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Intermediary Liability in USA and India: To Block or Not to Block

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INTRODUCTION

Since the discovery of internet, access to internet has evolved from being a perplexing technological advancement to a matter of basic human rights.¹ As internet becomes inextricably involved in everyday life of individuals, the intermediaries like search engines and social media or media sharing websites have attracted significant regulatory and judicial attention. The regulatory regimes across the world have introduced stringent laws on account of increased instances of use, and misuse, of internet intermediaries. Incidentally, intermediaries have inordinately come under fire for actions of their users' and third-party generated content. While the fundamental jurisdictions such as the United States of America (hereinafter, 'the US') have developed sufficient safeguards to promote accountability amongst internet intermediaries. However, developing countries such as India, are still struggling to establish a uniform and coherent framework to address the extent and limits of intermediary liability.²

This paper is a rudimentary attempt aimed at evaluating and suggesting reforms in Indian laws relating to intermediary liability, based on the experience of the US legislations and judicial precedents. In this regard, the paper is divided in four sections. The first section encapsulates the primary legislations of US addressing internet intermediary liability. The second section discusses the legal provisions which deal with intermediary liability in India, through detailed analysis of recent amendments and landmark judgments. The third section synthesises the practise of US courts and legislators with the Indian reality and seeks to suggest reforms to improve the legal framework relating to internet intermediaries in India. In conclusion, the paper asserts that consistency and uniformity must be maintained in the guidelines and directions issued by Courts for removal of content, for the sake of accountability and adequate safeguards.



INTERNET INTERMEDIARIES AND THE BIRTH OF LIABILITY

The challenges relating to liability originate with its subject, and often, the scope and definition of the subject remains as elusive as the determination of the extent of liability. Internet intermediaries are no different. The varieties of stand-alone and built-in online Internet media services that are currently available hinder attempts for a general definition. However, internet intermediaries can be categorized on the basis of a functions-based classification, this paper is limited to two types of media sharing platforms—firstly, platforms such as YouTube, Instagram, MySpace and SoundCloud that allow their members to upload images or music in permitted file formats, while other members can typically post comments,³ and; secondly, social media platforms like Facebook, Twitter and LinkedIn that facilitate the creation and sharing of information, ideas, career interests, and other forms of expression via virtual

communities and networks.⁴ Both media platforms allow for interaction with users and simultaneously tailor the platform based on their interests.⁵ Though the system and ability of each media platform differs, they broadly allow user-generated content to be shared with a group of users who are connected to each other based on interests or community.⁶ This content covers a range of material, including text postings like reviews, opinions and comments, multimedia like videos or photographs, and certain metadata like geo-location and tags.⁷

The operators of such services and platforms are common targets of liability since they host user generated content,⁸ as opposed to website created content.⁹ These platforms are common features of 'Web 2.0', wherein user generated content is pervasive.¹⁰ It is fair to suggest that intermediaries



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allows for users to have unlimited outlets of expression.¹¹ Since the mandate of these platforms enables people to share such diverse data online, it also exposes itself to the risk that the concerned platform will be utilized for unlawful and illegal actions, such as, intellectual property infringement,¹² defamation, breach of confidence, misuse of private information, breach of data protection, and other miscellaneous civil and criminal wrongs.¹³ In this context, the fact that intermediaries operate via the collection and monetization of users' activities and personal information, for targeted advertising works implicates them further.¹⁴

The liability imposed on internet intermediaries is either of primary or secondary nature.¹⁵ Primary liability arises where the intermediary is the primary wrongdoer due to its own acts or omissions, whereas, secondary liability arises due to unlawful user-generated content, which the intermediary may have contributed to, or have been in recognition of it, making it the secondary wrongdoer.¹⁶ The intellectual property laws in India dictate that such a platform would be held liable for IP infringement each time it hosted/published an instance of a copyrighted work, for either contributory infringement, in the event that it had knowledge and contributed to the said infringement, or for vicarious infringement, in the event that it controlled and made commercial gain from the infringement.¹⁷

Intermediaries are perpetually alive to this risk. Hence, some platforms have community policies in place that restrict and remove content which breach these policies using post-moderation and community flagging tools to avoid liability.¹⁸ For instance, YouTube had introduced an automated algorithmic system known as 'Content ID' to detect copyrighted works contained in users' videos by comparing them against a database of known work supplied by content owners.¹⁹



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INTERMEDIARY LIABILITY IN THE US

The US is the birthplace of, and the home to, many major global Internet platforms that host millions of works posted online for users all across the world.²⁰ Thus, it is not surprising that the United States passed legislations far back in the 1990s, to encourage the development of intermediaries and provided them protection from liability for the actions of their users.²¹ In US, primarily the Communications Decency

Act (*hereinafter*, 'CDA')²² and the 'Digital Millennium Copyright Act' (*hereinafter*, 'DMCA') are concerned with intermediary liability. While section 230 of the CDA caters to claims of privacy invasion, defamation, tortuous offences and third party negligence²³, the claims against intellectual property infringement, criminal law and the Electronic Communications Privacy Act-related offences must seek recourse under section 512 of the DCMA.

COMMUNICATIONS DECENCY ACT OF 1996

The CDA gives expression to immunity for intermediaries through section 230(c) (1), which states that, "*no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*"²⁴ This provision wards off claims of defamation and a host of other civil claims against intermediaries.²⁵ It ensures that online intermediaries that host or republish any form of speech are protected against claims that might otherwise be used to hold them legally responsible for what the users say and do on the platform.²⁶ The scope of this immunity is not restricted to Internet Service Providers (*hereinafter*, 'ISPs') alone but also includes 'interactive computer services'²⁷, and 'information content providers,'²⁸ which includes such online platforms that publish third-party content.²⁹



In practice, US courts have been reluctant in dismissing petitions on the defence of immunity in absence of conclusive determination that the intermediary did not contribute and was not connected to the actual development of the content.³⁰ However, mere interaction with the content does not lead to loss of immunity under this provision, but is related to the factum of publishers' traditional editorial functions, such as deciding whether to publish, removing or altering content.³¹ In *Levitt v. Yelp! Inc.*, wherein the intermediary *Yelp!* reordered the reviews of certain business, the court held that the possible intent to edit content was irrelevant and separate from the realm of creation and development.³² The court held that, mere "encouragement" of contents development was insufficient to waive immunity, however, material contribution to content development is a pre-requisite for imposition of liability.³³ Hence, Facebook, Google, and LexisNexis have accordingly been exempted from liability for hosting content uploaded by someone else.³⁴

Similarly, voluntary "good faith" filtering of user content by intermediaries prescribed under section 230(c)(2) is not a prerequisite for availing immunity under section 230(c)(1).³⁵ Therefore, on a platform like Facebook, with 17,000 employees, 350 million photo uploads per day by nearly 1.9 billion users (as of 2013)³⁶, the requirement of monitoring and screening user content to avoid liability would jeopardize its ability to offer a free service.³⁷

In case of prosecution for dissemination of defamatory content, intermediary platforms are entitled to defences such as "fair report privilege", "wire service defence", and "single publication rule" under the Act.³⁸ The fair report privilege permits fair and accurate re-publication of statements that are made in official public documents or proceedings,³⁹ whereas the wire service defence safeguards the re-publication of defamatory content from



a reputable news agency, provided the re-publisher was unaware of illegal content and did not substantially alter the same.⁴⁰ The single publication rule stipulates that any particular edition of a newspaper or any particular radio broadcast is to be considered as a single publication or a communication simultaneously available to multiple persons, and only one action can be brought against that publication by a plaintiff.⁴¹

DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

The safe harbour established under section 512 of the DCMA requires that the content providers must take down infringing material as and when notified of its presence on their platform by the copyright owner, and must not have obtained direct commercial benefit from the infringing content where such provider is able to control the activity on its platform.⁴² The section envisages a notice-and-takedown system for removal of infringing content as identified by copyright owners.⁴³ Besides standard protective technical measures,⁴⁴ the section further establishes a mechanism for identifying 'repeat offenders' to eliminate them from the platform.⁴⁵ However, issuing a takedown notice 'without proper consideration of the fair-use doctrine' exposes the copyright owner to liability for misrepresentation under section 512(f) of the DMCA.⁴⁶

This provision targets four types of Internet intermediaries-conduit providers,⁴⁷ those who store/cache content hosted by another,⁴⁸ those who host content posted by another,⁴⁹ and services like search engines.⁵⁰ The application of the section has been extended to include online marketplaces and peer-to peer networks as well. For instance, eBay, an online classifieds' site, qualified for safe harbour for listing of alleged infringing movie titles.⁵¹ Further, unlike section 230 of the CDA, the DMCA specifically and expressly provides for injunctive relief against intermediaries.⁵² Many online media platforms such as YouTube, MySpace, Facebook, etc., have flourished under the umbrella of the safe harbour provision.⁵³



INTERMEDIARY LIABILITY IN INDIA: WHERE WE STAND

India enacted the Information Technology Act, 2000 (*hereinafter*, 'IT Act') with the objective of regulating and facilitating lawful electronic, digital, and online transactions, and mitigating cyber-crimes. Until 2008, the Indian authorities were entering into pacts with intermediaries like Orkut to allow for quick deletion of content and prompt access to user data.⁵⁴ However, in response to an infamous Delhi High Court decision⁵⁵, India adopted a conditional-safe harbour approach by amending the provisions of section 79, to establish a 'notice and takedown' regime for limiting intermediary liability.⁵⁶

The amended section 79(1) states that "*an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.*"⁵⁷ The protection under sub-section (1) is qualified with the conditions provided under the following sub-section that states, "*(a) the function of the intermediary should be limited to providing a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or (b) the intermediary does not initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission; and (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.*"⁵⁸ While the first two sub-sections account for the nature of the intermediaries,

the last sub-section imposes an unqualified burden of due diligence on the intermediary website.

Section 79(3) provides that the safe harbour protection would not apply: "(a) 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; and, (b) if upon receiving actual knowledge or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner."⁵⁹ It effectively holds an Internet intermediary liable for content, which might be



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illegal or may have been published by third parties, where the intermediary was aware or was made aware of such content. Online intermediaries would be required to block content on the threat of prosecution,⁶⁰ and they are required to assign grievance officers to meet the IT Act's detailed safeguards.⁶¹ Consequently, the process of assigning a person, ensuring that all the blocking orders are received in the correct form, and are redressed within one month, has been criticized for its deterrent effects.⁶² In furtherance of the amendment, guidelines for the administration of takedowns by intermediaries were promulgated in 2011 vide the Information Technology (Intermediaries Guidelines) Rules (*hereinafter*, 'the Guidelines'),⁶³ in exercise of the rule making powers conferred on the executive by virtue of section 87 (2)(zg) read with section 79(2).⁶⁴ The Guidelines were modelled on the European Union E-Commerce Directive (*hereinafter* 'EU Directive').⁶⁵ However, while the EU Directive clearly differentiated between mere conduits and system caching and hosting,⁶⁶ the Guidelines fail to clearly distinguish between the roles and responsibilities of different classes of intermediaries.⁶⁷ The EU Directive laid down specific requirements due diligence requirements for each category of intermediary.⁶⁸ The Guidelines lays down the nature of due diligence to be followed by intermediaries, generally. It also detailed the content that is 'unlawful,' for the purposes of section 79.

Rule 3(1) of the Guidelines requires that the intermediary publish the rules and regulations, privacy policy, and the user agreement of access or usage i.e., their terms of service.

Rule 3(2) provides guidelines for intermediaries' terms of service. This rule provides a wider range of words than suggested in Section 66A, including, 'harassing', 'blasphemous', 'disparaging', 'invasive of another's privacy,' 'racially objectionable,'⁶⁹ 'harms minors in any way,'⁷⁰ infringes any patent, trademark, copyright or other proprietary rights.⁷¹ Sub-rule 3 provides that the intermediary shall not 'knowingly' host or publish or initiate, select the receiver of or modify the transmission of any content that violates the



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standards contained in rule 3(2). Hence, the secondary liability in sub-rule 3 is effectively at the mercy of interpretation of terms provided in sub-rule 2. The language of rule 3(2) exceeds the scope of section 66A. Thus, intermediaries are incentivised to engage in expansive censorship in order to avoid litigation, whether or not the speech

is lawful.⁷²

Rule 3(4) requires an intermediary to disable content within 36 hours of such notification or court order. The Government had clarified, stating that the intermediary would have to respond or at least acknowledge the complaint within 36 hours⁷³ and the intermediary must redress such complaints within 30 days.⁷⁴ Unfortunately, the threshold of the term 'redressal' was unclear even in Rule 3(11) and no guidance was provided by the rules or the clarification.⁷⁵

THE SHREYA SINGHAL CASE: AN UNCERTAINTY

The Supreme Court of India recognized the problems with the IT Act, and the 2011 Guidelines, in *Shreya Singhal v. Union of India*⁷⁶ (hereinafter '*Shreya Singhal*'). It declared section 66A unconstitutional and upheld the validity of section 79 but limited the purview of its application.

The court agreed that 'it would be very difficult for intermediaries to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not'.⁷⁷ Consequently, it read down 'actual knowledge' under section 79(3)(b) to refer to situations where an intermediary, upon receiving intimation from a court order or on being notified by the appropriate government or its agency, fails to expeditiously remove or disable access to the relevant material.⁷⁸ Similarly, the court also read the scope of Rule 3(4) was read down in the same manner.⁷⁹

The Court drew a parallel between the wordings of section 66A and rule 3(2)(b) and classified both as overbroad and vague. However, only section




66A has been struck down. In any case, section 79(3)(b) and rule 3(4) have been encumbered by Article 19(2), effectively rules 3(2) has also lost its potency.

In this case, the Court took note of the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (hereinafter '2009 Rules') under section 69A. These Rules provide for two ways of removing content, one by the Designated Officer after complying with a request from a nodal officer under rule 6, and the other by the Designated Officer when he has to follow an order passed by a competent court under rule 10. In this context, the Court concluded that there was no possibility for the Intermediary to apply its own mind to determine the legality of content.⁸⁰

The ruling of the court in *Shreya Singhal* brought great clarity to intermediary liability albeit failed to delve deeper into the sections of the IT Act. Section 79 provides that an intermediary must take down content on receipt of notice from the government, as given in the 2011 Guidelines. However, it does not contain the protections that are mentioned in section 69A and its rules which specifically relating to website blocking. Surprisingly, the court failed to address this lacuna in *Shreya Singhal*, effectively creating parallel blocking mechanisms.

Furthermore, there still exists ambiguity on whether the intermediaries are still required to include the categories of offensive speech as laid down in rule 3(2)(b) in their user agreements or terms of service, since the Court did not specify any terms in the operative part of the judgement, which exceeds the ambit of Article 19(2). Thus, although the Court addressed pertinent issues relating to the intermediaries, it failed to deliberate upon the other rules in the Guidelines which are swift, harsh and have a concrete and critical bearing on intermediaries.⁸¹ Similarly, the Court failed to address

the constitutional competence of the executive to permit such direct takedown.⁸² Even if the competence were to be assumed, the *de minimis* procedural safeguards provided under section 69A, the 2009 Rules or under section 96 of the Code of Criminal Procedure, entitles the concerned person to move the High Court for setting aside the declaration.⁸³ Thus, there exists no opportunity for a hearing neither for the creator of the impugned content

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prior to the issuance of such a notice or the intermediary itself, nor does the act have a provision for appeal against the take-down order except through a writ petition. In fact, Rule 3(5) prescribes immediate termination of user rights on non-compliance with rules and regulations, user agreement and privacy policy.

BLOCKING ORDERS: INTERPRETIVE CONCERNS

Copyright infringement taking place online, has been a cause of concern for right holders. For the effective protection of copyrighted content, there must be a balance struck between the rights and duties of intermediaries in such regard. The proviso to section 81 of the IT Act provides that nothing in the IT Act restricts a person from exercising rights guaranteed under the Copyright Act.⁸⁴ Section 79 of the Act which begins with the words "*notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3)*" exhibits the inherent limitations. The dichotomy between section 79 and the proviso to section 81,⁸⁵ has led to an amendment introducing exceptions in the Copyright Act itself.⁸⁶

The Copyright (Amendment) Act, 2012, extended the expression of the term 'fair use' in section 52(1)(b) and (c) to include 'the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public' and '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.'⁸⁷

Intermediary liability for copyright infringements can also be categorised as primary or secondary.⁸⁸ While, primary liability arises when infringing content is deliberately stored, or the transmission of such works to the public is facilitated, secondary liability arises when such primary infringer is given a platform for such facilitation.⁸⁹ Section 52(1)(c) of the Copyright Act

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is designed to protect intermediaries from liability for secondary infringement. It also contains a notice, and a takedown procedure which provides that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright, he would be required to take down the infringing material for twenty-one days from receipt of the complaint. Unless a subsequent court order confirms the infringement, or no court order is made in reference to such material before the expiry of the period of twenty-one days, he may continue to provide such access.⁹⁰

In *Super Cassettes Industries Ltd. v. MySpace Inc.*⁹¹ (hereinafter 'MySpace'), the

Delhi High Court held that the proviso to section 81 of the IT Act does not preclude the affirmative defence of safe harbour for an intermediary against copyright claims. It further held that immunity under section 79(1) of the Act would not be available unless the due diligence requirement under sub-section 2 is fulfilled.⁹²

In the absence of clear legislative framework for blocking of infringing content on the internet, the judiciary has exercised discretion in issuing such blocking orders, giving rise to certain identifiable trends. Firstly, film-makers of major motion pictures have been approaching the courts for obtaining 'John Doe orders' to ensure the effectiveness of copyright in their movies.⁹³ A John Doe order is an *ex parte* directive issued against unidentified people, limiting them from continuing activities which violate the rights of the applicants. Film-makers file such cases a couple days before the release of their movies, naming people/websites (named as John Doe) and ISPs as parties.⁹⁴ These kind of orders originated in the US,⁹⁵ and were introduced in India in *Taj Television Ltd. v. Rajan Mandal*.⁹⁶ The court issued an *ex parte* order against fourteen unnamed persons, in exercise of the inherent powers of the court to evolve a fair and reasonable procedure for meeting exigent situations under Section 151 of the Code of Civil Procedure, in accordance with the international practice of John Doe orders.⁹⁷

The ISPs don't host content and their role is constrained to providing access to the Internet. However, issuance of an interim 'John Doe order' requires ISPs to block video, audio, and document sharing sites. On several occasions, ISPs are required to indiscriminately block content



without discriminating between infringing and non-infringing material.⁹⁸ The Madras High Court recently granted a sweeping interim injunction for blocking as many as 830 websites, without the particular link with the infringing material, on mere allegation of hosting illegal copies of the movie 'A Flying Jatt'. The order remained in force for a period of four week, pending final adjudication.⁹⁹ Surprisingly, the same court had previously held that only particular URLs that contained infringing content could be taken down and not the entirety of a website.¹⁰⁰ In any case, the final order is issued in a suit only against the John Does who are clearly identified and are set forth as parties to the primary suit.¹⁰¹ However, in several instances, John Doe orders blocking websites may amount to granting the final relief at the interim stage itself.¹⁰²

At another instance, Multi Screen Media Satellite approached the Delhi High Court to protect its FIFA World Cup 2014 broadcast rights, and the court passed an *ex parte* injunction against 219 websites as they were likely to host, stream, broadcast, retransmit, exhibit, make available for viewing and download, provide access to, and communicate the FIFA World cup broadcast to the public.¹⁰³ While section 37 of the Copyright Act clearly provides for a cause of action to arise only in case of actual breach of broadcast rights, no evidence was produced before the imposition of liability on the intermediaries in this case. The action of the court constitutes recognition of anticipatory infringement, in excess of the mandate stipulated under the Copyright Act.¹⁰⁴

Despite the utility of John Doe order to several industries, the lack of clarity and inconsistent practice of courts has placed an onerous burden on the intermediaries to increasingly monitor and regulate content being hosted by them to avoid being at the receiving end of such blocking orders. However, the reality remains that features such as YouTube's Content ID cannot guarantee that the continuous and voluminous streak of content being uploaded on the website will be effectively checked and regulated.

Hence, the present practice of courts and trend of orders severely undermine the safe harbour envisaged for intermediaries under section 79 of the IT Act.


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Secondly, the courts have left the modalities of the execution of the blocking order to the ISPs.¹⁰⁵ In August 2016, there were copyright infringement warnings being issued by ISPs on specific URLs which warned against the viewing, downloading, exhibition and duplication of contents of the URL as punishable under Sections 63, 63A and 65A of the Copyright Act.¹⁰⁶ However, it is imperative to point out that these warnings that were widely reported and displayed on various file sharing websites, mostly torrent (P2P) network websites are seldom accurate in law and lacked clarity in their invocation of the penal provisions.¹⁰⁷ Section 63 provides that any person who 'knowingly' infringes copyright or abets the infringement of the same may be punished or fined. It lays down a maximum fine of up to Rs. 2 lakhs,¹⁰⁸ but the recently issued warnings set forth fine extending to Rs. 3 lakhs.

SABU MATHEW GEORGE: THE ACHILLES HEEL OF INTERMEDIARIES

The *MySpace* judgment observed that, though MySpace carried out insertion of advertisements through automated processes without going through the content and generated revenue, general awareness was not enough to impute knowledge on the part of the intermediary. Knowledge must be of specific nature and could not be based on mere possibility of suspicion or apprehension.

However, advertising by intermediaries has brought blocking of content under severe scrutiny recently. The Supreme Court of India in *Sabu Mathew George v. Union of India*¹⁰⁹ directed Google, Microsoft and Yahoo to 'auto-block' advertisements relating to sex selective determination.¹¹⁰ The applicant sought enforcement of section 22 of the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1944 (hereinafter 'PCPNDT Act'), which imposes criminal liability for displaying any advertisement for any technique that can lead to determination of the gender of an unborn child. The order dated 16 November 2016,¹¹¹ the Court directed the Central

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Government to create a nodal agency to allow people to lodge complaints against websites for violation of Section 22 of the PCPNDT Act, which would be sent to the search engine for further action.¹¹² The search engines would have to delete the content within 36 hours and report the same to the Nodal Agency.¹¹³ The functioning of such a nodal agency would be in circumvention of the 2009 Rules. Rule 7 of the 2009 Rules requires that the blocking request be scrutinised by a review committee.¹¹⁴

Prima facie, the order passed by the Supreme Court also seems to be in contradiction of the holding by the same court in *Shreya Singhal case*, wherein the court held that intermediaries could only be compelled to takedown content through court orders/executive notifications. The judgment disregarded the 2009 Rules and instead directed the establishment of an in-house expert committee that will, based "on its own understanding" delete content in violation of Section 22 of the PCPNDT Act and would approach the nodal agency for clarification, in case of conflict.¹¹⁵

The Court also directed a 'key word filtering system' listing down 40 search terms,

which had to be mandatorily blocked on being looked up.¹¹⁶ It is inevitable that such an automated list would effectively block legitimate and legal content.¹¹⁷ If one were to look up 'sex determination kit', which has been included in the list, theoretically, the Supreme Court orders issued in this case itself would have to be blocked. This judgment could also pave the way for a scenario, where Courts would issue directions to internet intermediaries to create in house expert committees, similar to the one in *Sabu Mathew* for every offence outside the purview of the Copyright Act and the IT Act. Thus, the Court in this case has effectively modified the mandatory requirement of 'specific knowledge of illegal content' laid down in *MySpace* and *Shreya Singhal*.



SUGGESTIONS: THE WAY AHEAD

The literature identifies two types of regulations - horizontal and vertical.¹¹⁸ The horizontal legislations deal intermediaries liability specifically in various domains like Section 230 of the CDA and Section 79 of the IT Act, while the vertical ones caters to specific subject matters such as copyright, data protection. Therefore, on one hand, there are rules specifically provided for blocking on content under IT Act, on the other hand, where the Copyright Act or the PCPNDT Act comes into play, courts have created parallel agencies or have issued directions imposing monitoring liability.¹¹⁹ The courts have failed to ensure consistency between the horizontal legislation i.e., IT Act and the vertical legislation i.e. Copyright Act and this is one of the most problematic developments relating to the law of intermediary liability in India. This inconsistency is a direct consequence of the failure of legislature to reconcile the provisions of the Copyright Act and the IT Act.

Similarly, the 2011 Guidelines fail to take into consideration the rights of the content creators. The application of the maxim *ubi jus ibi remedium*, which is regularly relied upon by the Courts for issuing the *ex parte* John Doe orders, must extend to the application of the 2011 Guidelines as well. The courts should refrain from issuing orders to ISPs to block websites, without serving due notice upon author of the content and the intermediary. There is a vital difference between liability of ISPs and the liability of a website, whether intermediary or not. The court must ensure that the stakeholders are afforded a reasonable opportunity to be heard and advance their claims. Therefore, while it is agreed that John Doe orders for blocking websites act as timely shields that ensure that the licensed privileges of movie producers under as intellectual property right-holders are protected from the malice of online piracy, the practice of issuing takedown orders against ISPs should be the exception and not the rule. The courts must strive to issue takedown orders against identified websites only.

The IT Act not only fails to provide a remedy to the author or the intermediary, who are subjected to wrongful takedown orders, to have the removed information restored or put back, but also suggests immediate termination of access rights of non-compliant users.¹²⁰ The Copyright Act states that in case the claiming party complaining of infringement fails to obtain court orders in the infringement suit, the content may be put back by the intermediary within 21 days, but in light of the interim blocking orders being passed by the Court in copyright matter points to the ineffective nature of this remedy. In cases where the intermediary takes down content



in good faith voluntarily, there is no protection for the same under the IT Act, 2011 Guidelines or 2009 Rules.

Section 512 of the DMCA has sufficient safeguards to ensure that the notice-takedown mechanism is not used arbitrarily, wherein the intermediary can file a 'counter-notice' to object to the removal of the material.¹²¹ While the dispute is under adjudication, the DCMA provides the intermediary, a safe harbour to keep the content up, till the end of such adjudication. Further, it penalises persons who knowingly and materially misrepresents in notice or counter-notice that the impugned material is infringing.¹²² In a similar vein, section 230 of the CDA has a provision for protection of 'Good Samaritan' that lends protection to intermediaries for the same.¹²³ The DMCA even requires service providers to have procedures to respond to "repeat infringers", including termination of accounts in appropriate circumstances, unlike the IT Act which provides for immediate termination.¹²⁴ Intermediaries based in US, consequently educate users about the consequences of repeat infringement and issue warnings.¹²⁵

Canada has adopted a notice programme wherein the intermediary forwards the notice from right-holders alleging infringement to their users and subscribers who have allegedly made it available.¹²⁶ This neutralizes the threat of over-blocking by intermediaries in the name of caution and balances the burden between the intermediaries and the users.

Clearly, the fact that an intermediary could be gaining financial benefit from hosting the impugned content triggered the argument that they should at least be partly liable for infringement or other offenses like distribution or facilitation of the unlawful content. The Supreme Court in the *Sabu Mathew George case* suggested that when such responsibility is imputed on intermediaries whose business model monetizes the user generated content; it amounts to 'constructive knowledge' and hence, causes an onerous burden to be placed upon intermediary. However, the standard of intermediary liability under the IT Act is 'actual knowledge', as interpreted in *Shreya Singhal*, whereas Copyright Act provides a system of 'notice' as the standard for holding intermediaries liable. In *MySpace*, the court clarified that even the existence of safeguard tools i.e., Rights Management Tool, Notice and Take Down etc., are not sufficient to imply actual knowledge



of infringement, but merely implied general knowledge. Interestingly, the US Courts have held that the knowledge requirement includes both active and constructive knowledge.¹²⁷ The 'actual knowledge' is imputed by the prescribed form of notice for takedown; and the conditions for constructive knowledge are fulfilled by determination of the 'red flag' test set under Section 512 of the DMCA, looking into the obviousness of the infringement on being sent a defective notice.¹²⁸ The red flag test stems from the language in the statute which states that "aware of facts or circumstances from which infringing activity is apparent."¹²⁹

In *Sabu Mathew George*, the court also mandated the 'auto-block' mechanism and the key word filter. As discussed earlier, the effectiveness of these detection systems would be adversely affected in instances where the content is blocked, but such content contains only a small portion of infringing content. Moreover, such auto-block mechanisms if made mandatory by the Court could raise serious technical and practical problems for many small-scale intermediaries. While contextual

determination may have been preferable to automatic blocking, the existing resources and tools at the disposal of intermediaries renders the idea ineffective. Critically, in its analysis of advertisements and having recognised Internet users' right to receive information or content, the Supreme Court ought to have taken note of the adverse effect of an auto-block mechanism or a key word filtering mechanism on legitimate expression.

CONCLUSION

It is undisputed that the conventional intermediaries are no longer merely passive observers to the content being uploaded. This is only a natural consequence of the evolving technology of content creation and consumption. Hence, regulators have often struggled to frame straitjacket legislations dealing with intermediaries. However, if the task of regulating content was to be left to intermediaries, partially or completely, in the absence of sufficient guidelines and safeguards, it could lead to a chilling effect on free speech and expression,¹³⁰ the deleterious effects of which been documented extensively in the United States.¹³¹



So far, India has taken a unified approach to issue of intermediary liability by prescribing the same standard for holding such intermediaries liable irrespective of their classification. The Courts have handled blocking of internet intermediaries in a very high-handed fashion.¹³² Such practice has the potential to turn away very lucrative business of Internet intermediary that contributes to the economy and e-commerce in the country. In fact, the Centre for Internet and Society, as part of a research project, sent take-down requests to un-named Indian intermediaries targeting perfectly legal content and six out of seven intermediaries over-complied with the notices.¹³³

The objective should have always been the removal of infringing content whilst maintaining standards of transparency to ensure accountability, rather than indulging in a witch-hunt of intermediaries when it comes to content regulation. The dynamics of emerging economies like that of India in the context of online content and the critical bearing of unwarranted blocking on such legitimate content cannot be treated as a settled matter but one that requires immediate attention of the Government and a strong legislative intervention.

The difficulties encountered while making attempts to create a comprehensive legislation for intermediary liability indicate that the time for stand-alone legislations has passed. As such, there is much India can learn from the CMA-DMCA model of the US or any other that is characterized by sufficient safeguards against abuse of the takedown mechanism and an inclusive system of accountability to avoid suppression of legitimate content.

As a matter of policy, separate and clear legislation dealing with intermediary liability, pertaining to specific subject matters, seems to be the optimal solution. At the same time, the regulators must ensure an alternative remedy to the outrageously disproportionate orders that are being issued in suits concerning intermediary websites. Presently, the definition of 'intermediaries' under the IT Act extends from websites, like YouTube, etc., to utilities such as cyber-cafes. Rather than attempting to modify the exemptions under the IT Act and the Copyright Act in a piecemeal fashion, a better alternative would be to enact laws targeting a class or category of intermediary websites, for example, a guideline for commercial websites that earn

revenue from 'user generated content'. Moreover, a standard procedure for the removal of content, irrespective of the subject matter of offence, should be laid down clearly. Thus, ensuring consistency in the process and uniformity in guidelines and directions issued by Courts for removal of content should prevail in the legislature and policy houses.

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