

CHANGING DYNAMICS OF INTERNET AS AN INTERMEDIARY

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ABSTRACT

Digital Revolution demands that the laws governing the vast unchartered territory of internet undergo a significant shift and India has already taken a giant leap by introducing changes in its prevailing laws.

The Information Technology (Intermediary Guidelines) Rules of 2021 have replaced the earlier Information Technology (Intermediary Guidelines) Rules of 2011. The new rules of 2021 have prescribed a change in how the internet-based businesses which include social media platforms, OTT (over-the-top) streaming services, digital news outlets will be regulated by the government. These new rules of 2021 have been framed in exercise of powers under Section 87 of The Information Technology Act, 2000.

According to the new rules of 2021, government welcomes the social media companies to operate in India, to do business in India and also to earn profits in India. However, they will have to be accountable to the Constitution of India and laws applicable in India against its misuse and abuse over the internet, embodying a mechanism for redressal and timely resolution of the grievances.

Keywords - *Internet, Information Technology, Intermediary, Digital, Social Media*

INTRODUCTION

The Digital Revolution has helped in internet connectivity to become a more inclusive and accessible phenomenon for the world at large. Digital connectivity today is considered a significant driver of economic growth. The internet has brought about a magnificent change in the way businesses and governments are run, the way education is imparted, the way healthcare system functions and even the way we interact with our loved ones. A dramatic shift. Connecting and Exploring to the whole world at the same time which was something that the mankind had not even imagined has now become a reality of daily life.

The rise in usage of the internet has sparked a debate about breach of our privacy issues as well how this online communication is impacting social relationships. Today, anyone sitting around in any corner of the world can access any kind of information available on the internet. This connection of providing the information between a user and accessing such information on internet enables it to adopt a role of an intermediary.

Intermediary, in legal sense, means a person or an entity who acts as a link between the user and the entity providing any such kind of information.

‘Intermediary’ as defined under Section 2(w) of the Information Technology Act, 2000 (hereinafter referred to as IT Act for the sake of brevity) refers to “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, web-hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes”.

Intermediaries with respect to messages, under the IT Act are defined as “any person who on behalf of another person receives, stores or transmits message or provides any service with respect to a message”, and includes social networking sites such as Facebook and Twitter, instant messaging apps like WhatsApp and e-commerce platforms.

DISCUSSION

An internet intermediary can be referred to a company that facilitates the use of the internet. Such companies include Internet Service Providers (ISPs), Search Engines like Google, Yahoo, etc. and Social Media platforms like Facebook, Twitter, etc. Growth of internet has led to an upsurge in surfing, uploading and downloading content from the internet and online shopping. The number of users on social media platforms has become manifold, owing to which, there has been an increase in unlawful activities as well. Therefore, the question now arises whether the intermediaries can be made liable for the unlawful acts of the users on the internet of which they are not directly responsible for?

Normally intermediaries enjoy protection from liability under Section 79 of the IT Act. This provision is also termed as ‘safe harbour provision’ for the act of third parties, provided that they observe certain due diligence while discharging their functions, including publication of privacy policy, user agreement, etc. For example, if some defamatory content is uploaded by a user on Facebook, Facebook which is an intermediary would not be held liable for posting of such defamatory content by third party by virtue of safe harbour provided to it under Section 79 of the IT Act. Therefore,

Facebook being an intermediary cannot be held liable for unlawful act committed by a user being a third party by sharing illegal content on Facebook.

Similar view is taken in case of e-commerce platforms who are also intermediaries. In the recent judgement by the Hon'ble Delhi High Court in the case Amazon Seller Services versus Amway India Enterprises, FAO(OS) 133/2019, pronounced on 31st January, 2020 Division Bench of the Delhi High Court held that e-commerce platforms shall not be held liable for products being sold on their website by third party users as they were merely intermediaries. The facts of this case were that in 2018, Amway came across its products being sold on Amazon and other platforms. It was alleged that the products were being sold by Amway's direct sellers on Amazon, by tampering with the original products, or selling fake products by associating it to the name of Amway. It is to be noted that Amway had a strict policy of quality control of its products and this sale was interfering with its ordinary course of business, and adversely effecting Amway's goodwill and reputation, and hampering its further sales in the market. The contention therein was that Amway did not give permission to these intermediary platforms to sell its products online, as was required by clause 7(6) of the Direct Selling Guidelines (DSG), 2016. The e-commerce platform, Amazon contended that the DSGs were not binding in law, and that they were further exempted from any liability by virtue of Section 79 of IT Act, 2000 as they were merely intermediaries and cannot be held liable for actions of a third party. Then the Division Bench of Hon'ble Delhi High Court while dealing with the issue regarding trademark infringement, discussed the Principle of Exhaustion of Trademarks. Earlier in this case, the learned single bench had categorically stated that there had been an infringement of the products of Amway. However, the Division Bench overruled this judgement of the single bench, by relying on the judgement in Kapil Wadhwa v. Samsung Industries, MIPR 2012 (3) 0191 where the bench reiterated that India follows the principle of International Exhaustion. This principle means that once a good is lawfully acquired, the rights over the said good vests in the buyer. Further selling it in any market, domestic or international, shall not amount to infringement. The Division Bench pointed out that Amway itself also had a "Code of Ethics" which stated that once the product has been sold to the direct seller, no further condition can be imposed on them by Amway. Therefore, considering these circumstances, the Division Bench decided that the sale of Amway products by the direct sellers on the online platforms could not be deemed to be an infringement.

Further in this case discussing about e-commerce platforms as intermediaries under Section 79 of The IT Act, the Hon'ble Court discussed Section 79 of the IT Act, 2000 extensively which is a safe harbour provision for intermediaries, that saves them from liability for third party information on their websites. According to the Section 79(1), any intermediary that complies with the provisions mentioned in Sections 79(2) and 79(3) of the IT Act shall not be held liable for any third-party information, data, or communication link made available or hosted by him. It was further held that specific reference must be made to Section 79(2)(b), which states that to gain safe harbour protection, the intermediary must fulfil certain conditions such as the intermediary must not initiate the transmission, it must not select the receiver of the transmission, and it must not select or modify the information contained in the transmission and further held that pursuant to Section 79(3) the intermediary must observe due diligence while discharging its duties.

The Hon'ble Court also held that e-commerce websites are not obligated to take written permission from the Direct Selling Entities, as in the current form the DSG (Direct Selling Guidelines) is not a binding law. This landmark decision also reiterated that there exists a principle of international exhaustion of trademarks in India. It was also marked that safe harbour provided to the intermediaries under Section 79 of the IT Act, 2000 have been strengthened, and therefore e-commerce websites were held to be exempted from any liability against illegal acts of third party. However, the court held that in any case the DSEs (Direct Selling Entities) are entitled to file suits against their Direct Sellers if there exists a grievance, but intermediaries shall not be made liable for the same.

In the recent judgment of Sri Kunal Bahl versus State of Karnataka pronounced on 7 January, 2021 by the Hon'ble Mr. Justice Suraj Govindaraj, the Karnataka High Court held that an intermediary as defined under Section 2(w) of the IT Act, 2000 or its directors or officers would not be held liable for any action or inaction on part of a vendor or seller making use of the facilities provided by the intermediary in terms of a website or a market place. Mr. Kunal Bahl is the CEO of Snapdeal, the company involved in this case. The court in this case held that Snapdeal is an intermediary and has no control on what users may post on its platform. Court further held that Snapdeal had exercised 'due diligence' under Section 79(2)(c) of the IT Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011 and therefore cannot be held liable for actions of third-party users.

Let us further discuss about the recently notified Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 which have been released by the Government of India.

These new rules of 2021 have prescribed a change in how the internet-based businesses and organisations which include the social media platforms, OTT (over-the-top) streaming services, digital news outlets, among others will now be regulated by the government itself. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 have been framed in exercise of powers under Section 87 of The IT Act, 2000 and replacing the earlier Information Technology (Intermediary Guidelines) Rules of 2011.

According to the new rules of 2021, government welcomes the social media companies to operate in India, to do business in India and also to earn profits in India. Certainly, the social media platforms have empowered the ordinary users by

enabling them to show their creativity, ask questions, be informed and freely share their views, including criticism of the government. However, they will have to be accountable to the Constitution of India and laws applicable in India against its misuse and abuse over the internet. Undoubtedly the new rules empower ordinary users of social media, embodying a mechanism for redressal and timely resolution of their grievance.

According to the new rules, the social media intermediary will have to appoint India based compliance officers, nodal contact person and a resident grievance officer. A chief compliant officer shall be responsible for ensuring compliance with the act and the rules, while nodal contact person shall be available for 24x7 in coordination with the law enforcement agencies and a resident grievance officer shall perform the functions mentioned under the grievance redressal mechanism.

The new rules will require social media companies to take down unlawful content within a specific time-frame of being served either by a court order or notice by the government. The rules also carve out a separate category for sexual content which exposes the private areas of individuals, show such individuals in full or partial nudity or in sexual act or is in the nature of impersonation including morphed images under which an intermediary shall within 24 hours remove the offending content.

Interestingly, to encourage innovations and enable growth of new social media intermediaries, the rules make a distinction between social media intermediaries and significant social media intermediaries. This distinction is based on the number of users on the social media platform.

Moving on further, let us discuss the scope of Section 79 of The IT Act, 2000 under the new Rules of 2021 which deals with immunity provided to the intermediaries.

The new rules impose new responsibilities on Internet intermediaries seeking to enjoy the legal immunities offered by Section 79 of the IT Act, 2000. Previously, the law allowed the internet intermediaries to enjoy the unprecedented and wide-ranging immunity from legal liability at little to no cost. Nobody in the information transmission business enjoys such immunities from legal claims of defamation, etc. For example, while newspapers and broadcasters have always operated under the threat of legal liability for defamation and other speech related offences, intermediaries have escaped this liability despite behaving as publishers because of the immunity offered to them by the Section 79 of IT Act. This immunity is in the nature of a privilege or a subsidy since it reduces operating costs for intermediaries. However, it is to be noted that social media giants do not enjoy such immunity, since they have a bigger responsibility to discharge and actions of users on these platforms cannot be taken lightly in the interest of keeping public peace.

The new rules require the significant and giant social media intermediaries to follow certain additional due diligence such as those providing services primarily in the nature of messaging, such as WhatsApp to enable the identification of the first originator of the information for the purposes of prevention, detection, investigation, prosecution or punishment of an offence such as and offence which compromises to sovereignty and integrity of India, the security of India or friendly relations with foreign countries or in relation with rape, sexually explicit material or child sexual abuse material. This is a necessary move aimed at tracking down people who use WhatsApp to spread fake news or carry out illegal activities.

Further, in the landmark case of Google India Private Ltd versus Visakha Industries, AIR 2020 SC 350 delivered on December 10, 2019 by the Supreme Court, the apex court denied to quash the defamation proceedings against Google for its failure to expeditiously remove allegedly defamatory material from its 'Google Group' service. In this case, articles containing defamatory statements alleging Visakha Industries, a prominent asbestos manufacturer, indulged in corruption were posted on a Google Group. Visakha sent a takedown notice to Google India and later filed criminal complaints against Google for criminal defamation for which Google was held liable as it failed to remove the defamatory content from its website. Therefore, it was held that, the intermediary has to remove the illegal or defamatory content if directed to do so by the government or any notification, failing to do which will make them liable for publication of defamatory content and will not be provided any immunity for the same.

The rules of 2021 also lay down the general principles for offering safeguards in relation to digital and online media. The rules about digital media and OTT (over-the-top) focuses more on in house and self-regulation mechanism. In the light of self-regulating the content, the OTT platforms shall have to self-classify the content into five age-based categories such as U (Universal), U/A 7+, U/A 13+, U/A 16+ and A for the Adults. Platforms would be required to implement parental locks for content classified as U/A 13+ or higher and reliable age verification mechanisms would be implemented for content classified as A. The government has also introduced a three-tier regulatory framework for addressing the grievances under the rules with different levels of self-regulation. The three-tier structure is as classified as Level I for self-regulation by the publishers, where publisher shall appoint a grievance redressal officer based in India who shall be responsible for the redressal of grievances received by it; Level II for self-regulation by the self-regulating bodies of the publishers, where such body will oversee the adherence by the publisher to the code of ethics and address grievances that have not be been resolved by the publisher; and, Level III for the oversight mechanism by the government, formulated by Ministry of Information and Broadcasting.

These new rules of 2021 shall come into effect from the date of their publication in the official gazette except for the additional due diligence for significant social media intermediaries which shall come into effect three months after the publication of these rules.

CONCLUSIONS AND SUGGESTIONS

Concluding the above discussion, it is opined that the proposed framework is progressive, liberal and contemporaneous. It seeks to address the peoples varied concerns while removing any misapprehension about curbing creativity and freedom of speech and expression. The guidelines have been framed keeping in mind the difference between viewership in a theatre and television as compared to watching it on Internet. Practically, identifying the appropriate approach to regulate digital and social media is a challenge being faced by governments around the world. Legislators must draw a fine line to adequately protect citizens from harm and, at the same time, guarantee the right to privacy and freedom of speech and expression for the same citizens. The changes introduced by the new rules point to greater regulation in this regard in the coming years. However, it remains to be seen whether such regulation will enable better governance or simply pave the way for clamping down on the constitutional rights.

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