes access to the information possible, network provider who transports information and the end user. These service provider join together to make information available with or without any pre-existing relationship with each other. “Internet Service Providers have been defined as the entity offering the transmission, routing or providing of connections for digital online communications, between and among points specified by a user, of material of users choosing, without modifications to the content of the material as sent or received.”¹⁰

FUNCTIONS OF INTERNET INTERMEDIARIES

Against the backdrop of a broadening base of users worldwide and rapid convergence to IP networks for voice, data, and video, Internet intermediaries ‘provide increasing social and economic benefits; whether it be through information, e-commerce, communication/social networks, participative networks, or web services. Internet intermediaries provide economic growth with new businesses and productivity gains through their contribution to the wider ICT sector as well as through their key role within the Internet ecosystem. They operate and maintain most of the Internet infrastructure, which now underpins economic and social activity at a global level, and are needed to help ensure there is continued sufficient investment in both physical and

⁹ Microsoft Internet & Networking Dictionary at 13 (2004).

¹⁰ Farooq Ahmad, Liability Limits of service providers for Copyright Infringement, JIPR, V l. 8, at 189 May 2003.

logical infrastructure to meet the network capacity demands of new applications and of an expanding base of users.

Internet intermediaries also stimulate employment and entrepreneurship by lowering the barriers to starting and operating small businesses and by creating opportunities for long-tail economic transactions to occur that were not previously possible, whereby businesses can sell a large number of unique items, each in relatively small quantities. Internet intermediaries enable creativity and collaboration to flourish among individuals and enterprises and generate innovation. User empowerment and choice are considered to be very important and positive social side effects of the access to information that Internet intermediaries provide, as well as improving purchasing power with downward pressure on prices.

A critical role of Internet intermediaries is to establish trust while using modern communication technologies. By enabling individuality and self-expression, they also offer potential improvements to the quality of societies in terms of fundamental values such as freedom and democracy.

As the intermediaries are preferred targets they look for ways which will help them out of a possible legal entangle hence they resort to certain tactics like disclaimer and boundary markers to prevent liability mainly in the areas of liability arising out of contract of tort. ISPs help e-commerce by enabling internet users to disseminate information at low cost and to do so anonymously. The question of liability of such Intermediaries arises when there is dissemination of illegal content and such liability is two fold- civil and criminal. Quite recently this area of law has undergone a considerable change whereas effort is on to simplify the liability but at the same time to burden the online intermediaries with obligation to scan and filter the illegal content. Though their liability is multi- dimensional extending to the civil, tortious and criminal entrenchment.

The impact of intermediary liability on innovation, economic development, and human rights is of important concern. The history of the Internet to date shows that providing broad protections for intermediaries against liability is vital to the future of the Internet. Certain attributes of the internet appear to support especially robust online speech: the internet has a nearly unlimited capacity to enable user participation and interactivity, and its borderless nature defines traditional territorial boundaries. At the same time, other attributes of the internet offer new avenues of control and new ways for governments to stifle dissent.

ROLE OF ISPs IN COMMUNICATION ON THE INTERNET

The two main services provided by ISPs are: Web site building and hosting; done by an entity that provides space and management for individual or business Web sites; and Access providing; done by an entity that arranges for an individual or an organization to have access to the Internet.

The access providers play a major role in the working of Internet by providing various services, ranging from dial-up account for the home user, to a permanent leased- line connection for commercial use. Nowadays, a typical access provider is a commercial organisation making profits out of selling Internet access to home and commercial users. These commercial access providers are commonly known as ISPs. In order to connect to the Internet, a user requires an ISP and a medium for communication to allow passage of information to and from the computer.¹¹ ISP, provides the user with services like World Wide Web, e-mail, listserves, newsgroups and other additional services like web site hosting and design, rendering its role even more prominent for the working of the technical web.

In addition to serving individuals, ISPs also serve large companies, providing a direct connection from the company's networks to the internet. ISPs themselves are connected to one another through Network Access Points (NAPs). The term ISP presently encompasses a wide array of different types of service providers. An ISP may provide Internet access services on a retail basis to residential and/ or business customers. An ISP may operate only a backbone network and provide Internet dial and/or dedicated access services to other ISPs on a wholesale basis.¹² Some ISPs provide hosting services, whereby customers store information on their computer servers operated by the ISP with dedicated internet access and 24-hour-a-day, 7-day-a-week maintenance and security. Some ISPs provide server caching, the local storage of frequently requested third-party web site content. Other ISPs do not provide any of the aforementioned services and operate only portals. A portal is a website that aggregates and organizes information about the content of other web-sites so users can readily find desired information.

CHALLENGES

Given the scale and openness of the Internet, it is inevitable that some users will post content or engage in activity that is unlawful or offensive. As a result, Internet intermediaries often face calls to control or police user activity in a wide range of circumstances, including in response to claims of defamation, obscenity, intellectual property infringement, invasion of privacy, or because content is critical of government. This raises challenging policy questions that will impact the

¹¹ Roper Brent D, Using Computers in the law office at 289 (2000).

¹² Timothy D. Casey, ISP Liability Survival Guide at 16 (2012).

future growth of the online environment and the liability of technological intermediaries for content posted by their users and other third parties and the circumstances to require or encourage intermediaries to police or limit access to such content.

There are some common elements to intermediary liability. In general, there is recognition that intermediaries who transmit information originating from third parties (including information hosted by the intermediary for such transmission) should not be absolutely liable for the action of their users. There are two reasons for imposing liability on which most laws seem to be agreed: where the intermediary knows or has reason to believe that the information content it transmits is unlawful; and where, irrespective of the intermediary's knowledge, it benefits directly from the transmission. An additional reason for imposing liability, which is not accepted universally, is; where the intermediary fails to take reasonable steps to determine if the information content it transmits is unlawful. It must be recognised, however, that these justifications for imposing liability were developed in respect of physical world transaction. There, an intermediary is more closely connected with the parties to the transaction, and has a great opportunity to assess the respectability of those for whom it acts and the nature of their activities. Internet intermediaries work in what is effectively an anonymous world. It is theoretically possible to identify the source of transmissions and the nature of the information transmitted, but in practice the volume and speed of transmission make such identification difficult, if not impossible. For this reason, there is a trend towards granting internet intermediaries much greater immunities and limitations on their liability for third party content.

While the Intermediaries play the most significant roles in the cyber world, they are being targeted by governments and/ or law enforcement agencies across the world, for failure to discharge gate – keeping duties and obligations, and as abettors of criminal acts by the main actors – the speaker/ author/ initiator/ originator of an electronic communication or publishing of an electronic record. Intermediaries are facing bans by are being hounded by law enforcement agencies, and are also being implicated in criminal prosecutions.

The legality pertaining to intermediaries assume significance. Without realizing, intermediaries, today have become huge data repositories, which are saving valuable data, personally identifiable data as also sensitive personal data and information of their users on their networks and computer resources. As such, intermediaries have been straddle with distinct responsibilities under distinct legal frameworks.

The liability of an intermediary for its various activities is generally determined by a court of law. Since the legislative provisions are evolving in this field, the extent varies from case to case and circumstance to circumstance. The exact standard to which intermediaries will be held liable will vary between jurisdictions, but as a general rule liability will only arise where a certain level of knowledge (whether actual or constructive) is present.¹³ Protecting Internet intermediaries from both liability and gatekeeping obligations with regard to content posted or transmitted by others is critical for preserving the Internet as a uniquely accessible medium for free expression. It supports widespread public access to information, innovation in information and communications technology, and economic development. User generated content sites in particular have become vital forums for all manner of expression, from economic and political participation to forging new communities and interacting with family and friends. If liability concerns and content- and user-regulation requirements force private intermediaries to close down or sharply restrict these forums, then the expressive and economic potential of Information Communication technologies will be diminished.

The liability regime for Indian online intermediaries is defined by the Information Technology Act, 2000 and the Copyright Act, 1956. These Acts are supplemented by various allied rules under the IT Act, the main is Information and Technology (Intermediaries Guidelines) Rules 2011. The Information Technology Act 2000, is mother legislation that deals with use of computer, computer systems, computer network, computer resources and communication devices. Its amendment in 2008 made it a stronger cyber legislation. However, the legal framework has been criticised for being unclear and open to interpretation, leading to legal uncertainty for online intermediaries.

In India, the law has attempted to mitigate and remove the vulnerability of intermediaries to liability (civil and criminal) by providing them immunity from liability subject to certain conditions. Thus internet intermediary liability is a wide-ranging topic, stretching into many different areas of law, from defamation and privacy to trademark and copyright infringement - just to name a few. Given the substantial differences between the issues at stake in these areas, legislators in many countries adopted domain-specific solutions, with the aim to appropriately account for the tension between different rights and interests at stake.

CONCLUSION

¹³ Chris Reed and John Angel, *Computer law* at 240 (2002).

The concept of intermediary is extremely broad and wide in its scope and ambit as also constantly expanding with each passing day. Different countries and legislative mechanism are adopting different methodologies and approaches on how to define the concept of intermediaries. Intermediaries are huge data repositories who are managing, processing, dealing and handling huge volume of data. Intermediary's liability have curved a lot of attention of the people in the recent times. The reasons for imposing liability on intermediaries is that they are often seen as potentially more lucrative targets for litigation than the originators of the offending information content.

As technology evolves at a fast pace, the law should not be found wanting. The law should be an enabling factor that ensures that citizens enjoy their right to freedom of speech and expression without any hindrance. India, being the largest democracy in the world should lead the world in ensuring that the citizens enjoy the right to express themselves freely online. Governments everywhere should adopt policies that protect Internet intermediaries as critical actors in promoting innovation, creativity, and human development. A harmony between liability and exemption from liability must be maintained to ensure the continued accessibility of information and content.