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# Accountability in the Digital Realm: Examining Internet Intermediary Liability

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## ABSTRACT

*In this age of technological growth, the number of internet intermediaries and their user bases has grown exponentially. These entities play an important role in today's digital world. But, this change in the digital landscape is accompanied by various challenges being faced in relation to internet intermediaries like rampant spread of misinformation and hate speech, instances of intellectual property infringement, and breaches of privacy. The current legal system in India seeks to address these issues by imposing certain obligations on these intermediaries. However, a critical question arises in relation to the sufficiency and efficiency of these regulations in light of the safe harbour principle. This study reveals that the level of liability for intermediaries despite the regulations is relatively low. Although specific conditions are set for obtaining safe harbor, they represent a minimal threshold easily met by intermediaries.*

**Keywords:** *Internet Intermediaries, Accountability, Content Regulation, Information Technology Act, 2000, Safe Harbor Principle.*

## I. INTRODUCTION

The fast expansion of the internet has transformed the way information is transferred, and internet intermediaries have emerged as critical participants in facilitating this process. The Information Technology Act, 2000 defines an 'intermediary' in Section 2(w) of the Act as "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 telecom service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes". Due to the increase in users and consumers, internet intermediaries today face various challenges concerning liability and content regulation. Finding the right equilibrium between preserving freedom of expression and mitigating harmful content proves to be a significant hurdle. Issues such as hate speech, fake news, misinformation, copyright infringement, and privacy breaches are widespread in legal and policy discussions. To grapple with these concerns, various jurisdictions worldwide have established safe harbor provisions, extending a measure of protection to intermediaries for content generated by users.

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Nevertheless, the application of these provisions differs across jurisdictions, underscoring the dynamic nature of intermediary liability. In India, the Information Technology Act of 2000, in conjunction with the Intermediary Guidelines and Digital Media Ethics Code, constitutes the foundation of legislation governing intermediary liability. Additionally, judicial interpretations and discussions have played a key role in developing intermediary liability in India. These legal precedents reinforce the importance of safe harbor provisions and underscore the necessity for diligent action in addressing unlawful and copyright infringing content.

This paper first deals with the basic concept and working of internet intermediaries. Challenges faced by these intermediaries specifically in relation to content posted by users. Further, the protection given under safe harbour to them is also discussed along with its conditions. The legislative framework concerning internet intermediaries is discussed in light of the Information Technology Act of 2000, the Intermediary Guidelines and Digital Media Ethics Code and the Copyright Act, 1957. Lastly, the contemporary legal judgements are also discussed to get an in - depth understanding of the concept.

## **II. INTERNET INTERMEDIARIES**

Internet intermediaries, also known as online service providers or platform operators, are entities that provide services enabling the transmission, storage, or retrieval of data between users. These intermediaries perform an important role in the operation of the digital ecosystem, serving as bridges between content creators and consumers, while enabling seamless communication and exchange of information.<sup>2</sup>

Internet intermediaries come in various forms, including social media platforms, search engines, online marketplaces, hosting providers, and more. Social media platforms like Facebook, Twitter, and Instagram connect millions of users globally, enabling them to share personal experiences, thoughts, and media content. Search engines like Google and Bing allow users to access a vast array of information at their fingertips. Online marketplaces such as Amazon and eBay facilitate e-commerce by connecting buyers and sellers from different corners of the world.

Additionally the consumers for over the top (hereinafter “OTT”) platforms have also increased in India in the past decade. OTT media services refer to content delivery platforms that directly transmit media to users via the World Wide Web on their demand. “On demand” refers to a

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<sup>2</sup> Veloce Network, “What Is An Internet Intermediary? Complete Guide” (*Veloce Network*) <<https://www.velocenet.com/tech/what-is-an-internet-intermediary/>> accessed on 29 July 2023.

system that allows a user to access, at a time of their choosing,<sup>3</sup> any electronic content that is sent over devices such as laptops, desktop applications, as well as mobile phones and tablets.<sup>4</sup> In India some of the prominent OTT players are Prime Video, Disney+Hotstar, Sonyliv and Netflix.

The importance of internet intermediaries in the digital ecosystem is multifaceted. Firstly, they empower individuals and businesses to participate in the digital age, providing a platform for expression, entrepreneurship, and economic activity. For content creators, these platforms offer unprecedented opportunities for visibility and audience reach, which is especially crucial for small businesses and artists<sup>5</sup>. Secondly, internet intermediaries enhance access to knowledge and information, enabling users to find answers to their questions, explore diverse perspectives, and stay informed about global events. This fosters a more informed and connected society. Thirdly, intermediaries play a pivotal role in promoting innovation. They allow third-party developers to build upon their platforms, spurring the creation of new services and applications. Moreover, internet intermediaries contribute significantly to economic growth, providing jobs and generating revenue through advertising, subscription fees, and transaction commissions.

However, as internet intermediaries wield considerable influence over the content circulated on their platforms, they also face challenges related to liability and responsibility. Their role as facilitators of information can lead to issues such as the spread of misinformation, hate speech, copyright infringement, and privacy breaches. Consequently, debates around their liability and the balance between free expression and harmful content have become prevalent in legal and policy discussions.

### **III. CHALLENGES FACED IN RELATION TO INTERNET INTERMEDIARIES**

Internet intermediaries have revolutionized the way people interact and access information, but their role as facilitators of communication and content sharing has brought about numerous challenges and controversies. Balancing the fundamental right to freedom of expression with the need for regulation, addressing hate speech<sup>6</sup>, fake news, misinformation, and tackling

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<sup>3</sup> Krishna Veera Vanamali, 'What is OTT platform?' Business Standard (New Delhi, 15 February 2022) <[https://www.business-standard.com/podcast/current-affairs/what-is-ott-platform-which-regulations-govern-it-122021500049\\_1.html](https://www.business-standard.com/podcast/current-affairs/what-is-ott-platform-which-regulations-govern-it-122021500049_1.html)> accessed on 29 July 2023.

<sup>4</sup> Akkiraju Akhila, 'Legal Framework of over the Top (OTT) Platforms in India', (2023) 12 (5) IJSR <<https://www.ijsr.net/archive/v12i5/SR23503195932.pdf>> accessed on 29 July 2023.

<sup>5</sup> Dishy Mishra and Devansh Mishra, 'Role and liability of the internet intermediaries: An analysis', The Daily Guardian (19 November 2021) <<https://theguardian.com/role-and-liability-of-the-internet-intermediaries-an-analysis/>> accessed on 29 July 2023.

<sup>6</sup> LSE, 'Self-Regulation of Internet Intermediaries: Public Duty Versus Private Responsibility' (LSE, 30 May 2017) <<https://blogs.lse.ac.uk/medialse/2017/05/30/self-regulation-of-internet-intermediaries-public-duty-versus-private-responsibility/>> accessed on 26 October 2023.

copyright infringement<sup>7</sup> and piracy issues are some of the most pressing concerns faced by internet intermediaries today.

One of the most significant challenges is striking the right balance between promoting free expression and curbing harmful content. Internet intermediaries often face criticism for either excessively censoring content, which may stifle free speech, or for not doing enough to prevent the spread of harmful or illegal material. The difficulty is to create a medium ground that protects users' rights to express themselves while limiting the spread of information that incites violence, encourages terrorist activity, or violates other laws.

Internet intermediaries have become breeding grounds for hate speech and the dissemination of fake news and misinformation. These issues can lead to societal unrest, undermine trust in information sources, and even incite violence. A recently released movie “Afwaah”, directed by Sudhir Mishra and starring Nawazuddin Siddiqui and Bhumi Pednekar delves into the menacing world of fake news, rumors, and doctored videos. The movie aptly discusses the nefarious potential of social media in disseminating false narratives which cause a chaos in the society.<sup>8</sup> Internet intermediaries face the daunting task of developing effective content moderation policies and automated systems that can identify and remove such harmful content promptly.

Further, OTT face problem related to the nature of the content they host, which has raised concerns related to religious sentiments, explicit content, and the language and scenes portrayed. Allegations have emerged that these platforms produce content that may infringe upon religious norms and standards, and they also host content that is considered vulgar and immoral.<sup>9</sup> Consequently, there has been a substantial increase cases pending in courts concerning these platforms.<sup>10</sup>

Internet intermediaries deal with rampant copyright infringement and piracy of digital content, including music, movies, software, and books. Despite implementing measures to combat

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<sup>7</sup> Stefan Kulk, *Internet Intermediaries and Copyright Law. Towards a Future-proof Legal Framework* (1<sup>st</sup> edn, Kluwer Law International 2018).

<sup>8</sup> Anuj Kumar, ‘Afwaah movie review: Sudhir Mishra’s night out in a rumour mill’ *The Hindu* (05 May 2023) <[<sup>9</sup> Nidhi Sinha, ‘OTT Regulatory Laws: Myth or Reality’ \(2020\) 3 \*BURNISHED LAW JOURNAL\* <<http://burnishedlawjournal.in/wp-content/uploads/2021/05/OTT-REGULATORY-LAWS-MYTH-OR-REALITY-BY-NIDHI-SINHA.pdf>> accessed 26 October 2023.](https://www.thehindu.com/entertainment/movies/afwaah-movie-review-sudhir-mishras-night-out-in-a-rumour-mill/article66815482.ece#:~:text=A%20timely%20thought%20that%20has,the%20soul%20in%20equal%20measure.> accessed 26 October 2023.</a></p></div><div data-bbox=)

<sup>10</sup> King Stubb & Kasiva, ‘Navigating Legal Challenges: Strategies for Ott Platforms to Safeguard Intellectual Property Rights and Address Taboo Content’ (22 May 2023) < <https://ksandk.com/intellectual-property/ott-platforms-legal-challenges-safeguarding-ip-rights-and-addressing-taboo-content/>> accessed 26 October 2023.

piracy, the sheer volume of user-generated content makes it challenging to detect and remove all copyrighted material. This has led to legal battles and debates about the responsibility of intermediaries in policing and enforcing copyright laws.

Additionally, Internet intermediaries also deal with the challenge of data protection of its users. One prominent hurdle is striking a delicate balance between user privacy and targeted advertising. The users have a right to privacy and the breach of their data can lead to invasion of privacy, thus intermediaries bear a significant responsibility for safeguarding user data. They must enact robust security measures and educate users about their privacy rights

#### **IV. SAFE HARBOUR PROVISIONS**

To strike a balance between the responsibility of intermediaries and the need for a free and open internet, many jurisdictions have implemented safe harbour provisions and immunity from liability frameworks. These legal mechanisms aim to shield intermediaries from being held fully accountable for user-generated content while also encouraging them to take appropriate measures to address unlawful or harmful material. Safe harbour provisions are legislative or regulatory measures that grant internet intermediaries a degree of immunity from liability for the actions of their users.

Section 230 of the Communications Decency Act of 1996 of the United States, safeguards online platforms from being treated as publishers of user-generated content. This protects them from claims stemming from content posted by users by providing a substantial legal defence.<sup>11</sup> In the European Union, the e-Commerce Directive creates a similar structure by providing safe harbour safeguards for online intermediaries. However, the EU's policy varies from that of the United States in that it emphasises on responsibility that is shared. The EU Directive requires platforms to swiftly delete or prevent access to unlawful content any time they become aware of it. It's important to note that the application of safe harbor provisions varies across jurisdictions. China and Russia have adopted a more stringent stance as compared to United States and the EU.<sup>12</sup> These countries have passed legislation that give internet platforms more responsibility for monitoring and filtering material, typically forcing them to retain user data within the country's boundaries.

The purpose of safe harbor is to promote innovation, freedom of expression, and investment in

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<sup>11</sup> AP, 'What is Section 230, the rule that made the modern internet?' The Livemint (2 February 2023) < <https://www.livemint.com/technology/tech-news/what-is-section-230-the-rule-that-made-the-modern-internet-11677022999900.html> > accessed on 27 October 2023.

<sup>12</sup> Sanhita Chauriha, 'Safe Harbor: Bridge to Innovation Amidst The Waters Of Liability?' ( Live Law, 16 October 2023) < <https://www.livelaw.in/articles/safe-harbor-bridge-innovation-amidst-waters-liability-240253> > accessed on 27 October 2023.

online services without exposing intermediaries to excessive legal risks. To qualify for safe harbor protection, internet intermediaries are usually required to meet certain conditions and take specific actions. These may include implementing a notice-and-takedown mechanism for copyright infringement claims, promptly removing or disabling access to infringing content upon receipt of a valid takedown notice, and adopting acceptable use policies to address harmful or illegal content. By complying with these conditions, intermediaries can avail themselves of the immunity provided under safe harbor provisions. While safe harbor provisions offer a level of immunity, they are not absolute. Some jurisdictions impose limitations on this immunity, especially if the intermediary is directly involved in the creation or editing of content. Additionally, safe harbor protections may not apply in cases where an intermediary has knowledge of illegal activities and fails to take appropriate action. This “actual knowledge” provision encourages intermediaries to be vigilant in addressing harmful content once they become aware of its existence. Exemptions to safe harbor provisions may also be made in cases involving serious criminal offenses, national security concerns, or other situations where the gravity of the content supersedes the usual immunity protections. Safe harbor provisions and immunity from liability frameworks are critical for maintaining a balance between the responsibility of internet intermediaries and the preservation of a free and innovative digital ecosystem. By complying with specific conditions and taking appropriate action to address unlawful or harmful content, intermediaries can enjoy a level of protection from legal repercussions, thereby encouraging the continued growth and development of the internet as a powerful global platform for communication and collaboration.

## **V. LEGISLATIONS IN INDIA**

As the internet continues to shape the way information is shared and services are delivered, internet intermediaries have become indispensable players in this digital landscape. However, their role as facilitators of content dissemination has also brought forth complex legal issues regarding liability and content regulation. In India, the liability of internet intermediaries is governed by various legislations, with the primary focus on the Information Technology Act, 2000 (IT Act), the Intermediary Guidelines and Digital Media Ethics Code (Guidelines), and the Copyright Act, 1957.

The Information Technology Act, 2000, commonly known as the IT Act, serves as the backbone for regulating electronic communication, e-commerce, and online activities in India. Section 69(C) of the IT act allows intermediaries to preserve and retain the information only for the

duration and in such manner and format as given by the Central Government.<sup>13</sup> The aim of this Section is to protect the information of consumers and to uphold their data privacy. Further, under Section 69(A) the central government has the power to direct any intermediary to block public access of any information if they believe it to be necessary and it comes under the reasonable restrictions under Article 19(2) of the Constitution. In case any intermediary fails to comply with the direction given, they will be punished with a term of imprisonment for which may extend to seven years and also with fine.<sup>14</sup> According to Section 72(A) an intermediary, gains access to material containing someone else's personal information through a legal contract and discloses it without consent, they may face penalties of up to three years of imprisonment, a fine of up to five lakh rupees, or both.<sup>15</sup>

Section 79 of the IT Act is the primary provides a crucial safe harbor provision to internet intermediaries, shielding them from direct liability for third-party content posted on their platforms. To qualify for immunity, intermediaries must meet certain conditions. One of the conditions is that the intermediaries must act as mere intermediaries, merely providing a platform for information exchange without initiating, modifying, or selecting content.<sup>16</sup> Secondly, they must exercise due diligence to ensure compliance with laws and guidelines. Further, if notified by the appropriate government authority or an affected party, the intermediary must promptly remove or disable access to content that is deemed unlawful.<sup>17</sup> If the intermediary has in any way contributed to commission of the unlawful act they will not be given this protection.

In furtherance of the obligations provided on the intermediaries under the act the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 puts additional responsibility of on the intermediaries. According to Rule 3, an intermediary is required to observe due diligence in various forms. It is required to publish the rules and regulations, privacy policy etc. for its users.<sup>18</sup> It also have the responsibility of informing its users about the type of content that is not allowed to be uploaded.<sup>19</sup> An intermediary is only allowed to store information of an user for a period of one hundred and eighty days after such user withdraws or cancels their registration.<sup>20</sup> Additionally, internet intermediaries can also be

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<sup>13</sup> Information Technology Act, 2000 (Act 21 of 2000) s 69(C).

<sup>14</sup> Information Technology Act, 2000 (Act 21 of 2000) s 69(A).

<sup>15</sup> Information Technology Act, 2000 (Act 21 of 2000) s 72(A).

<sup>16</sup> Information Technology Act, 2000 (Act 21 of 2000) s 79.

<sup>17</sup> Rajas, 'Intermediary Liability Under The Information Technology Act, 2000' (Net Lawgic, 8 December 2022) <<https://netlawgic.com/intermediary-liability-it-act/>> accessed on 29 July 2023.

<sup>18</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 3(a).

<sup>19</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 3(b).

<sup>20</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 3(h).



considered as “Data Fiduciary” under the Digital Personal Data Protection Act, 2023<sup>21</sup> (hereinafter DPDP) and hence have to follow certain obligations in order to protect personal data of users.<sup>22</sup>

Further, the Intermediary Guidelines identify ‘significant social media intermediary’ having a specified number of registered users in India who are required to follow additional due diligence like hiring a Chief Compliance Officer and using technology to identify explicit content and display disclaimers for users accessing it.<sup>23</sup> Part III of the guidelines also includes a code of ethics that online content providers must follow in connection to digital media, as well as a three-tier system to guarantee observation and adherence to the Code of Ethics. This structure includes ‘Self-regulation’ by the publishers at level one<sup>24</sup>, Self-regulation by the ‘Self-Regulating Bodies’ of the publishers by level two<sup>25</sup> and an oversight mechanism by the Central Government at level three.<sup>26</sup> In furtherance the recent Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 puts an additional obligation on the internet intermediary to inform its users not to publish and to promptly remove any information which is identified as a fake news by the fact check unit of the central government. Violation of this can act as a barrier for obtaining safe harbour.<sup>27</sup> However, this particular amendment was recently challenged in the Bombay High Court in *Kunal Kamra v. Union of India*<sup>28</sup>, where a split verdict regarding the validity of the amendment was given by the court.<sup>29</sup>

The Intermediary Guidelines and Digital Media Ethics Code provides an institutional mechanism for regulating OTT platforms. The ethical guidelines for online content publishers state that when releasing any content that could impact India’s sovereignty or compromise state security, it is imperative to proceed with careful consideration and discretion. Further publisher of online curated content are required to classify all content with ratings “U”, “U/A 7+”, “U/A 13+”, “U/A 16+”, “A”, on the basis of certain parameters given as in the code. The publishers

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<sup>21</sup> The Digital Personal Data Protection Act, 2023 (Act 22 of 2023) s 2 (ii).

<sup>22</sup> The Digital Personal Data Protection Act, 2023(Act 22 of 2023) ss 7 & 8.

<sup>23</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 4.

<sup>24</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 11.

<sup>25</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 12.

<sup>26</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 r 13.

<sup>27</sup> Sharmeen Hakim, ‘[IT Rules Amendment] No Immunity To Intermediaries That Fail To Remove Content Flagged By Fact Checking Unit: Centre To Bombay High Court’ (Live Law, 8 June 2023) <<https://livelaw.in/high-court/bombay-high-court/bombay-high-court-it-rules-amendment-central-government-fact-checking-unit-fake-information-238859>> accessed on 22 October 2023.

<sup>28</sup> WP(L)/9792/2023.

<sup>29</sup> Sharmeen Hakim, ‘Bombay High Court Delivers Split Verdict On Pleas Challenging IT Rules Amendment’ (Livelaw, 31 January 2024) <<https://www.livelaw.in/top-stories/bombay-high-court-judgment-it-amendment-rules-2023-social-media-fake-news-fact-checking-unit-kunal-kamra-vs-union-of-india-248120>> accessed on 01 February 2024.

is obligated to display such classification displaying viewer discretion. This mechanism is based on self - regulation by the OTT platforms.

There was judicial confusion related to whether Section 79 of the IT act can be applied to cases of copyright infringement since Section 81 of the Act while providing that the IT act has an overriding effect on other acts in force through its proviso stated that no person shall be restricted from carrying out any remedy given under the Copyright Act or the Patents Act, 1970. There was no uniformity in judicial decisions about this<sup>30</sup>. Recognizing this issue, the Copyright (Amendment) Act of 2012 incorporated Section 52(b) and Section 52(c), which included a form of copyright intermediary safe harbor provisions.<sup>31</sup> Thus, now, internet intermediaries can avail themselves of safe harbor protection under the Act, provided they adhere to certain conditions. Intermediaries must not have knowledge of copyright infringement on their platforms.<sup>32</sup> Upon receiving a valid notice from the copyright the intermediaries must expeditiously remove or disable access to the infringing material.<sup>33</sup>

## VI. JUDICIAL INTERPRETATIONS AND LANDMARK CASES

The judgement in *Google India Private Ltd v. M/s. Visakha Industries*<sup>34</sup> helps understand the position of liability of intermediary prior to the 2008 Amendment to the Information Technology Act, 2000 which resulted in grant of safe harbour to intermediaries. In this case two users posted on google with articles which were of defamatory nature against Visakha Industries. Against this criminal complaints were filed against google. The Supreme Court concluded that since the case was filed before Section 79 was amended with the current version that provides prolonged safe harbour protection, the amount of intermediary duty had to be established using the unamended Section 79 in existence in mid-2008. The Court ruled that publishing may occur if an intermediary capable of deleting material refuses to do so. As a result, the Court ruled that because Google did not remove the information, the case against Google could not be quashed.

One of the landmark cases related to intermediary liability in India is *Shreya Singhal v. Union of India*<sup>35</sup>. This decision is connected to Section 66A of the Information Technology Act, which

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<sup>30</sup> Super Cassettes Industries Ltd. v. Myspace, 2011 (48) PTC 49 (Del) and Vodafone India Ltd. v. R.K. Productions, 2013 (54) PTC 149 (Mad).

<sup>31</sup>Aradhya Sethia, 'The Troubled Waters of Copyright Safe Harbours in India', (2017) 12(5) 398 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3278841](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3278841)> accessed on 22 October 2023.

<sup>32</sup> Copyright Act, 1967 (Act 14 of 1957) s 51 (a) (ii).

<sup>33</sup> Copyright Act, 1967 (Act 14 of 1957) s 52(c).

<sup>34</sup> Google India Private Ltd v. M/s. Visakha Industries, (2020) 4 SCC 162.

<sup>35</sup> Shreya Singhal v. Union of India, AIR 2015 SC 1523.

criminalised the transmission of offensive materials via communication services. Two women were detained under this Section for allegedly offensive and objectionable comments on Facebook concerning the morality of closing down Mumbai following the death of a political leader. The constitutional validity of this Section was challenged by these women. The court observed that Section 66A has a chilling effect of stifling freedom of expression and thus it struck down this Section. The Court was of the held Section 79 to be valid and laid down the correct interpretation of Section 79(3) (b) to mean that if an intermediary is informed by a court order or by the relevant government or its agency that activities violating the provisions of Article 19(2) are about to occur, then the intermediary must promptly fail to take down or restrict access to such material.

Recently the Allahabad High Court in *Flipkart Internet Private Limited v. State Of U.P. And 3 Others*<sup>36</sup>, upheld that Flipkart being an intermediary was protected as per safe harbour provision. In this case, the complainant purchased certain product from Flipkart marketplace from a seller however he did not receive the product he had ordered thus he filed a criminal complaint against Flipkart. The court observed that Flipkart was merely a platform for buying of products, it is not itself the seller. The Court emphasised that an intermediary's only responsibility under Section 79(3) (b) of the Information Technology Act of 2000 is to remove third-party information upon receipt of either a court order or a notice from an authorised government entity, and nothing more and in the present case Flipkart fulfilled this liability.

The Delhi High Court in *MySpace Inc. v. Super Cassettes Industries Ltd*<sup>37</sup> examined the liability of social networking platform MySpace for copyright infringement. Super Cassettes Industries Ltd. claimed that despite informing MySpace of the copyright infringement of their content on MySpace's website, it did not take any action to remove the content, and that its business model facilitates infringement of intellectual property rights through its platform. The court determined that MySpace, as an intermediary, could not be held directly accountable for copyright infringement perpetrated by its users. The court reiterated the safe harbour provisions under the Information Technology Act protected Myspace and emphasized the intermediary was liable to take down content within 36 hours only after having "actual knowledge" of the infringement.

Further the Delhi High Court in *Christian Louboutin SAS v. Nakul Baja*<sup>38</sup>, eBay's culpability for selling counterfeit items on its website was discussed. The court ruled that eBay could not

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<sup>36</sup> Flipkart Internet Private Limited v. State Of U.P. And 3 Others, MANU/UP/3302/2022.

<sup>37</sup> MySpace Inc. v. Super Cassettes Industries Ltd, [(2017) 236 DLT 478 (DB)].

<sup>38</sup> Christian Louboutin SAS v. Nakul Baja, 2018 SCC OnLine Del 12215.

be held accountable for its sellers' infringing activity provided it swiftly removed the infringing listings after receiving information from the copyright owner. The court emphasized the importance of intermediaries adopting effective mechanisms to address infringement complaints.

In *Flipkart Internet Private Ltd. V. State of Nct Of Delhi & Anr*<sup>39</sup> the court upheld safe harbour protection for Flipkart. The complaint alleged that Flipkart was involved in deceptive and unlawful sales of DC Dermacol cosmetics, in collaboration with unauthorized resellers. Flipkart was subsequently charged under specific sections of the Copyright Act of 1957 and the Trade Marks Act of 1999. The Court determined that Flipkart had fulfilled the necessary due diligence as outlined in Rule 3(2) in this case. The Delhi High Court emphasized that for an intermediary to be held liable for the offenses alleged, an active role in the commission of those offenses must be demonstrated. Otherwise, the intermediary would be eligible for protection under Section 79 of the Information Technology Act of 2000.

#### ANALYSIS

In this technologically fast growing digital realm, internet intermediaries face a host of issues such as fake news, misinformation, and tackling, copyright infringement by its users which calls for content regulation and the need to ascertain the liability of these intermediaries in relating to the information posted on them. The general rule which is established as a result of adoption of the internationally recognised safe harbour principle for internet intermediaries is that a certain level of conditional immunity is provided to internet intermediaries. The most important element related to obtaining safe harbour principle is the “actual knowledge” an intermediary has about any unnecessary and harmful content posted and the prompt actions taken by them to deal with it. These conditions ensure that though the liability on them is not high, the intermediaries are still accountable at a great extent to be vigilant and take swift actions.

In India, the Safe Harbour provision, primarily outlined in the IT Act, sets forth specific criteria for intermediaries to be eligible for this protection. It stipulates that the intermediary must refrain from any involvement in the creation of posted content and should strictly serve as a platform. Moreover, it is required that the intermediary carries out proper checks and promptly takes action to restrict access to content that is considered unlawful when notified. These conditions, as mentioned earlier, guarantee that intermediaries are not entirely exempt from liability. While the level of accountability is relatively low, they still bear some responsibility. They cannot simply deny any responsibility for the content posted on their platform and cannot

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<sup>39</sup> Flipkart Internet Private Ltd. V. State Of Nct Of Delhi & Anr, W.P.(CRL) 1376/2020.

facilitate illegal activities through their content. Further, the intermediaries are regulated on the information they retain under the IT act and the DPDP act.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 give more specific actions that need to be taken by internet intermediaries various rules and policies related to due diligence, data privacy and content regulation needs to be followed by the intermediaries. Internet intermediaries including OTT platforms fit into the definition of “publisher” given under the rules and hence needs to follow certain self - regulation guidelines related to the content published. The practicality and efficiency of this self – regulation though regulated by the government at a higher level is still questionable. Though there is a requirement of appointment Chief Compliance Officer and self-regulating bodies by the publisher, there is still rampant unlawful content being circulated on these intermediary platforms. This situation prompts inquiries about the need for further accountability imposed on these intermediaries. This ensures that the systems in place to monitor posted content are genuinely effective, rather than being merely a theoretical safeguard.

Even though the laws establish certain conditions, recent judicial decisions lean towards granting safe harbour protection to internet intermediaries, shielding them from liability associated with user-posted content. The required due diligence and compliance obligations for these intermediaries are quite minimal, and adhering to them secures their protection. However, merely appointing individuals doesn't guarantee that these designated officers will carry out their responsibilities effectively. There must be mechanisms in place to ensure their performance is adequately monitored. Thus, there is an urgent need impose greater liability on internet intermediaries while at the same time protecting freedom of speech and expression of users and consumers.

## **VII. CONCLUSION**

Internet intermediaries have become indispensable players in the digital age, revolutionizing information sharing and communication. They offer a wide range of services, connecting users and enabling seamless interactions. Intermediaries empower individuals and businesses, foster knowledge access, and drive innovation, contributing significantly to economic growth. However, their prominent role also raises concerns about liability and content responsibility. Striking a balance between free expressions and curbing harmful content remains a challenge. As these platforms continue to shape the digital landscape, ongoing discussions on liability and regulation will be crucial to create a responsible and inclusive online environment. Internet intermediaries face a myriad of challenges in their role as facilitators of communication and

content sharing. Balancing freedom of expression with content regulation, tackling hate speech, fake news, and misinformation, as well as addressing copyright infringement and piracy are pressing concerns. Striking the right balance between promoting free expression while curbing harmful content remains a difficult task for these platforms. Effective content moderation policies and copyright enforcement measures are essential for creating a responsible and trustworthy online environment. Safe harbor provisions and immunity from liability frameworks strike a balance between intermediary responsibility and a free internet. These legal mechanisms shield intermediaries from full accountability for user-generated content, encouraging innovation and expression. Intermediaries must meet certain conditions, promptly address infringing content, and act upon actual knowledge of illegal activities. While providing protection, these provisions may have limitations and exemptions, ensuring a responsible and innovative digital ecosystem. The liability of internet intermediaries in India is a multifaceted and rapidly evolving legal subject. The Information Technology Act, along with the Intermediary Guidelines and Digital Media Ethics Code and the Copyright Act provides the legal framework that attempts to strike a balance between safeguarding intermediary immunity and holding them accountable for harmful or illegal content.

After studying the protection given to internet intermediaries under various provisions and through judicial interpretations, it becomes clear that the level of liability is intermediaries in comparatively low. Though for getting safe harbour they are required to fulfil certain conditions, these have a minimum criteria and can be fulfilled easily. However, the provisions have not gone above and beyond to ensure that internet intermediaries are truly vigilant and actively work to stop unlawful content from being accessed on their platforms. The officers appointed and committees set up only ensure compliance with the provisions however its actual effectiveness is still unknown. Hence, it is the need of the hour to assess the effectiveness of the systems set up and make the changes required to ensure that along with protection of freedom of speech and expression, they also curb unlawful content being circulated via the medium of internet intermediaries.

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