

8 RMLNLUJ (2016) 182

Liabilities of Intermediaries and Safe Harbours Under Cyber Law Regime in India

by
Vipull Vinod

Online stuff is known to be spread, kept as well as positioned along by online intermediaries, where a role, in the complete organization, made up of the information society definitely is crucial. Data or service providers many times keep along with them legal liability, that can be, criminal or civil e.g. obscene, defamatory, racist content.

On the net intermediary responsibility has grown to be progressively equivocal in the context of copyright stuff due to a couple of core advancements: the increase in illegal accessing of those video, film and digital music ever since the dawn of the P2P revolution; and of course the emergence of social networking; individual emitted or mediated data.

Notwithstanding whether and the times social interactions portals like Google, Twitter and Facebook tend to be accountable for such a users' over the net behavior can be one of the core issues that influences creativity and free speech and expression. Nearly all innovative articulation presently occurs well over social platforms managed by professional establishments. Governments all over the world progressively push intermediaries to limit such users' unfavorable online stuff as a way to eliminate disagreement towards government, hatred tongue, privacy infringement and many more.

One of the forms relating to stress would be to have communications intermediaries legally accountable for precisely what such subscriber execute and express. Legal responsibility regimes that often place network intermediaries within legal threat for users' over the net endeavor certainly are a kind of censorship, in addition to thus expose not only free expression but also innovation, whilst governments want to take care of very realistic policy troubles.

To add to this already significant discussion, this paper steps really to explore a repository of information on liability regimes and critically



Page: 183

examine free expression communities to endorse for apportion which will defend creativity, freedom of expression, confidentiality along with other person's rights. It will further explore intermediary obligations pertaining to consumers' IPR infringement, libel or slander, hatred tongue along with other vicarious liabilities, safe guards, or safe harbours.

I. WHO ARE INTERMEDIARIES?

In analyses relating to internet companies, the term intermediary many times gets reference. A concept associated with this terminology is pivotal since this is put to use considerably in the IT Act, 2000, the law that is actually governs the sector in India.

An on line intermediary can be an company that provides solutions which typically allow others to make use of the internet. There are several sorts of internet intermediaries that will fall in couple of wide-ranging classifications: "conduits" and

“hosts”. “Conduits” are technological vendors of access to the internet or transmitting assistance. Conduits tend not to disrupt the stuff they are transferring except for computerized, medium or transient storage space required for transmission. “Hosts” are vendors of data solutions; for instance, online platforms and storage services.

According to the Information Technology Act, “Intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes Telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes”¹.

Under the Information Technology Act, 2000 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, 2008 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 there by 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.

However, intermediaries keep a requirement to avoid the appearance of unlawful or dangerous endeavor by clients using their facilities. Failing



to do it comes with legal orders stimulating the intermediary to behave in proper order or reveal the intermediary to civil or criminal legal action.

Intermediary's responsibility arises whereby governments or individual litigants can accuse cyber intermediaries for instance websites; accountable for dishonest or dangerous data provided by the consumers for such web services. Intermediary's responsibility may appear within the huge selection of occurrences, with a variety hardships such as: copyright and trademark disputes, spamming and phishing, piracy, network management, child pornography, cybercrimes, defamation and hate speech, illegal content such as illegal torrents, legal but offensive content, broadcasting and telecommunications laws and regulations, freedom of speech and expression and privacy protection.

In doing those types of functions, intermediaries are not able to moderately be expected to pay attention to so many data transferred, saved or linked upon their networks, which is persistently modified and that to in a computerized and hasty tempo. Due to this, it is argued many that intermediaries actually should not be answerable for stuff upon their networks provided by the third parties.

The most suitable case in point regarding the legal responsibility related to intermediaries will be the Baazee.com case, wherein Avnish Bajaj, the CEO of Baazee.com, an auction website, happens to be taken into police custody for the pornographic video clip which has been offered for downloading on the website through a subscriber. The Baazee.com² case revealed the legitimate hazards that often organizations within the internet market are likely to be threatened by. Despite the fact that the data won't be created by the intermediaries, many times, they could have been held accountable for offences done by clients whereas employing their web services.

The Delhi High Court at the time of contemplating about a request to overturn the

criminal charge towards Avnish Bajaj in this situation instance, realized as the site that is offered the clip just might be held to get accountable for 'Sale etc... of obscene books' within Section 292 of IPC along with Section 67 of IT Act, 2000 relating to publishing of information that's obscene in digital form.

After the Bazeem.com case the Information Technology Laws most certainly been amended. As per Section 79 of the IT Amendment Act, 2008 "a web service provider should not really be subject to under any law for the time being in force for every single third party information, data or communication link offered by him excluding whenever the intermediary has got conspired or abetted in the commission of the unlawful act or upon



Page: 185

obtaining precise understanding or on appearing informed through relevant government or its agency that any information, data or communication link residing in or connected to a computer resource managed through intermediary has been used to employ the unlawful act, the intermediary fails at expeditiously take out or disable ability to access that stuff regarding that resource whilst not having vitiating the evidence in any way"³.

Therefore under amended section 79 of the IT Act, 2000 the necessity of information is now been exclusively switched to receipt of precise information. Those have definitely been put along with a notice and take down responsibility. There exists a deadline of 36 hours to answer this sort of insistence. Whether an intermediary declines to do it, it can also be pulled into the legal procedure being a co-accused. Under the Amendment Act the safe harbour provisions is offered just to an Internet service provider exactly where the job of the intermediary is restricted to that provides the ability to access a communication network over which data offered through third party is transferred or momentarily saved or in which the intermediary is not going to kick off the transmission, will not choose receiver of the transmission and it doesn't settle on or revise the information stored by the transmission.

II. SAFE HARBOUR PROTECTION

The intermediaries such as social networking sites, website hosts, ISPs and blogging sites perform a significant part in distribution of data by facilitating utilities and portals that actually permit users to get into the web, host data, distribute files and conduct commerce. Sites such as Youtube, google, blogspot, and Facebook just insure a cyber space for consumers to publish in their material, and definitely don't perform any editorial influence above all of this website content.

Governments worldwide formed an opinion where these intermediaries needs to be provided safeguard against legal responsibility that might rise from unlawful data publicized by subscribers, thinking about the significance of these intermediaries within the net and in addition to such a means of function appeared to be relatively diverse from conventional industry. Nations such as USA and constituents of the EU, and now India right away allows safeguard to intermediaries from such user emitted material. Such safeguard is frequently mentioned as a 'safe harbour' protection.

However, there are at least two models providing safeguard to cyber intermediaries. First one being Generalist, in such aversion, intermediary's responsibility is scorned at in accordance with the universal rules of civil



Page: 186

and criminal law. Within this version, it concerns most nations around the world, as intermediaries can easily be accountable for website content whether since they directly contributed to the criminality i.e.; contributory liability or as they indirectly provided as they possessed the capacity to manage it and obtained a direct economic gain from against it. This generalist model applies in many African countries, as well as in some areas of South-America.

The second theory for liability of intermediary is safe harbour. Safe harbor is a secure position e.g.; a safe harbour is provided for intermediaries, subject to their online activity, if they stick in such a safe harbour, they won't get accountable for consumers' activity. By doing such protection to and from responsibility is dependant upon circumstances, that can be very intricate and intense⁴, that's restricted to a specific aspect, e.g. copyright or trademark law or devised to cope with various kinds of actions and responsibility for different subjects of law⁵, which applies across different domains.

"Section 79 of the IT (Amendment) Act, 2008 for that reason concerns protection of intermediaries. It can be suggested to be a safe harbour developing modelled on EU Directive"⁶. The Safe Harbour options present in the IT Act are kind of like that available in the US Laws which generally clearly admit that the intermediaries that only insure the site weren't to blame for precisely what consumers probably did. The ultimate condition being that they answer timely to a notice letting them know regarding a infringement. When the internet site accepted that take down after that they had been clear.

The Delhi High Court in a lawsuit versus myspace.com carried out that in fact safe harbour procedures just didn't work within Myspace case⁷ since it introduced promotional advertisements to foot age of music thusly modifying them. One particular thing nearly any intermediaries won't be speculated to perform whenever they wish to be protected due to safe harbour rules. Additionally the Copyright Act within this existing variation doesn't certainly facilitate the provision of giving a notice with regards to bring offline the video. The best way for Myspace to stay clear of appearing susceptible would be toper form its due diligence preceding the copyright infringement.

The Indian Copyright law is unable to facilitate the nature of process which defends internet intermediaries. The Indian law is nonetheless



proceeding closer to importing the safe harbour options in the IT (Amendment) Act into the Indian Copyright Law.

The safe harbour safeguard offered to intermediaries is in fact not absolute, it is subject to their adhering to "due diligence" all the while discharging of their obligations and certainly firmly sticking to regulations supplied by the Government in connection with this. All of these guidelines actually have been released as the Information Technology (Intermediary Guidelines) Rules, 2011. Therefore these mentioned rules are so significant due to the understanding of liability of intermediaries.

"Rules demands intermediaries to set exclusions upon the sort of data which a person is able to publish by enumerating a diverse choice of data"⁸. "Rule 3 orders consumers to not ever host information covered in a wide count of which includes information that really is grossly harmful, harassing, blasphemous, defamatory,

obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever"⁹.

The content of data cited in sub-rule (2) of rule 3 deals with phrases which are extremely subjective and isn't described either within this rule or in the parent Act, as well as any legislature either. The rule simply by integrating these kinds of uncertain phrases ends in vast interpretation of a given question, therefore, the rule is extremely outrageous and discretionary and violate of Art. 14 of the Indian Constitution.

Article 19 (2) allows the legal system to create laws compulsorily requiring decent limitation upon the practicing of the right sanctioned by Art. 19(1)(a) supplied for welfare of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence¹⁰. For that reason, any limitation that could be produced according to the right of citizens to freedom of speech and expression only applies through ambit of clause (2) of Article 19.

"The Hon'ble Supreme Court has of the view that if any limitation on the exercise of the fundamental right under Art. 19(1)(a) does not fall within the four corners of Art. 19(2) it cannot be upheld"¹¹. Clause (i) of sub-rule (2) of Rule 3 has got cited the acceptable limitation to freedom of speech permissible under Article 19(2) of the Constitution of India. Above and



beyond clause (i) of sub-rule (2) of rule 3, most of the provisions commit to enforce limitation that isn't acceptable on the right to freedom of expression of the user.

Sub rule (4) of rule 3 is what demands where the intermediary, on finding information on its own or being taken to specific information by an sufferer with regard to all such selective information as stated in sub-rule (2), ought to perform just within thirty six hours to obstruct these sort of resources and information that is undoubtedly in contravention of sub-rule (2), fails to take into accounts a chance to the customer that keeps published the material to answer to the objection in order to validate his case.

The rule which typically directives the intermediary to obstruct the item whilst not having giving a chance of hearing on to the user who placed the content is violative of the principles of natural justice and is incredibly discretionary. This provision ends in taking down of content without the need for supervision of the authorities or its agency and such will lend to a private censorship system eliminating inspection and protection. Such a provision is highly discriminatory.

Rule 3(4) causing endowing as an adjudicating position to that intermediary when deciding concerns of fact and law, that may be exclusively performed by a qualified court. This type of development involving regulations are susceptible to get distorted that is incredibly outrageous and discretionary.

Rule 3(4) at intermediary rules demands where the intermediary, relating to whom computer system the data is saved or kept or made available, after achieving information on it's own or being taken to exact information by an sufferer in writing or by means of email endorsed with digital signature related to any and all detail as stated in sub-rule (2) above, shall act within thirty six hours and where appropriate, collaborate with consumer or person who owned these sort of data to impede such content that is completely in contravention of sub-rule (2).

The subject of dishonest content cited in rule 3(2) is extremely subjective might

benefit contribute to broad interpretation.

Sub-rule (2) of rule 3 has requirements that might be on top of acceptable limitation that could be stated following the Article 19(2) of the Constitution of India. The terms and conditions set a obligation toward the intermediaries to settle on the legal characteristic of a given stuff for being pre-condition for immunity from responsibility.



Page: 189

The intermediaries, on obtaining a grievance, in order that they will keep the safeguard available in Section 79 of the Act, will probably be compelled to impede availability of the content released through consumer. By means of rules, someone who will be critical relevant to an article or maybe a piece of writing are able to bring up a objection with intermediary, and such would bring about elimination of the stuff by the intermediary. For that reason, the straight result at regulations tends to be rigorous censoring of data released on-line by users. The laws are going to have a immediate impression toward the fundamental right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution of India.

Rule 3(5) instructs the intermediary that it requires notification to clients that in the event of non-compliance along with guidelines, user agreement and privacy policy to have accessibility or utilization of intermediary computer resource, the Intermediary has got the power to instantly bring to an end the accessibility or usage permission of the clients to the computer resource of Intermediary and take out non-compliant content. This feature is going to contribute to ending of services to a consumer on submitting of whatever material when the intermediary deems as dishonest. This gesture was unsuccessful to take care of almost any precaution as a way to using all of the desire for interrupt the availability of a user. Such a possibilities needed to be utilized by the intermediary is enormously outrageous and haphazard.

This gesture provision fails to cater for any checks and balances in order to use of this ability to discontinue the accessibility of a user. Such a potential required to be used by the intermediary is extremely unreasonable and arbitrary.

Rule 3(7) demands the intermediary, when needed by legal authority, to furnish data or perhaps this sort of aid to Government departments that are adequately authorised for investigative, defensive, cyber safety and security endeavour. The necessity of legal order is aligned where as mandating content or this sort of support needs to be offered with regards to validation of identification, and also for aversion, exposure, investigation, criminal prosecution, cyber safety and security occasions and sanctions of offences under any law for the time being in force, on a call for in writing expressing obviously the objective of searching for this sort of data or these sort of support. The necessity of supplying details about clients through intermediary just written letter from an bureau would have dangerous consequences on the right to privacy of citizens.



Page: 190

“Right to privacy as a component of Article 21 of the Constitution of India, which

guarantees for “right to life and personal liberty” has been recognised by the Hon'ble Supreme Court¹².

“Doing this might be curbed just about through a processes developed by legal jurisprudence and may not be accomplished indiscriminately. The Hon'ble Supreme Court along with pondering upon the matter of tapping of telephone conversation raised that “Telephone-Tapping is a serious invasion of an individual's privacy” and suggested rules to follow in order to do that¹³. The principles by supplying for further information to get delivered by intermediaries on a written request will trigger wire-tapping of the online eliminating legal protection in any respect.

“The IT (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 have finally been recognize with Government to supply these sort of protection and suggestions. All of these regulations hold the instructions suggested by the Hon'ble Supreme Court¹⁴.

These rules mandate that such interception or monitoring of information can be carried out by an order just a direction released by an adequate agency. The adequate agency through just an direction released by a authority. The competent authority to supply like order within the listed regulations is probably the Secretary within the Ministry of Home Affairs, in the instance relating to Central Government or even the Secretary in control of the Home Department, in the instance of a State Government or Union Territory. Rule 3(7) that commands an intermediary to supply data lacks every protection that is infringement of a given procedures of the Act and the Rules.

III. CONCLUSION

On-line subscribers could be influenced by internet intermediary liability in all good and bad manners. On one side, the standard of and array of products or products that might be offered to these guys may well be violated if not more highly priced in cases where there is too little competing retailers and creativity in the intermediary segment due to the fact that intermediaries tend to be hesitant to endanger responsibility for service invention.

However, providing a law enforcement part to really intermediaries presents disadvantages onto the rights to freedom of speech, privacy and due

process, particularly if intermediaries assume prohibitive agreements on data and a lot more human rights intrusive guidelines for the administration of content in their spaces. Additionally, users' human rights are likewise in peril if intermediaries do not take down human rights violating stuff, yet the legal system is unable to provide rapid and impactful approaches contrary to the violation of individual rights. Nevertheless most notably in which the private contractual regimes developed by the intermediaries are depleted.

Requirement for protection to avoid the abuse of notice and takedown instructions by complainants, inclusive of endorsing sanctions for misrepresentation, and legal lapse for demands of admission to private records, with restricted deviant. Whereas best ways might be observed, majority of these illustrations associated primarily to a reduced series of rights related grievance. More effort is were required to find out best practice to defend several other sections.

* Assistant Professor (Law), Dr. Ram Manohar Lohiya National Law University, Kanpur Road, Lucknow

¹ Section 2 (w) of the IT Act, 2000.

² *Avnish Bajaj v. State (NCT of Delhi)*, 2004 SCC OnLine Del 1160.

³ Section 79 of the IT Amendment Act, 2008.

⁴ Also termed as “vertical” safe harbour.

⁵ Also termed as “horizontal” safe harbour.

⁶ EU Directive 2000/31.

⁷ *Super Cassettes Industries Ltd. v. Myspace, Inc.*, 2011 SCC OnLine Del 3131.

⁸ Rule 3(2) of Information Technology (Intermediary Guidelines) Rules, 2011.

⁹ *Ibid.*

¹⁰ Art. 19 Constitution of India.

¹¹ *Express Newspaper (P) Ltd. v. Union of India*, AIR 1958 SC 578.

¹² *Gobind v. State of M.P.*, (1975) 2 SCC 148 and *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632.

¹³ *People's Union of Civil Liberties (PUCL) v. Union of India*, (1997) 1 SCC 301.

¹⁴ *Ibid.*

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.