Liability of Intermediaries under IT Act with Special Reference to Internet Service Provider

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Abstract

Intermediaries are widely recognized as essential cogs in the wheel of exercising the right to freedom of expression on the Internet. Most major jurisdictions around the world have introduced legislations for limiting intermediary liability in order to ensure that this wheel does not stop spinning. Intermediaries are entities that provide services enabling the delivery of online content to the end user. The IT Act regulates internet intermediaries using the defined term ‘intermediaries’, which means, with respect to any particular electronic records, 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 marketplaces and cyber cafes (Riordan 2016). This definition of intermediaries was inserted by the IT (Amendment) Act, 2008 which replaced the previous definition as presented in the original act. Looking at the definition, it appears that any person providing any service with respect to electronic messages including receiving, storing, transmitting it would qualify as an Intermediary (Kim et al. 2017).

Key Words: Intermediary, IPR, Infringement, Guidelines, IT Act, 2000.
1. Introduction

The IT Act regulates internet intermediaries using the defined term ‘intermediaries’, which means, with respect to any particular electronic records, 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. The intermediary has to act within 36 hours to remove the content. If the intermediary does not act within the stipulated time then the intermediary cannot avail safe harbour. This provision was criticized by intermediaries after, a clarification was issued by the Government on March 18, 2013 stating that the intermediary shall respond or acknowledge the complaint within 36 hours. Thereafter, the intermediary has 30 (thirty) days time to redress such complaints. What constitutes redressal is unclear and no guidance has been provided by the rules.

Research Question

Whether the IT act 2000 and clause 6 of section 29 of trademark act 1999 is liability to imposed the intermediaries is effectively with the comparison of Section 79 of IT act and the intermediaries guideline act 2000.

2. Aim of Study

- To find out the internet service provider online trademark infringement
- To analysis the liability of intermediaries
- To examine the cases relating to internet service provider

Hypothesis

HA: The internet service provider can effectively monitor and implement measures for prevent cyber offences

HO: As law stands today the Internet service provider need more effective supervision from government or law enforcement agencies

3. Review of Literature

Child's right to free flow information via internet: liability and responsibility of the internet service provider

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Laws that govern the dissemination of information through internet are still struggling to control the flow of illegal information via web. This has in a way open up a path that leads to the corruption of an innocence mind of a child(Whitfield et al. 2017). The objectives of this study are to critically outline the extent of a child's right to information access. This research adopts the qualitative methodology as it provides a deeper understanding of social
phenomena on the extent of liabilities of the internet service provider (Barber et al. 2017). The outcome of the study is to propose the amendment to the current relevant laws in Malaysia

**Indian Internet Copyright Law: With Special Reference to Author’s Right in the Digital World.**

This book is purely based on the right of Indian copyright holders in the digital world. Indian Copyright Law is not considering the digital world for copyright protection, whereas Indian information Technology Act of 2000 contains only one section (sec. 79) dealing with digital copyright problem. So in the light of the above section, the book is analyzing the Digital Millennium Copyright Act of United States and other International dimensions in this regard (Yu et al. 2016; Lieberman 2016; Reisert et al. 2014; Bollepalli et al. 2018; Su and Carlson 2017; Vitish-Sharma et al. 2018; Escobar et al. 2016; 2009). At the same time, the work proceeds through various landmark cases and comments of other legislations and courts-the rights available to the authors and copyright owners as well as the theories of liability, etc., deeply discussing in the book. The need of an apt legal framework is the main focus of the work; otherwise, the modern technological changes and ambiguous interpretation of the present copyright law will lead to unsettled problems. The book also discusses the moral right in the digital world. Intermediary liability is another important focus of the work. In most jurisdictions, Internet Service Providers are transmitting information to and from third parties and are hosting information for that particular purposes, and there appears to be a growing consensus among legislators and judges that they should not be held liable absolutely for violations committed by others; hence, the balancing tendency of courts in deciding this type of cases is another important aspect of the book.

**Internet service provider liability for subscriber copyright infringement, enterprise liability and the first amendment boston college law school research paper no. 2000-03**

The Internet offers the fastest reproduction and distribution of information ever known, presenting fundamental challenges to copyright law. (Tonge et al. 2017) Practically anyone with a personal computer can receive and send information over the Internet, and so practically anyone has access to copyrighted works and can duplicate them, adapt them, or disseminate them. From the perspective of a copyright holder, even a single innocent use represents a threat. This Article examines the controversial proposal that Internet Service Providers ("ISPs") be held liable for the copyright infringements of the subscribers. The Article takes the position that the existing case law considering ISP liability for subscriber copyright infringement - under theories of direct liability, vicarious liability, and contributory liability - thus far has struck an acceptable balance between the property interests of copyright holders and the First Amendment rights of subscribers. The Article supports this contention with an examination of the rationales underlying the closely analogous field of enterprise liability in tort. It then examines recent
Congressional legislation - the Digital Millennium Copyright Act ("DMCA") - providing "safe harbors" for ISP liability. The Article concludes that the DMCA, unless properly interpreted, threatens to upset the balance struck by the case law by creating an incentive to unduly restrict the free speech of subscribers

The liability of internet intermediaries and disclosure obligations in Greece secondary liability of internet service providers pp 317-338| cite as

Blogs with defamation and insults, social networks with fake profiles and blackmailing content, downloading of illegal copies of music and movies, ‘phishing’ frauds and ‘denial of service’ attacks, cyber-bullying, child pornography, offenses committed in cybergames: In Web 2.0 anyone can become the producer of information. Countless ‘intermediaries’ function as go-betweens for the transmission of such data and information: Classical access and host providers (ISPs), search engines (Google, Yahoo), social networks (Facebook, Myspace), electronic encyclopedias (Wikipedia), websites for video uploading (YouTube), blogs, internet games platforms (Second Life, World of Warcraft), webpages for short messages (Twitter) etc. In what circumstances can they be liable for the data involved? In 2000, the EU Electronic Commerce Directive established immunity of ISPs from liability for illegal and harmful content. Greek Constitution and subsequent interpretations of legislation have imposed controversial disclosure obligations. This Chapter tries to identify the role of the players in this disputed field and to address questions such as: What are the limits for disclosure of personal data? (Tonge et al. 2017; Haller et al. 2015) Will Intermediaries become, in the future, quasi-judges controlling every Internet activity? Are they entitled to defend not only the rights of users but, generally, legitimacy in Cyberspace? Legislators must take into serious consideration the attitude of these new custodians toward compliance and social responsibility.

Internet service provider liability for copyright infringement on the internet

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4. Materials and Methods

The researcher more on relied on the secondary source of data such as books, journals, e-sources, articles and newspaper. Due to the shortage of the time, the researcher in which primary source of the data such as interview and field research is not more adequacy in result of data collection and interpretation in which parameters so described (Tonge et al. 2017; Haller et al. 2015; Rajkumar
and Nallani Chackravatula Sr...) Under this counteractive action and early intercession structure, immense research is being directed to figure out which of the numerous current projects are genuinely powerful.

5. **Research Methodology**

The present research is conclusive, descriptive and based on non-empirical design. Qualitative data was generated to test the research hypothesis. In order to collect data on the dimensions of the study, a research instrument was designed. (Tonge et al. 2017; Haller et al. 2015; Rajkumar and Nallani Chackravatula Sr...; Thornton et al. 2006) The study was conducted on secondary source of data books, articles, journals, e-sources, theories and the relevant provision with decided case laws. Focusing on these three areas put forward specific research problems.

6. **Sample Size Calculation Sources of Study**

Only secondary sources are available. The secondary sources include books which is available in English, E-sources. Primary source of interview can’t be conducted which researcher unable to refer due to shortage of time.

7. **Limitation of the Study**

Primary sources, compared to the secondary sources, are limited. Researcher had to rely more on secondary sources available in books, e-sources gather information about the study. The researcher was unable to visit and interview the personnel like construction workers and their employers

**CHAPTERIZATION -1**

**Role of Intermediaries in India**

“Intermediary” is defined in Section 2(1) (w) of the Information and Technology Act 2000. "Intermediary" with respect to any particular electronic message means any person who on behalf of another person receives stores or transmits that message or provides any service with respect to that message. The liability of the intermediaries is lucidly explained in section 79 of the Act.

**Section 79 of Information and Technology Act, 2000**

Section 79 of the Information Technology Act, 2000 exempts intermediaries from liability in certain instances. It states that intermediaries will not be liable for any third party information, data or communication link made available by them. (Tonge et al. 2017; Haller et al. 2015; Rajkumar and Nallani Chackravatula Sr...; Thornton et al. 2006; United Nations Development Programme ...) 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. This provision was added to the Act by the Information Technology (Amendment) Act, 2008 on the demand of the software industry and industry bodies to have protection from liability that could arise because of user generated content. This was mainly prompted by the controversial case in which Avnish Bajaj, the CEO of Bazee.com, an auction portal, was arrested for an obscene MMS clip that was put up for sale on the site by a user. The provision states that an intermediary needs to observe due diligence while discharging its duties under the Act and observe such other guidelines as prescribed by the Central Government. These other guidelines were laid down in the Information Technology (Intermediaries Guidelines) Rules, 2011 framed in the exercise of powers conferred by Section 87 read with subsection (2) of Section 79 of the Information Technology Act, 2000. The Rules were notified on April 11, 2011.

According to Section 79 of Information and Technology Act, 2000, for the removal of doubts, any person who is providing any service as a network service provider shall not be liable under this act for certain cases, rules or regulations made there under for any third party information or data made available by him. Even if 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. For the purposes of this section,

- "Network service provider" means an intermediary;
- "Third party information" means any information dealt with by a network service provider in his capacity as an intermediary;

An intermediary would be liable and lose the immunity, if the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act. Sections 79 also introduced the concept of “notice and take down” provision as prevalent in many foreign jurisdictions. It provides that an intermediary would lose its immunity if upon receiving actual knowledge or on being notified that any information, data or communication link residing in or connected to a computer resource controlled by it is being used to commit an unlawful act and it fails to expeditiously remove or disable access to that material. On the other hand, another interpretation can be drawn where section 79 of the IT Act, 2000 absolves ISPs (the internet service providers), who work as intermediaries, of its liability if it can prove its ignorance and due diligence, it does not specify who would be held liable for such contravention in such an event. Therefore, this provision will cause problems when an offence regarding third party information or provision of data is committed.

Analysis of the Information Technology (Intermediaries Guidelines) Rules, 2011

The Intermediaries Guidelines Rules lay down the guidelines that the intermediaries have to follow so that they qualify for the safe-harbour protection provided under the Act.

The Intermediaries Guidelines Rules lay down the procedures that an intermediary has to follow to avail safe harbour. Rule 3(2)7 of the Intermediaries Guidelines Rules lists the categories of information, if posted online, which could be considered as illegal. According to Rule 3(4)8 an affected person could write to the intermediary to remove any content which is listed as unlawful under Rule 3(2). The intermediary has to act within 36 hours to remove the content. If the intermediary does not act within the stipulated time then the intermediary cannot avail safe harbour. This provision was criticized by intermediaries who said that it is not easy to take down content or take action in 36 (thirty six) hours.

The Information Technology (Intermediary Guidelines) Rules, 2011 make it obligatory for intermediaries to appoint a grievance officer and provide the name and contact details of such officer on their website. The grievance officer shall redress the complaints within 30 days from the receipt of complaint.

CHAPTERIZATION -2

Since its introduction back in October 2000, the Information Technology Act has proved to be a highly controversial piece of legislation. In its thirteen-odd years of operation, the Act has managed to draw considerable criticism from the legal community and the general public. It is alleged to contain a whole spectrum of flaws, shortcomings and pitfalls ranging from being inefficient in tackling cyber crimes to placing unfair curbs on the civil liberties of citizens. Making matters worse, a 2008 Amendment introduced to the Act the now-infamous Section 66A. This section defines the punishment for sending “offensive” messages through a computer or any other communication device like a mobile phone or a tablet. A conviction can fetch a maximum of three years in jail and a fine. The main problem with this section is the vagueness about what is “offensive”. The word has a very wide connotation, and is open to distinctive, varied interpretations. It is subjective, and what may be innocuous for one person, may lead to a complaint from someone else and, consequently, an arrest under Section 66A if the police prima facie accepts the latter person’s view.
Apart from Section 66A, the Information Technology (Intermediaries Guidelines) Rules, 2011 have also seen their fair share of criticism. While Section 79 exempts intermediaries from liability in certain cases, the Rules water down these exemptions and force intermediaries to screen content and exercise online censorship. Additionally, the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 provide for blocking of web pages without proper publication or notice to public containing the reasons for blocking. The process of blocking is undisclosed and fails to meet Constitutional safeguards of natural justice. Section 66A of the Information Technology Act, 2000 was struck down in its entirety for being in violation of Article 19(1) (a) and not falling under the scope of ‘reasonable restriction’, under Article 19(2) of the Indian Constitution. Section 66-A of the Act stipulates punishment for sending offensive messages through communication service by the Supreme Court while determining its constitutionality in Shreya Singhal v Union of India Section 66A is ambiguous in its phraseology and imposes statutory limits on the exercise of internet freedom. Further, the Intermediaries Guidelines Rules are similarly ambiguous and require private intermediaries to subjectively assess objectionable content. They actively water down the exemptions from liability granted to intermediaries by Section 79 of the IT Act, and prescribe unfeasibly minuscule time-frames for the removal of objectionable content. Section 66A of the Act, and the Rules are thus violative of Articles 14, 19 and 21 of the Constitution and the petitioner prays that they be declared as such. The vagueness of language invites blatant transgressions of Fundamental Rights and the grounds for incrimination under 66A are beyond the scope of reasonable restrictions on Fundamental Rights allowed by Article 19(2) of the Constitution. Due to the vague and undefined purported offences contained within 66A, the power to punish speakers and writers through arrest and threat of criminal trial is at the first instance granted to complainants with offended sentiments and police officials. A significant proportion of the offences in Section 66A do not even fall within the permissible categories of restriction in Article 19(2) of the Constitution. Further, the Intermediaries Guidelines Rules provide for vague and undefined categories that require legal determinations and effective censorship by private online service providers. The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 provide for blocking of web pages without proper publication or notice to public containing the reasons for blocking. The process of blocking is entirely secret and ex facie fail to meet constitutional safeguards of natural justice.

8. Findings

The Intermediaries Guidelines Rules lay down the guidelines that the intermediaries have to follow so that they qualify for the safe-harbour protection provided under the Act. The Intermediaries Guidelines Rules lay down the procedures that an intermediary has to follow to avail safe harbour. Rule 3(2)7
of the Intermediaries Guidelines Rules lists the categories of information, if posted online, which could be considered as illegal. According to Rule 3(4) an affected person could write to the intermediary to remove any content which is listed as unlawful under Rule 3(2). The intermediary has to act within 36 hours to remove the content. If the intermediary does not act within the stipulated time then the intermediary cannot avail safe harbour. This provision was criticized by intermediaries who said that it is not easy to take down content or take action in 36 (thirty six) hours. Thereafter, a clarification was issued by the Government on March 18, 2013 stating that the intermediary shall respond or acknowledge the complaint within 36 hours. Thereafter, the intermediary has 30 (thirty) days time to redress such complaints. What constitutes reprisal is unclear and no guidance has been provided by the rules.

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9. Suggestions

Hence under amended section 79 of the IT Act, the requirement of knowledge has now been expressly changed to receipt of actual knowledge. This has been combined with a notice and take down duty. There is a time limit of 36 hours to respond to such a request. If an intermediary refuses to do so, it can be dragged to the court as a co-accused. Under the Amendment Act the safe harbour provisions is available only to an Internet service provider where the function of the intermediary is limited to giving access to a communication network over which information made available by the third party is transmitted or temporarily stored or where the intermediary does not initiate the transmission, does not select the receiver of the transmission and does not select or modify the information contained in the transmission.

Section 79 of the IT (Amendment) Act 2008 thus deals with immunity of intermediaries. It is purported to be a safe harbour provision modelled on EU Directive 2000/31. The Safe Harbour provisions found in the IT Act are similar to that found in the US Laws which essentially say that the intermediaries who merely provide a forum weren't liable for what users did. The only condition being that they respond promptly to a notice telling them about a violation. If the website took that file off then they were in the clear.

10. Conclusion

The intermediaries should be classified and according to this classification all the different intermediaries, rules should be followed for different types of intermediaries, as an intermediary which might need more than 36 hours time for applying action on take down notice. Also the guidelines should be refined and advanced for not infringing the essentials of Article 19 of Indian
constitution and provide natural justice for better functioning in the dynamic India which is becoming promoter of freedom of speech and expression.

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