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THE FUTURE OF INTERMEDIARY LIABILITY IN INDIA: EMERGING ISSUES AND TRENDS

AUTHORED BY - SNEHA S TERDALE

Introduction

Intermediary liability refers to the legal accountability of online intermediaries or service providers for the content or actions of their users or third parties. In India, intermediary liability covers distinct types of online intermediaries, such as internet service providers, social media platforms, e-commerce platforms, search engines, cloud service providers, online payment systems, and more.

The main goals and principles of intermediary liability regulation in India are to balance the interests of different stakeholders, such as the intermediaries, the users, the government, and the public. Some of the important goals and principles are:

- To safeguard the users' freedom of expression and privacy and to avoid censorship and surveillance by the intermediaries or the government.
- To encourage innovation and competition among the intermediaries, and to support the development of the digital economy and society.
- To ensure the accountability and transparency of the intermediaries and provide effective remedies and redress mechanisms for the users and aggrieved parties.
- To prevent and combat the misuse and abuse of intermediaries, and to address the challenges of harmful or illegal content or actions, such as cybercrime, hate speech, defamation, terrorism, etc.

The current legal framework and judicial interpretations of intermediary liability in India are based on the Information Technology Act, 2000 (IT Act) and its amendments, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules). The IT Act provides a safe harbor or immunity to the intermediaries from liability for any third-party information, data, or communication link made available or hosted by them, subject to certain conditions and exceptions. The IT Rules prescribe due diligence and grievance redress obligations for the intermediaries and regulate the digital media platforms, such as online news and current affairs publishers and over-the-top (OTT) streaming services.

The intermediaries in India face various challenges and opportunities in complying with their legal obligations and exercising their self-regulation. Some of the challenges are:

- The lack of clarity and consistency in the definitions and classifications of intermediaries, and the scope and applicability of the IT Rules.
- The risk of over-compliance or under-compliance with the IT Rules, and the potential legal action or penalties for non-compliance.
- The conflict between the domestic laws and the global policies and standards of the intermediaries, and the jurisdictional issues and cross-border cooperation.
- The technical and operational difficulties in implementing the IT Rules, such as the
- traceability and identification of the originators of the messages, the proactive monitoring and removal of the unlawful content, the deployment of automated tools and artificial intelligence, etc.

Some of the opportunities are:

- The opportunity to engage and collaborate with the government, the users, and other stakeholders in the formulation and implementation of the IT Rules, and to provide feedback and suggestions for improvement.
- The opportunity to enhance the trust and reputation of the intermediaries, and to improve the user experience and satisfaction, by adopting the best practices and standards of self-regulation, such as the code of ethics, the transparency reports, the user education, and awareness, etc.
- The opportunity to leverage the emerging technologies and innovations, such as blockchain, encryption, cloud computing, etc., to improve the efficiency and security of the intermediaries, and to address the challenges of intermediary liability.¹

Comparative analysis of global norms and standards on intermediary liability

Online platforms and service providers face different legal regimes and challenges depending on the country or region they operate in. These regimes affect how they deal with the content and activities of their users, and how they balance the competing interests and rights of various stakeholders. Some of the main features and implications of these regimes are:

¹ SS Rana & Co., E-Commerce Intermediary Liability in India, <https://ssrana.in/corporate-laws/information-technology-law-india/ecommerce-intermediary-liability-india/> (last visited Nov. 22, 2023).

- The US grants online platforms and service providers wide immunity from liability for most types of user-generated content, except for some specific violations of intellectual property and federal criminal law. This immunity, established by Section 230 of the Communications Decency Act, has enabled the growth and diversity of the online ecosystem in the US, but has also been blamed for allowing the proliferation of harmful and illegal content online, such as hate speech, misinformation, and child exploitation.
- The EU provides online platforms and service providers with a conditional liability exemption, which protects them from liability if they act as passive intermediaries of information and do not have actual knowledge or awareness of illegal content. However, this exemption, established by the E-Commerce Directive, also imposes a duty of care on online platforms and service providers to take reasonable measures to prevent or remove illegal content, such as complying with notice and takedown requests or implementing proactive filtering tools. This exemption aims to balance the interests of online platforms and service providers, users, and rights holders, but also raises concerns about the lack of clarity, consistency, and due process in the application of intermediary liability rules.
- China imposes a strict liability regime on online platforms and service providers, which requires them to monitor, censor, and report any content that violates the law or the “socialist core values”. This regime, established by the Cybersecurity Law, also obliges online platforms and service providers to verify the real identity of their users and cooperate with the authorities in providing user data. This regime reflects the authoritarian and paternalistic nature of the Chinese government, but also infringes on the rights and freedoms of online users, as well as the innovation and diversity of online platforms.
- Brazil adopts a hybrid liability regime for online platforms and service providers, which combines elements of the US and the EU models. It grants online platforms and service providers immunity from liability for user-generated content, unless they fail to comply with a court order to remove it. It also prohibits online platforms and service providers from removing content without a court order, except for cases involving nudity or sexualacts. This regime, established by the Marco Civil da Internet, seeks to protect online free speech and due process, but also faces challenges in dealing with the volume and complexity of content removal requests, as well as the jurisdictional and extraterritorial issues of intermediary liability.

- Singapore adopts a selective liability regime for online platforms and service providers, which empowers the government to issue correction or removal orders to online platforms and service providers that host or disseminate false or misleading content that affects the public interest. This regime, established by the Protection from Online Falsehoods and Manipulation Act, also imposes criminal sanctions on online platforms and service providers that fail to comply with such orders or facilitate the use of inauthentic online accounts or bots. This regime aims to combat online misinformation and disinformation, but also poses risks of censorship and abuse of power by the government, as well as chilling effects on online expression and innovation.²

Emerging issues and trends that will shape the future of intermediary liability in India

Online platforms and their users are affected by the rights and responsibilities of intermediary liability, which is a legal area that changes and evolves constantly. New technologies and phenomena, such as artificial intelligence, encryption, blockchain, fake news, hate speech, cybercrime, or national security, create new possibilities and difficulties for intermediary liability regulation.

Artificial intelligence (AI) is the capability of machines or software to perform tasks that usually require human intelligence, such as understanding speech, analyzing images, processing natural language, or making decisions. Intermediaries can use AI to improve their services, such as offering personalized suggestions, filtering spam, detecting fraud, or moderating content. However, AI can also raise ethical, legal, and social issues, such as privacy, accountability, transparency, bias, or human dignity. For example, AI can produce or amplify fake news, hate speech, or deepfakes, which can damage the reputation, dignity, or safety of individuals or groups. AI can also violate the intellectual property rights of creators or authors, by copying, modifying, or generating original works. In India, there is no specific law or regulation that addresses AI, but some existing laws, such as the Information Technology Act, 2000, the Indian Penal Code, 1860, or the Copyright Act, 1957, may cover certain aspects of AI. For instance, in the case of [*Google India Private Limited v. Visakha Industries and Ors.*], the Supreme Court of India ruled that Google was not liable for

² ADVANI, P. R. (2013). Intermediary Liability in India. *Economic and Political Weekly*, 48(50), 120–128. <http://www.jstor.org/stable/24479053>

defamation for showing an auto-complete suggestion that linked the plaintiff's name with a criminal case, as it was based on an algorithm that reflected the search activity of users.³

Encryption is the process of transforming information into an unreadable form, using a secret key or algorithm, to protect its confidentiality, integrity, or authenticity. Encryption can be used by intermediaries and users to secure their communications, data, or transactions, from unauthorized access, interception, or modification. However, encryption can also pose challenges for law enforcement, national security, or public safety, as it can prevent or hinder the access to or the identification of the source, destination, or content of the encrypted information. For example, encryption can be used by criminals, terrorists, or extremists, to conceal their identity, location, or activities, from the authorities. In India, encryption is regulated by the Information Technology Act, 2000, and the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, which authorize the government to intercept, monitor, or decrypt any information transmitted, generated, received, or stored in any computer resource, for the purposes of national security, public order, or investigation of any offence. However, these rules also impose certain obligations on intermediaries, such as maintaining the confidentiality of the intercepted information, providing technical assistance to the government, or ensuring that the encryption used by them is compatible with the decryption facilities of the government.

Blockchain is a distributed ledger technology that records and verifies transactions or data, without the need for a central authority or intermediary. Blockchain can be used by intermediaries and users to create, store, or transfer digital assets, such as cryptocurrencies, tokens, smart contracts, or digital identities, in a secure, transparent, and decentralized manner. However, blockchain can also raise legal and regulatory issues, such as jurisdiction, taxation, consumer protection, or anti-money laundering. For example, blockchain can enable or facilitate illegal or illicit activities, such as tax evasion, money laundering, or terrorism financing, by allowing anonymous or pseudonymous transactions, across borders, without any oversight or control. In India, there is no specific law or regulation that governs blockchain, but some existing laws, such as the Reserve Bank of India Act, 1934, the Foreign Exchange Management Act, 1999, or the Prevention of Money Laundering Act, 2002, may apply to

³ Mondaq, Intermediary Liability and Copyright: A Fine Balance, <https://www.mondaq.com/india/copyright/829986/intermediary-liability-and-copyright> (last visited Nov 22, 2023).

certain aspects of blockchain. For instance, in the case of [*Internet and Mobile Association of India v. Reserve Bank of India*], the Supreme Court of India overturned a circular issued by the Reserve Bank of India, which prohibited banks and financial institutions from dealing with or providing services to any individual or entity dealing with or settling virtual currencies, such as Bitcoin, as it violated the fundamental right to trade and commerce of the petitioners.⁴

Policy options and recommendations for ensuring a balanced and proportionate intermediary liability regime in India.

Intermediary liability is the legal responsibility of online platforms and service providers for the content and activities of their users. In India, the intermediary liability regime is governed by the Information Technology Act, 2000 (IT Act) and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules). However, the current regime has been criticized for being vague, overbroad, and inconsistent with constitutional and international human rights standards. Therefore, there is a need to reform the intermediary liability regime in India to ensure a balanced and proportionate approach that respects the rights and interests of all stakeholders.

Some of the policy options and recommendations for improving the intermediary liability regime in India are:

- Adopting a clear and precise definition of intermediaries that excludes entities that exercise editorial control or influence over the content, such as digital media and online curated content platforms.
- Revising the due diligence obligations and takedown procedures for intermediaries to make them more transparent, accountable, and consistent with the principles of natural justice and fair hearing.
- Establishing an independent and impartial oversight mechanism for the implementation and enforcement of the IT Rules, with adequate safeguards for the protection of privacy, freedom of expression, and innovation.
- Harmonizing the intermediary liability regime with other relevant laws and policies, such as the Personal Data Protection Bill, 2019, the Draft National E-Commerce Policy, 2019, and the Draft National Cyber Security Strategy, 2020.

⁴ Centre for Internet and Society, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet*, <https://cis-india.org/internet-governance/intermediary-liability-in-india.pdf> (last visited Nov 22, 2023)

- Engaging in a meaningful and inclusive consultation process with all the relevant stakeholders, including civil society, academia, industry, and users, to ensure that the intermediary liability regime reflects the diverse and dynamic realities of the online environment.⁵

These policy options and recommendations aim to address the emerging issues and trends in the online space, such as the proliferation of misinformation, hate speech, and cybercrime, as well as the growing role and influence of intermediaries in shaping the public discourse and opinion.

However, they also entail some trade-offs and challenges, such as balancing the competing interests and rights of different actors, ensuring the compliance and cooperation of intermediaries, and adapting to the evolving technological and social changes. Therefore, these policy options and recommendations should be considered with caution and care, and evaluated based on their feasibility, effectiveness, and desirability.⁶

Conclusion

Intermediary liability is a complex and dynamic issue that affects the online ecosystem in India and beyond. As intermediaries play a vital role in facilitating and moderating online content and services, they face various legal and ethical challenges in balancing their rights and responsibilities. This paper has examined the current and future scenarios of intermediary liability in India, by comparing the global norms and standards, analyzing the emerging issues and trends, and proposing policy options and recommendations.

The paper has shown that the intermediary liability regime in India is influenced by multiple factors, such as the constitutional and statutory provisions, the judicial interpretations, the technological developments, the social and political contexts, and the international obligations. It has also highlighted the gaps and inconsistencies in the existing legal framework and the need for a more coherent and comprehensive approach to intermediary liability regulation. The paper has suggested some policy options and recommendations for ensuring a balanced and proportionate intermediary liability regime in India, such as revising the safe harbor rules,

⁵ Lakshmikumaran & Sridharan Attorneys, Liabilities of an Intermediary: The Indian Perspective, <https://www.lakshmisri.com/insights/articles/liabilities-of-an-intermediary-the-indian-pers> (last visited Nov 22, 2023).

⁶ Lexology, India: Intermediary Liability and Copyright: A Fine Balance, <https://www.lexology.com/library/detail.aspx?g=be8df572-55b1-499a-85cf-8b44b59ee0bc> (last visited Nov 22, 2023).

strengthening the due diligence requirements, enhancing the transparency and accountability mechanisms, promoting the self-regulation and co-regulation models, and fostering the multi-stakeholder dialogue and collaboration.

The future of intermediary liability in India is not predetermined, but rather depends on the choices and actions of various actors, such as the government, the judiciary, the intermediaries, the users, and the civil society. Therefore, it is important and urgent to engage in a constructive and informed debate on this topic, and to seek a consensus on the principles and practices that can best serve the public interest and the common good. This paper hopes to contribute to this debate and to inspire further research and action on this important and evolving issue.

