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## LIABILITY OF INTERMEDIARIES: COMPARATIVE PERSPECTIVE

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### ABSTRACT

*The organizations and individuals that make it possible for people to access the internet are called intermediaries. Intermediaries on the Internet connect parties or help them conduct transactions with one another. Presently, intermediaries are held liable for IP infringement to the degree that they actively take part in the process and are not only acting as service providers. As such, they have a duty to monitor what is published on their platform. The issue of intermediary liability has grown in importance with 60% of people utilising the internet to communicate and express themselves. In order to offer efficient online governance and administration under the law, the issues concerning intermediaries' liability must be defined in order to not only prohibit infringing conduct but also to identify infringers and acts that constitute such infringement. In this essay, the topic of intermediary liability is explored, along with its extent and scope, as well as the legal systems that control it both inside and outside of India.*

### INTRODUCTION

The concept of Intermediary Liability is widely used in the context of Intellectual Property on various levels. The role played by the intermediaries in the use and spread of Intellectual Property is what accounts for their growing value and makes them easily accessible and available, serving the very purpose of their creation. Currently, intermediary liability in the case of an IP infringement is to the extent when they actively

participate in the process and are not just mere service providers, have a responsibility to keep a tab on what is being published on their platform.

According to Section 2 (w) of the Information Technology Act, 2000 (IT Act, 2000), Intermediaries are the people who are the entities which enable people to use the internet. 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. There may be numerous types of intermediaries present, with changing time. The following could be categorized as the intermediaries:

- Who on behalf of another person receives
- Stores or transmits that record
- Provides any service with respect to that record

So, basically an intermediary is like a middleman in a transaction that helps in the process of exchange of goods/dialogues. Since the content exchanged through the use of such platforms is user-generated, the question arises as to how far can intermediaries be held liable?

It is not only a topic for legislators and law enthusiasts to argue because it has a far-reaching impact on the lives of every ordinary person who has access to the internet. With 60 percent of people using the internet and 3.8 billion people using social media to connect and express themselves, the problem of intermediary liability has become increasingly important. The concerns surrounding intermediaries' liability must be clarified in order to not only prohibit infringing actions, but also to identify infringers and acts that constitute such infringement in order to provide effective online governance and administration under the law.

Intermediaries play an important role in both the growth of the Internet and the distribution of creative content. They host, locate, and search





for content, as well as make it easier to distribute it. Their growing influence, as well as their changing position, has sparked a dispute over their accountability in the case of online copyright infringement.

### **ONLINE INTERMEDIARIES**

The online intermediaries form the biggest chunk of liability susceptible class. The internet is an amalgamation of human and non-human agencies that are all equally important for its survival. The automation and uncertain mechanism often renders its human face namely, the myriad numbers of intermediaries liable for the activities online. The internet owes its existence to the infrastructure providers who are its main survival plank. Intermediaries, in the internet context are organizations whose services are used to facilitate a transaction between communicating parties.

As per the Organization for Economic Co-operation and Development (OECD) "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.<sup>91</sup> Internet intermediary is defined in the Indian Information Technology Act. The act reads - "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, on-line market places and cyber cafes<sup>92</sup>

On the extent to which an intermediary should be held liable for the content provided by a user, there are differing perspectives around the world. In general, these can be described as

three models: strict liability model, safe harbour model, and broad immunity.

The intermediaries are held unconditionally accountable for user generated content under the strict liability model, thus they must monitor the content and guarantee that it complies with the law.

In the safe-harbour approach, intermediaries are allowed conditional protection as long as they meet certain legal standards. This paradigm includes "notice-and-takedown" processes, which are procedures for the intermediaries to follow when they receive and process content takedown requests. Content filters may be required of intermediaries in order to prevent the hosting or transmission of illegal content. The EU e-commerce directive, the US Digital Millennium Copyright Act, and the Indian Information Technology Act all use the safe-harbour model of intermediary regulation.

The intermediaries are provided extensive, sometimes conditional, exemption from responsibility for user-generated content in the broad immunity model. The intermediaries are not obligated to check the user-generated data for illegal content in this arrangement.

### **LEGAL FRAMEWORK IN INDIA**

Legal frameworks dealing with intermediary liability usually use two kinds of regulatory structures: One is the "horizontal" approach where a single liability regime applies to any infringement irrespective of the area of law it is concerned with. For instance, the same regime will apply to intermediaries' exemption for defamation and copyright violation. Alternatively, the "vertical" approach follows a system where different liability regimes are applicable to specific domains, such as copyright, defamation, or child pornography.

India follows the vertical approach.<sup>93</sup>

<sup>91</sup> (Intermediary Liability And Copyright - Intellectual Property - India, 2022)  
<sup>92</sup> Information Technology Act, 2000 S. 2(1) (w), No. 21, Acts of Parliament, 2000 (India).

<sup>93</sup> Section 79 of the IT Act begins with "Notwithstanding anything contained in any law for the time being in force...an intermediary shall not be liable...(emphasis added)



Prior to the Amendment Act, Section 79 provided immunity to a network service provider, defined as an intermediary<sup>94</sup> if the offence or contravention had been committed without his knowledge or if he had exercised due diligence. The Amendment Act, to the extent it is concerned with intermediary liability is considered a reaction to the decision in Avinash Bajaj vs. State ("Bazee case").<sup>95</sup> The court rejected a petition for annulling the criminal prosecution of the Managing Director of a website, Bazee.com, which carried a listing for sale of a mobile phone video clip containing pornographic content involving teenagers. The court found that it prime facie appeared that the website had failed to exercise due diligence because it did not provide filters to screen pornographic content, and it also did not have any policy in place to prevent the listing, display or scale of such content on the website.<sup>96</sup> Although the case did not specifically refer to S. 79 of the IT Act, it clearly demonstrated the dangers faced by intermediaries.

The new safe harbour provision incorporated in S.79 of the IT Act, has brought India closer to the international standards on intermediary liability. It is well recognised that Section 79 is largely based on European Union Directive on Electronic commerce. The new section exempts intermediaries from liability for any third party information, data or communication link hosted by him. This exemption is subject to conditions placed under S 79 (2) and S 79(3). The provision has been significantly improved to provide immunity to intermediaries from liability.

### **INTERMEDIARY LIABILITY AND COPYRIGHT INFRINGEMENT**

The Copyright Act of 1957 was significantly amended in 2012. Section 52 of the amended law specifies a number of situations in which copyright infringement is exempted. S 52 (1)(c) states that "transient or incidental storage of a work or performance for the purpose of

providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy. Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitation access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access". Thus to sum it up this particular section implies that intermediaries are not responsible and liable unless they are aware or have reasonable grounds for believing that such storage is of an infringing copy.

However the procedure for such exemption of liability of the intermediaries is given in the Copyright Rules of 2013. The storage of temporary or incidental copies of work is discussed in Chapter XIV, Rule 75 of the rules (i.e., Intermediaries). The procedure for submitting a complaint under Rule 75 is as follows:

The copyright holder must submit a written complaint to the intermediary. Rule 75 specifies the information that should be included in the complaint.

When the intermediary receives the complaint, if he believes the copyright is truly infringed, he must take down the content or take any other appropriate action within 36 hours or 21 days, whichever comes first, from the date of receipt of the complaint or until he receives an order from a competent court prohibiting him from facilitating access.

<sup>94</sup> Pre-amendment Explanation (a) to Section 79 of the IT Act.

<sup>95</sup> Avnish Bajaj vs. State 150 (2008) DLT 765.

<sup>96</sup> Avnish Bajaj vs. State 150 (2008) DLT 765.



Users who request content must be informed that the content is unavailable due to infringement, in the form of a notice.

The content could be restored if the owner is unable to produce the order from the competent court. In addition, if the intermediary fails to get the decision of the competent court within the time limit, the copyright owner's takedown notice at a specific location is nullified.

### **POSITION OUTSIDE INDIA**

In USA, The Communications Decency Act and the Digital Millennium Copyright Act (the 'DMCA') are two independent pieces of legislation that deal with intermediary responsibility. The facilitator of an "interactive computer service" is immune from content published by a third-party on its platform under Section 230 of the Communications Decency Act. The protection is broad enough because such intermediaries are not required to take any action against offensive use of their platforms. In the classic *Doe vs. Myspace* case, the Act's provisions were exploited by Myspace to avoid liability for its failure to determine the age of its users, resulting in children's vulnerability to sexual predators.

The DMCA, unlike the Communications Decency Act, provides a conditional 'safe harbour' provision rather than an outright denial of duty and accountability. It establishes a suitable 'notice and take-down' procedure in the event that any infringing content is discovered by the intermediary or requested by the copyright owner. The DMCA was thoroughly examined in the recent case of *Viacom International Inc. vs. YouTube Inc.*, in which the court gave intermediaries more protection and put the burden of demonstrating the intermediary's knowledge of the infringing act entirely on the copyright owner. Because Viacom was unable to show that YouTube was aware of the specific Copyright Infringement on its portal, the court absolved YouTube of all culpability in the case.

The EU's intermediary legislation is fraught with inconsistencies since it imposes a legal obligation on intermediaries for the type of information carried on their e-platforms. The EU Directive on Copyrights puts liability on internet for user-generated content that infringes on someone's copyright under Article 13 (Article 17 in the modified version). Although parodies and memes may be exempt from copyright infringement, the extent to which this can be given a blanket exclusion is debatable, considering that the majority of these memes are based on extracts from copyrighted films and movies. The same can have a negative impact on small businesses' ability to conduct business as well as a user's right to free speech and expression on digital platforms.

### **CASE LAW**

#### **Myspace Case**

One of the problems arising with respect to intermediary liability under the It Act is the effect of the provision to Section 81 inserted by the Amendment Act. Section 81 for intermediaries ordinarily gives the It Act overriding effect over all other statutes, but the proviso creates an exception for any rights conferred under the Copyright Act, 1957 or Patents Act, 1970. This means that the immunity conferred under Section 79 would not cover intermediaries in cases of claims of copyright or patent. This exception defeats the purpose of providing immunity to intermediaries under Section 79 (Gupta 2010). This issue was recently raised in *Super Cassettes Industries Ltd vs. Myspace Inc.*<sup>97</sup> ("Myspace case") where T-Series filed a copyright infringement suit against Myspace.com in relation to a large repertoire of sound recordings. The Delhi High Court held Myspace liable under Section 51(a) (ii) of the Copyright which deems infringement when any person "permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work..." The

<sup>97</sup> MIPR2011 (2)303 (Delhi High Court, 29 July 2011).



court that since "any place" includes websites and the internet, and not restricted to physical locations<sup>98</sup>, and since the revenue derived by Myspace from advertisements on the website constitutes profit<sup>99</sup>, Myspace was liable under Section 51 (a) (ii).

The It Act does not provide protection to intermediaries under Section 51(a)(ii). The court explained that interpreting Section 79 of the It Act as being applicable to copyright infringement would render the proviso to Section 81 redundant. Thus, it stated that and if a subscriber files a counter-notice contesting the Section 79 is, thus, meant for all other internet wrongs wherein intermediaries may be involved including auctioning, networking servicing, news dissemination, uploading of pornographic content but not certainly relating to the copyright infringement or patent which has been specifically excluded byway of proviso to S 81. In this case the court further ruled that due diligence should be exercised pre-infringement by taking preliminary measures at the time of modifications of the work and prior to making them available for general public.

This decision may have serious ramifications on freedom of speech and expression in India. Intermediaries are likely to Act, which deems infringement when any person "permits resort to overbroad filtering and blocking to avoid liability, particularly in relation to copyright/patent infringement claims. This is further aggravated now that post-infringement curative measures, such as notice and take down, are considered inadequate. This implies that intermediaries will have to be cautious and monitor information at the pre-infringement stage in order to avail safe harbour.

However, the Copyright Amendment Act, 2012 has reduced the onerous obligations on intermediaries to some extent. The amended Section 52(b) declares that transient or incidental storage of a work in the technical process of electronic transmission to the public

shall not amount to copyright infringement. Further, Section 52(c) stipulates that transient and incidental storage of a work for the purpose of providing electronic links, access or integration has not been expressly prohibited by the right holder, shall not constitute infringement, unless the intermediary has reasonable grounds for believing that such storage is of an infringing copy.

## CONCLUSION

Platforms that disseminate a limited bit of information to a big number of individuals at once are known as intermediaries. In most jurisdictions, intermediaries are covered by an indemnity against IP infringement. The reasoning for this is that due to the large number of users uploading content to these platforms, it is nearly difficult for such intermediaries to monitor every activity and piece of content. The safe harbour idea is based on the assumption that these Online intermediaries are aware of the infringement or not. Because "intention" is the basic principle behind every crime in law, interpreting the intention and knowledge of the infringement is critical. One cannot make some entity liable if they don't have sufficient knowledge of the crime that has taken place.

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<sup>98</sup> Ibid,35,36

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