

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**

[ISSN 2581-5369]

Volume 4 | Issue 6

2021

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Liability of Internet Intermediaries in the protection of Right to Privacy

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ABSTRACT

A new generation is a technology driven generation. From the morning till the time to bed everybody is dependent on various kinds of applications for their day-to-day work. We are bound to provide our personal and sensitive information willingly or unwillingly to the internet intermediaries for getting our things done. Online intermediaries are the entities that facilitates the transaction executed through internet. A huge amount of data that flows through such internet intermediaries on a daily basis generates numerous privacy concern. In India though right to privacy is not explicitly guaranteed under Indian Constitution but through various judicial pronouncement it has been established that it is an intrinsic part of right to life and personal liberty under Art.21 of the Constitution. In order to comply with the mandate of the apex court for securing the right to privacy of an individual, the government has taken many legislative measures from time to time. However, the government actions taken in this regard are not adequate. Firstly, these legislative measures are not satisfactory to protect the personal data collected by intermediaries and secondly, they are inefficient to protect the individual from infringement of his right to privacy. Moreover, the laws regulating internet intermediaries and protecting individuals' privacy rights are scattered. The IT Act 2000 imposes liability on the intermediaries to protect the personal data of the individual which they collect and handle. The IT Rule 2011 and the recent IT Rule 2021 are the further steps taken by the government for regulating the internet intermediaries like Facebook, Twitter, WhatsApp, and other OTT (Over the Top) platforms which are providing services in India. The advancement in the technology and our huge dependence on internet requires that there should be stringent privacy law. The Personal Data Protection Bill is in the stage of finalization, but it is also facing controversies all around. In the meanwhile, till the privacy law has not taken final shape, there should be a harmony between the law governing the intermediaries and the protection of right to privacy of an individual.

Keyword: *Internet Intermediaries, Right to Privacy, Protection of Data.*

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I. INTRODUCTION

The internet intermediaries play a significant role in the modern global society. Since our dependence on internet for our daily needs is tremendously increasing, the liability of internet intermediaries has also been increased considerably. The term intermediaries refer to a wide and rapidly evolving service providers that facilitates interaction between individuals and business enterprises. They connect users to the internet, gather information, assist searches, enable processing of data, host web-based services, facilitates sales of goods and services, and other commercial transactions.

The statutory definition of the term intermediaries is given under the Information Technology Act 2000 as, “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, web-housing service providers, search engines, online payment sites, online auction sites, online marketplaces, and cyber cafes”³.

On the basis of the above-mentioned statutory definition following will be called the intermediaries.⁴

1. **Internet Service Provider (ISP):** The various internet service provider like MTNL and Airtel helps the users to get connected to the internet either by means of wired or wireless connection.
2. **DNS Providers** – These service providers translate the domain names (e.g., www.sflc.in) to addresses (e.g., 64.202.189.170) that can be understood by computers.
3. **Search Engines** –Google and Bing are called search engine that help users to search for specific information on the web and provide links to websites having content relevant to the search terms given by the user.
4. **Interactive Websites:** The social networking site like Twitter and Facebook, blogging platforms like Blogspot and WordPress, auction sites like eBay, and payment gateways like PayPal are the example of various interactive website. On Facebook and Twitter, we can store and recover contents. The symbolic representation gives an overview of the intermediaries involved in a common internet transaction.

³ Sec 2(w), Information technology Act, 2000.

⁴ <https://sflc.in/sites/default/files/wp-content/uploads/2012/07/eBook-IT-Rules.pdf>

5. **Web Hosts** – These are service providers like Godaddy.com that provide space on server computers to place files for various web sites so that these sites can be accessed by users.
6. **Cyber Cafes** – Cybercafé also comes under the ambit of the definition of intermediaries under section 2(w) of IT Act, 2000. It is the place where access to the internet is offered by any person to the ordinary public.

Now the question arises how far such intermediaries could be held liable for any unlawful or scrupulous content, product or service posted on their website, platform, or board by a third party and to what extent? The enormous growth of the internet and easy access to everyone to the personal and sensitive information of others has led to the rise in the internet crimes in contemporary times.

The liability of online intermediaries is based on the principle of vicarious liability which means that the service providers shall be held accountable for any illegal act of the user on their platform. As rightly said by Rebecca MacKinnon⁵ *"Intermediary liability means that the intermediary, a service that acts as 'intermediate' conduit for the transmission or publication of information, is held liable or legally responsible for everything its users do."*

However, it is not possible for such internet intermediaries to regulate the entire data that flows through their platform because of the enormous size of such data. Most of the time such intermediaries fail to give proper privacy protection to their users and blunders happen due to mishandling of their data. Sometimes spreading of fake news on social networking sites like Facebook, twitter, and WhatsApp etc. has provoked the riots, mob lynching, murder, and mass scale migration as we have seen in 2020 during covid pandemic. US presidential election is another example where Facebook and Twitter played substantial role and such sites were criticized for being misused by the anti-social elements. There is gross misappropriation of the content available on internet which results in harmful consequences. Therefore, it is the high time to impose more severe liability on the intermediaries which is storing, collecting, processing and disseminating information belonging to others.

II. LEGAL FRAMEWORK REGULATING INTERNET INTERMEDIARIES IN INDIA

(A) Information technology Act 2000

The liability of such intermediaries is enumerated under section 72A of IT Act, 2000 which

⁵ Rebecca MacKinnon was the founding director of Ranking Digital Rights (RDR), a program that works to promote freedom of expression and privacy on the internet by creating global standards and incentives for companies to respect and protect users' rights.

reads as “any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.”⁶

However, there is another Provision under the IT Act 2000 which gives safe harbor to the intermediaries. Sec 79 of the IT Act 2000 provides all “intermediaries” with immunity from prosecution for carrying or transmitting user generated content, subject to the fulfillment of certain conditions. In order to avail this immunity, the intermediary should not have actively participated in the commission of the offence and should take remedial action upon gaining “actual knowledge” of the commission of the offence.⁷

(B) Information Technology (Intermediaries guidelines) Rules, 2011

Another important legislation to regulate internet intermediaries is Information Technology (Intermediaries guidelines) Rules, 2011. The MINISTRY OF COMMUNICATIONS AND INFORMATION TECHNOLOGY on 11th April 2011 has issued this rule under which certain obligations were imposed on the intermediaries.

Rule 3 of IT (Intermediaries guideline) Rule,2011 lays down that the intermediaries are required to observe following due diligence while discharging their duties:

- The intermediary shall publish the rules and regulations, privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person.⁸
- Such rules, regulation and user agreement prohibit the user of computer to host, display, upload, modify, publish, transmit, update or share any information that
 - i. Belong to another person
 - ii. is harmful, defamatory, obscene and attacks on another’s privacy or otherwise objectionable and encourages money laundering, gambling and unlawful in any manner.
 - iii. harm minors in any way

⁶ Sec 72A, Information technology Act 2000

⁷ https://www.datagovernance.org/files/research/BahlRahmanBailey_-_Paper_6-2.pdf

⁸ Information Technology (Intermediaries guidelines) Rules, 2011, Rule 3(1)

- 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 such messages or communicates any information which is grossly offensive or menacing in nature.
- vii. impersonate another person
- viii. contains software viruses and destroy the functioning of any computer resource

threatens the integrity and sovereignty of India, public order, friendly relation with foreign state, provoke the commission of any cognizable offence and is insulting any other nation.⁹

- The rule also provides that intermediary shall not knowingly host or publish any information or initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified above. However, intermediaries are not guilty of hosting, publishing, editing or storing of any such information if

- i. Without exercise of any human editorial control, there is temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource

such information, data or communication link comes to the actual knowledge of a person authorized by the intermediary pursuant to any order or direction as per the provisions of the Act; and access to this information, data or communication link is removed by the intermediaries.¹⁰

It is also incumbent upon the intermediaries to strictly follow the provisions of the Act or any other laws for the time being in force and to provide informant and assistance to Government Agencies for the purpose of verification of identity, or for prevention, detection, investigation, prosecution, cyber security incidents and punishment of offences under any law for the time being in force when asked for in writing and clearly stating the purpose for seeking such information by government agencies¹¹

The intermediary shall report cyber security incidents and also share cyber security incidents related information with the Indian Computer Emergency Response Team.¹²

⁹ Id Rule 3(2)

¹⁰ Id Rule 3(3)

¹¹ Id Rule 3(6) & 3(7)

¹² Id Rule 3(9)

It is also mandatory for the intermediaries to publish on its web site, the name and the contact details of the Grievance officer as well as mechanism by which users or any victim who suffers as a result of access or usage of computer resource by any person in violation of rule 3 can notify their complaints. The Grievance Officer is also required to redress the complaints within one month from the date of receipt of complaint.¹³

(C) The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021

The Ministry of Electronics and Information Technology has introduced a new rule under the IT Act 2000 on 25th Feb 2021, to be known as the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021. The Information Technology (Intermediaries Guidelines) Rules of 2011 have been replaced by the 2021 Rules. The previous IT rules applied only to intermediaries whereas the new rules expanded the scope of intermediary control by bringing Social Media Intermediaries (SMIs), Significant Social Media Intermediaries (SSMIs), Digital Media Platforms (DMPs) and Original Curated Content Platforms (OCCPs) within its jurisdiction.

As compared to the Information Technology (Intermediaries Guidelines) Rules, 2011 the new intermediaries' guidelines impose more responsibilities on intermediaries regarding the information being made available by them. The new added rules ensures that the intermediaries take instant action with regard to the unlawful and violating information being made available by them. Some of the mechanism under 2021 rules are as under:

1. New Due Diligence Rule for Social media intermediaries (SMI) and significant social media intermediaries (SSMI)

- Intermediaries are required to remove the offending content upon receiving actual knowledge in the form of a court order or upon being notified by the government or agency envisaged under Section 79 of the IT Act, within 36 hours of the receipt of a court order.¹⁴
- Unlike Intermediaries Rule 2011 where intermediaries were required to maintain records of the content and related information for a period of ninety days after receiving a complaint with regard to such content, Rule 2021 Rules require intermediaries to maintain the records of any content referred to in a complaint for a

¹³ Id Rule 3(11)

¹⁴ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Second proviso, Sec 3(1)(d).

period of one hundred and eighty days or more as may be notified by the authorities, for the purposes of further investigation.¹⁵

- The intermediary shall, within 72 hours of the receipt of an order, provide information under its control or possession, or assistance to the Government agency 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.¹⁶
- The Social Media Intermediaries and significant social media intermediaries (SSMI) i.e., intermediaries with more than a registered user base of 5 million in India is required to publish on its website and mobile app, the name of the ‘grievance officer’ and his contact details, as well as a mechanism for lodging the complaint.¹⁷
- The Grievance Officer shall - (i) acknowledge the complaint within twenty-four hours and dispose of such complaint within a period of fifteen days from the date of its receipt; (ii) receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction.¹⁸
- In case the complaint made is concerning any obscene/nude content, the intermediary is required to bring down the content within 24 hours.¹⁹
- The SSMI shall appoint a chief compliance officer for ensuring compliance with the IT Act and rules. The officer shall be liable relating to any third-party information, data hosted by that intermediary where he fails to ensure that the intermediary observes due diligence while discharging its duties. The chief compliance officer should be a resident of India.²⁰
- The SSMI shall also appoint a nodal officer for coordination with law enforcement agencies, who should be resident in India.²¹

¹⁵ Id 3(1)(g)

¹⁶ Id 3(1)(j)

¹⁷ Rule 3(2)(a), ¹⁷ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021

¹⁸ Ibid

¹⁹ Id Rule 3(2)(b)

²⁰ Id Rule 4(1)(a)

²¹ Id Rule 4(1)(b)

- SSIMs are required to expressly provide details of the or origin of the information being made available to the users on the platform as may be required by a court of competent jurisdiction or any other competent authority under the law.²²
- SSIMs must allow the users who either register for their services or use their services within India, to voluntarily verify themselves as per the mechanism deemed appropriate by the SSIM. After being verified, the respective user must then be provided with a verification mark that is visible to all the users of the service.

Thus, we can conclude that new Intermediaries Rule 2021 would make the intermediary like Facebook or Twitter etc. if a third-party user posts unlawful content on their platforms and such intermediaries hosting such information would be punishable under the relevant law. Rule 7 clearly provides that if an intermediary fails to observe any of the rules laid down, it loses protection afforded to it by Section 79 of the Information Technology Act.

Most of the companies like Facebook, Google, Telegram, WhatsApp, Koo, share chat, and LinkedIn have shared their details with MeitY as per the requirement of new Rule of 2021. However, WhatsApp has filed a case in the Delhi High Court against the government on grounds that the particular provision of new rules infringes the right to privacy of an individual guaranteed by the Constitution.

2. Code of Ethics and Safeguard for Digital media Platform

According to Rule 8 & 9 publishers of news and current affairs content and publishers of online curated content shall be administered by the Ministry of Information and Broadcasting, Government of India and shall observe and adhere to the Code of Ethics laid down in the Appendix annexed to these rules.

For ensuring observance and adherence to the Code of Ethics by publishers operating in the territory of India, and for addressing the grievances made in relation to publishers under this Part, there shall be a three-tier structure as under—

1. Level I is the Self-regulating Mechanism which requires the publishers to establish a grievance redressal mechanism and shall appoint a Grievance Officer based in India, who shall be responsible for the redressal of grievances received by him.²³
2. Level II requires establishing one or more self-regulating bodies consisting of publishers, which will be an independent body constituted by publishers or their

²² Id Rule 4(2)

²³ Id Rule 11(2)(a)

associations. After its establishment, the self-regulating body must register itself with Ministry, within a period of thirty days after these rules have been notified.

3. Under Level III of the mechanism:

- The Ministry of Electronics and Information Technology shall co-ordinate and facilitate the adherence to the Code of Ethics by publishers and self-regulating bodies, develop an Oversight Mechanism among other functions as prescribed under the 2021 Rules.²⁴
- The Ministry shall constitute an Inter Departmental Committee, called the Committee, consisting of representatives from the Ministry of Information and Broadcasting, Ministry of Women and Child Development, Ministry of Law and Justice, Ministry of Home Affairs, Ministry of Electronics and Information Technology, Ministry of External Affairs, Ministry of Defense, and such other Ministries and Organizations, including domain experts, that it may decide to include in the Committee.²⁵

Press Trust of India (PTI) has approached the Delhi High Court Challenging New Intermediary Guidelines and Digital Media Ethics Code on the ground that the government attempting to regulate digital news media by imposing sweeping government oversight and a vaguely worded code of ethics. It has also been challenged by entities like *The Wire*, *Live Law* and *The Quint*.

III. INTERNATIONAL LAWS RELATING TO INTERNET INTERMEDIARIES

Almost all the countries of the world has made laws imposing the liabilities on internet intermediaries against unlawful and misuse of the content on their platform. Some of them are as follows:

1. United States: Section 230 of the Communications Decency Act governs online intermediary liability in the United States. It contains two main provisions. The first, Section 230(c)(1), prevents online services from facing liability for third-party content on their platforms.

the second, Section 230(c)(2), protects online services from facing liability for removing objectionable third-party content from their platforms.

Section 230 also contains a few major exceptions; notably, its liability shield does not apply to federal criminal law, state or federal sex trafficking law, or intellectual property law. The United States also has a separate law, the Digital Millennium Copyright Act (DMCA), that governs online copyright law.

²⁴ Id Rule 13(1)

²⁵ Id Rule 14(1)

2. Australia: Schedule 5, Clause 91 of Australia's Broadcasting Services Act 1992 states that websites and Internet service providers (ISPs) are not liable for third-party content under state or territory laws as long as they were "not aware of the nature" of the content. Australia was one of the first countries to pass online intermediary liability legislation in 1992.²⁶

3. South Africa: Chapter XI, Section 77 of South Africa's Electronic Communications and Transactions Act, websites are not liable for wrongful takedown if they remove content in response to a takedown notice. Rather, the individual who submitted the notice is liable for damages if they knowingly misrepresented the facts.

4. Japan: Article 3 of Japan's Provider Liability Limitation Act, enacted in 2001, contains a liability shield that does not apply if a provider is aware that third-party content causes "the infringement of the rights of others," or if "there is a reasonable ground to find" that they know this.

5. Philippines: On the similar ground of Japanese's law, section 30 of the Philippines' Electronic Commerce Act also contains a liability shield that does not apply if a provider has "actual knowledge" or is aware that third-party content is "unlawful or infringes any rights."

6. New Zealand: In New Zealand, Section 24 of the Harmful Digital Communications Act 2015 outlines the requirements for a "notice of complaint," which is the notification an individual sends to a website requesting the removal of harmful third-party content. Types of content the law covers include any that is unlawful or that violates one or more of the law's "communication principles," which include any content that is threatening, "grossly offensive," obscene, harassing, discriminatory, or a breach of confidence or that discloses sensitive personal information, makes a false allegation, incites individuals to send harmful messages, or incites an individual to commit suicide. It also outlines the process websites must follow after they receive a valid notice of complaint, including removing the content within 48 hours. As long as websites comply with this process, "no civil or criminal proceedings may be brought against them."²⁷

Thus, we see that the liabilities of internet intermediaries are recognized on the basis of different approaches all around the world. The countries like Australia, India, Japan, and the Philippines hold websites and online platforms accountable only for content they are aware or have "actual knowledge" of. Whereas there is another approach to determine intermediaries' liability is the "notice and takedown" approach which is followed by the countries like New

²⁶ <https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability>

²⁷ Ibid

Zealand, South Africa, and the United Kingdom. In each of these countries, online services must follow notice and takedown provisions for content the state deems unlawful. The benefit of the notice and takedown approach is it does not penalize online services if they fail to remove all potentially harmful or illegal content on their platforms as long as they follow the notice and takedown process.

IV. CONCLUSION

Internet forum obviously play a significant role in today's world to share our views, opinion, and expression whether it be a personal, social, political, or cultural in a virtual manner. Within a spur of moment, one can disseminate his opinion to a million of people through various Apps like Facebook, Twitter, and WhatsApp. The role of such internet intermediaries is only to act as a link between the persons who wants to share their content and to whom the consent is sent. Section 79 of IT Act 2000 used to provide immunities to such intermediaries against unlawful contents on its platform if it were not the parties to it and had taken remedial measures after having knowledge of such unlawful content. But now more responsibilities on such intermediaries have been imposed in the form of due diligence rule and if such rule is not observed they loses protection given under sec 79 of IT Act. Due diligence rule requires the intermediaries to monitor and sensor whatever content is available on their platform. However, it is practically not possible for them, having millions of users, to have the knowledge of each and every content on its platform. Even if they do so it would in turn violate the right to free speech and the right to privacy of an individual. No doubt the new Intermediaries Rule 2021 is a welcoming step of the government which empowers the users of social media platforms and OTT platforms. It provides a mechanism for redressal and timely resolution of their grievances with the help of a Grievance Redressal Officer (GRO) who should be a resident in India. But few of the provision of the new rule also needs genuine criticism. One of the provisions is that large online intermediaries designate a chief compliance officer who would be personally liable for any failure to comply with the law. Obviously, the companies will not be willing to take such kind of personal risk and the result would be to weaken free speech online. Again, another provision under the rule of 72-hour obligation to respond to a government order is also unreasonable. It is not possible to obtain data from abroad using existing international legal frameworks within such a short span of time. The most difficult rule is that the intermediaries providing messaging services to be able to identify the "first originator" of potentially unlawful messages. Such harsh rule will ultimately force such service provider to leave the Indian market. The ultimate goal of intermediary's laws should be to strike a balance between user protection, fostering free speech and permitting online innovations so that India could also

stand on the equal footing along with the other developed countries of the world. The time will say how far the new intermediary's rule 2021 will be fruitful to the internet users and the government agencies for enforcing the laws.

V. REFERENCES**Web Sites:**

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