

## THE CHANGING ROLE OF INTERMEDIARIES IN THE INFORMATION TECHNOLOGY ERA

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### ABSTRACT

Modern era may aptly be described as the Information Technology era where the use of electronic or digital devices has increased manifold. Netizens are active on various platforms on the internet. The word Intermediary had been defined in the Information Technology Act, 2000. Prior to Amendment of 2009, Intermediary with respect to any particular electronic message, meant any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message. In the 2009 amendment, this definition was further extended. It says that Intermediary with respect to any electronic records means any person acting on behalf of another person receives, stores or transmits that record or provides any service in that regard. It includes telecom service providers, network service providers, internet service providers, web-hosting service providers and many more. Thus, the word 'intermediary' has been defined in the Information Technology Act, 2000. However, there is no separate classification of the intermediaries in the Act itself, In 2021, for the first time, a separate classification for the social media intermediaries was introduced by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. This clearly specified the government's intent to make the intermediaries more responsible. The basic idea behind this change was that intermediaries don't have control over the content posted on their platform. Hence, they enjoy a legal immunity against third party content posted on their platform, as long as they adhere to certain due diligence requirements, termed as 'safe harbour'. But such regulations in regard to other intermediaries are not available, including e-commerce sites, fact-checking portals etc. presently. Keeping in view the growing menace of misuse of these platforms and portals, the Central Government has brought a new legislation, the Digital India Bill which is supposed to

address this issue. The new law will recognize different kinds of intermediaries because their regulation has to be different. There will be no pure intermediary anymore. The idea behind is that the intermediaries do not have control over the content. However, with the new legislation, this situation will change, since fact-checking portals would typically be considered as publishers. This paper explores the scope of online intermediaries in the light of new legislation and the possible impact on the digital space.

**Keywords:** Intermediary, Information Technology Act, 2000, The draft Digital India Bill, Safe Harbour, The IT Rules, 2021.

## INTRODUCTION

The word 'Intermediary' has been defined in the Information Technology Act, 2000 as a person who on behalf of another person receives, stores or transmits any particular electronic message or provides any service in regard to that message.<sup>i</sup> This definition was amended by Act 10 of 2009, Section 4 (w.e.f. 27.10. 2009). The amended Section stipulates that 'Intermediary' is a person in regard to any particular electronic records who on behalf of others receives, stores or transmits that record or provides any service connected 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- marketplaces and cyber cafes". Thus by introducing this amendment, the categories of intermediaries have been clearly specified.<sup>ii</sup> Here, it would be worthwhile to examine the provisions in regard to intermediaries in the IT Act of 2000,-

1. Section 6-A of the Act (IT Act) authorizes by order any service provider to set up, maintain and upgrade the computerized facilities and perform such other services as may be specified by notification in the official gazette. Its purpose is to provide efficient delivery of services through electronic means. This authorization will accrue from the appropriate Government.
2. Section 6-A(2)(3)&(4) deals with the appropriate service charges.<sup>iii</sup> Further, Section 67-C of the IT Act ordains the intermediaries to preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may

prescribe. Section 67-C (2) specifically says that any Intermediary who knowingly or intentionally contravenes these provisions, he will be subjected to punishment with an imprisonment for a term which may extend to three years and shall also be liable to fine.<sup>iv</sup>

3. Section 69-B(2) stipulates that any intermediary when called upon by any Government-authorized agency to monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource, to provide technical assistance and extend all facilities to such agency to enable online access or to secure and provide online access to the computer resource generating, receiving or storing such traffic data or information. Sub-Section (4) further says that any contravention in this regard would attract the punishment with an imprisonment for a term which may extend to three years and shall also be liable to fine.

4. Again, Chapter XII of the IT Act, and corresponding Section 79 deals with exemption of intermediaries from liability in certain cases. It says that subject to the provisions of sub-sections (2) and (3) of this Section 79, an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him. This immunity is not available if he has conspired or abetted or aided or induced in the commission of any unlawful act. The Explanation to this section clearly states that for the purpose of this section, the expression "third party information " means any information which the intermediary has dealt with in his capacity as an intermediary.<sup>v</sup>

These provisions only ask the intermediary to diligently follow the government guidelines and instructions and they also provide an immunity against third party information subject to certain conditions. These regulations are the same for all kinds of intermediaries irrespective of their assigned roles and responsibilities. For the first time, "Social Media intermediary" was defined separately in the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Rule 2(w) of these Rules defines "Social Media Intermediary " which states that it 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. Thus, a social media intermediary enables the online interaction between two or more users allowing them several connected services. In the strict sense, it is related to social media platforms. In Rule 2(v) of these Rules, "Significant social media intermediary " has also been defined which means a social media intermediary having number

of registered in India above such threshold as notified by the Central Government. Rule 3, Part II of these Rules is about due diligence by an intermediary which says that both the social media intermediary and significant social media intermediary shall observe the following due diligence while discharging its duties, namely:-

(a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement for access or usage of its computer resource by any person;

(b) the rules and regulations, privacy policy or user agreement of the intermediary shall inform the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that,-

- i. belongs to another person and to which the user does not have any right;
- ii. is defamatory, obscene, pornographic, pedophilia, invasive of another's privacy, including bodily privacy, insulting or harassing on the basis of gender, libelous, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force;
- iii. is harmful to child;
- iv. infringes any patent, trademark, copyright or other proprietary rights;
- v. violates any law for the time being in force;
- vi. deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any information which is patently false or misleading in nature but may reasonably be perceived as a fact;
- vii. impersonates another person;
- viii. threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting other nation;
- ix. contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;
- x. is patently false and untrue, and is written or published in any form, with the intent to mislead or harness a person, entity or agency for financial gain or to cause any injury to any person;<sup>vi</sup>

(c) It will be the duty of the intermediary to periodically inform him, at least once a year, that in case of non-compliance with rules and regulations, privacy policy or user agreement for access or usage of the computer resource of such intermediary, it has the right to terminate the access or usage of the computer resource immediately or remove non-compliant information or both accordingly.

(d) On receiving an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (b) of sub-section (3) of Section 79 of the Act, the intermediary concerned shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force. Provided that such notification shall be issued by an authorized agency, as may be notified by the Appropriate Government. Provided further that the concerned intermediary shall remove or disable access to that information, as early as possible, but in no case later than thirty-six hours from the receipt of the court order or on being notified by the Appropriate Government or its agency, as the case may be. It has also been provided that no such removal or disabling of access to any information, data or communication link within the categories of information specified under this clause, under clause (b) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such intermediary, shall amount to a violation of the conditions of clauses (a) or (b) of sub-section (2) of Section 79 of the Act.

(e) Any temporary or transient or intermediate storage of information automatically by an intermediary in a computer resource within its control as an intrinsic feature of that computer resource, and where no exercise of any human, automated or algorithmic editorial control for onward transmission or communication to another computer resource is involved, shall not amount to hosting, storing or publishing any information referred to in clause (d).

(f) The intermediary will inform its users, at least, once a year, of its rules and regulations, privacy policy or user agreement or any change in the rules and regulations, privacy policy or user agreement, as the case may be.

(g) Where any information has been removed or access to which has been disabled after receiving actual knowledge under clause (d), on a voluntary basis on violation of clause (b), or on the basis of grievances received under sub-rule (2), the intermediary shall preserve such information and associated records for one hundred and eighty days for investigation purposes, without vitiating the evidence in any manner. This period may be longer as may be required by the court or by lawfully authorized Government agencies.

(h) Any information collected by the intermediary from a user for registration on the computer resource, shall be retained by him for a period of one hundred and eighty days after any cancellation or withdrawal of his registration, as the case may be.

(i) The intermediary shall take all reasonable measures and follow the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011, to secure its computer resource and information contained therein.

(j) The intermediary shall, as soon as possible, but not later than seventy two hours of the receipt of an order, provide information under its control or possession, or assistance to the lawfully authorized government agency for investigative or protective or cyber security activities, for the purposes of verification of identity, or for the prevention, detection, investigation, or prosecution of offences under any law for the time being in force, or for cyber security incidents. However, this order shall be in writing stating the clear profile seeking information or assistance, as the case may be.

(k) The intermediary shall not knowingly deploy or install or modify technical configuration of computer resource or become party to any act that may change or has the potential to change the normal course of operation of the computer resource. No such changes are permissible thereby circumventing the prevalent law.

(l) It is incumbent on the intermediary to report cyber security incidents and share related information with the Indian Computer Emergency Response Team in accordance with the policies and procedures as mentioned in the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013.

There is also a provision for Grievance Redressal Mechanism of intermediary. Rule 2(a) stipulates that the intermediary shall prominently publish on its website, mobile based application or both, the name of the Grievance Officer and his contact details as well as mechanism by which a user or a victim may make complaint against violation of the provisions of this rule or any other matters pertaining to the computer resources made available by it. The Grievance Officer shall acknowledge the complaint within twenty-four hours and dispose off such complaint within a period of fifteen days from the date of its receipt. He shall also receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction.

Rule (2)(b) states that the intermediary shall, within twenty-four hours from the receipt of a complaint made by an individual or any person on his behalf under this sub-rule, take all reasonable and practical measures to remove or disable access to such content which is hosted, stored, published or transmitted by it. Such content should be prima facie in the nature of any material which exposes the private area of such individual, shows such individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such individual, take all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it. The intermediary under Rule (2)(c) shall implement a mechanism for the receipt of complaints under clause (b) of this sub-rule to enable the individual or person to provide necessary details in relation to such content or communication link.

These basic principles of the Rule 3 are very exhaustive and take care of almost everything which may prove to be detrimental to existing social fabric. For the first time any Rules or regulations have defined due diligence to be observed by the intermediaries in such detail. Not only this but also, additional due diligence practices which need to be observed in case of significant social media intermediary have also been enumerated in Rule 4 of the Rules 2021. Under this Rule, such an intermediary will appoint a Chief Compliance Officer who shall be responsible for ensuring compliance with the Act and shall be liable in any proceeding relating to any relevant third-party information, data or communication link made available or hosted by that intermediary where he fails to ensure that such intermediary observes due diligence while discharging its duties under the Act and the rules thereunder.<sup>vii</sup> Provided that he will be

given an opportunity of being heard before making him liable. Explanation appended to this rule states that Chief Compliance Officer means key managerial personnel or such other senior employee of a significant social media intermediary who is resident in India. A significant social media intermediary can appoint a nodal contact person for 24×7 coordination with law enforcement agencies and officers to ensure compliance to their orders or requisitions made in accordance with the provisions of concerning law or rules.<sup>viii</sup> Here, Explanation to this sub-rule says that nodal contact person means the employee of a significant social media intermediary, other than the Chief Compliance Officer, who is resident in India. Again, rule 4(1)(c) stipulates that the intermediary shall appoint a Resident Grievances Officer, who shall, subject to clause (b), be responsible for the functions referred to in sub-rule (2) of rule 3. He will be an employee of a significant social media intermediary, who is resident in India. The intermediary will publish a periodic compliance report every month mentioning the details of complaints received and action taken thereon. It will also mention the number of specific communication links or parts of information that the intermediary has removed or disabled access to in pursuance of any proactive monitoring conducted by using automated tools or any other relevant information as may be specified.<sup>ix</sup>

Similarly, additional due diligence to be observed by an intermediary in relation to news and current affairs content has been prescribed under Rule 5 of the said Rules. Rule 6 stipulates that the any intermediary which is not a significant social media intermediary may be required by an order of the Ministry to comply with the obligations mentioned under Rule 4, if the services of that intermediary permit the publication or transmission of information in a manner that may create a material risk of harm to the sovereignty and integrity of India, security of the State, friendly relations with foreign States or public order. Section 7 of the Rules stipulates the punishment in case the intermediary fails to observe these rules. In that case, the provisions of sub-section (1) of Section 79 of the Act shall not be applicable and shall make him liable for punishment under any law for the time being in force.

Now the Government of India is under process to introduce a Bill, Digital India Bill, in the Parliament which is aimed at classifying various online intermediaries like social media platforms, e-commerce sites, and fact-checking portals as different categories. The upcoming Bill is also expected to introduce a regulator for the digital space and specify penal consequences for flouting norms. It is expected to prescribe fresh criminal offences beyond



what is contained in the Information Technology,2000. There will also be provisions for governing the emerging arenas such as blockchain and metaverse. With the upcoming Bill, the government is also viewing a definite departure from the concept of intermediary which has been in existence for a long time. The new regulation will extend the norms beyond the prevalent norms for intermediaries, to other online entities including e-commerce portals and fact-checking platforms. The Bill is expected to have a big impact on tech giants including Google, Meta, Amazon, Apple etc. According to a government official "The new law will recognise different kinds of intermediaries because their regulations have to be different". He further added that "There are no pure intermediaries anymore, so the adjudication and our understanding of it has to go beyond intermediary liability. We need to start seeing intermediaries as digital service providers".<sup>x</sup> In the present system, intermediaries do not exercise control over the content posted on their platform. Hence, they seem to enjoy something like legal immunity which is also called 'safe harbour ' against third-party content posted on their platform, as long as they adhere to certain due diligence requirements. That may be taking down inappropriate content when flagged by the government. However, that could alter, since fact-checking portal would be considered as publishers.<sup>xi</sup> The new Bill will replace the Information Technology Act, 2000.

## CONCLUSION

In the age of information technology and ever- increasing use of the Internet, the role of intermediaries has received a sharp focus. Currently, their role is confined to receive, store or transmit the information on behalf of others in accordance with the due diligence requirements of the government authorities. He has no role in going through the content of the matter uploaded on his electronic resource. Factually, there is nobody to look into and scrutinize such content. As a consequence, a spate of fake news, spams and other obnoxious material is causing a lot of problems including law and order problems before the law enforcement authorities. Hence, there is a strong need to strengthen the role of intermediaries. They should also be made responsible for the content uploaded on their electronic resource. For this, it is also essential that the intermediaries should be put into separate categories and accordingly be entrusted the role to perform. The Information Technology (Intermediary Guidelines and Digital Media

Ethics Code) Rules, 2021 has issued separate guidelines for social media intermediaries and a provision for regulator has also been made. In case of significant social media intermediaries, the provision for chief compliance officer has been inserted in these Rules. In the proposed Digital Media Bill, fact-checking portals would be considered as publishers. Now the time has come to classify the different categories of intermediaries and identify their roles in the light of above observation. The intermediaries can't remain silent spectators as to what is being uploaded on their electronic resource. It is hoped that the proposed Digital India Bill would be able to bring the required change.

## ENDNOTES

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<sup>i</sup> {Information Technology Act,2000, Section (2) (12) f.n. 12}

<sup>ii</sup> [Section 2 (12)(w), Information Technology Act, 2009]

<sup>iii</sup> Section 6-A of the IT Act.

<sup>iv</sup> Section 67-C of IT Act.

<sup>v</sup> Section 79 of the IT Act.

<sup>vi</sup> Gazette Extraordinary, G.S.R. 139(E), 25th February, 2021, Ministry of Electronics and Information Technology Notification, available at <https://www.meity.gov.in/content>, accessed on 15.2.2021.

<sup>vii</sup> [Rule (4)(1)(a)]

<sup>viii</sup> [ Rule (4)(1)(b)]

<sup>ix</sup> [(Rule 4)(1)(d)]

<sup>x</sup> Soumyarendra Barik, Govt plans classification of online intermediaries, separate norms, The Indian Express, Dec 12, 2022.

<sup>xi</sup> Ibid.