



## ANALYSIS OF INTERMEDIARY LIABILITY AND THE IT ACT

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### ABSTRACT

India is one of the vast countries and has the largest number of internet users in the world. Privacy is the serious concerns among the people. The discloser of data and information has become easier and more uncontrollable. Now it is the time to disclose the internet and the Indian state is highly making demand on intermediaries to monitor and screen data which is posted on internet that will increase the tension among the individuals for exercising our right to privacy, freedom of speech and expression and defamation on the internet. India also provides the social media platform for free speech and has incorporated a safe harbor protection in order to limit the liability of the intermediaries but legislative ambiguities coupled with the onerous obligations imposed on intermediaries threatens to defeat the purpose of providing safe harbor protection. Further, a recent spate of judicial decisions that endorses overbroad filtering without taking into account its chilling effects on free speech highlights a need for immediate change in the legislative, executive and judicial approach towards intermediary liability and internet service providers in India.

Keywords: Intermediary, Internet, privacy, Freedom of speech and expression, Safe harbor, legislative, judicial decision.

### 1. INTRODUCTION

In the present world the obligations, liabilities, and the responsibilities of online intermediary is increasing on the internet. However, these obligations infringe the legal rights of both the users and the business opportunities. Internet service provider is one of the types of Intermediary which allows the users to upload any type of information, data on the internet, which includes text, video, comments etc.; some of the example of intermediaries are Facebook, WhatsApp, Twitter, Instagram, YouTube and BlogSpot. In India the word 'intermediary' is described in section 2(1)(w) of the Information Technology Act, 2000 stated as "any one person on behalf of another person receive, stores, or transmits, that record and provide any service to that of record ; this include internet service provider, network service provider, telecom service provider online market place, cyber café."<sup>1</sup> Definition of intermediary is only satisfied if there is exchange of data, information, goods and service through the internet on the social media platform. Intermediary is widely recognized as essential cogs in the wheel of exercising the right to freedom of speech and expression on the internet.<sup>2</sup> To limit the liability of the intermediary many such institutions in the world ensure that this wheel does not stop spinning.

In 1990s, when internet was still coming into its form, intermediaries were subject to only limited regulation.<sup>3</sup> In present times,

<sup>1</sup> Vipull Vinod, Liabilities of Intermediaries and Safe Harbours Under Cyber Law Regime in India, 8 RMLNLJ 182, 183-184 (2016).

<sup>2</sup> Centre for Democracy & Technology intermediary liabilities: protecting internet platform for expression and innovations (2010).

<sup>3</sup> Article 19 Free Word Centre, *Internet Intermediaries: Dilemma of Liability* (2013),



they have grown to provide a prosperous social media platform through which information or data uploaded. India provides both internet related services as well as 'consuming' the internet all over the world. India is one of the leading IT service providers to the businesses over the globe, its own internet users were 481 million at the end of 2017, report said by internet and mobile association of India (IAMAI).<sup>4</sup>

The large scale information transmitted across world has facilitated the commission of offences such as defamation, violation of privacy, unlawful acts and intellectual property infringement.<sup>5</sup> These harms are raised due to the invasion of privacy of the particular individual. The information should be collected and used by intermediary in a manner that privacy cannot be harmed. The main purpose of this research paper is to find the best approach to divide the intermediaries' into two categories based on whether the liability is primary or secondary.

In some cases, there is direct infringement of the privacy of individual when the information, data is deliberately and unknowingly disclosed by the intermediary. On the other way if intermediary service is used by third party to commit an unlawful act which infringes the rights of privacy, freedom of expression of individual, and if

intermediary fails to understand that he exercised a reasonable care in monitoring the content hosted by it, may be secondary liable of infringement. Depending on the nature of the concern, the right to privacy of individuals can be secured by three means: (a) self-regulation, or the governance of the internet by the participants themselves, without intervention by the State; (b) privacy-enabling technology architecture; or (c) through state action, in the form of laws.<sup>6</sup> For the purpose of this Report, its analysis will be restricted to the regulation of intermediaries in India through the operation of law.

## 2. INTERMEDIARY LIABILITY BEFORE AND AFTER IT AMENDMENT ACT 2008.

After the enforcement of IT Act, 2008 intermediaries have become liable for the act of the third parties. The most suitable case defining the legal responsibilities of intermediaries is **Baazee.com case**<sup>7</sup> (also called as ebay.in), an auction portal which is owned by an American auction giant Ebay.com. Avnish Bajaj the CEO of the company was taken into custody for allowing the auction of pornographic video clip involving two students on its website.<sup>8</sup>

Amazon provides for a system whereby an aggrieved person can notify Amazon about the material that has been infringed by giving a description of the work or by

[https://www.article19.org/data/files/Intermediaries\\_ENGLISH.pdf](https://www.article19.org/data/files/Intermediaries_ENGLISH.pdf).

<sup>4</sup> PTI, *Mobile Internet users in India to reach 500 mn*, INDIAN EXPRESS (Feb. 20, 2018), <https://economictimes.indiatimes.com/tech/internet/internet-users-in-india-expected-to-reach-500-million-by-june-iamai/articleshow/63000198.cms>.

<sup>5</sup>Pritika Rai Advani, *Intermediary Liability in India*, ECONOMIC & POLITICAL WEEKLY VOL. 48, ISSUE NO. 50 (Dec. 14, 2013), <http://www.epw.in/author/pritika-rai-advani>.

<sup>6</sup>Ujjwala Uppaluri & Varsha Shivanagowda, *Preserving Constitutive Values in the Modern Panopticon: The Case for Legislating Toward a Privacy Right in India*, 5 NUJS L. REV. 21 (2015).

<sup>7</sup>Avnish Bajaj v. State (N.C.T.) Of Delhi, 116(2005) DLT427.

<sup>8</sup>Vipul Vinod, *liabilities of Intermediaries and Safe Harbours under Cyber Law Regime in India*, 8 RMLNLJ, 182-183(2016).



providing a statement showing the rightful owner. In the case if the In case one feels that one's work has been infringed, this needs to be notified to the respective sites with a description of the material and the signature of the person authorized to act on behalf of the owner of the material. These sites further provide that one is responsible for maintaining confidentiality. The Yahoo Auction site also clearly provides that they are not in any way liable for the material that is uploaded and may at any time terminate a user's account.<sup>9</sup> Under the old IT Act, they could be released only if they proved that they had no knowledge about the infringement and they had exercised all due diligence to prevent such offence. If the website had knowledge about the unlawful content posted on the website or he didn't take proper care then the websites are liable.<sup>10</sup> However, it is impossible for any website to monitor this content. This led to amendment of the IT Act 2000. After that the old IT Act, is changed into the new IT Act, 2008. Under the Information Technology Amendment Act 2008 section 79 states that- *"If any data or information posted on the internet by the third party then the intermediary is not liable as they had no knowledge about what is posted on the websites."*

However there are some conditions:

- The role of intermediary is minimal and providing access to communication system over the information accessible to the third party to transmitted or temporarily hosted.

<sup>9</sup>Ammu Charles, Online Auction Sites: Liability for Counterfeit Goods, 6 SCC J-3, J4-5, (2015).

<sup>10</sup>Devika Singh, Blacklisting Blacklists — the Information Technology Amendment Act, 2008 and ISP Driven Content Filtering, PL APRIL 16, 18-19(2010).

- Intermediaries are not allowed to modify any type of data posted by the third party.
- While discharging his duties the intermediary must observe due diligence. Due to this amendment the internet service provider i.e., the 'intermediary' have been exempted from the liability under the section 79 of the IT Act. However, if the intermediary forced or threatens any of the users to upload obscene, unlawful content that harm the reputation of the third party then the intermediary loses their liability. Many foreign jurisdictions the idea of 'notice and take down' is prevalent and section 79 of the IT Act also uses this idea for the protection of rights of intermediary. An intermediary loses the liability if they have knowledge of the unlawful content and fails to remove or disable access to that material.

Even though they are immune from liability but still they are liable under the section 72A<sup>11</sup> for the disclosure of personal information without the consent of person to whom it can cause wrongful loss or breach of contract. And punishment for such discloser is imprisonment extending to three years or fine extending to five lakh rupees or both.<sup>12</sup> This provision was introduced under IT Act, 2008 and is aimed to protect the privacy of the individual.

### **3. ANALYSIS OF INFORMATION TECHNOLOGY (INTERMEDIARIES GUIDELINES) RULES, 2018**

<sup>11</sup>Pavit Singh Katoch, *liability of intermediaries under the IT Amendment Act, 2008*, VAISH ASSOCIATE ADVOCATE, (oct.27,2009,10:04AM), <https://vaishlaw.com/homeimage/Liability%20of%20Intermediaries%20under%20the%20IT%20Amendment%20Act%202008.pdf>.

<sup>12</sup>*Ibid.*



The IT (Intermediary Guidelines) Rules 2011, under section 79(2) of the Act clearly specify the due diligence requirements under such exemption.<sup>13</sup> In 2018 a discussion was raised in the Parliament on misuse of social media platform.<sup>14</sup> The Ministry of Electronics and Information Technology released a new Rule to the intermediary which amends the due diligence and requirements for the intermediaries.<sup>15</sup>

### 3.1 Key features of the rule

- The Intermediary Guidelines Rules<sup>16</sup> prohibit the users from uploading certain types of content on social media platform like obscene content. The new Rules prohibit new category of information which threatens to 'public health or safety'.
- Previously intermediary was required to remove unlawful content within 36 hours if intermediary did not remove within stipulated time then he couldn't avail 'safe harbor'<sup>17</sup> protection. But according to new guidelines they have to provide assistance to any government agency within 72 hours and further they must trace the origin of the (i) information on their platform.
- Intermediary must have technology tools to (ii) identify and remove the unlawful contents.

<sup>13</sup> G.S.R. 314(E), The Gazette of India, (Apr. 11, 2011), [http://meity.gov.in/writereaddata/files/GSR314E\\_10511%281%29\\_0.pdf](http://meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdf).

<sup>14</sup> Official Debates, Rajya Sabha, (July 26, 2018), [http://164.100.47.5/official\\_debate\\_hindi/Floor/246/F26.07.2018.pdf](http://164.100.47.5/official_debate_hindi/Floor/246/F26.07.2018.pdf).

<sup>15</sup> The draft IT (Intermediary Guidelines (Amendment) Rules), (December 24, 2018), [http://meity.gov.in/writereaddata/files/Draft\\_Intermediary\\_Amendment\\_24122018.pdf](http://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf).

<sup>16</sup> (2011).

<sup>17</sup> A safe harbor is a provision in a law or regulation that affords protection from liability or penalty under specific situations, or if certain conditions are met.

Further, intermediary with more than fifty lakh users must incorporate a company in India.

### 3.2 Analysis of the Key Features

- Intermediary is required to prohibit the publication of content that harms the public health or safety. It may be argued here that this may violate the right of freedom of speech and expression under article 19(1) but the Supreme Court clarified that threat to public health or safety cannot be a ground to restrict freedom of speech. Further, the court stated that any restriction on freedom of speech must relate to article 19(2).<sup>18</sup> One of the Supreme Court judgments clarified that restriction on speech should be reasonable, narrowly, so as to restrict only what is absolutely necessary.<sup>19</sup>
- In 2015 the Supreme Court, examined section 79(3) (b) of the IT Act<sup>20</sup> which requires intermediaries to remove or disable content on basis of user request. The content which falls under the following categories should be disabling or removed:
  - If the court or government orders the intermediaries to remove, and
  - The order relates to the restriction under the article 19(2) of constitution.<sup>21</sup>
- New rules provide that intermediaries with more than fifty lakh users must incorporate in India under the Companies Act, 2013. Also, the new rules say that when the intermediary receives knowledge from the court or are notified by the government

<sup>18</sup> Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal (1995) AIR 1236 (India).

<sup>19</sup> Shreya Singhal vs. Union of India (2015) AIR SC 1523 (India).

<sup>20</sup> (2000).

<sup>21</sup> *Ibid.*



under section 79(3) (b) of Act shall remove or disable access to unlawful act under article 19(2) of constitution of India which is related to the sovereignty and integrity of India, security of state, friendly relation with foreign states, public order, morality, or in the contempt of court, defamation but in no case later than twenty four hours in sub rule (6) of rule 3. Further, intermediary has to preserve the information or record for at least previously ninety days but after (new guidelines) it is one hundred and eighty days for investigation purpose or either by longer times decided by the court or government. This new guideline ensures traceability for content posted by user.<sup>22</sup>

One issue whether an intermediary is treated as a publisher of content, **Mr. Sundaram** argued that an intermediary cannot be the publisher of the content. If intermediary fails to take any action despite of notice given by court or government authorities and has knowledge of such content then fails to take down then publisher of content is liable.<sup>23</sup> Supreme Court clarifies that private parties should not be able to force content offline just by sending a notice to online intermediary.<sup>24</sup>

#### 4. SUPREME COURT AND THE IT ACT

<sup>22</sup> Aroon deep, *Intermediary rules for platform Liability in India*, THE ECONOMIC TIMES (Aug. 29, 2018), [www.medianama.com/2018/08/223-india-intemmediary-rules-sc-notice-to-whatsapp/](http://www.medianama.com/2018/08/223-india-intemmediary-rules-sc-notice-to-whatsapp/).

<sup>23</sup> *Google india v. visaka industries*, A.I.R 2017 (NOC 582) 193(India).

<sup>24</sup> Giancarlo Frosio, *Landmark Intermediary Liability Decision from the Indian Supreme Court* (March 27, 2015), <http://cyberlaw.stanford.edu/blog/2015/03/landmark-intermediary-liability-decision-indian-supreme-court>.

Since the IT Act, came in the year 2000 and this Act, faces a lot of criticism from the public and legal community. Conditions are becoming worse that lead to the amendment in the IT Act, 2000 is replaced with the IT Amendment Act, and 2008 has introduced the infamous section 66A. This section defines the punishment for sending “offensive” messages through computer and any other communication devices. And convict can fetch a maximum of three year jail and fine. The main problem with this section is what is “offensive”. It is very difficult to decide which is offensive or which is not. Apart from Section 66A the Information Technology (Intermediary Guidelines) Rules, 2011.

Also face criticism while section 79 of this Act, exempt the liability of the intermediaries in certain cases. Furthermore, the information technology (procedure and safeguard for blocking for access of information by public) rules, 2009 provide the page to block without any notice given to public and this fails to meet the natural justice. After some time the section 66A of the information technology Act, was struck down because of the violation of article 19(1) (a) and not falling under the scope of ‘reasonable restriction’ under the article 19(2) of Indian constitution. While the supreme court in the landmark judgment **ShreyaSinghal v. Union of India**<sup>25</sup> not only upheld the freedom of speech and expression but also narrowed down the law pertaining to protection of rights of online intermediary like twitter, Facebook, WhatsApp or other social media called ‘intermediaries’ from liability under the

<sup>25</sup>(2013) 12 SCC 73.



section 79 of the information technology Act, 2000. Further the court also held that the intermediary is required to take down or block content only after the notice from the government agency or a court order and not the discretion of the other member. The process of blocking is entirely secret and ex facie fail to meet constitutional safeguard of natural justice.<sup>26</sup>

The Delhi high court in the case **Super Cassettes Industries Ltd v. MySpace Inc**<sup>27</sup> (called “MySpace”), held that the proviso to section 81 of IT Act, does not provide defense of safe harbor to intermediary liability against copyright claims. Further the court held that the immunity under section 79(1) of IT Act, is not available unless due diligence requirement is fluffed under sub section 2.<sup>28</sup> In **Sabu Mathew George v. Union of India**<sup>29</sup> the Supreme Court directed Google, Microsoft and Yahoo to “auto-block” the advertisement related to sex determination. That imposes criminal liability for imposing or displaying any advertisement that can lead to knowledge of the unborn child the applicant enforce under the section 22 of Pre-conception and Pre-natal Diagnostic Techniques Act.<sup>30</sup> The court held the order in November 2016.<sup>31</sup>

<sup>26</sup>Common Cause v. Union of India, W.P. (c) NO.21 of 2013.

<sup>27</sup> 2011 SCC OnLineDel 3131: (2011) 2 MIPR 303.

<sup>28</sup>*Ibid.*

<sup>29</sup> (2015) 11 SCC 545.

<sup>30</sup> (1944).

<sup>31</sup>Arpita, *Roundup of Sabu Mathew George v. Union of India: Intermediary liability and the ‘doctrine of auto-block*, LEGALLY INDIA (Feb. 3, 2017), [www.legallyindia.com/views/entry/roundup-of-sabu-mathew-george-vs-union-of-india-intermediary-liability-and-the-doctrine-of-auto-block](http://www.legallyindia.com/views/entry/roundup-of-sabu-mathew-george-vs-union-of-india-intermediary-liability-and-the-doctrine-of-auto-block).

The European commission has narrowed the limitation of e-commerce for online intermediary liability and putting in place a “fit for purpose”- or vertical - regulatory environment for platform and intermediaries. It is planning to introduce enhanced obligation on websites that deal with the third party content.<sup>32</sup>

## 5. DATA PROTECTION IN INDIA

In India there is no hard and fast rule for the protection of data, but adopted the sectorial approach. There are almost fifty sectorial laws, policies, and regulations that deal with the concept of privacy<sup>33</sup>, also including legislation in the financial<sup>34</sup>, and health.<sup>35</sup> In the context of internet and digital information, the information technology Act<sup>36</sup> used the term privacy protection. This is lack of awareness on privacy in India.<sup>37</sup> The term privacy is different in United States and in India, in India “privacy” is still

<sup>32</sup>Giancarlo F. Frosio, *Internet Intermediary Liability: Wilmap, Theory and Trends*, 13 IJLT, 16, 30-31 (2017).

<sup>33</sup> Kessler, Ross & Hickok, *A Comparative Analysis*, supra note 44.

<sup>34</sup> Chapter VI (Sections 19 to 22) of the Credit Information Companies (Regulation) Act 2005 lays down, in detail, the requirements that are to be complied with by a Credit Information Company while conducting its business.

<sup>35</sup> For example, Regulation 1.3 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 provides for the maintenance of medical records and the procedure to be followed while disclosing these records.

<sup>36</sup> (2000).

<sup>37</sup>PonnurangamKumaraguru&NiharikaSachdeva, *Privacy in India: Attitudes and Awareness. 2.0*, INDRAPRASTHA INSTITUTE OF INFORMATION TECHNOLOGY (Nov.22, 2012),

[http://precog.iiitd.edu.in/research/privacyindia/PI\\_2012\\_Complete\\_Report.pdf](http://precog.iiitd.edu.in/research/privacyindia/PI_2012_Complete_Report.pdf).



construed as the term of personal space whereas in United States “privacy” is used in context of financial information and identity theft.

## 6. INTERMEDIARY LIABILITY IN UNITED STATE OF AMERICA

Internet intermediary liabilities are of two types that are primary and secondary by nature primary liability is due to the intermediary’s own act and omission. Whereas secondary liability is due to unlawful user generated content, may either intermediary contributed to it or have the knowledge of the same. The regulatory regimes in the world have introduced stringent laws that increased the use and misuse of the intermediary liability. Intermediary comes under the fire of action of user and third party generated content. While fundamental jurisdiction of United States of America has developed the safeguard to promote internet intermediary. However in developing countries like India are still struggling to establish uniform and coherent limits of internet intermediary.<sup>38</sup> As we all know that United States of America is the first place where mostly electronic and internet related things are discover for use of all people across the world.<sup>39</sup> So it is common to know that United

States has passed legislation earlier in 1990, to encourage the development of intermediary and provide the protection from the content posted by the user or the third party.<sup>40</sup> Also see in US, previously the communication Decency Act (called CDA)<sup>41</sup> and the “Digital Millennium Copyright Act” (called “DMCA”) deals with intermediary liability. While section 230 of the CDA caters to claims of privacy invasion, defamation tortuous offences and third party negligence, the claims against intellectual infringement, criminal law and the Electronic Communication Privacy Act, related offence that recourse under section

the DMCA. In US courts have been antipathetic in dismissing petition on the defense of immunity in absence of conclusive determination that online intermediary did not contribute and not connected to the development of the content. However, interaction with the content not lead to loss of immunity under the provision, but related to the factum of publishers such as publish or altering or removing content. In the case law **Levitt v. Yelp! Inc**<sup>42</sup>, where in case the defendant yelp! Has recorded the views of certain business, the court held that the

<sup>38</sup> Joe Karaganis, *Media Piracy in Emerging Economies*, SOCIAL SCIENCE RESEARCH COUNCIL (Mar.25, 2011),

<https://www.ssrc.org/publications/view/C4A69B1C-8051-E011-9A1B-001CC477EC84/>.

<sup>39</sup> Adam Holland & Chris Bavitz, *NoC, Online Intermediaries Case Studies Series: Intermediary Liability in the United States*, BECKMEN CENTRE OF INTERNET AND SOCIETIES (May 28, 2017, 10:04 AM),

[https://cyber.harvard.edu/is2015/sites/is2015.images/NOC\\_United\\_States\\_case\\_study.pdf](https://cyber.harvard.edu/is2015/sites/is2015.images/NOC_United_States_case_study.pdf).

<sup>40</sup> AnupamChander, *Internet Intermediaries as Platforms for Expression and Innovation*, GLOBAL COMMISSION ON INTERNET GOVERNANCE (May. 20, 2016, 08:00 PM), [www.cigionline.org/sites/default/files/documents/GCIG%20no.42.pdf](http://www.cigionline.org/sites/default/files/documents/GCIG%20no.42.pdf).

<sup>41</sup> Communications Decency Act 1996 (USA).

<sup>42</sup> Paul Levy, *Levitt v. Yelp: Business Claims of Yelp Extortion Rejected*, PUBLIC CITIZEN (sep.9, 2004, 05:11PM), <https://pubcit.typepad.com/clpblog/2014/09/levitt-v-yelp-business-claims-of-yelp-extortion-rejected.html>.



intent of the defendant to edit the content was irrelevant. The court further, held that mere ‘encouragement’ of the contents of development was insufficient to waive immunity hence, intermediary like Facebook, Google have been exempted for hosting content uploaded by the third party.<sup>43</sup>

As, Facebook is used by almost 17,000 employees 350 million photo uploaded per day. 1.9 billion Users (as of 2013) therefore it is difficult for the intermediaries to monitor the content.<sup>44</sup> Further the section 203 of CDA the DMCA provides relief against intermediaries. Many online platforms such as Facebook, you tube, etc. comes under the provision of ‘safe harbor’.

## 7. RECOMMENDATIONS

The intermediary liability regime in India imposes direct liability upon intermediaries for third party content in case the due diligence requirement have not been satisfied, or where the ‘actual knowledge’ standard has not been satisfied. To comply with the principle the framework under the Information Technology Act, would need to be amended to clarify that no direct liability for unlawful content of third party.

There are various tools which may allow balancing the rights of intermediaries from undue liability and ensuring efficient removal of content. The administrative quasi-judicial committee constituted under the Blocking Rules attempts to provide such

<sup>43</sup>*Gaston v. Facebook Inc*, (2012) 312 STWL 629868; *Black v. Google Inc*, 2011 WL 5188426 (9th Cir 2011).

<sup>44</sup>Shounak Banerjee, *Intermediary Liability in USA and India: To Block or Not to Block*, 4 CMET, 1, 4-6(2017).

a model, however, it lacks important safeguards - in particular, there is no provision for judicial review of allegedly illegal content. Judicial process is to address unlawful content may be bring into the Indian substructure as well as, there is existing concern of exhaust judicial systems and processes that would have to be considered.

The liability for failure to comply with a court direction must be proportional to the action of the intermediary, which may be penalized under general laws of contempt of court decision, or others failure to comply with Section 79 of the Information Technology Act<sup>45</sup>. Therefore, it is proposed that Section 79(1), providing for safe harbor, be de-linked from the obligation to take down content upon issuance of a court order under Section 79(3) (b). Under Canada’s notice-and notice framework, the liability of intermediaries is limited to a financial penalty for failure to forward a notice of infringement to an identified third party content provider. That restricts the liability of an intermediary and aegis intermediaries from direct liability for the third parties.

## 8. CONCLUSION

The summation of the law on intermediary liability, freedom of expression and law on privacy presented by this paper suggests that India is moving in the right direction in order to achieve a balance between intermediaries’ operations and individuals’ right to privacy. Even though the constitutional status of the right to privacy in India is far from settled, the legislature has taken steps to ensure that proper safeguards

<sup>45</sup>(2000).



are developed to keep up with the privacy concerns that arise in the context of the rapidly-advancing technologies that constitute an ‘intermediary’. While the amendments to the Information Technology Act <sup>46</sup> serve to achieve these ends to a certain extent, the privacy of an individual in cyberspace will only be truly secured when it is formally recognized and applied by privacy law.

India has taken a unified approach to issue of intermediary liability by prescribing the same standard for holding such intermediaries liable irrespective of their classification. The Courts have handled blocking of internet intermediaries in a very high-handed fashion. Such practice has the potential to turn away very lucrative business of Internet intermediary that contributes to the economy and e-commerce in the country.

In fact, the Centre for Internet and Society, as part of a research project, sent take-down requests to un-named Indian intermediaries targeting perfectly legal content and six out of seven intermediaries over-complied with the notices. However, this proposed legislation is not without its gaps in coverage, which ideally will be resolved prior to it being passed. For instance, the validity of the provisions which provide for extraterritorial operation of the Act must be examined, and the means of enforcement against foreign entities need to be clearly laid down.

Furthermore, the effect of such legislation on other sectors is not clear, which are governed by specific regulations. For

example, the medical profession is governed by the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations<sup>47</sup> that provide for the maintenance of medical records and the procedure to be followed when disclosing these records. The application of the privacy principles discussed in this Report to the medical field may not be desirable; for example, if doctors are required to destroy a patient’s records after treatment, they will be left with no medical history to rely on for providing care in the future.

Finally, the legislature must specify the extent to which the privacy principles will apply to data held by the Government, as well as put in place adequate checks and balances to reign in the Government’s ability to intercept or modulate content hosted by intermediaries.

The objective should have always been the removal of infringing content whilst maintaining standards of transparency to ensure accountability, rather than indulging in a witch-hunt of intermediaries when it comes to content regulation. The dynamics of emerging economies like that of India in the context of online content and the critical bearing of unwarranted blocking on such legitimate content cannot be treated as a settled matter but one that requires immediate attention of the Government and a strong legislative intervention.

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<sup>46</sup>(2000).

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<sup>47</sup> (2002).