

INTERMEDIARIES

Under Information Technology Act,
2000 and Information Technology
(Intermediaries guidelines) Rules,
2011.

Introduction

- Intermediaries under the old act was a network service provider.
- They facilitated data on Internet by Means of Infrastructure for means of communication.
- They are one of the three pillars being originator, addressee and Intermediary.
- The existence of the Internet would be impossible without a Intermediary.

Definition

According to section 2(1)(w) of the IT 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

Definition

a platform which facilitates interaction between buyers and sellers.

Jitendra Singh Yadav vs Union Of India

Intermediaries are also persons and entities that collect sensitive personal data and information and for the purpose of storing and disseminating such information they become intermediaries.

intermediary is neither supposed to own any content nor have any control over it.

DATA

- Defined as “data” means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer”

Liability of Intermediary

Liability of the Intermediary for content transmission and posting through its service was first questioned in the US courts.

The debate was they should be treated as newspapers or magazines which publish contents therefore liable for copyright infringement, defamation and other civil / criminal liabilities.

OR

Be treated as telephone company which cannot be held liable for content and communication that is transmitted.

US district court of northern California first set up precedent in 1995 in the Netcom case when it held that ISP is a passive service and like telephone company cannot be held liable for content transmitted through its server.



New Draft Amendment Rule 2018.

The Draft Rules prohibit a new category of information, i.e., content which threatens 'public health or safety'.

enable tracing of the originator of the information on their platform.

deploy technology-based automated tools – like algorithm filters or human controlled filters - to identify and remove public access to unlawful information.

Intermediaries with more than fifty lakh users must incorporate a company in India.

Why Intermediaries should not qualify for non liability under section 79 of IT Act

Liability of Intermediary

This exemption is not absolute, and ISP has to make certain conditions like

- a. ISP should not have actual knowledge that the material is illegal or infringing
- b. Is not aware of the fact and circumstances of apparent posting upon actual knowledge removes or disables access to such material.
- c. Must not receive a financial benefit directly that can be attributed to the usage of such illegal or Infringing country

Section 79 (2) of IT Act 2000:

Non-liability shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(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.

Section 79 of the IT Act

- The intent behind inserting section 79 is for providing safe harbor for intermediaries who should not held liable unreasonably.
- Liable Unreasonably is question of facts.

Section 79(2)(a)

“the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or”

- To avail the defense of non-liability under Section 79(2)(a), the intermediary should restrict its functions to- transmitting, hosting and temporarily storing.
- But, when it comes to matrimonial sites, it is observed to be otherwise.

Section 79(2)(b)

“(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;”

- If the above conditions are complied with, then the intermediaries could potentially qualify for non-liability.
- Many “web-hosting services”, those discussed, do implicate a sense of initiation, selection of receivers and selection or modification of the intended transmission.

Section 79(2)(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.”*
- The intermediaries are required to observe due diligence as prescribed in the IT(intermediaries guidelines), 2011.

Information Technology (Intermediary Guidelines) Rules, 2018

- “**Rule 3(2)(j)** requires that the privacy policy/user agreement shall inform the users of the computer resource not to host, display, upload or modify, publish, transmit, update or share any information that:
- *threatens public health or safety; promotion of cigarettes or any other tobacco products or consumption of intoxicant including alcohol and Electronic Nicotine Delivery System (ENDS) and like products that enable nicotine delivery except for the purpose & in the manner and to the extent, as may be approved under the Drugs and Cosmetics Act, 1940 and Rules made thereunder.*

Information Technology (Intermediary Guidelines) Rules, 2018

- **Rule 3(4)** places an obligation on intermediaries to inform their users at least once a month that non-compliance with the rules and regulations, user agreements, and privacy policies, will allow the intermediary to immediately terminate the access or usage rights and remove non-compliant information.
- .Obligation caste
- Inform users
- That certain compliances are to be followed.

Intermediary guidelines

- These rules may be called the Information Technology (Intermediaries guidelines) Rules, 2011.
- In exercise of the powers conferred by clause (zg) of subsection (2) of section 87 read with sub-section (2) of section 79 of the Information Technology Act, 2000 (21 of 2000), the Central Government hereby makes the following rules,

RULE 3: DUE DILIGENCE

- **Due diligence means taking reasonable measures to avoid committing an offence**
- According to rule 3: The intermediary shall observe following due diligence while discharging his duties:
- RULE 3(1): the intermediary shall publish rules and regulations, privacy policy and user agreement.
- 3(2): such regulations shall inform the users of the service to not host:
 - a) Belongs to another person
 - b) Harmful, harassing, defamatory, obscene, etc...
 - c) Harms minors in any manner
 - d) Infringes any proprietary rights such as patent, trademark, copyright.
 - e) violates any law for the time being in force
 - f) deceives or misleads the addressee about the origin of such messages
 - g) impersonate another person
 - h) contains software viruses
 - i) threatens the unity, integrity, defence, security or sovereignty of India

- 3(3): The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission .
- 3(4): the intermediary shall preserve information and associated records of a said crime for at least ninety days for investigation purposes.
- 3(5):The Intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy the intermediary has the right to immediately terminate the access
- 3(6) :The intermediary shall strictly follow the provisions of the Act or any other laws for the time being in force.
- 3(7): When required by lawful order, the intermediary shall provide information or any such assistance to Government Agencies who are lawfully authorised
- 3(8): The intermediary shall take all reasonable measures to secure its computer resource
- 3(9): The intermediary shall report cyber security incidents
- 3(10):The intermediary shall not knowingly deploy or install or modify the technical configuration of computer resource or become party to any such act
- 3(11): The intermediary shall publish on its website the name of the Grievance Officer and his contact details.

Provisions under IT Act

- Sec 67C – retention of information as per prescription of Central Govt.

THANK YOU

QUESTIONS PLEASE

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