



Medha Srivastava  
Partner



Mehul Arora  
Associate



**ATLAS LAW**  
PARTNERS

April 24, 2020

---

## THE INTERMEDIARY CONUNDRUM

---

### 1. INTRODUCTION

With the enactment of the Information Technology Act, 2000 (“**IT Act**”) the legislature introduced the concept of an ‘intermediary’. At the time the IT Act was enacted, the definition of the term intermediary<sup>1</sup> was as follows:

*“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”.*

To put it simply, an intermediary is a mediator connecting two people in order to bring about an agreement between them.

Over the years, we have observed, not just the definition of intermediary evolving in scope but also the legislative attempts at determining the four walls of their obligations and liabilities given their role as

mere middle men in transactions or in communication channels.

Through this article, we would like to discuss and assess the significant changes which have taken place in the IT Act with respect to an Intermediary and the rules framed thereunder and would also like to assess the proposed amendment to the Information Technology (Intermediaries guidelines) Rules, 2011.

### 2. THE TERM INTERMEDIARY

As stated above, an intermediary is an entity who on behalf of others would store, transmit, receive the message of another person or would provide services with respect to that message.

It was soon realised that the definition of an intermediary was not sufficient. The scope of the term was widened after an amendment took place in 2008<sup>2</sup> (“**IT Amendment Act**”). One of the triggers for the amendment was the Bazeem.com

---

<sup>1</sup> Section 2(1)(w) of the Information Technology Act, 2000

<sup>2</sup> Available at [https://www.meity.gov.in/writereaddata/files/itact2000/it\\_amendment\\_act2008.pdf](https://www.meity.gov.in/writereaddata/files/itact2000/it_amendment_act2008.pdf)

case<sup>3</sup>. The website bazee.com provided an online platform/ market place where a seller and a buyer could interact. An obscene clip was listed on his website by a user for sale, as a result of which, both the user and the CEO, Mr. Avinash Bajaj, were arrested and criminally charged under the provisions of Indian Penal Code, 1860 and the IT Act. The role of bazee.com was put to scrutiny and the platform was eventually identified as an intermediary. The existing definition of an ‘intermediary’ was found wanting and therefore an amendment was made to the definition of an intermediary soon thereafter.

The revised definition is provided below:

*“Intermediary with respect to any particular electronic records<sup>4</sup>, 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*

- a) *telecom service providers,*
- b) *network service providers,*
- c) *internet service providers,*
- d) *web-hosting service providers,*
- e) *search engines,*
- f) *online payment sites,*
- g) *online-auction sites,*
- h) *online-market places, and*
- i) *cyber cafes<sup>5</sup>”.*

The revised definition of an intermediary now additionally and very clearly identified entities that facilitate transactions between two parties such as blogs, websites, social media platforms, content and service aggregators and so on.

<sup>3</sup> *Arvish Bajaj v. State*, (2005) 3 CompLJ 364 Del

<sup>4</sup> Section 2(t) of the Information Technology Act 2000, “An “electronic record” is data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche”. Section 2(o) The term “data” is defined as “a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a

### 3. OBLIGATIONS AND SAFE HARBOUR PROVISIONS

Given that an intermediary is merely a middleman in any given transaction, the intermediary’s liability or its obligations is basically the extent to which they can be held responsible for the acts of third parties at both ends of a transaction. The intermediaries neither generate nor modify any act/content on their connecting platforms, and so it would be unfair to hold them responsible for the illegal acts of the third parties. Intermediaries are recognised as an important wheel in modernising our country’s economy and in order to ensure that this wheel does not stop spinning, the Government of India, came up with laws protecting intermediaries from any disproportionate liability by introducing safe harbour provisions in the IT Act.

Section 79 of the IT Act, introduced *vide* the IT Amendment Act acts as a safe harbour provision for all the intermediaries. It explicitly states that intermediaries shall not be liable for any third party information, data or communication link made available by them. The IT Act extends the safe harbour provisions to those cases where the intermediaries only act as a facilitator and don’t have any role in the creation or change of any information or data. The provision however makes the safe-harbour protection contingent upon the intermediary removing any unlawful content on its computer resource on being notified by the appropriate authorities or upon receiving actual knowledge. The safe harbour provision further provides that the

*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”*

<sup>5</sup> Section 2(1)(w) of the Information Technology Act, 2000

intermediary should neither initiate the transmission, nor select the receiver of the transmission, nor modify the information contained in the transmission and should ensure the exercise of the necessary due diligence while discharging its duties. Further, it also states that the intermediary should not conspire, abet or induce the commission of an unlawful act.

A few years after the IT Amendment Act, the Government of India notified the Information Technology (Intermediaries Guidelines) Rules, 2011 (“**Intermediaries Rules**”)<sup>6</sup>. The Intermediaries Rules, *inter alia*, brought forth the following conditions, which all intermediaries need to adhere to ensure their safe-harbour protection.

- a) The intermediary shall publish the terms and conditions, rules and regulations and privacy policy of use of its platform.
  - b) Such rules and regulations, terms and conditions or user agreement shall inform the users not to host, display, upload, modify, publish, transmit, update or share any prohibited content.
  - c) The intermediary shall not initiate or select the receiver of transmission and host, publish, select or modify any prohibited information.
  - d) The intermediary on whose platform the information is stored or hosted, shall within thirty six hours of the knowledge (whether self or when informed by affected persons) of prohibited content on its platform act upon such prohibited content. Further the intermediary shall preserve such information and associated records
- e) for at least ninety days for investigation purposes.
  - e) The intermediary shall inform its users that it has the right to terminate the access of any user who is in non-compliance with the above mentioned rules.
  - f) The intermediary shall strictly follow the provisions of the IT Act or any other laws for the time being in force.
  - g) When required by lawful order, the intermediary shall provide information or any such assistance to government agencies who are lawfully authorised for investigative, protective, cyber security activity.
  - h) The intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable security practices and procedures and sensitive personal Information) Rules, 2011.
  - i) The intermediary shall report cyber security incidents and share such incidents with the Indian Computer Emergency Response Team.
  - j) The intermediary shall not knowingly deploy, install or modify the technical configuration of computer resource or become party to any such act provided that the intermediary may develop, produce, distribute or employ technological means for the sole purpose of performing the acts of securing the computer resource.

---

<sup>6</sup> Available at [https://meity.gov.in/writereaddata/files/GSR314E\\_10511%281%29\\_0.pdf](https://meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdf)

k) The intermediary shall publish on its website the name of the Grievance Officer and his contact details as well as mechanism by which users who suffers as a result of violation of these rules can notify their complaints The Grievance Officer shall redress the complaints within one month from the date of receipt of complaint.

#### 4. LIABILITIES AND THE LEGAL CONUNDRUM

In spite of the various amendments from time to time, the determination of an intermediary's liability has not been an easy task, as is evidenced by the jurisprudence in this regard. In this section we will evaluate some of the judgments of the Supreme Court and the High Courts that have attempted to do the same.

a) The Shreya Singhal case<sup>7</sup>

The case addressed the question on whether an intermediary can be held liable for not taking down objectionable content posted on social media platforms. Shreya Singhal, who was the petitioner in this case, assailed the Intermediary Rules and contested that an intermediary is a person who is supposed to offer a neutral platform through which persons may interact with each other over the internet, and it must therefore not take down content from its platform upon receiving request from a non- governmental person as that would be in direct conflict with the *Right to Freedom of Speech and Expression* enshrined in the Constitution of India.

The Supreme Court of India confirmed that an intermediary must receive a court order/notification from a government agency for removing specific

information/content and only then it is under an obligation to take down any such content.

b) Myspace v. Super Cassettes Industries Ltd.<sup>8</sup>

Myspace is a platform for user generated content. Myspace as a platform ensured compliance with the non-involvement requirements under section 79 of the IT Act, at the same time performing its diligence under rule 3 of the Intermediary Rules. Certain infringing content was posted on the platform by certain users and a music production company 'T-Series' accused the platform of being a secondary infringer by aiding the infringing content. It further required Myspace to take down all infringing content belonging to T-Series. MySpace was not held liable as it had met the requirements under section 79 of the IT Act and rule 3 of the Intermediary Rules. Having said that, the Delhi High Court clarified that MySpace would be liable for infringement in spite of having complied with section 79 of the IT Act and rule 3 of the Intermediary Rules, only if it failed to take down infringing content specifically brought to its knowledge. Myspace was placed under an obligation to take down all infringing content pointed out by T-Series within 36 hours. The court also clarified that a generic request by T-Series to take down infringing content without identifying the actual and specific infringing content would not be considered while determining Myspace's liability. The request has to be for specific infringing content.

c) Christian Louboutin case<sup>9</sup>

<sup>7</sup> *Shreya Singhal v. Union of India*, (2015) 5 SCC 1

<sup>8</sup> FAO(OS) 540/2011, C.M. APPL.20174/2011, 13919 & 17996/2015

<sup>9</sup> *Christian Louboutin SAS v. Nakul Bajaj & Ors*, Civil Suit No. 344/2018

This case is particularly important because it was the first time that the Delhi High Court decided on the issue of trademark infringement by online e-commerce platforms that have maintained that they are immune from liability by virtue of Section 79 of the IT Act and also differentiated between the active and passive roles of an intermediary.

In this case, the plaintiff, Christian Louboutin's business was to manufacture high end luxury shoes and to sell its products through authorized dealerships. The defendant, Darveys.com was an e-commerce platform that markets itself as a luxury brands marketplace. The plaintiff alleged that the defendant sold counterfeit products bearing the plaintiff's name on its website. The defendant argued that there was no infringement on its part as the goods sold on its platform were genuine and claimed that its entitlement to protection under Section 79 of the IT Act.

The Delhi High Court in this case, observed that it has to be seen whether the platform is taking adequate measures to ensure that no unlawful acts are committed by the sellers. Measures include the manner in which the terms of the agreements entered into between the sellers and the platform are enforced, consequences of violation of the terms, among others. The Delhi High Court noted that the elements summarised above would be key to determining whether an online marketplace or an e-commerce website is 'conspiring, abetting, aiding or inducing' and is thereby contributing to the sale of counterfeit products on its platform.

It also examined the definition of 'intermediary' under section 2(w) of IT Act

and also discussed an intermediary's position in the EU, the US and in India and Concluded that the defendant is more than an intermediary and exercises complete control over products being sold. Therefore, the conduct of the relevant intermediary in failing to observe 'due diligence' with respect to intellectual property rights could amount to conspiring, aiding, abetting or inducing unlawful conduct would disqualify it from the safe harbour exemption, as per Section 79(3)(a) of the IT Act.

## **5. PROPOSED AMENDMENTS TO THE INTERMEDIARY GUIDLEINES**

The debate over an intermediary's liability has also taken a new form with time. What was initially intended to shield technology providers in the chain of flow of communication, later evolved into a law also governing a different kind of service providers – online platforms for services/communication. The many unresolved questions in relation to intermediaries, their status and their liabilities led the lawmakers to act and further amendments were proposed to the Intermediary Rules in 2018<sup>10</sup>. A summary and comparative analysis of the present rules and the proposed rules is provided below:

---

<sup>10</sup> Available at [https://meity.gov.in/writereaddata/files/Draft\\_Intermediary\\_Amendment\\_24122018.pdf](https://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf)

<u>S.No.</u>	<u>Present Rule</u>	<u>Proposed Rule</u>	<u>Our Views on the Proposed Rule</u>
1.	The intermediary shall publish the terms and conditions, rules and regulations and privacy policy of use of its platform. Such rules and regulations, terms and conditions or user agreement shall inform the users not to host, display, upload, modify, publish, transmit, update or share any prohibited information	As per the proposed rule, the prohibited content will also include content which promotes consumption of tobacco or intoxicating products and content which threatens the critical infrastructure of India.  An intermediary is now also required to warn its users at least once a month, of their need to comply with the intermediary's terms of use.	There is no clarity on the method to be used for notifying users. It may also impact user experience.
2.	The intermediary shall provide information or any such assistance to government agencies who are lawfully authorised for investigative, protective, cyber security activity, when required by law.	As per the proposed rule, the intermediary has to assist any government agency within 72 hours of communication. Such request can be made through electronic means also. If the authorized functionaries demands, then the intermediaries are also required to trace out the originator of the information and break the end-to-end encryption	Tracking of the originator of the message will be against the privacy provisions under the law in India.  Genuine and pressing matters (such as matters related to terrorism, inflammatory content that poses a threat to life) such that they can be addressed within 72 hours and other matters may be addressed over a longer timeframe. This will ensure that smaller intermediaries which do not have adequate resources dedicated to enforcement efforts will be able to comply with these provisions.
3.	No corresponding provision	Intermediaries with above 50 lakh users in India are required to be incorporated in India and have a permanent, registered, physical address in India. They are also required to have a nodal officer who	There is no clarity on whether this number refers to weekly, monthly or yearly users. This provision does not clarify as to how the relevant authorities will verify the quantum of the user base of an intermediary



		shall be available 24X7 for coordination with law enforcement agencies and officers.	It may also increase operational costs of many intermediaries.
4.	The intermediary on whose platform the information is stored or hosted, shall within thirty six hours of the knowledge (whether self or when informed by affected persons) of prohibited content on its platform act upon such prohibited content. Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.	As per proposed rule, intermediaries are required to take-down content only upon receiving actual knowledge by way of a court order or upon being notified by appropriate government agency. Such take-down must occur within 24 hours of the receipt of the order and/or notification. The intermediary will have to preserve the records for a minimum of 180 days.	Smaller intermediaries may not have the institutional capacity to respond within the stipulated time. Also, in case of smaller intermediaries, failure to provide the necessary information on time may impact their defence under the safe harbour provisions.
5.	No corresponding provision	The Intermediary shall deploy technology based automated tools or appropriate mechanisms, with appropriate controls, for proactively identifying and removing or disabling public access to unlawful information or content	India is a diverse country and people speak in different languages, adding filters will not only be an expensive process but will also be an ineffective step as it may not be able to filter the content posted in languages other than English. Such filters may not be necessary for all the intermediaries, it would fully depend on the kind of business they are engaged in. It will conflict the freedom of speech of citizens. Monitoring of content would also mean that the intermediary has actual knowledge of content transmitted in its computer resource which in turn will dilute the existence of safe harbour provision.

## 6. CONCLUSION

The term intermediary has been witness to many changes in meaning through the course of the years. When the term was introduced in the year 2000, the intention was merely to cover internet service providers and other similar technology based intermediaries who enabled communication through the internet. Today, the term covers digital platforms, e-commerce portals, and social media platforms amongst others. Given the stark difference in the original scope versus the present day scope of the term, the nature of the connected rights and obligations have also evolved. While protecting technology intermediaries who enabled communication via the internet was important in the past, today a balance also needs to be worked out between the rights of the intermediary platforms and the rights of the entities using such intermediary platforms. The proposed amendments were a step towards balance creation, but as pointed out in the earlier section, the draft rules still have areas of concern, which need to be addressed. We anticipate the government to come back with further changes in line with the need for balance of rights between all stakeholders.

### ***Disclaimer***

*This article is a copy right of Atlas Law Partners. It is intended for informational purposes only. The article does not get into detailed discussions on the issues raised nor does it seek to identify all issues concerned. Further, there may have been changes to the law after publication of this article. No reader should act on the basis of any statement contained herein without seeking specific professional advice. The Firm and the authors expressly disclaim all and any liability to any person who reads this article in respect of anything, and of consequences of anything done, or omitted to be done by any such person in reliance upon the contents of this article. This article does not and is not intended to constitute solicitation, invitation, advertisement or inducement of any sort whatsoever from the Firm or its members to solicit any work, whether directly or indirectly. For any help or assistance, please email us on [admin@atlaslawpartners.com](mailto:admin@atlaslawpartners.com) or visit us at [www.atlaslawpartners.com](http://www.atlaslawpartners.com).*

**ATLAS LAW**  
P A R T N E R S