



## **THE LIABILITIES OF INTERNET INTERMEDIARIES FOR CYBERCRIMES**

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### **ABSTRACT**

The present paper deal with the evolution of the concept of intermediaries in India. The paper also discussed in detail the relevance of regulating intermediaries and the intermediary liability. The paper addressed the aspect of intermediary liability since the *Avnish Bajaj* case and the development in the form of the Information Technology (Amendment) Act, 2008, to amend Section 79 of the Information Technology Act, 2000. The paper also discussed the due diligence required under the Information Technology (Intermediaries Guidelines) Rules, 2011, which are replaced by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The paper also elaborates on the changes in intermediary liability

after *Shreya Singhal*'s judgment, the safe harbour principle, and the Manila Principles. The paper concludes with suggestions for amendments to India's regulatory framework of intermediary liability.

**Keywords:** Intermediary, Safe Harbour, Shreya Singhal case, Manila Principles.

### **INTRODUCTION**

An intermediary is like a virtual middleman who helps connect product or service providers with consumers. Their goal is to minimise issues such as information imbalance, lack of trust, and expensive transactions that are commonly linked to the exchange of information.<sup>2</sup> Online intermediaries, such as search engines, e-Commerce platforms,

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2. Thomas Cotter, 'Some observations on the law and economics of intermediaries' (2006) Mich ST L Rev 67, 69.

social networking sites, and cloud computing services, provide various services.<sup>3</sup> The OECD has defined online intermediaries as “*entities that 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>4</sup> Google has advocated for the safe harbour for the online intermediaries at par with the telecom industry and according to it, “*we don’t hold the telephone company liable when two callers use the phone lines to plan a crime*.”<sup>5</sup> *The same line of reason applies to internet intermediaries. This is a well-known principle followed concerning the Internet intermediaries, and they are responsible to take action when put on notice of unlawful content through proper legal channels.*”

According to the Information Technology Act, 2000 in India, an ‘intermediary’ receives, stores, or transmits electronic messages on behalf of another person or provides services related to those messages. The definition of ‘intermediary’ under the Information Technology Act, 2000 was updated in 2008 to include more specifics. Section 79 of the Information Technology Act, 2000, was also amended in 2008 to provide the ‘safe harbour principle’ for online intermediaries in line with the *Avnish Bajaj* judgment. Online intermediaries,

such as internet service providers (ISPs) and social media platforms, are protected by the ‘safe harbour principle’, which shields them from being held accountable for copyright infringement or objectionable content, which could include hate speech, harassment, or defamatory content posted or shared by third party users.

The Information Technology Act, 2000, may soon be replaced with the Digital India Bill, 2023. The draft of the Digital India Bill, 2023, has not yet been made available for public consultation and feedback. However, the government is considering revising the ‘safe harbour principle’ due to the evolving nature of the Internet.<sup>6</sup> Furthermore, the Digital India Bill, 2023 also aims to broaden the definition of ‘intermediaries’ to encompass wide range of online platforms, such as social media platforms, e-commerce entities, fact-checking portals, and AI-powered platforms.<sup>7</sup>

## LIABILITY OF THE INTERMEDIARIES

The liability of intermediaries is explained under Section 79 of the Information Technology Act, 2000. However, the old version of Section 79 was ambiguous and vague, leading to confusion and cases like *Avnish Bajaj v State*<sup>8</sup>. As a result, the Information Technology (Amendment) Act, 2008 amended Section 79 to state that intermediaries are not liable for any third-party actions they

3. Katrine Ellersgaard Nielsen, Bruno Basalisco and Martin H. Thelle, ‘Online intermediaries assessing the economic impact of the EU’s online liability regime’ Copenhagen Economics <<https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/6/226/0/The%20impact%20of%20online%20intermediaries%20-%20April%202013.pdf>> accessed 13 June 2023.
4. The economics and social role of internet intermediaries <<https://www.oecd.org/internet/ieconomy/44949023.pdf>> accessed 13 June 2023.
5. Rishi Jaitly, ‘Intermediary liability and the future of the Internet in India’ <<https://publicpolicy.googleblog.com/2007/10/intermediary-liability-and-future-of.html>> accessed 13 June 2023.
6. Soumyarendra Barik, ‘Govt rethinking ‘safe harbour’ in Digital India Bill: How this could change internet landscape’ The Indian Express (New Delhi, 11 March 2023) <<https://indianexpress.com/article/explained/explained-sci-tech/digital-india-bill-new-law-internet-explained-8488748/>> accessed 5 June 2023.
7. Soumyarendra Barik, ‘Digital India bill to replace IT Act, 2000: Govt plans classification of online intermediaries, separate norms’ The Indian Express (New Delhi, 10 December 2022) <<https://indianexpress.com/article/business/economy/digital-india-bill-to-replace-it-act-2000-govt-plans-classification-of-online-intermediaries-separate-norms-8316146/>> accessed 5 June 2023.
8. *Avnish Bajaj v State* (2005) 3 CompLJ 364 Del.

host. However, subject clauses and conditions must be considered under Section 79 of the Information Technology Act, 2000.<sup>9</sup> According to the Information Technology (Amendment) Act, 2008, intermediaries are protected from liability if they comply with the due diligence provisions set forth in the Rules. The Act provides a 'safe harbour protection' only if the intermediary acts solely as a facilitator and does not create or modify data or information. However, if an intermediary does not remove illegal content after being notified by the appropriate government or agency or after becoming aware of it, their immunity can be revoked. In addition to the Information Technology Act, 2000, there are guidelines in the Information Technology (Intermediaries Guidelines) Rules, 2011 that supplement the law. The Information Technology (Intermediaries Guidelines) Rules from 2011 have been replaced by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021.

As per Section 79(3)(a) of the Information Technology Act, 2000, an online intermediary could lose their protection if they have contributed to an illegal act by assisting, supporting, or encouraging it, whether through intimidation, promises, or any other methods. If an intermediary assists in a crime committed online, they will be considered to have committed it themselves and will no longer be protected under Indian safe harbour laws.

### **ANALYSIS OF THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021**

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, explain the rules surrounding the

responsibility of intermediaries in cyberspace and are necessary for legal protection. In accordance with Rule 3(1)(b) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, individuals who are impacted by content can request the intermediary to have it removed. This rule outlines what content may be considered illegal and subject to removal. Initially, there was confusion about the 36-hour time limit for intermediaries to respond. However, the government has made it clear that the intermediary shall respond or acknowledge the complaint within 36 hours and is given a period of 30 days to take action on it.<sup>10</sup> As per Rule 3(2) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, appointing a grievance officer who will acknowledge the complaint within 24 hours and resolve them within 15 days is mandatory.

### **JUDICIAL STANCE BEFORE SHREYA SINGHAL JUDGMENT**

In the case of *Super Cassettes v Myspace*, the liability of intermediaries was discussed. In this case, a single-judge bench of the Delhi High Court ruled that intermediaries must promptly remove content from their websites upon receiving a complaint of infringement from a third party. Additionally, the court ordered that intermediaries should conduct a preliminary check of all content before making it public. However, this ruling was considered impractical due to the vast amount of data uploaded on the internet. The ruling was later overruled by a Division Bench on December 23, 2016, which clarified the grounds of liability for intermediaries. The Division Bench held that intermediaries "*could be held liable only when they have actual or specific knowledge and not constructive knowledge of the existence of infringing content on their website,*

9. The Information and Technology Act, 2000 s 79.

10. Clarification on The Information Technology (Intermediary Guidelines) Rules, 2011 under Section 79 of the Information Technology Act, 2000 <<http://meity.gov.in/writereaddata/files/Clarification%2079rules%281%29.pdf>> accessed 13 June 2023.

and do not take any steps to have such content removed".<sup>11</sup>

In the Delhi High Court case of *Kent RO Systems v Amit Kotak*<sup>12</sup>, an important ruling was made regarding the liability limit of intermediaries. This case reaffirmed the Supreme Court's decision in the *Shreya Singhal* case, stating that intermediaries are obliged to remove information from their platforms upon receipt of an order from the relevant government agency or court order, as per the Information Technology Act, 2000.<sup>13</sup>

## CYBERCRIMES WHICH ATTRIBUTE LIABILITY TO INTERMEDIARIES

They may also be held liable if an intermediary fails to justify their position under the safe harbour provision for online crimes. However, the Information Technology Act, 2000 includes specific provisions outlining the offences related to intermediaries.

## FAILURE TO COMPLY WITH DATA RETENTION PROVISION

Data retention is a crucial issue to consider when it comes to investigations and providing evidence. Depending on the jurisdiction, laws regarding data retention may differ. Intermediaries may have different communication and disclosure requirements, which can affect liability.

In India, laws regarding data retention can be found under the Information Technology Act, 2000 and the Copyright Act, 1957. Accordingly, intermediaries are required to keep records of information that has been removed for up to 180 days.<sup>14</sup> According to the Information Technology Act, 2000, read with the Information Technology (Intermediary Guidelines and Digital Media

Ethics Code) Rules, 2021, there is a requirement of disclosure obligations on the intermediaries. Rule 3(1)(d) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, mandate intermediaries to disclose information to government agencies that are authorized for investigative, protective, and cyber security activities.

However, the regime does place disclosure obligations on the intermediary under Rule 3(1)(d) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. According to Section 67-C of the Information Technology Act, 2000, intermediaries are responsible for preserving and retaining information. Failure to comply with these rules can result in liability. As the law prescribes, the Central Government determines the specific data that must be preserved and retained.<sup>15</sup> In this section, the second clause discusses the possibility of criminal liability for intermediaries who fail to fulfil their obligations under Sec 67C (1). To prove liability, knowledge and intention must be established. The punishment for such offences may include up to three years in prison and a fine. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 prescribes that the "*information or any such assistance*" shall be provided 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*".<sup>16</sup>

## NON-COOPERATION OR ASSISTANCE IN LAWFUL SURVEILLANCE

If an authorized officer issues a direction under section 69, intermediaries must comply by providing

11. *Super Cassettes v MySpace* FAO(OS) 540/2011.

12. *Kent RO Systems v Amit Kotak* CS (Comm) 1655 of 2016.

13. *Id.*

14. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 3(1)(g).

15. The Information Technology Act, 2000 s 67C (1).

16. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 3(1)(d).

all necessary facilities and technical assistance. This section permits the interception, monitoring, or decryption of information. Failure to cooperate with lawful agencies may result in punishment under this section.

However, if an intermediary does not comply with lawful surveillance by authorized agencies, then Section 69-B prescribes punishment. For cyber security, the government has the authority to monitor and gather traffic data or information from any computer resource.

## NON-COMPLIANCE WITH SECTION 69-A OF THE INFORMATION TECHNOLOGY ACT, 2000

Section 69-A grants the power to issue directions for blocking websites, which intermediaries must comply with. If the Central Government or its authorized officer issues a direction under Section 69-A to block public access in the interest of specific grounds, the intermediary must follow the direction. Failure to comply with the directive may result in criminal liability, with a punishment of up to seven years imprisonment and a fine.

### Privacy Breach

It is considered a crime when an intermediary breaches a person's privacy. It is illegal to share personal information without consent. The Information Technology Act, 2000 specifies that anyone who acquires personal information through a contract while providing services and then reveals that information without permission, with the intention of causing harm or benefit to someone else, is committing a crime under section 72-A. Intermediaries are also included in this type of cybercrime and can be punished with up to three years in prison, a fine of up to five lakh rupees, or both.

## International Activism: Manila Principles

The importance of the Manila Principles cannot be overstated. They embody the voices and needs of those who stand for digital rights and social justice. These principles were developed due to the challenges faced by internet intermediaries. They were officially introduced at RightsCon Southeast Asia held in Manila. The Manila Principles aim to safeguard internet users' fundamental rights, including freedom of expression, association, and privacy. It is the responsibility of the State to protect these rights and ensure they are functioning properly. The Manila Principles consist of six overarching principles along with sub-principles. The first principle states that the law should protect Intermediaries from being held liable for third-party content. This means that Intermediaries should not be held responsible for any changes made to the content by a third party.<sup>17</sup> The second principle states that content cannot be restricted unless ordered by a judicial authority. This is to prevent intermediaries from determining the legality of material hosted by third parties and to ensure that a judicial order clarifies any ambiguity or vagueness. The third and fourth principles state that any restrictions on content must be clearly and unambiguously stated through a formal request process. In addition, these limitations must pass the tests of being necessary and proportionate. The fifth principle states that laws and policies regarding content restrictions must adhere to due process.

In the case of *Shreya Singhal v Union of India*<sup>18</sup>, the Supreme Court highlighted the significance of transparency and accountability in laws and policies related to content restriction. This aligns with the sixth principle of the Manila Principles. These principles aim to create a safe environment where intermediaries can be protected from liability while preserving fundamental rights. The second principle is particularly critical as it seeks to eliminate administrative schemes that hold internet

17. Principle 1, Manila Principles on Intermediary Liability <<https://www.manilaprinciples.org/>> accessed 13 June 2023.

18. *Shreya Singhal v Union of India* AIR 2015 SC 1523.

intermediaries liable. This was a significant concern for many individuals; therefore, the issue is now addressed solely by a court of law.

### **The Judicial Interpretation and Way Ahead**

The Information and Technology Act, 2000, has been criticized for its potential to violate civil liberties. In 2008, an amendment was made to address cybercrime, including an infamous provision - Section 66-A. This section was criticized for its vague language, particularly the term 'offensive'. As a result, police could arrest someone if they deem their actions offensive, which is subjective and open to interpretation.

In discussing intermediary liability, we must consider the criticisms of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. These rules were intended to provide safe harbour protection to intermediaries but also required them to censor content, which went against the idea of immunity. The *Shreya Singhal* judgment<sup>19</sup> also examined the ambiguity of these rules and their obligation to censor content.

The Indian Supreme Court recently reviewed the constitutionality of several provisions in the Information Technology Act, 2000 and contributed to the legal understanding of this subject. The Court emphasized that the provisions must not be vague or unclear. When removing or blocking online content, it is essential to follow reasonable standards and have a clear and well-reasoned order from a judicial, administrative, or governmental body.

The case where two women were apprehended for their involvement in a post regarding a political figure was made by one of them on social media, which the other had 'liked'. Their action was considered as an offence under Section 66-A of the

Information Technology Act, 2000, which ultimately resulted in their arrest.

The Court has ruled that a certain provision, known for censoring online speech without reasonable grounds, is unconstitutional. Section 66-A was criticized for being vaguely worded, allowing police misuse and not qualifying as a reasonable restriction on freedom of expression.

In *Google India v Visaka*<sup>20</sup>, Section 79 of the Information Technology Act, 2000 was interpreted to clarify the circumstances in which intermediaries could be held liable for online content. The Court determined that intermediaries can only remove online content if they are compelled to do so by an adjudicatory body issuing an order. Online intermediaries can avoid being held liable if they promptly remove the alleged illegal material from their website within a specified time frame after receiving an order from the appropriate government. Section 79 of the Information Technology Act, 2000, offers a safe harbour provision for online intermediaries. However, this protection can be revoked if the intermediary fails to remove content following notification from the government or its agency. Thus, the intermediaries are protected from liability unless they disregard an order from the appropriate authority.

The Manila Principles, launched at Rights on Southeast Asia in Manila, are not being followed by some entities. A court ruling in India upheld the provision that empowers the government to block public access to information through computer resources.<sup>21</sup> Therefore, the Manila Principles insisted that "*content must not be required to be restricted without an order from a judicial authority*".<sup>22</sup> In India, *Shreya Singhal v Union of India* has successfully protected online freedom of speech and expression by preventing private

19. *Id.*

20. *Google India v Visaka* 2019 SCC Online SC 1587.

21. The Information Technology Act, 2000 s 69A.

22. Principle 2, Manila Principles on Intermediary Liability <<https://www.manilaprinciples.org/>> accessed 13 June 2023.

parties from using intimidating notices to force the removal of online content.<sup>23</sup>

## CONCLUSION

It is essential to differentiate between different types of intermediaries and not treat them all the same. For example, the liability of a search engine should not be used as a basis for holding social media websites accountable. Rational categorization is necessary for creating effective laws. In some situations, quick action is necessary, but in others, acting too swiftly could restrict

freedom of expression. Some argue that the *Shreya Singhal* case has undermined the original intent of provisions meant to prevent irreparable harm quickly. Thus, the proposed Digital India Bill, 2023, which shall repeal and replace the Information Technology Act, 2000, shall cater to the evolving issues of the fourth industrial revolution and changing nature of the intermediaries. The blanket protection for online intermediaries under the 'safe harbour' provision of the Information Technology Act, 2000, also needs consideration considering the changing digital world and the technological revolution.

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23. Giancarlo Frosio, 'Welcome to the Manila intermediary liability principles!' <<https://cyberlaw.stanford.edu/blog/2015/03/welcome-manila-intermediary-liability-principles>> accessed 13 June 2023.