

# LEGALFOXES LAW TIMES

## **Intermediary liability: Tracing a journey in India**

Since the discovery of internet, access to internet has evolved from being a perplexing technological advancement to a matter of basic human rights.<sup>1</sup> 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.<sup>2</sup> Certain countries believe in a horizontal approach to ISP liability i.e one liability regime applicable to any infringement regardless of the area of law, be it copyright, defamation or privacy rights.<sup>3</sup> Others go by the vertical approach where liability limitations for ISPs are defined according to the area of law in which the offence occurs.

Section 2(1)(w) of the Act defines intermediaries as the persons who, on behalf of another individual, receive, store, or transmit records or provide any service with respect to that record.<sup>4</sup> It may also be noted that section 2(1)(w) specifically 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 within

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<sup>1</sup>United National Human Rights Council, 'Report of the Special Rapporteur to the Human Rights Council on Key Trends and Challenges to the Right of all Individuals to Seek, Receive and Impart Information and Ideas of all Kinds Through the Internet' (UN Doc A/HRC/17/27, Special Rapporteur Report 16 May 2011).

<sup>2</sup>Joe Karaganis, Media Piracy in Emerging Economies (Social Science Research Council 2011) 360.

<sup>3</sup>Rosa Julia-Barcelo, Centre De Recherches Informatique Et Droit "Liability for Online Intermediaries: A European Perspective", [http://www.eclip.org/eclip\\_l.htm](http://www.eclip.org/eclip_l.htm) last accessed 28-4-2009. Also see EU Council Directive, 2000/31 of 8-6-2000. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF> last accessed 29-4-2009.

<sup>4</sup>Information Technology Act, No. 2.

the definition of intermediaries.<sup>4</sup> Social networking sites also fall within the definition of intermediaries.<sup>5</sup>

Under Indian Laws the liability of ISPs is governed by the Information Technology Act 2000<sup>55</sup>. Section 79 of the said legislation deals with conditions where the intermediaries are exempt from liability. Since the provision applies to all forms of intermediaries and it also applies to all ISPs. It precludes liability towards the ISP for any information hosted by it. However, in order to get the benefit of this section, the ISPs have to be fulfil some conditions. These conditions have been divided into three parts. The Act extends “safe harbor protection” only to those instances where the intermediary merely acts a facilitator and does not play any part in creation or modification of the data or information. The provision also makes the safe- harbor protection contingent on the intermediary removing any unlawful content on its computer resource on being notified by the appropriate Government or its agency or upon receiving actual knowledge.<sup>6</sup>

The first part of clause (a) states that as long as the ISP only acts as a means by which the infringer gets access to the communication system it would not be liable. In turn this section protects the ISPs from direct/strict infringement. It essentially means that as long as the ISP acts as a passive observer and does not take active part in the infringement, it is not liable. The second clause (b) further provides three conditions. Firstly, they cannot initiate the transmission. Secondly, it cannot choose who it would give the information to.

Thirdly, the ISP has to transmit the information as it without making any modification. All the aforementioned conditions that limit the liability of an ISP were added through the 2006 amendment in the IT Act.

The third condition that was added in 2008 included the concept of due diligence in the Act. This has been added as Section 79(2)(c). According to it an intermediary, in order to prevent itself from being liable has to observe the standard of ‘due diligence’ while discharging its functions. Furthermore, the intermediary is liable to follow all guidelines as are prescribed by the central government.

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<sup>5</sup>K.N. Govindacharya v. Union of India, ia, WP(C) 3672/2012 and CM Nos. 7709/2012, 12197/2012 & 6888/2013.

<sup>6</sup>[http://www.rna-cs.com/liability-of-intermediaries-under-information-technology-act-2000/#\\_ftn1](http://www.rna-cs.com/liability-of-intermediaries-under-information-technology-act-2000/#_ftn1)

However, Due Diligence has not been defined anywhere and for the understanding of the same it is imperative to look at the case of *Avnish Bajaj v. State*<sup>7</sup>. In this case ‘[bazeecom.com](http://bazeecom.com)’ carried a listing which offered for sale a video clip, shot on a mobile phone, of two children of a school in Delhi indulging in an explicitly sexual act. The petitioner who was the Managing Director of the website pleaded the Delhi High Court to annul his criminal prosecution. The website provided an online platform or market where a seller and a buyer could interact. The seller in the present case was a person named Ravi Raj. Though he had uploaded the video in the category of e books, [bazeecom.com](http://bazeecom.com) had enough means of control to filter it. Before the sale could actually be deactivated eight clips had already been sold. Even though there were newspaper reports of such listings on their website, ‘[bazeecom.com](http://bazeecom.com)’ did nothing to take the video clip off. Moreover, for each sale transaction, they used to get Rs. 3 as commission. Thus, the court held that due diligence was not exercised. The court held that there was a prima facie case against the petitioner and hence all criminal charges against him could not be annulled.

This judgment shows us that due diligence is a minimum standard which an ISP has to comply with in order to limit itself from liability. The interpretation of the phrase in the *Avnish Bajaj* case shows us that it means a reasonable standard of care which an ordinary ISP under normal circumstances is bound to maintain.

The ‘*due diligence*’ provision in the IT Act precludes the complete limitation on the liability. In *Maqbool Fida Husain v Raj Kumar Pandey*<sup>8</sup>, in which an allegedly obscene painting was offered for sale over the internet, the DHC reasoned that since the test to determine obscenity under both the IT Act as well as the IPC was similar, it was ‘necessary to understand the broad parameters of the law laid down by the courts in India, in order to determine obscenity. This judgment of the SC gives welcome relief to intermediaries. The SC, in reaffirming the principle of *generalia specialibus non derogant*, held that in cases of obscenity appearing on the web, once the criminal act had a nexus with the electronic record, the provisions of the IT Act, particularly the safe harbour principle under Section 79, could not be ignored.’<sup>9</sup>

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<sup>7</sup>*Avnish Bajaj v. State*, (2008) 150 DLT 769.

<sup>8</sup> 2008CriLJ4107

<sup>9</sup>The Bazeecom Saga Unravalled: Supreme Court Clarifies Intermediary Liabilities For Hosting Obscene Content; <http://www.nishithdesai.com/information/news-storage/news-details/article/the-bazeecom-saga-unravalled-supreme-court-clarifies-intermediary-liabilities-for-hosting-obscene.html>

*InGoogle India Pvt. Ltd. v. M/S Visaka Industries Ltd*<sup>10</sup>, where defamatory materials regarding Visaka and certain leading political persons were posted on Google, Visaka filed a criminal complaint against Google for criminal conspiracy (i.e., conspiring with the author of the posts to defame Visaka). Google argued that it is a service provider that allows users to upload content; therefore, Google is an intermediary that is not liable for the content. The High Court of Andhra Pradesh held that Google did not remove the defamatory materials in spite of being notified regarding their existence. Therefore, Google cannot claim any exemption under section 79.

the Delhi High Court in the *Super Cassettes Industries Ltd vs Myspace Inc*<sup>11</sup> case readily interpreted analysis of Section 79 of the it Act and related rules enacted due diligence as a mandatory requirement by stating that "The under the it Act. use of the wordings 'or' between (a) and (b) makes them dis junctive, although (c) has to coexist with (a) or (b) whichever is applicable.

The new safe harbour provision incorporated in Section 79 has brought India closer to international standards on intermediary liability. It is well-recognised that Section 79 is based on the European Union Directive on Electronic Commerce<sup>12</sup> ("EU E-commerce Directive"<sup>13</sup>). In *Nirmaljit Singh Narula v. Indijobs at Hubpages.com*<sup>14</sup>, certain defamatory materials regarding a spiritual guru were posted on a website; the website failed to remove the materials despite a request to do so. The Delhi High Court held that the website was required to remove the objectionable content and by refusing or failing to do so, it violated Rule 3(4) of the Rules. Therefore, the website was not protected under Section 79 of the Act.

Therefore, things may be changing again. In a speech in the Rajya Sabha on July 26, 2018, India's minister for electronics and information technology Ravi Shankar Prasad (he also holds the law and justice portfolio) made a statement on the issue of "rising incidents of violence and

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<sup>10</sup>2011 Cri. P. No. 7207 of 2009 (High Court of Andhra Pradesh)

<sup>11</sup> MIPR2on (2)303 (Delhi High Court, 29 July 2011).

<sup>12</sup>Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 8 June 2000, viewed on 29 October 2013 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:i78:oooi:ooor:EN:PDF>)

<sup>13</sup>See Report of the Expert Committee, Department of Information Technology (2005): "Proposed Amendments to the Information Technology Act 2000.

<sup>14</sup>(2012) 50 PTC 320 (Delhi High Court).

lynching in the country due to misuse of social media platforms” which included the following phrases:

*“If do not take adequate and prompt action, then the law of abetment also applies to them.”*

This could be seen as an indirect reference to one of the exceptions to Section 79 of the IT Act, which says that the safe harbour will not apply if “the intermediary has conspired, abetted, aided or induced, whether by threats, promise or otherwise, in the commission of the unlawful act”. The government could be trying to interpret the law to mean that failure to implement adequate safeguards or tools to prevent the viral spread of inflammatory messages could be seen as the abetment of their spread.<sup>15</sup>

It is commendable that the Amendment Act attempts to protect an intermediary so comprehensively by emphasising control as a turning point for its liability. However, the one-sidedness of these provisions overlooks the clarifications contained in the EU Directive and the practical translation of this situation to the detriment of other stakeholders. This is glaringly unfair when it is technically feasible on the part of ISP to prevent the posting of certain user generated content which is illegal and when, in its discretion, ISP wishes to be a good Samaritan.<sup>16</sup> It needs to be understood that these ISPs must follow due diligence and must stick to the rules and regulations laid down by law. There is a lot of scope of improvement in Intermediary Liability law, however, as always been understood by us, law is dynamic and will always keep evolving and is ever-changing to meet the needs of society

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<sup>15</sup>Intermediaries in India may be on the cusp of a brave new world by Vinay Kesari

<sup>16</sup>J. Band, “The Superhighway to Jericho: Good Samaritan Provisions” <http://www.policybandwidth.com/doc/Jband-GoodSamaritanProvisions.pdf> last accessed 30-4-2009.