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From Likes to Liability: Regulating Nudity-Based Influencer Content in India

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ABSTRACT

The refusal of the Delhi High Court in 2022 to grant an injunction against obscene online content did not resolve the question of intermediary liability; it merely deferred it. That deferral exposes a structural problem in Indian digital law: the statutory framework governing online platforms was built on the assumption of a very different internet, one whose users were mere conduits rather than commercial intermediaries that profit from making hosted content visible. The rise of the influencer economy now tests that framework. This article asks to what extent social media platforms are legally liable as intermediaries for nudity-based influencer content under India's Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Confining its analysis to intermediary liability under the Information Technology Act, 2000 and the 2021 Rules, with supplementary attention to the obscenity provisions of the penal law, the article argues that the framework is structurally inadequate. It contends that algorithmic curation undermines the passive-conduit premise of safe harbour, that a due-diligence paradox penalises platforms that police content actively, and that definitional indeterminacy produces both over-enforcement and under-enforcement. Drawing instrumentally on the European Union, the United States, and Germany, the article concludes with recommendations for a graduated liability model, a specialised regulatory authority, and a statutory definition of sexually explicit content.

Keywords: *Intermediary liability, Influencer content, Nudity, Obscenity, Information Technology Rules 2021, Safe harbour, Algorithmic curation, Digital regulation.*

I. INTRODUCTION

The refusal of the Delhi High Court to grant an injunction against obscene content on online platforms in 2022 did not settle the question of liability; it merely delayed its determination. This judicial reluctance brings into focus a fundamental dilemma of Indian digital law. The statutory framework governing online platforms was constructed on the assumption of a very different internet, one whose users were conduits rather than intermediaries operating

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commercially by deriving profit from their role in making hosted content visible. It is here that the concept of the 'influencer economy' becomes critical in testing that statutory framework.

The research question animating this article is specific: to what extent are social media platforms legally liable as intermediaries for nudity-based influencer content under India's Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021? The question matters because the scale of the problem is not trivial. India is among the largest markets for social media consumption globally, and nudity-based content, ranging from semi-nude editorial imagery on Instagram to explicitly sexual content on subscription platforms, represents a significant category of user-generated and monetised material accessible to Indian users. The law governing this space is fragmented, contested, and in several respects inadequate.

The scope of this article is confined to intermediary liability under the Information Technology Act, 2000 and the Information Technology Rules, 2021, with supplementary attention to the penal provisions governing obscenity.¹ Questions of data protection, copyright, and the criminal liability of individual content creators, while tangentially relevant, fall outside its remit. Comparisons with the European Union and the United States are drawn instrumentally, to illuminate the weaknesses in India's approach rather than to propose wholesale transplantation.

The article proceeds as follows. It first traces the conceptual and statutory development of intermediary liability in India. It then develops three sub-arguments concerning the inadequacy of the current framework. It next identifies critical gaps and emerging judicial tensions, before concluding with concrete recommendations.

II. THE STATUTORY SOURCE OF INTERMEDIARY LIABILITY: THE INFORMATION TECHNOLOGY ACT, 2000

The Information Technology Act, 2000 is the principal statute regulating intermediaries in India. It was enacted to facilitate the use of the internet for commercial and governmental transactions rather than to address the ethical problems arising from user-generated content.² An 'intermediary' is defined under the Act as any person who, on behalf of another person, receives, stores, or transmits a record, or provides any service with respect to that record.

A. The safe harbour provision and its judicial interpretation

The safe harbour in the Act, under Section 79, is conditional: an intermediary is shielded from liability for third-party material provided it exercises due diligence and refrains from initiating,

¹ The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India), s. 67.

² The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India), s. 2(1)(w).

selecting, or modifying the material in question.³ The section was drafted in part on American and European models⁴ and, in doing so, made plain the underlying assumption that the intermediary is an impartial conduit. The judgment in *Shreya Singhal v. Union of India*⁵ played a crucial role in defining the scope of this protection by declaring Section 66A of the Act unconstitutional and, in the process, clarifying the procedure for content takedown under Section 79(3).

This reading of safe harbour was progressive in that it protected platforms from liability for hosting lawful but controversial speech. However, as Sebastian argues, it created a structural incentive for platforms to remain wilfully ignorant of content that might attract legal scrutiny, because proactive knowledge of offending material could strip them of safe harbour protection.⁶ The early judicial treatment of platform liability, exemplified by the Delhi High Court's decision in *Avnish Bajaj v. State (NCT of Delhi)*,⁷ which briefly threatened the personal criminal liability of a marketplace chief executive for third-party auction listings, revealed the fragility of safe harbour before the *Shreya Singhal* clarification.

B. The Information Technology Rules, 2021: a new compliance regime

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 constitute the most comprehensive changes to India's intermediary regulation scheme since the passing of the parent Act.⁸ The Rules provide for a layered compliance regime that distinguishes between ordinary intermediaries and 'significant social media intermediaries', defined as any platform with a user base of five million or more in India.⁹ Instagram, YouTube, and comparable platforms fall squarely within this category.

For significant intermediaries, the Rules impose additional obligations: the appointment of a Resident Grievance Officer and a Nodal Contact Person, the proactive identification and removal of child sexual abuse material, and the monthly publication of compliance reports.¹⁰ Rule 3(1)(b) requires all intermediaries to inform users that they must not host content that is

³ The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India), s. 79.

⁴ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

⁵ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

⁶ Tania Sebastian, *Intermediary Liability in India: Safe Harbour, Intermediary Duties and the Reasonable Expectations of Users*, 12 NUJS L. REV. 45, 48 (2020).

⁷ *Avnish Bajaj v. State (NCT of Delhi)*, (2005) 3 Comp LJ 364 (Del.).

⁸ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3 (India).

⁹ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 2(1)(v) (India).

¹⁰ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4 (India).

obscene, pornographic, or sexually explicit.¹¹ The obligation to include these terms in user agreements is straightforward; the obligation to enforce them at scale is considerably less so. Kapil observes that the Rules create compliance obligations without establishing the evidentiary and procedural scaffolding necessary to make enforcement meaningful.¹²

The statutory architecture is further complicated by the absence of a codified definition of obscenity adapted to the digital context. The penal provision on obscenity,¹³ drawn from Victorian-era jurisprudence, was interpreted in *Ranjit D. Udeshi v. State of Maharashtra* through the Hicklin test, which asks whether the material tends to deprave and corrupt minds open to immoral influences.¹⁴ This test, though subsequently modified by Indian courts to adopt a more contextual standard, remains structurally ill-suited to the heterogeneous and globally produced character of online nudity content.

III. THREE STRUCTURAL DEFECTS IN THE PRESENT FRAMEWORK

Three considerations demonstrate that the rules on intermediary liability, when applied to nudity-based influencer content, are inadequate. First, the framework misunderstands the nature of modern platforms. Second, it creates compliance obligations that are difficult to satisfy. Third, it leaves the scope of prohibited material unclear, producing both over-enforcement and under-enforcement. Taken together, these defects show why the intermediary liability framework requires reform.

A. Algorithmic curation undermines the passive-conduit premise

The conceptual foundation of safe harbour is the assumption that intermediaries are neutral conduits, entities that transmit information without exercising editorial discretion over it. This article submits that Instagram, YouTube, and comparable platforms have not functioned as passive conduits since at least 2012, and that the failure of Indian law to reckon with this transformation is the most fundamental deficiency of the current regime.

These platforms use algorithms to determine what content to show users, and those algorithms are designed to select content that will keep users engaged for as long as possible. A nudity-based influencer post does not appear on a user's feed at random; it is placed there by a platform's algorithm, which the platform has built, tested, and refined to maximise viewing

¹¹ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(1)(b) (India).

¹² Rishabh Kapil, *Platform Liability and the Regulation of Online Speech in India*, 7 INDIAN J.L. & TECH. 101, 107 (2022).

¹³ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), s. 292.

¹⁴ *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

time. The platform actively amplifies the content it predicts will engage the user, and it does so in order to derive revenue from that engagement.¹⁵ Malviya argues compellingly that when a platform's algorithm functions as an editor by choosing what content a user sees, the platform assumes a degree of editorial control that is functionally indistinguishable from the editorial discretion exercised by publishers.¹⁶ If that argument is correct, and this article submits that it is, the passive-conduit premise underpinning safe harbour does not apply.

The Delhi High Court observed in *Christian Louboutin SAS v. Nakul Bajaj* that a platform which selects what content to display, charges for access, and profits from it cannot claim to be a neutral intermediary.¹⁷ That decision, however, concerned trademark infringement, so its applicability to nudity-based content must be considered with care. *Christian Louboutin* is a useful starting point, but its relevance to obscene and nudity-based content requires further analysis. The gap between what the law permits and what judicial reasoning implies is precisely where legislative intervention is needed.

The European Union's Digital Services Act addresses this lacuna by imposing enhanced due-diligence obligations on 'very large online platforms', including mandatory risk assessments for the amplification of illegal content and the provision of algorithm-free content options to users.¹⁸ India's Information Technology Rules, 2021 contain no equivalent obligation. Platforms may host and algorithmically amplify nudity-based content, take compliance fees from creators, and then claim safe harbour if a complaint is filed. This article argues that such a framework is internally inconsistent.

B. The due-diligence paradox

Safe harbour under Section 79 is conditional upon the intermediary exercising due diligence in accordance with the Rules. The Information Technology Rules, 2021 specify due-diligence obligations under Rule 3, including the obligation to publish terms of service prohibiting obscene content, to establish a grievance-redressal mechanism, and, for significant social media intermediaries, to appoint a Resident Grievance Officer.¹⁹ This article submits that compliance with these procedural obligations is being treated, by platforms and regulators alike, as a

¹⁵ Amod Malviya, *Algorithms as Editors: How Recommendation Systems Create Publisher-Level Liability*, J. CYBER L. 33, 41 (2021).

¹⁶ *Id.* at 41.

¹⁷ *Christian Louboutin SAS v. Nakul Bajaj*, 2018 SCC OnLine Del 12215.

¹⁸ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act), art. 16.

¹⁹ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(2) (India).

sufficient discharge of the substantive due-diligence requirement. That conflation is analytically unjustifiable.

The paradox operates as follows. Platforms that proactively identify and remove nudity-based content risk losing safe harbour, because proactive monitoring implies actual knowledge of the content, which can trigger liability under Section 79(3)(b).²⁰ Platforms that adopt a purely reactive posture, removing content only upon receipt of a court order or government direction, satisfy the formal requirements of *Shreya Singhal* but abdicate any meaningful editorial responsibility.²¹ The result is a perverse equilibrium in which legal compliance and the reduction of social harm are structurally opposed.

Nariman characterises this as the 'safe harbour paradox': the more actively a platform polices its content, the more legally exposed it becomes.²² This critique is particularly acute in the context of nudity-based content, where the boundary between protected expression and proscribed material is genuinely contested. The Supreme Court's recognition in *Bobby Art International v. Om Pal Singh Hoon* that nudity in art is not inherently obscene²³ complicates any algorithmic approach to content moderation, since artistic context is a matter of human interpretive judgment. Platforms confronting this uncertainty rationally choose procedural compliance over substantive engagement with content.

C. Definitional indeterminacy and the chilling effect

The third sub-argument concerns the impact of definitional uncertainty on both platform behaviour and influencer expression. The Information Technology Rules, 2021 prohibit content that is obscene, pornographic, or sexually explicit, but do not define those terms. The parent statute addresses obscenity in Section 67 of the Information Technology Act, which targets material that is lascivious or that tends to deprave and corrupt those exposed to it. Because the Rules draw on this provision, the meaning of pornographic and sexually explicit material must be sought in the Act itself. This formulation, tracing back to Hicklin, offers little practical guidance to platforms processing hundreds of millions of posts each day.

The judicial record compounds the difficulty. Indian courts have applied obscenity standards inconsistently: *Ranjit Udeshi* adopted the Hicklin test; *Sabu Mathew George v. Union of India*

²⁰ Praveen Dalal, *Proactive Monitoring and Safe Harbour: An Analysis of Intermediary Liability under Indian Law*, 9 J. INTELL. PROP. RTS. 214, 219 (2019).

²¹ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523, para. 118.

²² Rohan Nariman, *The Safe Harbour Paradox: Why Platform Immunity Undermines Digital Rights*, 14 NAT'L L. SCH. INDIA REV. 120, 129 (2022).

²³ *Bobby Art International v. Om Pal Singh Hoon*, AIR 1996 SC 1846.

applied a more contextual standard to online content;²⁴ and *Bobby Art International* introduced the recognition that community standards and artistic purpose are relevant factors. Luthra observes that this doctrinal fragmentation leaves intermediaries, which must make real-time moderation decisions at scale, without a workable legal standard.²⁵

The consequences are readily apparent. Where platforms enforce rules too rigidly, the burden falls disproportionately on individuals from already marginalised communities, who are frequently judged on the basis of appearance. Where platforms enforce rules too laxly, they permit harmful material to remain online in pursuit of profit. Marwaha identifies this as a defect of the existing rules, which were designed for entities that merely host content rather than for entities that profit from the content they host.²⁶

The free-speech dimension complicates matters further. Article 19(1)(a) of the Constitution guarantees the right to freedom of expression, while Article 19(2)²⁷ permits that right to be restricted on grounds including decency and morality. The precise scope of these restrictions in the online context remains uncertain. In *Anuradha Bhasin v. Union of India*,²⁸ the Supreme Court recognised that access to the internet is a constitutionally protected right. No court, however, has yet determined whether it is fair to hold internet companies responsible for controlling content.

IV. CRITICAL EVALUATION: GAPS, TENSIONS, AND EMERGING ISSUES

The foregoing analysis shows that the current framework is beset by structural problems. This section identifies three further dimensions: the absence of a specialised regulatory body, the jurisdictional challenge posed by offshore platforms, and the emerging tension between content-moderation obligations and data-protection rights.

India has no body that supervises online content in the manner of the United Kingdom's Office of Communications, which is responsible for online safety, or the United States' Federal Trade Commission, which ensures that influencers disclose paid advertising. India has the Ministry of Electronics and Information Technology, which administers the Information Technology Rules, 2021,²⁹ but it lacks the resources to enforce those rules effectively. The Advertising Standards

²⁴ *Sabu Mathew George v. Union of India*, (2017) 7 SCC 678.

²⁵ Geeta Luthra, *Judicial Approaches to Online Obscenity: From Ranjit Udeshi to Digital India*, 10 NUJS L. REV. 78, 85 (2018).

²⁶ Puja Marwaha, *Regulating Online Obscenity: Gaps in India's Digital Legal Framework*, 3 CHRIST U. L.J. 55, 61 (2021).

²⁷ INDIA CONST. art. 19(2).

²⁸ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

²⁹ TELECOM REGULATORY AUTHORITY OF INDIA, Consultation Paper on Regulatory Framework for Over-the-Top Communication Services (2020).

Council of India has issued guidelines for influencers,³⁰ but these are not legally binding and require only that influencers disclose when content is promotional.

The jurisdictional challenge is exemplified by offshore subscription platforms that operate no registered Indian entity yet remain accessible to Indian users and host content created by Indian influencers. Such an entity complies with Indian law only as a matter of choice, because the Information Technology Rules, 2021 contain no mechanism to compel compliance by foreign-based platforms that decline to follow them.³¹ Although the Rules require significant social media intermediaries to appoint a Grievance Officer physically present in India under Rule 4(2),³² enforcement against non-resident entities remains difficult, and the regulatory machinery to address such cases is not fully in place. The pending Kerala High Court proceedings concerning online adult-content platforms illustrate judicial awareness of this gap, but their resolution remains uncertain.³³

The tension between content moderation and data protection deserves separate attention. Effective moderation of nudity-based content requires platforms to process sensitive personal data, specifically biometric data derived from images. The Digital Personal Data Protection Act, 2023 requires data fiduciaries to obtain consent and to use personal data only for specified purposes,³⁴ yet the moderation envisaged by the Information Technology Rules, 2021 depends on extensive surveillance. The right to privacy, recognised as a fundamental right in *Justice K.S. Puttaswamy (Retd.) v. Union of India*,³⁵ operates in two directions. On the one hand, it helps prevent the non-consensual sharing of images. On the other, it constrains the enforcement of both the Digital Personal Data Protection Act, 2023 and the Information Technology Rules, 2021, because the surveillance those instruments require sits in tension with privacy.

A further problem concerns the position of influencers themselves. The Information Technology Rules, 2021 do not specify any consequences for influencers and are directed almost entirely at platform obligations. They do not make influencers directly responsible for the nudity-based content they create, which remains governed by the penal law and the obscenity provisions of the Information Technology Act. The effect is to place the entire compliance burden on platform

³⁰ ADVERTISING STANDARDS COUNCIL OF INDIA, Guidelines for Influencer Advertising in Digital Media (2021).

³¹ Kalyani Thakur, *OnlyFans and the Absence of Regulatory Clarity in India*, 5 DIGITAL L. REV. 88, 92 (2023).

³² The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4(2) (India).

³³ *In re Regulation of Online Adult Content Platforms*, WP(C) 14895/2022 (Ker. HC) (pending).

³⁴ The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India), s. 4.

³⁵ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

operators, who make moderation decisions according to commercial rather than ethical considerations, while content creators bear comparatively little responsibility.

Germany offers a comparative model. Its Network Enforcement Act imposes substantial fines on platforms that fail to remove unlawful content promptly,³⁶ thereby strengthening platform accountability. Both the Information Technology Rules, 2021 and the position of influencers require re-examination to achieve a fair allocation of responsibility. At present, influencers and platforms alike are subject to the Rules, yet influencers are not held responsible for the content they create.

V. CONCLUSION AND RECOMMENDATIONS

This article has argued that India's intermediary liability framework is structurally inadequate to regulate nudity-based influencer content, because it is premised on a model of passive platform intermediation that does not reflect the commercial realities of algorithmically curated social media. The safe harbour paradox, definitional indeterminacy, and the absence of specialised regulatory institutions collectively produce a regime that neither protects legitimate expression effectively nor imposes meaningful accountability on platforms that profit from nudity-based content.

Three concrete recommendations follow from this analysis. First, Parliament should amend Section 79 of the Information Technology Act to introduce a graduated liability model under which platforms that exercise algorithmic editorial control over the distribution of content, through recommendation engines, trending lists, or monetisation arrangements, are treated as publishers rather than passive conduits for the purposes of nudity-related content liability. This amendment should be accompanied by a statutory definition of 'algorithmic curation' to prevent avoidance through architectural re-labelling.

Second, the Government should establish a Digital Content Regulatory Authority empowered to make rules on permissible online content, to assess whether a website or application complies with those rules, and to impose penalties for non-compliance, including against platforms based abroad but accessible within India. Such a body would help to remedy the present absence of an effective enforcement mechanism and would ensure that the rules are applied consistently and fairly.

Third, the legislature should enact a statutory definition of sexually explicit content for online platforms to replace the definition currently derived from the Hicklin test under the Information

³⁶ Netzwerkdurchsetzungsgesetz [Network Enforcement Act] 2017, s. 3 (Germany).

Technology Act and the penal law. The definition should incorporate a community-standards test calibrated to contemporary Indian social norms, distinguish between content involving minors and content involving adults, and recognise the artistic and educational contexts in which nudity may be constitutionally protected.³⁷

The regulation of nudity-based influencer content is not merely a question of digital morality. It is a question about the distribution of legal power between states, platforms, and individuals in an economy where attention is the primary currency. India's current framework assigns too much de facto power to commercially motivated platforms and too little to either the state or to users. Correcting that imbalance requires legislative imagination, institutional investment, and a willingness to depart from the passive-conduit model that has governed intermediary liability for nearly a quarter-century.

³⁷ The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India), s. 13.