

## INTERMEDIARY LIABILITY AND SAFE HARBOUR LAWS: STRIKING A BALANCE IN THE DIGITAL AGE

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### ABSTRACT

*In the present era of the digital world, Intermediary liabilities for intellectual properties and the safe harbour laws associated with them have become significant topics. As the internet is growing through content sharing and widespread sharing, intermediaries are the ones that help in this process. Intermediary liabilities refer to the legal and potential liabilities that these intermediaries face if their users are involved in intellectual property infringement. In response to this, many nations have implemented safe harbour laws to find a balance between safeguarding intellectual property rights and supporting online creativity and innovation. These safe harbour laws provide legal protection to intermediaries under specific conditions by protecting them from liabilities. This paper focuses on how the intermediaries are striking a balance between their users and content, and how they are decreasing the gap amidst the challenges, criticisms and how safe harbour laws support them in this process.*

**Keywords:** Copyright infringement, Safe harbour provisions, Notice and Takedown, Online Intermediaries.

### INTRODUCTION

Intermediaries refer to various online platforms, Service Providers, and social networks that help in content sharing, commerce transactions, and online interactions. The notion of intermediary liabilities for intellectual property raises important issues regarding the accountability and responsibility of online platforms in the digital economy. Intermediaries fight to maintain their status as promoters of online communication and innovation, while holders of intellectual property rights call for stronger regulations to stop infringement. By establishing conditions that must be fulfilled for intermediaries to be entitled to legal protection. Safe harbour laws attempt to strike this difficult balance. These requirements include establishing notice and takedown mechanisms, enacting rules to deter infringing behaviour and working with rights holders to remedy copyright violations. However, as

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stakeholders continue to struggle with the changing environment of digital content sharing and intellectual property protection, their effectiveness and implications are still up for debate and legal interpretation.

## **UNDERSTANDING INTERMEDIARY LIABILITIES**

### **INTERMEDIARIES:**

Intermediaries refer to various online platforms, service providers, and social networks that connect users and facilitate the exchange of information, products, and services. These are essential for the creation of user-generated content, e-commerce, and online interactions. Section 2(w) of the Information Technology Act, 2000 defines an intermediary as "any person who, on behalf of another person, receives, stores, or transmits that record or provides any service concerning that record, and includes telecom service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places, and cyber cafes<sup>1</sup>". These intermediaries act as a source of communication where there is no direct communication between the parties, allowing for easy information exchange. These are known for transmitting the information they intermediate between users and can transmit content to a wide range of users. They are also known as online distribution channels. In most nations, intermediaries are protected from intellectual property infringement.

Their presence has changed how people and corporations interact, and it has created new opportunities and difficulties for legal and regulatory institutions. Although intermediaries are now important for online activity, their use poses significant legal and policy challenges. Intermediaries may find themselves involved in a variety of legal problems, such as intellectual property infringement, privacy issues, defamation, and more since they operate as channels for information and services offered by users. Intermediary liability is the liability that safeguards them from these legal challenges.

### **LIABILITY OF INTERMEDIARIES**

Section 79 of the Information Technology Act, 2000, specifically deals with the issue of liability of intermediaries in India, it states that an intermediary is not liable for any third-party information, data, or communication link made available or hosted by him except as specified in Sections 79(2) and (3) of the IT Act 2000.<sup>2</sup> In Section 79 (2) of the IT Act 2000, the third-

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<sup>1</sup> Information Technology Act 2000, s 2(w)

<sup>2</sup> Information Technology Act 2000, s 79

party information is stated as "any information dealt with by an intermediary in his position as an intermediary. According to this section, an intermediary is not liable if its only role is to provide access to a communication system over, which information is posted by a third party and transmitted or temporarily stored, or hosted. Further, it states that the intermediary is not liable if it neither initiates the transmissions nor selects recipients or changes the information contained in the message which is transmitted."<sup>3</sup>

An Intermediary is not liable for third-party information if it complies with the due diligence requirements laid down by the government in section 79 (3) of the act.<sup>4</sup> In the case of SHREYA SINGHAL V. UNION OF INDIA,<sup>5</sup> the Supreme Court of India examined the constitutionality of Section 66A of the IT Act, which encompassed provisions for the apprehension of individuals for disseminating "offensive" content on the internet. While invalidating Section 66A as being violative of constitutional rights, the court also engaged in the explication of Section 79.

The court expounded that intermediaries cannot be held accountable for content generated by third parties unless they contravene the stipulations of the IT Act and its accompanying regulations. The court underscored that intermediaries should respond to specific takedown notices from aggrieved parties and expeditiously remove or disable access to illegal content. The court provided guidelines for the requisite standard of care that intermediaries must exercise to qualify for the safe harbour provision, including the implementation of terms of service and user agreements, the explicit cautioning of users against hosting, displaying, uploading, modifying, publishing, transmitting, updating, or sharing unlawful information, and the prompt elimination or restriction of access to infringing or objectionable content upon receipt of the notice. The judgement of this case strengthened the protection granted to intermediaries under section 79, it stated clear duties and obligations of intermediaries its interpretation emphasised striking a balance between protecting freedom of speech and expression and addressing unlawful or objectionable online content.

In the case of SUPER CASSETTES INDUSTRIES Ltd V MYSPACE Inc. and ANOTHER,<sup>6</sup> The Delhi High Court examined the responsibility of intermediaries, specifically social media platforms, for copyright infringement committed by their users. The court clarified that

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<sup>3</sup> Information Technology Act 2000, s 79(2)

<sup>4</sup> Information Technology Act 2000, s 79(3)

<sup>5</sup> *Shreya Singhal v Union of India* [2015] 2 SCC 1

<sup>6</sup> *Super Cassettes Industries Ltd v Myspace Inc. Another* [2008] 148 DLT 487

intermediaries could seek protection under Section 79 if they adhered to the prescribed due diligence guidelines and promptly removed infringing content upon receiving valid notices from copyright holders.

The court emphasized that intermediaries are not expected to actively monitor all user-generated content for potential copyright violations. However, they are required to take swift action upon receiving legitimate takedown notices from copyright holders. The court highlighted the need to strike a balance between safeguarding copyright interests and preserving the operational freedom of intermediaries. This judgement outlined the importance of the safe harbour provision in section 79 for intermediaries protecting them from liability for the acts of its users. It guided the establishment of efficient notice and takedown mechanisms to address copyright infringements and clarified the responsibility of the intermediaries.

### **CHALLENGES FOR INTERMEDIERIES**

There are challenges faced by the intermediaries while attributing their responsibilities to IP infringement; some of them include determining the responsibility for intellectual property infringement. When the infringement takes place through intermediaries like online platforms, it is a very difficult task. And this includes how much control an intermediary can have over their users and how they can they keep track of their users. The worldwide scope of the internet and the laws that are different for each country pose another challenge for the intermediaries because it's always confusing when it comes to what laws to be applied in multiple places and how to enforce them.

Another challenge faced by these is the vast amount of content posted online, which makes it difficult to spot copyright infringements and strike a balance between safeguarding people's freedom of speech and expression and the infringements. Technological advancements also pose a difficulty for these and the rapid advancements in the technology can make it more challenging to find the infringement and who is responsible for it. Intermediaries may find it difficult to cope with the evolving technologies and adapt their processes accordingly.<sup>7</sup>

### **CHALLENGES WITH COPYRIGHT INFRINGEMENT**

Intermediaries, like online platforms and service providers, have a tough job when it comes to copyright infringement. They need to find a balance between allowing users to share their

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<sup>7</sup> ADVANI PR (2013) 48 Intermediary Liability in India 120

content and protecting the rights of creators. It's not easy because so much content is being uploaded, and it's hard to check all this for copyright violations, some may go for advanced technology by using automated machines but they may result in errors. In my opinion, it is very difficult for the intermediaries because they have a challenging task before them, which is to keep things fair and legal and there are many people involved in this.<sup>8</sup>

There should be prompt and effective responses when it comes to notices from copyright holders alleging infringement and should take necessary actions while abiding by the law determining liability poses a greater challenge because there are different jurisdictions and they vary which adds complexity to the determining of liability. This all should be done by maintaining a balance between content generated by the user and protecting the rights of the creator, which is the most difficult thing to be done by the intermediaries. These challenges can be completed if intermediaries identify where the problem is arising, invest in the most robust mechanisms, advanced technologies and employ knowledgeable staff, and have more legal help.

### **SAFE HARBOUR LAWS**

A safe harbour is a statutory or regulatory provision that provides immunity or protection against legal or regulatory liability under specific circumstances, subject to the fulfillment of prescribed conditions. They are relevant in many fields including banking, taxation, real estate, and corporations and apply to many laws like environmental, copyright, and criminal.

The purpose of safe harbour laws, also known as intermediary liability safeguards, is to shield intermediaries, such as social networks, service providers, and internet platforms, from liability for the acts of their users. While noting the difficulties they encounter in monitoring and regulating user-generated content, these rules acknowledge the crucial role intermediaries play in promoting the sharing and dissemination of such content. In the digital sphere, safe harbour laws offer a framework for balancing the rights and obligations of intermediaries, content producers, and users.

Section 79 of the Information Technology Act 2000 introduced the safe harbour laws which safeguard intermediaries from liability in India. Safe harbour rules keep intermediaries accountable for resolving illegal activity while encouraging businesses to continue offering venues for user-generated material by giving them legal certainty and protections.

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<sup>8</sup> ibid

Intermediaries are given safe harbour protection as an inherent protection against being held liable for actions taken by third parties. Safe harbour provisions were created to shield intermediaries from liability for the actions of third parties, provided that the intermediary exercised "due diligence." Under Section 79 of the IT Act, intermediaries are immune from liability for data, materials, and information shared by users through them but not directly related to them.<sup>9</sup>

## **FUNDAMENTAL PRINCIPLES OF SAFE HARBOUR LAWS**

Safe harbour laws for intermediaries are governed by Section 79 of the Information Technology Act and the Information Technology Rules (Intermediary Guidelines), 2011<sup>10</sup>. These establish some fundamental principles, setting out certain obligations that if adhered to by intermediaries, can protect them from liabilities. They are”

### **DUE DILIGENCE**

Due diligence must be used by intermediaries when it comes to the content stored on or transmitted through their platforms. To stop and deal with illegal acts, including copyright infringement, they must establish and put into practice suitable safeguards and practises. One way to do this is by having terms of service and user agreements that forbid users from engaging in any illegal activity.

### **NOTICE AND TAKEDOWN**

Intermediaries are obligated to respond right away to legal complaints about infringing content filed by copyright holders or their authorised agents. They must immediately remove or restrict access to the infringing material after receiving a notice. By adhering to this concept, intermediaries will take the proper steps to resolve copyright violations and defend the rights of content creators.

### **NON-INTERFERENCE WITH THE CONTENT**

In general, it is not required for intermediaries to actively monitor or restrict user-generated content for possible legal violations. They are not required to keep an overall eye on the data they send, store, or host. This principle emphasises the significance of achieving a balance

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<sup>9</sup> ‘Safe Harbour Protection India’ (S.S. Rana & Co., 12 September 2022) accessed 17 May 2023

<sup>10</sup> Information Technology Guidelines 2011

between user privacy, freedom of expression, and the necessity to combat illegal actions while acknowledging that intermediaries might not be able to evaluate all content.

### **ADOPTION OF POLICIES:**

The adoption and publication of rules and guidelines that control user behaviour and material upload on intermediaries' platforms is required. These guidelines should list the actions that are not allowed and include ways for users to report violations. Intermediaries encourage responsible user behaviour and foster a safer online environment by establishing explicit rules. If the intermediaries abide by these, there are many possible ways that they can be protected from liability for copyright infringement by the copyright holders.

### **ISSUE WITH TWITTER**

The difficulties with content moderation, spreading false information, and hate speech on social media platforms have come to light as a result of the conflict between Twitter and other stakeholders. Twitter is criticised for not doing enough to adequately handle these issues, and it struggles to strike a balance between freedom of expression and upholding a secure online environment. Allegations of inconsistent application, prejudice, and censorship have also been made regarding the management of user accounts and the enforcement of policies. Data breaches and privacy violations have prompted questions about user privacy and data security. These difficulties highlight the difficult environment that social media platforms must operate in; to ensure responsible and ethical practises in the digital sphere, continuing conversations, legislative changes, and cooperation are all necessary. These issues are generally faced by every intermediary but here Twitter is not effective in defending its liability because of all the challenges faced by it. As it is one of the major social media platforms used all over the world it had many users and vast content which made it difficult to determine liability and maintain a balance between them which led to its criticism.<sup>11</sup>

### **THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)**

In the United States, the Digital Millennium Copyright Act (DMCA) is a significant safe harbour framework that shields online service providers (OSPs) from legal liability for copyright violations committed by their customers. The DMCA has played a significant role

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<sup>11</sup> 'Twitter, the Intermediary Guidelines Rules and the Safe Harbour Protection • Software Freedom Law Centre, India' (*Software Freedom Law Centre, India • Defender of Your Digital Freedom*, 16 June 2021) accessed 14 May 2023

in defining the digital world, but it has also generated discussion and criticism about how well it balances the protection of intellectual property rights with the development of online innovation. The notice and takedown clause of the DMCA is one of its benefits. It sets a precise procedure for copyright owners to notify OSPs of alleged infringing content, and OSPs are then required to swiftly remove or disable access to the infringing content. By using this technique, copyright holders can immediately address infringement and safeguard their rights.<sup>12</sup>

This serves as a reference for the development of similar provisions in other countries, including India. The legal framework for intermediary liability in India includes certain provisions including compliance with due diligence requirements. Indian law aims to strike a balance between protecting intellectual property rights and facilitating the growth of online platforms. In India, there have been talks and debates in recent years about the need for changes to the rules governing intermediary responsibility to address new problems in the digital sphere. Using examples from global frameworks like the DMCA, certain parties have argued for the implementation of a more thorough safe harbour structure. India's unique legal, cultural, and technological circumstances will need to be carefully taken into account before implementing a system similar to the DMCA. Legislative changes would be necessary, and numerous stakeholders, such as intermediaries, civil society groups, and rights holders, would need to be consulted.

## **DRAWBACKS AND CONTROVERSIES OF SAFE HARBOUR LAWS**

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### **UNCERTAINTY REGARDING THE SCOPE OF INTERMEDIARIES' RESPONSIBILITY:**

To be eligible for legal protections under safe harbour rules, intermediaries frequently need to fulfill certain requirements and do specific things. It might be difficult and arbitrary to judge whether an intermediary has complied with these criteria. This can result in legal conflicts and ambiguity over the extent of the intermediary's obligations, making it difficult for intermediaries and right holders alike to successfully negotiate the legal system.

### **UNEVEN IMPLEMENTATION AND GLOBAL VARIATIONS:**

Safe harbour laws can differ greatly between jurisdictions, making it difficult to establish uniform standards and enforce them internationally. Legal complications may result from this

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<sup>12</sup> The Digital Millennium Copyright Act 1998



lack of harmonisation, particularly for international platforms that operate in several different jurisdictions. Additionally, it might open up opportunities for "forum shopping" and "regulatory arbitrage," in which intermediaries opt to conduct business in regions with stronger legal defences.

### **BALANCING FREEDOM OF EXPRESSION AND CONTENT SHARING**

The tight balance between preserving freedom of expression and controlling harmful or unlawful information is another topic of debate concerning safe harbour laws. There are worries about the possibility of abuse, such as the dissemination of hate speech, false information, or other harmful content, although these rules aim to offer a framework that encourages innovation and user-generated content. For policymakers and stakeholders, finding the ideal balance between protecting fundamental rights and preventing abuse is a never-ending task.

### **LIMITATIONS OF SAFE HARBOUR LAWS IN INTELLECTUAL PROPERTY ENFORCEMENT:**

Safe harbour laws may not adequately safeguard intellectual property rights, which is another disadvantage. Some claim that these regulations may provide for legal loopholes for copyright infringement, allowing intermediaries to avoid responsibility even when they are aware of or benefit from the infringement. This might make it difficult for copyright holders and content creators to enforce their claims and get paid fairly for their work. And there are many more difficulties in the case of intermediaries but if they overcome all these there would be a new era of digital development and safer rules.<sup>13</sup>

### **ADAPTING TO THE DIGITAL REVOLUTION**

In today's digital age, it is important to adapt to the digital environment, and the first thing that comes to mind when thinking of the digital environment is technology. Technology is rapidly evolving in the digital landscape, and embracing it has become a significant thing for society. These innovations have both sides they give opportunities and, at the same time, pose challenges to the present world. There are many benefits if society gets used to it, it can enhance efficiency and productivity. The biggest example, in this case, is artificial intelligence which is ruling today's world. With this, intermediaries benefit but also face challenges while adapting

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<sup>13</sup> 'Safe Harbour Protection India' (S.S. Rana & Co., 12 September 2022) accessed 17 May 2023

to these new inventions. By utilising these technologies, intermediaries may automate activities, streamline processes, and provide users with quicker and more specialised services. This can open up new creativity and help in the development process.

There are challenges when we embrace technology, there may be issues with security and privacy because these days much personal information is shared online that is sensitive, and these inventions also pose a threat to traditional methods of business. But there are challenges faced when we adapt to something new, but if we cope with them, then the path of development can be seen and it is very important for intermediaries to embrace and adapt to the new changes in technology to be able to easily develop and balance between their user's rights and copyright infringements.

## CONCLUSION

Intermediaries are crucial in sharing the information generated by the user and also addressing the issue of copyright infringement. Their main responsibility includes maintaining a balance between its user's rights and creator's rights and this is a difficult task for every intermediary because it brings many problems with fulfilling this task. There are many challenges faced by them due to their vast number of users and the vast amount of content generated through them and these issues make it difficult for the intermediaries to monitor and identify its infringement. Not only in India but worldwide, this is one of the major issues due to the wide range of jurisdictions and different laws for different nations. And due to its vast range, it is difficult for them to determine the liability. Due to these problems safe harbour laws are introduced but they brought many controversies and debates with it. They were introduced, to provide legal protection and safeguard the intermediaries in case of any liability for copyright infringement, but they faced debate and criticism, and people are asking the government to reform these laws and implement stronger rules.

The main responsibility of intermediaries includes maintaining a balance between protecting the rights of the users and protecting intellectual property rights. To this day, this remains a complex task and many fail in this and are sometimes wrongly made liable for the infringement because there will be more complexity in determining liability. These problems can be solved by ongoing discussions, providing more laws, certain provisions, the absence of confusion, stronger laws, and adaptation to the new technological advancements so that they can navigate through them and ensure a digital ecosystem where both users' rights and creators rights are given equal importance by striking a balance between them.