Information and Technology (Intermediaries Guidelines) Rules 2011: Thin Gain with Bouquet of Problems

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Intermediaries' Liability

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

When there is such enormous creation of interest and application of the people of society, the laws relating to this becomes really significant. There are many problems which are faced and so the relation with law and information and technology in the contemporary world becomes juxtaposition.

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

Who are Intermediaries?

Under the Information Technology Act, 2000[1](herein after referred to as an Act), intermediary was defined as any person, who on behalf of another person, receives stores or transmits that message or provides any service with respect to that message. However, the Information Technology Amendment Act, 2000 has clarified the definition "Intermediary" by specifically including the telecom services providers, network providers, internet service providers, web-hosting service providers in the definition of intermediaries thereby removing any doubts. Furthermore, search engines, online payment sites, online-auction sites, online market places and cyber cafés are also included in the definition of the intermediary[2]. So in India Information Technology Act 2000 distinctly defines it in this form.

Intermediaries are widely recognized as essential cogs in the wheel of exercising the right to freedom of expression on the Internet. Most major jurisdictions around the world have introduced legislations for limiting intermediary liability in order to ensure that this wheel does not stop spinning. With the 2008 amendment of the Information Technology Act 2000, India joined the bandwagon and established a 'notice and takedown' regime for limiting intermediary liability.[3] On the 11th of April 2011, the Government

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1 Section 2(1)(w) of the Act

2 Pavit Singh Katoch, Advocate & IP Attorney, LIABILITY OF INTERMEDIARIES UNDER THE IT AMENDMENT ACT, 2008, Vaish Associates Advocates, http://www.vaishlaw.com/article/information_technology_laws/liability_of_intermediaries_under_the_it_amendment_act_2008.pdf?articleid=100324, last visited on 2 February, 2013

3 Rishabh dara, Intermediary Liability in India: Chilling Effects on Free Expression on the Internet, the centre for internet and society, http://cis-india.org/internet-governance/chilling-effects-on-free-expression-on-internet, last visited on 2 February, 2013

of India notified the 'Information Technology (Intermediaries Guidelines) Rules 2011' (herein after referred to as 'rules') that prescribe, amongst other things, guidelines for administration of takedowns by intermediaries. The Rules have been criticized extensively by both the national and the international media. The media has projected that the Rules, contrary to the objective of promoting free expression, seem to encourage privately administered injunctions to censor and chill free expression. On the other hand, the Government has responded through press releases and assured that the Rules in their current form do not violate the principle of freedom of expression or allow the government to regulate content.[4]and so this means that The rules require "intermediaries," companies like Face book, Google and Yahoo that provide the platform for users to comment and create their own content, to respond quickly if individuals complain that content is "disparaging" or "harassing," among other complaints. If the complainant's claim is valid, these companies must take down the offensive information within 36 hours.[5]

If a person makes a representation to a service provider proclaiming that there is a presentation of unlawful content available on the network, will the service provider be liable if he fails to take steps within a reasonable time to remove the infringing material from the network? If the service provider fails to prevent infringement of copyright in the above circumstances, is the plea of not having knowledge of infringement still available to him? If the service provider removes the material from the network in pursuance to the representation made by a person who later on proves false, will the service provider be liable to the person whose material has been removed?

Intermediaries: Role in India

"Intermediary" is defined in Section 2(1) (w) of the Information and Technology Act 2000. "Intermediary" with respect to any particular electronic message means any person who on behalf of another person receives stores or transmits that message or provides any service with respect to that message.[6]The liability of the intermediaries is lucidly explained in the section 79 of the Act.

Section 79 of information and technology Act, 2000

Network service providers not to be liable in certain cases

According to section 79 of information and technology Act, 2000, For the removal of doubts, any person who is providing any service as a network service provider shall not be liable under this act for certain cases, rules or regulations made there under for any third party information or data made available by him. Even if proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

If he proves that the Explanation.—for the purposes of this section, —

(a) "Network service provider" means an intermediary;

(b) "Third party information" means any information dealt with by a network service

Provider in his capacity as an intermediary;

An intermediary would be liable and lose the immunity, if the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act.

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4 ibid

5 Heather Timmons, 'Chilling' impact of India's April internet rules, NDTV.com, http://www.ndtv.com/article/india/chilling-impact-of-india-s-april-internet-rules-156126, last visited on 4 February, 2013

6 The gazette of India, Ministry of Law, Justice and Company affairs (legislative department), registered no. 33004/2000, http://eprocure.gov.in/cppp/sites/default/files/eproc/itact2000.pdf, last visited 4 February, 2013

Sections 79 also introduced the concept of "notice and take down "provision as prevalent in many foreign jurisdictions. It provides that an intermediary would lose its immunity if upon receiving actual knowledge or on being notified that any information, data or communication link residing in or connected to a computer resource controlled by it is being used to commit an unlawful act and it fails to expeditiously remove or disable access to that material.[7]And on the other hand another interpretation can be drawn where the section 79 of the IT Act, 2000 absolves ISPs (the internet service providers), who work as intermediaries, of its liability if it can prove its ignorance and due diligence, it does not specify who would be held liable for such contravention in such an event. Therefore, this provision will cause problems when an offence regarding third party information or provision of data is committed.[8]In India there was a Writ filed by Jacob, a law student (Shojan Jacob vs.Union of India & Others, WP(C) 5236 of 2012).

International Scenario

Early pressures on Internet service providers (ISPs) and hosts who feared being held responsible for multiple types of unwelcome content authored by third parties (including not just copyright infringing material but also illegal and harmful material such as pornography, hate speech and defamatory content) led to the promulgation of the two main global models, the EC Electronic Commerce Directive (ECD), and the US Digital Millennium Copyright Act (DMCA). These instituted a bright line, with some caveats, of no liability for intermediaries unless they received actual notice or became aware of facts or circumstances indicating illegal content or activity. This led to general voluntary participation by intermediaries in notice and take down (NTD) even where not mandated by law. In this model, prior monitoring was not expected of intermediaries.[9]

- ***Religious Technology Center v. Netcom Online Communication Services, INC.,* 907 F. Supp. 1361 (N.D. Cal. 1995) : A CASE FROM USA**

Since the seminal 1995 judgment of the District Court of Northern California in the Netcom case, the view in the U.S. has been that an ISP is a passive service provider much like a telephone company and cannot be held liable for the content transmitted through its server. The plaintiff had to prove that Netcom had the authority and ability to check the infringer's actions and also received a direct financial benefit from the infringement. On the latter point, the court noticed that the monthly subscription fees of the ISP did not register any increase, and so the court held that the ISP did not receive a direct financial benefit from the infringement. The ISP was absolved of any vicarious copyright liability, but on the aspect of contributory infringement the court held that the question of whether Netcom encouraged the client to post infringing materials should be determined at the time of trial. Unfortunately, from an academician's point of view, the case settled before trial. But, the decision in this case made it crystal clear that an act of volition is a prerequisite to copyright liability.[10]This legal position changed in the U.S. with the passage of the Digital Millennium Copyright Act (DMCA) 1998, which provided a "safe harbor" for ISPs, conferring exemption

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[7] Pavit Singh Katoch, Advocate & IP Attorney, LIABILITY OF INTERMEDIARIES UNDER THE IT AMENDMENT ACT, 2008, Vaish Associates Advocates, http://www.vaishlaw.com/article/information_technology_laws/liability_of_intermediaries_under_the_it_amendment_act_2008.pdf?articleid=100324, last visited on 2 February, 2013

[8] Thilini kahandawaarachchi, Liability of internet service providers for third party online copyright infringement: A study of the USA and Indian laws, http://nopr.niscair.res.in/bitstream/123456789/279/1/JIPR%2012(6)%20(2007)%20553-561%20.pdf, last visited on 5 February, 2013

[9] Lilian Edwards, Professor of E-Governance, University of Strathclyde, Role and Responsibility of Internet Intermediaries in the field of copyright and related rights, http://www.wipo.int/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf, last visited 8 February, 2013

[10] V.K. Unni, Internet Service Provider's Liability for Copyright Infringement- How to Clear the Misty Indian Perspective, Richmond journal of law and technology, Volume VIII, Issue 2, http://jolt.richmond.edu/v8i2/article1.html#t8, last visited on 7 February, 2013

from copyright liability.[11] But this is with respect to few conditions that the ISP must not have any knowledge that the material is in any way infringing and must not be aware of the facts and circumstances from which the infringing activity is apparent and, in the event of having such knowledge, must act expeditiously to disable such material. In order to avail himself of the exemption from liability, the service provider must also not receive a financial benefit directly attributable to the infringing activity.[12]

The Digital Millennium Copyright Act, 1998 has been a very crucial piece of work for defining the liability of intermediaries in a more proper way. Section 512 of the Digital Millennium Copyright Act, 1998 also contains provisions allowing users to challenge improper takedowns. Without these protections the risk of potential copyright liability would prevent many online intermediaries from providing services such as hosting and transmitting user-generated content.[13]Notice and takedown is a process by which the intermediary can save himself from being liable. When a copyright proprietor discovers allegedly infringing material on a provider's service, it has the right to send a notice to the provider demanding the removal or blocking of that material and if the notice is proper and the provider promptly complies, the provider remains exempt from liability to the copyright owner.[14]

From the mid 1990s, this lack of harmonization in the emerging case law lead to calls from industry for some form of rescuing certainty in the form of special statutory regimes giving immunity from liability – or in US terminology, "safe harbors".[15] To understand the term "safe harbors" is of at most importance when we talk about liability of intermediaries. Governments across the world realized that these intermediaries must be given protection from legal liability that could arise out of illegal content posted by users, considering the importance of these intermediaries in the online space and the fact that their mode of operation was quite different from the traditional brick-and-mortar business. Countries like the US and members of the European Union and India now provide protection to intermediaries from such user generated content. Such protection is often termed as a 'safe harbor' protection.[16]

In Europe, the liability regime debate came to be seen less as tied to different types of content—libel, pornography, material infringing copyright—and more as a holistic problem of whether intermediaries on the Internet should in general be made responsible for the content they made accessible to the public, and more importantly, whether they could in practice take any steps to deal with such responsibility and avoid risk.[17]

Tribulations with the Guidelines

- **Gross violation of the fundamental right of free speech and expression guaranteed under Article 19 (1) (a) of the Constitution of India**.- these rules have shown characteristics that

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[11] APARNA VISWANATHAN, The battle lines over encryption, The Hindu, http://www.thehindu.com/opinion/lead/article1487299.ece, last visited on 7 February, 2013

[12] ibid

[13] Digital Millennium Copyright Act, Electronic Frontier Foundation- Defending your rights in the digital world, https://www.eff.org/issues/dmca, last visited on 7 February, 2013

[14] IVAN HOFFMAN, B.A., J.D., The notice and take down provisions of the DMCA, http://www.ivanhoffman.com/dmca.html, last visited on 6 February, 2013

[15] Lilian Edwards Professor of E-Governance, University of Strathclyde, role and responsibility of internet intermediaries in the field of Copyright and related rights, wipo document, http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf, last visited on 6 February, 2013

[16] Shivam vij, How India made it easy for everyone to play internet censor: A primer from SFLC.in, Kafila, http://kafila.org/2012/03/23/how-india-made-it-easy-for-everyone-to-play-internet-censor/, last visited on 5 February, 2013

[17] Lilian Edwards, Professor of E-Governance, University of Strathclyde, Role and Responsibility of Internet Intermediaries in the field of copyright and related rights, http://www.wipo.int/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf, last visited 8 February, 2013

result in violation of right to free speech and expression and natural justice because intermediaries do not have the responsibility to verify the genuineness of the complaint received. The blockings may be arbitrary and not in accord with the principles of natural justice such as notice and fair hearing is also missing process. Intermediaries are companies who have business interest and are prone to influence by persons who have power to manipulate. They cannot be expected to be the custodian of free speech for internet above all influence and may engage in blocking, censoring internet content arbitrarily and on the basis of any frivolous complaint.[18] A reasonable restriction based on the edifice and principles of constitutionality has always been upheld to be valid. However, an unreasonable restriction flouting the basic fundamental rights has to be viewed strictly and remedied accordingly.[19]

- The grounds listed in Rule 3 (2) of the Intermediary Guidelines are highly subjective and is filled with private interest grounds which are not defined either in the Intermediary Guidelines or in the IT Act itself.[20] The terms such as "grossly harmful", "harassing", "invasive of another's privacy", "hateful", "disparaging", "grossly offensive" or "menacing" are vague and subjective and so put unreasonable restrictions on freedom of speech, with Rule 3 (2) containing vague terms which, in addition to falling beyond the purview of Article 19(2), cover only private and subjective grounds, incapable of objective definition or application.[21]
  There is also no provision in the Rules to file an appeal. The right to judicial remedy is totally taken away by the drawbacks in the Rules and this is a clear infringement of the fundamental rights including the right to constitutional remedies.[22] These Rules are vague, ambiguous and abstract with no proper definitions for the terms or illustrations of provisions like the Indian Penal Code (IPC) leaving room for very wide interpretation.[23]
- **Due diligence**- Intermediaries have to remove content prohibited under the Rules. To save itself from being liable to compensation the Intermediaries would have to determine whether the content violates the several terms which are ambiguous in nature. In order to minimize the risk of liability, they may block more content than required. This would imply adverse consequences for freedom of expression on the internet.[24]There is one more thing which should be taken into consideration that Publication of certain categories of content mentioned in the Rules is not offences under any existing law. For example, blasphemy is not prohibited under Indian laws and a newspaper may publish a blasphemous article, but the same article may not be reproduced on the internet. The Rules prohibit certain content on the internet which is permitted in other mediums such as the newspaper or TV.[25]
- **Differentiation of Intermediaries is ignored**: each intermediaries is not similar to each other and they even have different modus operandi, so to define them under single same functional guidelines is itself a critical step the underlying principle in the right to equality is that equals be treated equally and unequal, unequally. YouTube cannot be treated the same as Wikipedia, for reasons relating to differences in the nature and frequency of content being uploaded on each of

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[18] WEB CENSORSHIPAND INTERMEDIARIES GUIDELINES, KANTH AND ASSOCIATES Attorneys and International Legal Consultants, http://www.kanthandassociates.com/images/pdf/7-July_2012.pdf,

[19] Ibid

[20] Ujwala Uppaluri, Constitutional Analysis of the Information Technology (Intermediaries' Guidelines) Rules, 2011, The centre for internet and society, http://cis-india.org/internet-governance/constitutional-analysis-of-intermediaries-guidelines-rules, last visited July 27, 2013

[21] Ujwala Uppaluri, Constitutional Analysis of the Information Technology (Intermediaries' Guidelines) Rules, 2011, The centre for internet and society, http://cis-india.org/internet-governance/constitutional-analysis-of-intermediaries-guidelines-rules, last visited July 27, 2013

[22] Shojan Jacob vs.Union of India & Others, WP(C) 5236 of 2012

[23] Ibid

[24] Rules & Regulations Review, PRS Legislative research, http://www.prsindia.org/uploads/media/IT%20Rules/IT%20Rules%20and%20Regulations%20Brief%202011.pdf, last visited on July 27, 2013

[25] Ibid

these websites. Similarly, for reasons relating to scale of operations, a small start up with 6 employees working on a shoestring budget, should ideally not be held to the same standards as a large corporation like YouTube in honoring takedown requests especially when they relate to something relatively trivial like a single copyright claim.[26] In the absence a distinct classification of intermediaries, there is uncertainty in the steps to be followed by an intermediary as it cannot affirmatively determine whether a due diligence clause is applicable to it.[27]The qualifications and due diligence requirements of dissimilar classes of intermediaries have not been clearly defined in the Rules which result in ambiguity and non-functioning in the steps to be taken by the intermediary.

There are many areas over which the guidelines prove to be silent and obscure. In the normal course, the intermediary is required to make a judgment on the Offensive nature of any information and act to take the offending content offline. This is especially noteworthy given that there is no differentiation in the Intermediary Guidelines on the various types of criminal acts that may take place and no recommendations on treating differing crimes differently (for example, a terrorist threat would presumably require greater attention than a blog suspected of maligning a public figure – both are however treated to the same procedure).[28]

The intermediary may also be required to act upon receiving appropriate requests from the public. This is clearly arbitrary and unconstitutional and has tremendous scope for misuse. It should be noted that normally if any person is aggrieved by any information being made public, they may seek remedies – including the relief of injunction – from courts of law, under generally applicable civil and criminal law.[29] Hence for many types of intermediaries which perform function of regular and instantaneous scout about information on net, it is very difficult task for them to adhere to the required guideline rules and unfair for us to expect them to do so.

- **36 hours is an obscure timeframe for all intermediaries**: the time period mentioned in the guidelines for the intermediaries to save themselves from being liable is not much of sufficient time and so it again create a limitation to these guidelines. Sometimes it may be technically infeasible for an intermediary to comply with a takedown request within the requisite time period (36 hours) despite the best of intentions. In an empirical study by a scholar, the result obtained is as follows- intermediary apprised the complainant that actions have been taken towards disabling the impugned content pursuant to the complaint, it still failed to perform the requisite actions within 36 hours as stipulated under the Rules.[30]The period of 36-hours for the removal of content is simply impractical for certain websites to address copyright claims. 60 hours of video are uploaded to YouTube everyday (edit: every minute) - that is an incredibly large number of videos, and therefore an incredibly large number of takedown notices to deal with on a daily basis. There needs to be greater discussion on the reasonable period for removal of content.[31]Therefore classification of intermediaries should be done on the basis of functions performed by them.

NEED OF CHANGING THE GUIDELINES

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[26] Amlan Mohanty, Dear Mr. Sibal, You've Got It All Wrong, Spicy IP, http://spicyipindia.blogspot.in/2012/05/dear-mr-sibal-youve-got-it-all-wrong.html, last visited 6 February, 2013

[27] Rishabh Dara, Intermediary Liability in India: Chilling Effects on Free Expression on the Internet

2011, Google Policy Fellowship 2011, Centre for Internet & Society – Bangalore, http://cis-india.org/internet-governance/chilling-effects-on-free-expression-on-internet/intermediary-liability-in-india.pdf, last visited on 7 February, 2013

[28] Rishab Bailey, Commentary, Censoring the Internet: The New Intermediary Guidelines, EPW, http://www.indianet.nl/pdf/epw120204.pdf, last visited on july 27, 2013

[29] Ibid

[30] Ibid

[31] Amlan Mohanty, Dear Mr. Sibal, You've Got It All Wrong, Spicy IP, http://spicyipindia.blogspot.in/2012/05/dear-mr-sibal-youve-got-it-all-wrong.html, last visited 6 February, 2013

Solving the issue of liability of intermediaries in a country like India is not an easy task rather it requires consideration on the huge lacuna it leaves under its shadows. In spite of gains from these guidelines like it provides limiting the liability of intermediaries, these guidelines prove to be problematic too.

India as a nation is becoming a kin to the nations which have established themselves as a leader in the use of information and technology, and therefore laws with respect to Information and technology in the country requires a careful treatment. Intermediaries are the most important part of the network and they should be given every possible support to work properly without fear of loose edges in the law.

The process of censoring content in the internet needs to be rationalized by ensuring transparency and maintaining consistency and uniformity in the standards in blocking content. The blocking of content has to be in compliance to the principles of natural justice and with provisions providing for appeal and judicial review.[32]Clearly it keeps citizens uninformed and is antithetical to democracy

Rules which came in 2011 prescribe few measures which needs to be clarified, for instance, the rationality of 36 hours time limit given to the intermediaries is uniformly kept without taking consideration of the difference in intermediaries and their job. And even when it is a known fact that people are using internet at a large number and large number of take down notice are applied so the time limit assigned to remove content in question needs to be reconsidered for better diligent decision making and time limit should not be same for all intermediaries with different nature of work. The question of bringing all intermediaries in one single umbrella seems to be a vague idea as in this era modus operandi of different intermediaries is different from one another.

Except the Slight gains that these guidelines have minimized the risk of liability, it has tendency to adversely affect the freedom of expression on the internet. Therefore the guidelines are directed to give relief to intermediaries but it fails to do that in proper manner and proper classification of different Intermediaries should be done so the guidelines should be made according to the functioning.

Author's Viewpoint

My suggestions to the problem of intermediaries is that the intermediaries should be classified and according to this classification all the different intermediaries, rules should be followed for different types of intermediaries, as an intermediary which might need more than 36 hours time for applying action on take down notice. Also the guidelines should be refined and advanced for not infringing the essentials of article 19 of Indian constitution and provide natural justice for better functioning in the dynamic India which is becoming promoter of freedom of speech and expression.

[32] Shojan Jacob vs.Union of India & Others, WP(C) 5236 of 2012.