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INTERMEDIARY LIABILITIES: COMPARATIVE STUDY OF VARIOUS JURISDICTIONS

ASTITWA BHARGAVA
RESEARCH SCHOLAR
NATIONAL LAW UNIVERSITY
JODHPUR

DR. MANMEETA SAXENA
ASSOCIATE PROFESSOR
NATIONAL LAW UNIVERSITY
JODHPUR

ABSTRACT

Service providers have become an indispensable part of the society and an intermediary is one of them. The role of an intermediary is crucial, as they act as a connecting knob between the two entities for the exchange of information, services, etc. and this imposes a prodigious responsibility to protect the data transmitted through them. Various jurisdictions enforce a wide range of liabilities on the intermediaries depending on the type of services they deliver. This research paper focuses on the liabilities of the intermediaries in United States of America, United Kingdom and India. The paper also discusses the need for these restrictions to be imposed on the intermediaries with the help of the judicial development.

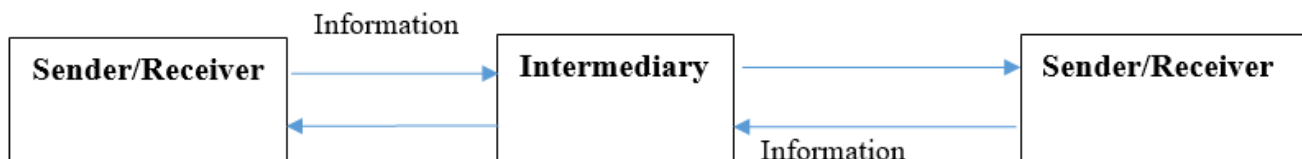
KEYWORDS

data protection, data privacy, intermediary, intermediary liabilities, internet service provider (isp), telecom service provider (tsp), network service provider (nsp).

1. INTRODUCTION

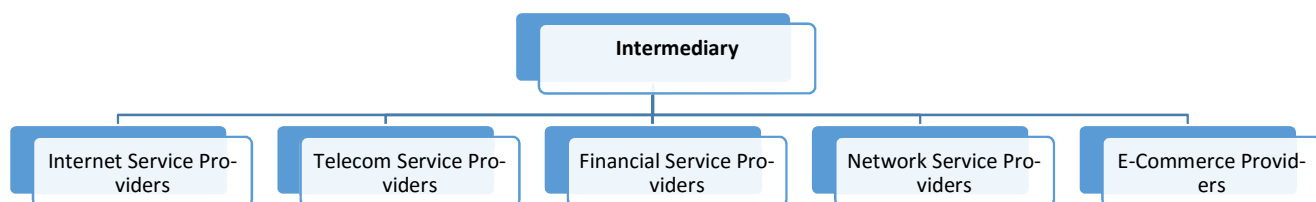
Internet which can be defined as the “network of networks”, has become avital part of our life. Internet uses various ‘Information and Communication Technology’¹ tools and techniques to provide services to the Netizens². Intermediaries³ plays a crucial role in providing Internet services to these netizens. An “intermediary”, with respect to any particular electronic records⁴ means any person who on behalf of another person receives, stores or transmits that record or provides any services with respect to that record.⁵

FIG. 1: FUNCTIONING OF AN INTERMEDIARY



Intermediaries operates via software which processes information⁶ automatically and without the knowledge of its content or the nature of the transaction, in some cases they are the most easily identified targets for legal activity if information content which they carry infringes a third party's right.⁷The classification of the intermediaries are made on the basis of the services they provide to their users like financial services, internet services, network services, telecom services, etc.

FIG.2: CATEGORIES OF AN INTERMEDIARY⁸



¹Information and Communications Technology-or technologies is an umbrella term that includes any communication device or application, encompassing: radio, television, cellular phones, computer and network hardware and software, satellite systems and so on, as well as the various services and applications associated with them, such as videoconferencing and distance learning. Available at <<http://searchcio.techtarget.com/definition/ICT-information-and-communications-technology-or-technologies>> Accessed on August 12, 2015

²Netizens are the users of Internet.

³Sec. 2(1)(w) of the Information Technology Act, 2000 defines “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.

⁴Sec. 2(1)(t) of the Information Technology Act, 2000 defines “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

⁵Vakul Sharma, “Information Technology Law & Practice (Law & Emerging Technology Cyber Law & E-Commerce)”, Third Edition, 2013 (Reprint), Universal Law Publishing Co., ISBN: 978-93-5035-000-3, pg. no. 278

⁶ Sec. 2(1)(v) of the InforFmation Technology Act, 2000 defines “information” includes data, message, text, images, sound, voice, codes, computer programmes, software and data-bases or micro film or computer generated micro fiche.

⁷ Chris Reed, “Internet Law”, Second Edition, 2010 (Reprint), Universal Law Publishing Co., ISBN:978-81-7534-474-7, pg.no.89.

⁸ Categories of an Intermediary are not limited to this; they may vary depending on the type of service they offer.

Intermediaries' holds a great responsibility of not only providing the platform for the users but also to exchange the information (data message⁹) among the users and this brings a wide range of liabilities on them. The intermediary liabilities differ from jurisdiction to jurisdiction and subject matter to subject matter. Most of the countries around the globe have imposed liabilities on the intermediaries with respect to the third party data¹⁰. In 2008, India has also become a part of this club after imposing liabilities on the intermediaries after the amendment in Information Technology Act, 2000.

Vicarious liability arises where there is pre-existing relationship between defendant and infringer, such that the defendant potentially benefits from the infringer's activities.¹¹ For most ISPs, the mere fact that they provide internet access which enables users to access infringing material will not amount to contributing infringement, as they will have no knowledge of what their users are using that access for. However, intermediaries who have a closer connection with websites from which infringing material is available may be at risk of liability, particularly if they get benefited indirectly from the existence of those websites and have received notice that they are playing a role in the infringing activities.¹²

China, in particular, has decided to regulate ISPs by imposing obligations to monitor and control the content that transmits through their systems. The model uses the mixture of positive law and self-regulation.¹³

To control the working of the intermediaries, United Nations Educational, Scientific and Cultural Organization¹⁴ (UNESCO) also issued a report on "Fostering Freedom Online, the Role of Internet Intermediaries" prepared by UNESCO's Division for Freedom of Expression and Media Development. The report was published to shed light on how internet intermediaries' services that arbitrate online communication and help various forms of online expression both foster and restrict freedom of expression across a range of jurisdictions, situations, technologies, and business models. The report focuses on the privacy issues in the online medium. The report is divided in the three sections namely Study-1 (Internet Service Providers), Study-2 (Search Engines) and Study-3 (Social Networking Platforms). It also discusses the laws and regulations related to the data privacy and intermediaries' liabilities.

2. INTERMEDIARY LIABILITIES IN UNITED KINGDOM

The UK Data Protection Act, 1998 defines 'data'¹⁵ and 'personal data'¹⁶, both the categories are handled by the intermediaries. In *Godfrey v. Demon Internet Ltd.*,¹⁷ the defendant ISP carried the newsgroup 'soc.culture.thai' and reserved postings in that hierarchy for about a fortnight during which time the posting was present to be read by its customers. On 13 January, 1997 someone McNown made a posting in the US in the newsgroup. This posting was improper, obscene and defamatory. On 17 January, 1997 the plaintiff, who was resident in England sent a letter by fax to the defendants, which requested them to remove the posting from their Usenet news server. The defendants could have removed the posting when they received the plaintiff's request, but it remained available until it got expired on or about 27 January, 1997. The plaintiff claimed damages for libel in respect of the posting after 17 January, 1997.

The U.K. Defamation Act, 1996 contains an "innocent dissemination" defense which is available only if the defendant takes "reasonable care," and "is unaware, and having no reason to believe," that he was publishing a defamatory statement. The court held that, since Demon was informed of the posting, it did not satisfy those two requirements, and was not entitled for the defense.

Moorland J. held:

"In my judgment, the defendant, whenever it transmits and whenever there is transmitted from the storage of its news server a defamatory posting, publish that posting to any subscriber to its ISP who accesses the newsgroup containing that posting. Thus every time one of the defendant's customers accesses 'soc.culture.thai' and sees that posting defamatory of the plaintiff, there is a publication to that customer".

....."the situation is analogous to that of the bookseller who sells a book having defamatory content for the plaintiff, to that of the circulating library who provided books to subscribers and to that of distributors. I do not accept the argument that the defendant was merely the owner of an electronic device through which postings were transmitted".....

However, in *Bunt v. Tilley*¹⁸, the question was- whether an ISP could be held liable for having 'published' a defamatory statement where the extent of its involvement in the publication was that others had published the words complained of 'via the services provided' by the ISP. The ISPs sued in this case did not, unlike in *Godfrey v. Demon Internet Ltd.*¹⁹, host the websites complained of, but merely provided the means by which the messages were conveyed between the author and the websites.

It was held by Easy I J., that-

"an Internet Service Provider which acted not more than a passive role in facilitating postings on the internet could not be considered to be a publisher at common law. It was essential to demonstrate a degree of awareness or at least a presumption of general responsibility, such as had long been recognized in the context of editorial responsibility, in order to impose legal responsibility under the common law for the publication of words. Although it was not always required to have knowledge of defamatory content to be liable for defamatory publication, there had to be knowing participation in the process of publication of the relevant words. It was not enough that a person had played just a passive influential role in the process."

⁹ Article 1 (a) of the UNCITRAL Model Law on E-Commerce, 1996 defines "Data message" as information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

¹⁰ Sec. 2(1)(o) of the Information Technology Act, 2000 defines "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized 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;

¹¹Performing Right Society Ltd. v. Bradford Corp. [1917-23] Mac CC 309, Australasian Performing Rights Association v. Miles [1962] NSW 405

¹²In Perfect 10 Inc. v. Cybernet Ventures Inc. Case No. CV 01-2595LGB (SHX)

¹³Chris Reed, "Internet Law", Second Edition, 2010 (Reprint), Universal Law Publishing Co., ISBN: 978-81-7534-474-7, pg.no.95

¹⁴ UNESCO is a specialized agency of the United Nations (UN). Its purpose is to contribute to peace and security by promoting international collaboration through education, science, and culture to further universal respect for justice, the rule of law, and human rights along with fundamental freedom proclaimed in the United Nations Charter. It is the heir of the League of Nations' International Committee on Intellectual Cooperation. UNESCO has 195 member states and nine associate members. Most of its field offices are "cluster" offices covering three or more countries; national and regional offices also exist.

¹⁵ The UK Data Protection Act, 1998 defines 'data' as information which-

- a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- b) is recorded with the intention that it should be processed by means of such equipment,
- c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- d) does not fall within paragraph (a), (b), or (c) but forms part of an accessible record.

¹⁶UK Data Protection Act, 1998 defines 'personal data' as data, which relates to a living individual who can be identified-

- a) from the data, or
- b) from the data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
- c) and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

¹⁷ (1999) 4 All ER 342 (HC)

¹⁸ [2006] EWHC 407; [2006] 3 All ER 336 (QB)

¹⁹ Supra 12

On the evidence in the instant case the claimant had no realistic way to establish that any of the internet service provider defendants had, in meaningful-sense, knowingly participated in the relevant publications. Publication is a question of fact, and it must depend on the circumstances of each case whether or not publication has taken place. The analogies that were held to inappropriate in Godfrey's case might yet be upheld where the facts do not disclose onward transmission with knowledge of the defamatory content.

To identify the accountability conditions for the intermediaries, the European Commission's Directive [2000/31/ EC, dated June 8, 2000] is consistent with the section 230 of the Communications Decency Act, 1996. It's Articles 12²⁰, 13²¹ and 14²² highlight the extent of ISPs liability. Subsequently, the Electronic Commerce (EC Directive) Regulations, 2002, came into force in August, 2002. These Regulations define the circumstances in which internet intermediaries should be considered liable for material which is hosted, cached, or carried by them but which they did not create. It is obligatory that the role of an ISP should be seen from its functional attributes.

3. INTERMEDIARY LIABILITIES IN US

The U.S. Congress enacted what is now known mainly as "Section 230"²³ to advance three policy goals:

- (a) to promote the continued rapid and innovative development of the Internet and other interactive media;
- (b) to remove disincentives to voluntary self-screening of content by service providers; and
- (c) to promote the development of tools (like filters) that maximize user control over what information the user receives online.

The Act was first applied in *Zemin v. America Online Inc.*,²⁴ where the court held: "Congress enacted § 230 to remove restraint to self-regulation worrying that the specter of liability would deter service providers from blocking and screening offensive material § 230 forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-controlling functions".

In *Doe v. America Online Inc.*,²⁵ plaintiff sued AOL for allowing a subscriber, one Russell, to use its chat rooms for marketing videotapes and photographs consisting of child pornography which plaintiff's minor son appears. The complaint alleged that AOL was negligent per se in allowing Russell to use its facilities for criminal distribution of obscene materials, and that it was likewise negligent on common-law principles. Plaintiff alleged that AOL had got complaints about Russell's utilize of its facilities for illegal purposes, but that "AOL neither warned Russell to end nor suspended his service." The Florida Supreme Court held that section 230 immunized AOL from negligence of liability based on a subscriber's use of its facilities to distribute child pornography.

By its plain language, section 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. In *Ben Ezra, Weinstein, and Co. v. America Online Inc.*,²⁶ the court held that section 230 insulated AOL from liability based on erroneous stock information that it provided. Plaintiff had alleged causes of action on account of negligence as well as defamation. The immunity conferred by section 230 is implemented to any "provider or user of an interactive computer service"²⁷. In *Schneider v. Amazon.com, Inc.*,²⁸ an author sued Amazon.com for defamation and tortious intervention with a business expectancy, based on a negative and allegedly defamatory book review displayed by a third party. The plaintiff argued that Amazon.com was not a provider of an interactive computer service," as it did not help access to the Internet: to visit the site, a user must already be online through some other service provider. The court rejected plaintiff's argument explaining that Amazon's website postings appear indistinguishable from AOL's message board [in *Zoran v. America Online*] for section 230 purposes. Schneider points out those web site operators do not provide access to the internet, but this is irrelevant. That is, Amazon's web 'site allow visitors to the site to comment about authors and their work, thus providing an intonation service and hence could be referred as an interactive computer service.

4. INTERMEDIARY LIABILITIES IN INDIA

Intermediary plays a vital role in the development and growth of a nation. Especially in India after 1980, the role of intermediaries is very significant for the progress of Information and Communication Technology. The effective functioning of an Intermediary depends on the amount of freedom they have, but the regulations are essential as this freedom is not absolute. Clause 32 and Clause 33 of the "License Agreement for Provision of Internet Services" gives certain obligations regarding the 'confidentiality of the information'.²⁹

²⁰The ISP is not liable as long as it acts as a mere conduit of information provided by others. This immunity is applicable to the automatic intermediate and transient storage of the information transmitted only if the storage is "for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission"

²¹ An ISP is not liable based on "caching," that is, "the automatic, intermediate and temporary storage of tilt information, perfumed for the sole purpose of making more efficient the informal-ion's onward transmission to other recipients of the service upon their request," if certain conditions are met, including:

- (a) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry;
- (b) the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and
- (c) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

²²An ISP is not liable based on hosting a website or other material;

- (a) the provider does not have actual knowledge of illegal activity dr. information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

²³ The Communications Decency Act of 1996 provides:

Section 230(c)(1): 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.

Section 230(e)(2): The term "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions."

Section 230(e)(3): The term "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service".

²⁴ 129 F.3d 327, 330-31 (4th Cir. 1997)

²⁵ 783 So. 2d 1010 (Fla. 2001)

²⁶ 206 F.3d 980 (10th Cir. 2000)

²⁷ Sec 230 (f)(2) the term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions".

²⁸ 31 P. 3d 37 (Wash. Ct. App. 2001)

²⁹32.1 The LICENSEE shall not employ bulk encryption equipment in its network. However, the LICENSEE shall have the responsibility to ensure protection of privacy of communication and to ensure that unauthorized interception of MESSAGE does not take place.

32.2 Subject to conditions contained in these terms and conditions, the LICENSEE shall take all necessary steps to safeguard the privacy and confidentiality of any information about a third party and its business to whom it provides the SERVICE and from whom it has acquired such information by virtue of the SERVICE provided and shall use its best endeavors to secure that:

It also prohibits the intermediaries for performing certain activities.³⁰Section 79 of the IT Act, 2000³¹ provides this balance between "necessity of technology" and "necessity of technology", the intermediaries being facilitator of third party information, data, or communication link may be held liable for copyright infringement, trademark infringement/ dilution, privacy violations, obscenity, defamation, child pornography, spamming, etc. The offended parties may not only seek injunctions against such intermediaries to block/ remove the offending content, but may also initiate civil and criminal proceedings against them.

Section 79³² of the IT Act, 2000 is for governing the functioning of the intermediaries. Significantly, in the amended section, the burden of proof is no longer with the intermediaries. It is for the prosecution to establish the liability of an intermediary. Earlier, under the previous Act, section 79 provided that "no person providing any service as a network service provider shall be liable.... if he proves"³³ placing the burden of proof on the intermediary to preclude liability. Under the exemption rule [sub-section (2) and (3) of Section 79 of the IT Act, 2000] the intermediaries are not liable for any third party information, data, or communication link made available or hosted by him. An intermediary may get the exemptions under Section 79 only if they it fulfills the criterion³⁴ under sub-section (2) and (3).

(i) No person acting on behalf of the LICENSEE or the LICENSEE divulges or uses any such information except as may be necessary in the course of providing such SERVICE to the Third Party; and

(ii) No such person seeks such information other than is necessary for the purpose of providing SERVICE to the Third Party.

Provided the above para shall not apply where:

(i) The information relates to a specific party and that party has consented in writing to such information being divulged or used, and such information is divulged or used in accordance with the terms of that consent; or

(ii) The information is already open to the public and otherwise known.

32.3 The LICENSEE shall take necessary steps to ensure that the LICENSEE and any person(s) acting on its behalf observe confidentiality of customer information.

32.4 The LICENSEE shall, prior to commencement of SERVICE, confirm in writing to the LICENSOR that the LICENSEE has taken all necessary steps to ensure that it and its employees shall observe confidentiality of customer information.

³⁰ 33.1 The LICENSEE shall not engage on the strength of this LICENSE in the provision of any other Service requiring separate license.

33.2 To remove any doubt, it is, hereby, clarified that nothing contained in condition in Para above shall preclude the LICENSEE from engaging in advertising and promotional activities relating to any of the service.

33.3 The LICENSEE shall take necessary measures to prevent objectionable, obscene, unauthorized or any other content, messages or communications infringing copyright, intellectual property etc., in any form, from being carried on his network, consistent with the established laws of the country. Once specific instances of such infringement are reported to the LICENSEE by the enforcement agencies, the LICENSEE shall ensure that the carriage of such material on his network is prevented immediately.

33.4 The LICENSEE is obliged to provide, without any delay, all the tracing facilities to trace nuisance, obnoxious or malicious calls, messages or communications transported through his equipment and network, to authorized officers of Government of India including Police, Customs, Excise, Intelligence Department officers etc. when such information is required for investigations or detection of crimes and in the interest of national security. Any damages arising on account of LICENSEE's failure in this regard shall be payable by the LICENSEE.

33.5 In case any confidential information is divulged to the LICENSEE for proper implementation of the agreement, it shall be binding on the LICENSEE and its employees and servants to maintain its secrecy and confidentiality.

33.6 Obscene material and applicability of Cyber Laws: The LICENSEE shall ensure that objectionable, obscene, unauthorized or any other content, messages or communications infringing copyright, Intellectual property right and international & domestic cyber laws, in any form or inconsistent with the laws of India, are not carried in his network, the ISP should take all necessary measures to prevent it. In particular, LICENSEE is obliged to provide, without delay, all the tracing facilities of the nuisance or malicious messages or communications transported through his equipment and network, to authorised officers of Government of India/State Government, when such information is required for investigations of crimes or in the interest of national security. The activities shall also be complied with the provisions of the Information Technology (IT) Act 2000, as modified from time to time. Any damages arising out of default on the part of licensee in this respect shall be sole responsibility of the licensee.

33.7 The use of the network for anti-national activities would be construed as an offence punishable under the Indian Penal Code or other applicable law. The networks cannot be used in such a manner as to endanger or make vulnerable a networked infrastructure. Acts such as break-ins or attempted break-ins of Indian networks shall be regarded as an anti-national act and shall be dealt with in accordance with the Indian Penal Code. ISPs must ensure that their services are not used for such purposes.

³¹ Exemption from liability of intermediary in certain cases.

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-section (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) 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.

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) 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.

³² Id

³³ Section 79 of the IT Act, 2000 (before Amendment) Network service providers not to be liable in certain cases.

For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

Explanation: For the purposes of this section,-

(a) "network service provider" means an intermediary;

(b) "third party information" means any information dealt with by a network service provider in his capacity as an intermediary;

³⁴ Criterion 1:

(a) the intermediary merely provides access to third-party information, which is transmitted or temporarily stored or hosted by such intermediary and includes:

(i) storage for the purpose of carrying out transmissions (mere conduit), or

(ii) storage for the purpose of making more efficient the information's onward transmission (proxy caching), or

(iii) storage of information provided by a subscriber (hosting). Or

"Due diligence"³⁵ means reasonable measures taken by a person in order to avoid commission of offence or contravention, i.e., adopting necessary and reasonable steps to find if the information content it transmits is unlawful. A due diligence exercise is a statutory duty on the part of the intermediary to observe regulatory practices/ guidelines as maybe prescribed by the Central Government to prevent transmission or publication of the unlawful content. However, it is imperative to know that in *J.M. Mutual Fund and J.M. Capital Management Pvt. Ltd. v. Securities and Exchange Board of India*, it was held by the Securities Appellate Tribunal (SAT), Mumbai:

"In our view no hard and fast rule or straight jacket method can be applied with respect to the principles of due diligence. Due diligence is nothing but a watchful caution and foresight as the circumstances of the particular case demands, the due diligence is an obligation to exercise reasonable care.

Further the Supreme Court in *Chander Kanta Bansal v. Rajinder Singh Anand*,³⁶ *Arijit Pasayat and P. Sathasivarn, JJ.* Observed:

The words "due diligence" is undefined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and responsibilities, showing care and effort. As per Black's Law Dictionary (8th End.), "diligence" means a continual effort to fulfill something, care; caution; the attention and protection required from a person in a given situation. "Due diligence" means the diligence reasonably awaited from, and normally exercised by, a person who seeks to fulfill a legal requirement or to remove an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable and rationale, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a wise man would exercise in the conduct of his own affairs.....

In *Sanjay Kumar Keddie v. Narcotics Control Bureaus*,³⁷ the petitioner's plea for seeking immunity from liability under the old Section 79 of the IT Act, 2000 was declined by the court since the petitioner's company Xponse Technologies Ltd. and Xpose IT Services Pvt. Ltd headed by Sanjay Kedia, were with clear knowledge and mala fide actions marketing through their own websites large quantity of psychotropic substances (Phentermine and Butalbital) to US and other countries violating the Narcotic Drugs and Psychotropic Substance Act, 1985. Hence, they were not entitled to immunity granted to intermediaries under Section 79 of IT Act, 2000.³⁸

The question before the Supreme Court was- whether the company selling huge quantities of prescription drugs on Internet could be granted immunity, being a network service provider?

It was held by S.B. Sinha & Harjit Singh Bedi, JJ:

"....That the Pones Technologies Ltd and Pones IT Services Pvt. Ltd. were not acting merely as a network service provider but were actually running internet pharmacy and dealing with prescription drugs like Phentermine and Butalbital." We thus find that the appellant and his associates were not innocent intermediaries or network service providers as defined under section 79 of the Technology Act but the said business was only a facade and camouflage for more sinister activity. In this situation, section 79 will not grant immunity to an accused who has violated the provisions of the Act as this provision gives immunity from prosecution for an offence only under Technology Act itself."

In the famous *Bazee.com*³⁹ case tried under earlier Section 79⁴⁰, the Court observed that the Director and CEO of Bazee.com could not prove lack of knowledge and that he had adopted due diligence in performing its duties when a third party placed a Delhi Public School MMS clip on its auction site Bazee.com. The court not only held that ISP could not escape liability under Section 79 of IT Act, 2000 but also explained a very important aspect of vicarious liability vis a vis ISPs. The Director's FIR was not quashed on ground that under Section 85⁴¹ of the IT Act, 2000 where a director is vicariously liable for acts committed by the company as the director was in charge of conduct of business of the company when contravention was made. The court held that under Section 292 of Indian Penal Code, 1860, there is "no automatic liability" of a director for publication of obscene matter by a third party on its website as *mens rea* cannot be proved, therefore, FIR can be quashed against director but under IT Act, 2000 vicarious liability exists as "the deemed criminal liability of the directors even where the company is not arraigned as an accused and can be later added" and therefore, FIR under Section 67⁴² (for publishing obscene content) read with Section 85⁴³ (dealing with offences by companies) cannot be quashed.

Since no due diligence standards were expressly prescribed and no safe harbor protection or exclusions for third party content transmissions or display were granted to internet service providers under old Section 79, the FIR was not quashed as despite actual notice infringing material was not removed for 2 days and

Criterion 2:

(b) the intermediary being a facilitator only plays a passive role in the sense that it does not:

- (i) initiate the transmission,
- (ii) select the receiver of the transmission, and
- (iii) select or modify the information contained in the transmission.

Criterion 3:

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Movement may prescribe in this behalf.

³⁵ "Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Available at Black's Law Dictionary, 6th Edition, pg. no. 457

³⁶ AIR 2008 SC 2234

³⁷ Criminal Appeal No. 1659 of 2007, SLP (Crl.) No. 3892 of 2007.

³⁸ Karnika Seth, "Computers, Internet, and New Technology Law", First Updated Edition, LexisNexis, 2013, ISBN:978-81-8038-903-0 pg.no. 476.

³⁹ Avnish Bajaj v State, on 29th May, 2008, 150 (2008) DLT 769, (2008) 105 DRJ 721.

⁴⁰ Supra 31

⁴¹ Offences by companies- (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation- For the purposes of this section,

(i) "company" means any body corporate and includes a firm or other association of individuals; and

(ii) "director", in relation to a firm, means a partner in the firm.

⁴² Punishment for publishing or transmitting obscene material in electronic form. Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard

to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

⁴³ Supra 40

its internal filters failed despite filters installed to check obscene information as the MMS clip used terms that were in filter blacklist. The traditional concept of vicarious liability requires that the defendant and actual infringer have an association of employment or partnership that invokes 'enterprise liability' on master if an employee negligently performs his duties as his acts bind the master in transactions as regards third parties.

In *Avnish Bajaj v State*⁴⁴, vicarious liability was held to exist as enterprise liability. Later this decision was overruled. In *Aneeta Hada v M/s. Godfather Travels & Tours (P) Ltd.*⁴⁵ the Hon'ble Supreme Court considered the case of *Avnish Bajaj* along with other criminal appeals involving same question of law, whether a director can be held liable even where a company is not arraigned as an accused. The court took the view that under Section 85 of the Information Technology Act, 2000, which provides for deemed liability of directors in case of offences committed by companies, a director cannot be held liable without impleading the company as an accused. The court quashed the proceedings against the appellant director as the company was not even arraigned as an accused. The court applied the doctrine of strict construction, and took the view that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. However, after the amendment in Section 79 of IT Act, 2000 the law became clearer as an intermediary is not liable unless there is actual knowledge with intermediary or intermediary modifies/selects third party content it publishes.

In *Goerner Infrastructure Equipment's Projects Ltd. v. Google India*⁴⁶, the Bombay High Court held:

.....*prima facie*, at present stage, there is merit in the contention of the Plaintiffs that the article [Toxic Fumes] put up by the defendant on the blog site is defamatory defendant to disclose particulars, names and the address of the person who is author of the article".

Similarly, there have been at least hundred cases [Civil Suits] in India, wherein various High Courts have issued ad-interim injunctions against the intermediaries. The list includes, *Yugant Ram Marlapalle v. Union of India*⁴⁷, *Mohit Kumar v. hh.mohitkumar@gmail.com*⁴⁸, *JCB India v. Abhinav Gupta*⁴⁹, *JCB India v. IP Address 122.163.98.166*⁵⁰, *JCB India v. abhinavdeepti@indiatimes.com*⁵¹, *VMD CAD & Graphic Technologies v. Ambuj Kumar Goel*⁵², etc. In *Umashankar Sivasubramaniam v. ICIC*⁵³ court held that "the respondent bank has failed to put in place a foolproof Internet Banking System" with adequate levels of authentication and validation which would have prevented unauthorized access. Bank was found liable for not placing the adequate measures for the protection of information.

The Ministry of Communications and Information Technology, government of India issued the Information Technology (Intermediaries Guidelines) Rules in 2011. These rules lay down the due diligence requirements of intermediaries, inter alia, obligation to publish rules, privacy policy and terms of use agreement.⁵⁴ Rule 3(2) makes intermediaries responsible for informing the users of prohibition to host, display, upload, modify, publish transmit, update or share any information' which pertains to another person, or is defamatory or obscene, invades privacy, hate speech, encourages money laundering, or contains other unlawful content, or harmful to minors, infringes intellectual property or other proprietary rights, violates law, communicates 'grossly offensive or menacing' messages, or spoofing, phishing activities, impersonation, contain virus or other worms to damage a computer resource, or threatens 'unity, integrity, defence, security, or sovereignty of India, friendly relations with foreign States, or public order or incitement to commission of any cognizable offence or prevents investigation of any offence or insulting any other nation'.

Rule 5⁵ states that intermediary shall not 'knowingly host or publish' such information or 'not initiate transmission or select the receiver of transmission and select or modify the information in the transmitted information'. Application of these provisions is likely to curtail freedom of speech and expression on the internet. Also, because the ambit of its application is quite large and vague, any form of objection or criticism may fall foul of the provision due to ambiguity in explaining meaning of "grossly offensive or menacing". Unless the intermediary verifies identity of person aggrieved, and checks if there is a legitimate complaint based on a legal provision, every frivolous complaint will be entertained by Intermediary leading to over censorship and removal of even legally valid content from internet. Rule 3(4) states that where an intermediary on its own or on actual knowledge by a complaint from an affected party in writing duly signed by electronic signature learns of unlawful content, it is responsible for disabling such content within thirty-six hours. However, a positive feature of the said rules is that it clarifies that mere transient storage of information with no human editorial control or removal of objectionable information on actual knowledge pursuant to an order or

⁴⁴ Supra 37

⁴⁵ 2012 (5) SCC 661.

⁴⁶ Notice of motion No. 668 of 2008 in Suit No. 506 of 2008.

⁴⁷ WP (Civil) 6554/2006 [Aurangabad Bench of Bombay High Court].

⁴⁸ CS (OS) No. 2366/2006.

⁴⁹ CS (OS) No. 691/2008.

⁵⁰ CS (OS) No. 1021/2008

⁵¹ CS (OS) No. 1143/2008

⁵² CS (OS) No. 142/2009

⁵³ Civil Jurisdiction Petition No. 2462 (2008)

⁵⁴ Due diligence to be observed by intermediary- The intermediary shall observe following due diligence while discharging his duties, namely:

(1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person.

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that-

(a) belongs to another person and to which the user does not have any right to;

(b) 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;

(c) harm minors in any way;

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force;

(f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(g) impersonate another person;

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation

(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 as specified in sub-rule (2):

provided that the following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information as specified in sub-rule: (2)-

(a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource;

(b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorised by the intermediary pursuant to any order or direction as per the provisions of the Act;

⁵⁵ Id.

direction envisaged by the Act will be permissible and not render an intermediary liable.⁵⁶ Similarly to the licensing agreement of the Intermediaries, they are also required to preserve and retain information as Central Government may specify under Section 67C of the IT Act, 2000.⁵⁷

The Ministry of Communication and Information Technology (Department of Information Technology) in exercise of its power enshrined by Section 87 of The Information Technology Act notified the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011. These rules are read in juxtaposition with Section 43A⁵⁸ that fixes liability for data theft or loss on body corporate. Rule 3 sheds light on the meaning of "Sensitive Personal Data or Information"⁵⁹. All business houses that collect, store, receive or transact any personal data or information is compelled to implement and pursue a privacy policy to manage sensitive personal information.

The privacy policy should proclaim what sort of personal information/ data is collected *raison d'être* for collection, disclosure norms as well as reasonable security practices being adopted by that body corporate. These rules compel the body corporate to acquire a written consent from that person whose personal information is being collected a prior notice shall be served to that person clearly explaining purpose of information collection, intended receiver of that information. In addition to that rules obligates a body corporate to retain that collected information only for the time period essential for legitimate purpose as well as the information to be used only for that purpose for which it was collected. The person whose information is being collected shall have access to his/her collected information so that correction/ updation of on request of individual can be done. It is mandatory for the body corporate to maintain security for the collected information. It requires a body corporate to espouse a reasonable security measures together with information security policy that hems in administrative, technical and physical security controls that matches with nature of business and the information assets taken into consideration.

Under Section 69B⁶⁰ an intermediary needs to offer technical assistance to the authorized government agency for online access to computer resource transmitting, receiving, storing of traffic data. Moreover under Section 70B(7)⁶¹, as regards protecting critical infrastructure, intermediaries are required to provide information to Indian Computer Emergency Response Team as per prescribed procedures of CERT.

5. CONCLUSION

Intermediaries are one of the key players in the Information and communication society. The significant role of an intermediary makes them a vital part of the society. India, US and UK have considered the intermediary liabilities as their primary concern due to the position they hold in the Information and Communication System. All the jurisdictions have implemented the rules and regulations for governing the functions of intermediaries, but more stringent regulatory frameworks are required to address the wider aspects of intermediary issues. Laws on Intermediaries liabilities are different in various nations, but there are some common elements to intermediary liability. In general, there is a recognition that intermediary who transmit information originating from third parties (including information hosted by the intermediary for such transmission) should not be absolutely liable for the actions of their users. There are two reasons for imposing liability on which most laws seem to be agreed:

- (a) Where the intermediary knows or has reason to believe that the information content it transmits is unlawful; and
- (b) Where, irrespective of the intermediary's knowledge, it benefits directly from transmission.

An additional reason for imposing liability, which is not accepted universally, is:

- (c) Where the intermediary fails to take reasonable steps to determine if the information content it transmits is lawful.⁶²

In the above context, the concept of due-diligence and reasonable security practices are required to be strictly implemented. There is also a requirement for setting severe accountabilities for the acts of the intermediaries. There can also be a common content regulations policy in order to combat cybercrimes, hate speeches and cyber terrorism in cyberspace.

⁵⁶ Karnika Seth, "Computers, Internet, and New Technology Law", First Updated Edition, LexisNexis, 2013, ISBN: 978-81-8038-903-0 pg.no. 481.

⁵⁷ Preservation and retention of information by intermediaries- (1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and shall also be liable to fine.

⁵⁸ Section 43A of Information Technology Act, 2000 explanation part clause (ii) states, "Reasonable Security Practices and Procedures means security practices and procedures designed to protect such information from unauthorized access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit."

⁵⁹ Rule 3 of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 defines "sensitive personal data" means personal data as to the data subject's-

- (i) biometric data;
- (ii) deoxyribonucleic acid data;
- (iii) sexual preferences and practices;
- (iv) medical history and health;
- (v) political affiliation;
- (vi) commission, or alleged commission, of any offence;
- (vii) [ethnicity, religion, race or caste]; and
- (viii) [financial and credit information].

⁶⁰ Power to authorize to monitor and collect traffic data or information through any computer resource for Cyber Security. - (1) The Central Government may, to enhance Cyber Security and for identification, analysis and prevention of any intrusion or spread of computer contaminant in the country, by notification in the official Gazette, authorize any agency of the Government to monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource.

(2) The Intermediary or any person in-charge of the Computer resource shall when called upon by the agency which has been authorized under sub-section (1), provide technical assistance and extend all facilities to such agency to enable online access or to secure and provide online access to the computer resource generating, transmitting, receiving or storing such traffic data or information.

(3) The procedure and safeguards for monitoring and collecting traffic data or information, shall be such as may be prescribed.

(4) Any intermediary who intentionally or knowingly contravenes the provisions of subsection (2) shall be punished with an imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purposes of this section,

(i) "Computer Contaminant" shall have the meaning assigned to it in section 43

(ii) "traffic data" means any data identifying or purporting to identify any person, computer system or computer network or location to or from which the communication is or may be transmitted and includes communications origin, destination, route, time, date, size, duration or type of underlying service or any other information.

⁶¹ 70B. Indian Computer Emergency Response Team to serve as national agency for incident response. -

(7) Any service provider intermediaries, data centers, body corporate or person who fails to provide the information called for the comply with the direction under sub-section (6), shall be punishable with imprisonment for a term which may extend to one year with fine which may extend to one lakh rupees or with both.

⁶² Chris Reed, "Internet Law", Second Edition, 2010 (Reprint), Universal Law Publishing Co., ISBN: 978-81-7534-474-7, pg.no.121

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