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# Must the Messenger be shot? - Liability of Internet Intermediaries


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*Don't shoot the messenger, is a famous phrase that essentially is a warning given to the receiver of the message to not hold a messenger unaccountable for the message it delivers. In this modern era of technology, the internet has ensured the ease of communication and spread of information, and the role of the messenger is obligated upon the internet intermediaries. The question remains, shall the intermediaries be liable for every activity performed by its users? This article aims to shed light upon the liability of internet intermediaries and the measures taken by law to prevent intermediaries from false allegations in India and the United States.*



**Keywords:** *liability, internet, intermediary, receiver, message.*


## INTRODUCTION

Ever since the discovery of the internet, internet access has gradually developed from being a mere technological advancement to a matter of being an intrinsic basic human right[1]. As the

[1] United National Human Rights Council, 'Report of the Special Rapporteur to the Human Rights Council on Key Trends and Challenges to the Right of all Individuals to Seek, Receive and Impart Information and Ideas of all Kinds Through the Internet' (UN Doc A/HRC/17/27, Special Rapporteur Report 16 May 2011)

internet is growing and permeating into all aspects of society, it has started to attract judicial attention for the safe and proper regulation of the information being shared.[2] In its quest to connect the world, the introduction of intermediaries like search engines and social media websites has made the spread of information easier and by doing so it also has introduced stringent laws on the account of excessive use or misuse of such online intermediaries.

Generally, these intermediaries facilitate the use of the internet.[3] They perform a wide range of functions, the most vital ones being, ensuring the free flow of communication and the spread of information. In such attempts to regulate online content, the intermediaries were burdened with the duty of ensuring the legitimacy of the content. Section 2(1)(w)[4] of the Information Technology Act, 2000 (*hereinafter*, 'IT Act'), 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-housing service providers, search engines, online payment sites, online auction sites, online market places, and cyber cafes"*[5]. The intermediaries functioning online, such as Twitter, Facebook, WhatsApp, etc., are known to be internet intermediaries. With regards to the accountability of such intermediaries, a landmark judgement of ***Shreya Singhal v Union of India***[6] was passed in the year 2015, which apart from upholding the freedom of speech and expression on the Internet, also revised a vital statutory provision about the protection of internet intermediaries. This case holds utmost relevance in this context as it clarified one of the main concerns of the online intermediaries, that is, whether an intermediary is held liable for the defamatory remarks, illicit content, and fake news posted on their respective platforms.[7]

## FROM NOTICE AND TAKEDOWN TO COURT NOTICE AND TAKEDOWN REGIME

The Court, in furtherance of narrowing down the interpretation of provisions about the protection of internet intermediaries, also transformed the notice and takedown regime into a court notice and takedown regime. Before the judgement, it was a pre-requisite for the

[2] *Ibid*
[3] *Ibid*
[4] Information Technology Act 2000, s 2(1)(w)
[5] *Ibid*
[6] *Shreya Singhal v Union of India* (2015) 5 SCC 1
[7] *Ibid*

intermediaries to remove or block access to illicit content upon being aware of its existence. Such knowledge could either be communicated to the intermediary by any affected individual or through a notification by the government or can be acquired by the intermediary itself. However, delegating the whole of the discretionary powers to these intermediaries disturbed the status quo. When the intermediaries were made the gatekeepers of the internet, they exercised this discretion in the removal of content that was permitted. The frivolous complaints made by the individuals for removal of the permitted content, and the intermediaries honouring such requests hampered the freedom of speech and expression. Moreover, the law was unclear whether the intermediary was required to take action on all or any takedown notifications.

Given the above, the Court directed the provisions of Section 79(3)(b) of the IT Act,[8] to be taken down and further narrowed down the interpretation. By doing so, the Court restricted the powers of the intermediaries to take down illegal online content.[9] Thus, the intermediary is now required to receive a court order or a notification via a government agency with regards to specific illegal content, and then only could an intermediary take down that content. It was clarified that such court order or a notification from a government-issued should strictly conform to the subject matters and must be within the ambit of Article 19(2) of the Indian Constitution[10] and anything beyond that would not attract the provision of Section 79 of the IT Act[11]. Hence, when a third party is hampered by content on an online platform, it will have to approach the government or the courts for relief.

## LIABILITY OF INTERNET INTERMEDIARIES IN THE US

The United States provided the foundation for the global Internet today. It is the birthplace of many major global Internet platforms across the world. Hence, the legislation passed far back in the 1990s about the protection of internet intermediaries in the US isn't surreal to believe. Primarily, the US follows two acts for the protection of intermediaries from liability for the

[8] Information Technology Act 2000, s 79(3)(b)
[9] *Ibid*
[10] Constitution of India, art 19(2)
[11] Information Technology Act 2000, s 79

actions of their users; the Communications Decency Act[12] (*hereinafter*, 'CDA') and the 'Digital Millennium Copyright Act[13] (*hereinafter*, 'DMCA'). While CDA caters to tortuous offences and third-party negligence, the DCMA tends to protect the claims against intellectual property infringement, criminal law, and the Electronic Communications Privacy Act-related offences.

## COMMUNICATIONS DECENCY ACT OF 1996

The CDA immunes the intermediaries through Section 230(c)(1),[14] which states, "*no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*" The Section acts as a shield to protect the intermediary from the liability of being regarded as the publisher or speaker of illicit content put up by a third party.[15] However, this shield isn't unconditional, the online intermediaries will still be liable for the violation of federal criminal law or copyright law, or sex-trafficking law. The provision aims to ward off claims of defamation and other civil claims against the intermediaries and ensures that they are protected against the claims that might otherwise hold them accountable which are the deeds of their users. Furthermore, the US Courts do not recognise the mere interaction of the intermediaries with the content as a loss to the immunity, but if the content is related to the editorial functions of the intermediary such as editing, publishing, or removal of the content, then the intermediaries are held accountable.[16]

## DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

The DMCA was passed by Congress to protect against excessive infringements of copyrights on the internet. The DMCA is one of the important laws, often known as the saviour of the web.[17] Section 512 of the DMCA incorporates the safe harbour principle, which requires the intermediaries to take down the infringing material upon being aware of its presence on their

[12] Communications Decency Act 1996
[13] Digital Millennium Copyright Act 1976
[14] Communications Decency Act 1996, s 230(c)(1)
[15] *Ibid*
[16] *Shiamili v Real Estate Group of NY Inc* (2011) 17 NY 3d 281, 289; *A-1 Technology Inc v Magedson* (NY Sup Ct 2011)
[17] David Kravets, '10 Years Later, Misunderstood DMCA is the Law that Saved the Web' (*Wired*, 27 October 2008) <https://www.wired.com/2008/10/ten-years-later> accessed 25 August 2022

platform by the copyright owner.[18] It also mandates that the intermediary must not have gained direct commercial benefit from such content where the activity can be controlled by the intermediary on its platform. A notice and takedown system is followed for the removal of the infringed content under this Act.[19] However, the copyright owner is made liable for misrepresentation if it is found that the issuance of takedown notice was made without proper consideration of the fair-use doctrine.

## LIABILITY OF INTERNET INTERMEDIARIES IN INDIA

Until 2008, India used to enter into pacts with the intermediaries like Orkut to allow the removal of content and prompt access to user data. Initially, the IT Act only catered protection to network service providers [add citation]. However, by 2008, the lacunas in the IT Act were discovered in a case named ***Sharat Babu Digumatri v Government of NCT of Delhi[20].*** An obscene MMS video was listed on the appellant's website, www.bazeee.com, for sale which is now acquired by www.ebay.in. Even though the website had filters that could restrict such contents to be listed but this particular listing couldn't be tracked. Upon investigations, the managing directors of the website were held responsible for handling the content on the website. The Supreme Court in this case held that in such a scenario an accused cannot proceed against Section 292 of the IPC,[21] which criminalises the spread of obscene content through print media but should be penalised under Section 67 of the IT Act,[22] which criminalises such act through electronic media. Hence, a special law, in this case, the IT Act prevailed over general laws.[23]

Later, one of the managing directors filed a petition challenging the above decision. It was contended that the transmission of MMS directly took place between the buyer and the seller, without the intervention of the website and the intermediaries cannot be held liable for a mere listing of such obscene content. The High Court of Delhi observed that the Indian Penal Code does not recognise the concept of automatic criminal liability of a director of a company,

[18] Digital Millennium Copyright Act 1976, s 512
[19] *Ibid*
[20] *Sharat Babu Digumarti v State (NCT of Delhi)* (2017) 2 SCC 18
[21] Indian Penal Code 1860, s 292
[22] Information Technology Act 2000, s 67
[23] *Ibid*

however, Section 67 of the IT Act applies a liability on the directors even when the company is not accounted as an accused.[24] On the appeal being made in front of the Supreme Court, this finding was overturned. It was held that "the commission of an offence by the company was an express condition precedent to attract the liability of others in charge of the company, hence, since there was no case made against the company."[25] Hence, the director was acquitted.

## SAFE HARBOR PROTECTION

Post this case, the IT Act was revised and amended. Amongst other amendments, safe harbour protection to the intermediaries was granted under Section 79(1)iii of the IT Act, which states that "*(a) if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; and, (b) if upon receiving actual knowledge or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.*"[26]

The safe harbour protection caters protection to the internet intermediaries from being held accountable for third-party's content that is shared on the intermediary's platform. It recognises an online intermediary as a mere messenger or a facilitator and guards it against the legal liabilities that could be imposed upon it for the content or information shared on its platform. Safe harbour protection has been enshrined under Section 79 of the IT Act,[27] which provides an exemption to intermediaries. However, this exemption is conditional. To avail of this immunity, an intermediary has to do due diligence as prescribed under the IT Rules.[28]

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[24] *Ibid*
[25] 'The Bazee.Com Saga Unravelled: Supreme Court Clarifies Intermediary Liabilities For Hosting Obscene Content (*Mondaq*, 2017) <https://www.mondaq.com/india/it-and-internet/572042/the-bazeecom-saga-unravelled-supreme-court-clarifies-intermediary-liabilities-for-hosting-obscene-content> accessed 25 August 2022
[26] Information Technology Act 2000, s 79(1)(iii)
[27] Information Technology Act 2000, s 79
[28] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021

## CONCLUSION AND RECOMMENDATION

The aforementioned case laws and amendments attempted at fixing the loopholes in the intermediary immunity regime. However, there are certain ambiguities left unresolved. For instance, the amendment was brought in after the case of ***Shreya Singhal v Union of India***[29]**,** where the intermediaries are now required to wait until a government notification or a judicial order is received by them. Even though limits have been placed on private censorship by online intermediaries, however, in this process slandered online content would remain in the public domain until the court order is received, and approaching the authorities is a long process. To tackle such a situation, the European Union has initiated a strict copyright protection regime that would make the intermediaries liable, and going through the long process of removal of unpermitted content would not be necessary. The European Parliament has put forth a reform that requires the respective online platforms of the intermediaries to install an 'upload filter' and holds the intermediaries accountable for the actions of their users. However, the initiative by the European Union would satisfy the needs of the copyright owners, but such filters would not always be functional when it comes to putting restraints on illicit content posted online. Internet intermediaries perform a diverse set of activities, from providing services to performing operations. For assessing their liability, the laws need to be less ambiguous and more specific towards whether or not can a liability be attracted by the intermediaries about each specific function they perform online.

[29] *Shreya Singhal v Union of India* (2015) 5 SCC 1