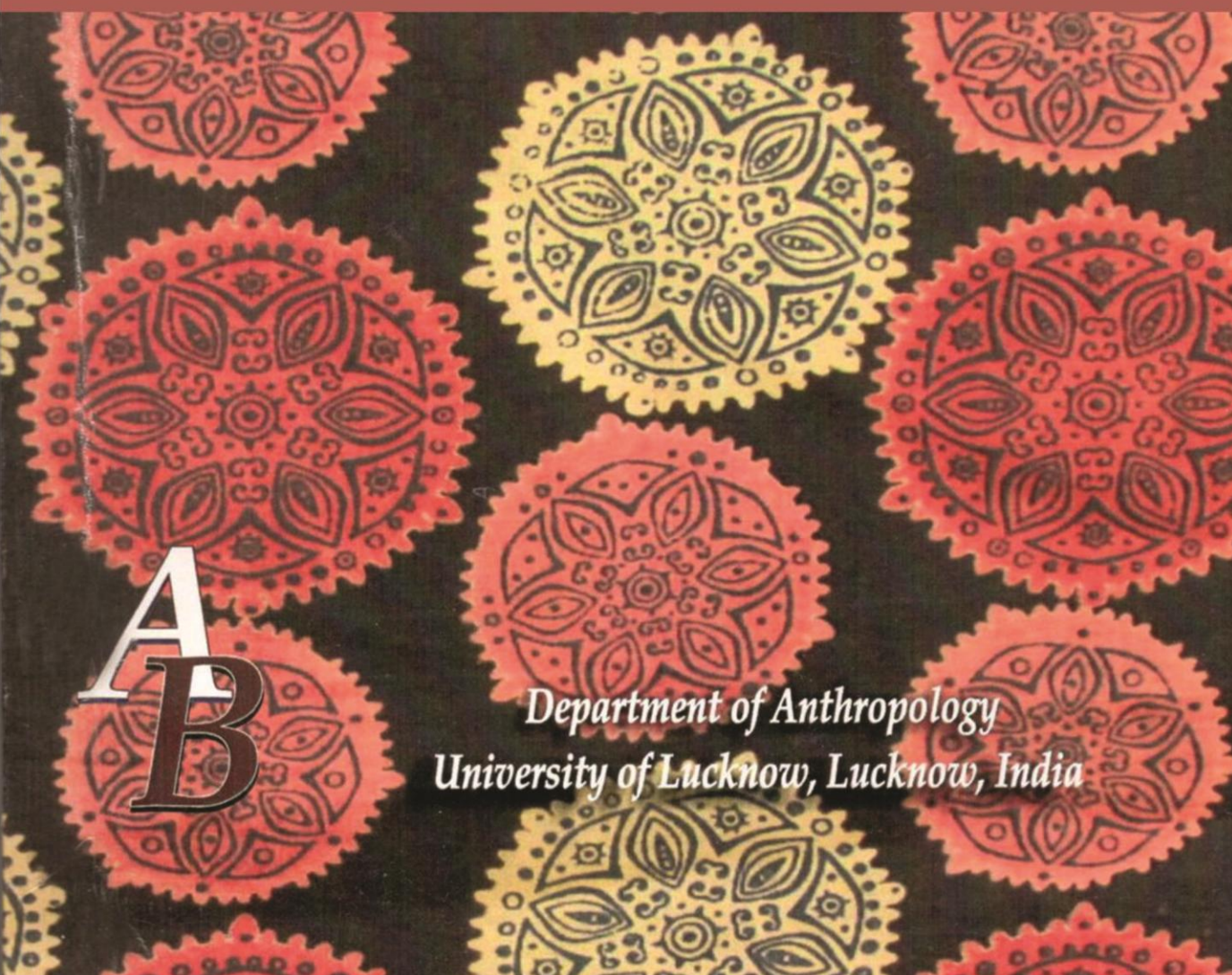


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Role and Liability of Intermediaries in Cases of Defamation in Cyberspace: An Analysis

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ABSTRACT

Cyberspace is a concept describing a widespread, interconnected digital technology. It refers to the virtual computer world, and more specifically, is an electronic medium used to form a global computer network to facilitate online communication. Cyberspace allows users to share information, interact, swap ideas, play games, engage in discussions or social forums, conduct business and create intuitive media, among many other activities. The rise of the internet and social media has led to an increase in instances of defamation in cyberspace. Although it seems that the user and the host are exchanging material via the Internet, no transaction is really completed between the two parties alone. Every Internet transaction involves a number of middlemen, and there may be more than two people involved. Intermediaries such as internet service providers, hosting services, and social media platforms play a crucial role in facilitating online communication. This article will examine the role and liability of intermediaries in cases of defamation in cyberspace in India. It will analyze the relevant legal provisions, including the Information Technology Act 2000 and the Intermediaries Guidelines Rules 2011, and the judicial decisions that have shaped the legal framework.

KEYWORDS- Cyberspace, Intermediary, Defamation, Internet, Information Technology Act

I. INTRODUCTION

The probability of utilising the internet as a platform for the transmission of defamatory material has multiplied with the exponential expansion in the use of the internet as a communication tool, necessitating a clear, straightforward interpretation of the law in this area. Although it seems that the user and the host are exchanging material via the Internet,

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no transaction is really completed between the two parties alone. Every Internet transaction involves a number of middlemen, and there may be more than two people involved.³

As "the glue" that holds the internet together and enables third parties to connect across the network, ISPs are the first people that come to a lawman's mind when the topic of responsibility arises. The Internet service provider is mostly responsible for "transmitting or broadcasting third-party content" without taking the initiative or having any input into the choice to disseminate a particular piece of content. Any individual who offers electronic access to information services is referred to as a network service provider.⁴ The primary duties of Internet service providers include building and hosting websites, managing and hosting mailing lists, and providing email services. ISPs are also in charge of offering protection against illegitimate users.

II. ROLE OF INTERMEDIARIES IN CYBERSPACE DEFAMATION

The problematic topic of system operators' liability complicates the Internet defamation legislation. The publisher of the material may also be held liable in defamation law for broadcast and print media, such as the author of a libellous newspaper post. This is occasionally the case. There are strong precedents for deciding who is liable for defamatory claims in conventional media, and the principle of holding publishers accountable for libellous information in these media has been carefully tested and established in court. On the internet, though, these matters are much more ambiguous.⁵

The biggest problem with cybercrimes on social networking sites is how to hold these service providers accountable for any offences committed there. The definition of an intermediary and its purpose must be examined before any blame can be placed on them. A network service provider known as an intermediary may also publish or transport information. In addition to serving as a crucial connection in the transmission, distribution, and publication of information on the World Wide Web, an intermediary provides an interactive wired world.

The intermediary shall include, in respect of specific electronic documentation, any person who gathers, stores or transmits those records or performs some service in relation to that record on behalf of another person. Intermediaries can be classified as information carriers who simply transmit the electronic message without scrutinising it, such as airtel.in; information publishers who publish as well as transmit the information, such as google.com; or information sellers who publish, transmit, and sell the information or product while also exercising reasonable care in its publication.

When there is the transmission of unlawful content, the topic of liability of such intermediaries arises, and such culpability is twofold: civil and criminal.⁶ "Social networking sites like Facebook.com, Myspace.net, Youtube.com, and blogging platforms like Twitter.com" post their own original content as well as third-party content that is uploaded by third parties on the website that serves as a platform for these service providers' websites. It is possible to hold intermediaries accountable for "copyright breaches, trademark infringement/dilution, privacy violations, obscenity, defamation, child pornography,

³Chris Reed, Chap 2 "From Each According to his Ability: Actors and Activities in the Internet World" in *Internet Law: Text and Materials* 24 (Cambridge University Press, 2004).

⁴ Nakul Sharma, "Information Technology Law and Practice" 186 (Universal Law Publishing co. Pvt. Ltd., Delhi, 2005).

⁵Prof. Y.R. Bhatnagar & Abhilasha Bhatnagar, "Online Defamation: A Comparative Analysis and evaluating the responsibility of the Internet Service Providers in the Indian Legal framework" 6 *International Journal of Advances in Engineering Research (IJAER)* 2013.

⁶Ernst-Jan Louwers & Prof. Corien E.J. Prens, Vol 2, *International Computer Law*, 65 (Lexis Nexis, 2004).

spamming, etc., if they act as a facilitator of third-party information, data, or communication links". Injunctions to ban or delete the offensive information, as well as civil and criminal procedures, may be brought against the intermediaries.⁷

Internet service providers serve as evidence in cases when crimes are perpetrated using either a computer as a tool or as a victim. Furthermore, any information pertaining to the emails, location, phone number, and Internet service provider address of the accused's computer can be collected from the ISP in order to take the proper action against the offender. ISPs provide email accounts that are enabled and set up for "3 POP and IMAP". When an "Internet connection is available", you may check your email using these Web-based GUI email addresses from any place and any computer. Finding an available email account when moving to a new place might be challenging.

The main issue in assessing the responsibility of ISPs and computer system operators is their knowledge of or control over the material supplied by them. Levels of obligation for publishers, distributors, common carriers, etc. varied even before the Internet Age.⁸ There is a very slight distinction between the numerous operations that ISPs are involved in. "The role of an access provider, software distributor, host, cache, or content provider can all be handled by an ISP". Since mobile content exists in a borderless environment, these online intermediaries, including ISPs, are primarily liable for content that is transmitted and frequently violates the rights of individuals arising from a contractual relationship or is simply a tort or a criminal offence, such as defamation, copyright infringement, child pornography, fraudulent misrepresentation, privacy, etc.

The intermediary, whose computer network the information is processed, posted, or written on, "shall act within 36 hours and, where appropriate, shall work with the user or owner of the information to deactivate the information" that is in violation of these rules. The intermediary shall obtain knowledge of the information by himself or shall be informed of such information "by the person concerned in writing or by email signed with an electronic signature". The intermediary must also keep these data for at least 90 days in case an inquiry is needed.⁹

III. LIABILITY OF ONLINE INTERMEDIARIES

There is no disagreement that the creator of such a posting should suffer legal repercussions, with the exception of the debate over whether persons who publish defamatory statements while engaged in a flame war should have a legal defence. The issue of how far internet service operators should be held accountable for statements that appear on their platforms, similar to conventional publishers, is more contentious.¹⁰ Whether a court views a third party as a "publisher," "distributor," or "common carrier" determines whether the third party is liable for defamation. Publishers are often responsible for the material they publish since it is assumed that they have some kind of control over it. Given that it is assumed that a distributor has no control over the information it disseminates, a distributor may only be held accountable for the information it disseminates if it is made aware of the information's nature and any claimed legal issues it may have caused and takes no action. A common carrier is a company that provides services to everyone without discrimination. As

⁷Nikita Barman, "Legal Implications of Cyber Crimes on Social Networking Websites" 5 International Journal of Scientific and Research Publications, 315(2015).

⁸Sharon K. Black, *Telecommunications Law in the Internet Age* 419(Morgan Kaufmann Publishers,2002).

⁹Dr.J.P. MISHRA, *An Introduction to Cyber Law* 67(Central Law Publications, Allahabad,2nd edition,2014).

¹⁰IAN J. LLOYD, *Information Technology Law*,554(Oxford University Press,5th edition-2011).

a result, they are required to transport all material and are therefore exempt from liability for the information they carry or send.¹¹

There are two types of service provider responsibility for defamation: publisher liability and distributor liability. Each case's liability parameters are treated separately since they vary.

1. "Liability as a distributor of Defamatory material"

"Defamation" is regarded as a tort as well as a crime in most of the legal systems of the world, as harming the reputation and prestige of a person makes the wrongdoer equally liable for harm to a person's body. A person's personal reputation is carefully guarded by legislation. Like most other illegal activity, defamation also received an increase and the crime rate went up just like electrons became the dominant means of information dissemination, whether health or incriminating.¹²

The judiciary might determine the role of internet intermediaries in defamatory issues and assign appropriate responsibility. "**Cubby Inc. v. CompuServe Inc.**¹³(CompuServe), a landmark decision on the subject, the court determined that CompuServe, as an online intermediary, was a distributor of the Rumorville publication, which they carried as part of their Journalism Forum, and thus was not liable for the defamatory statement against the plaintiff that appeared in Rumorville". The outcome was based on the First Amendment provisions which absolved the distributor for the defamatory contents if he had no knowledge of it. Though, it was decided in **Cianci v. New Times Publishing Co.**¹⁴ that ordinarily "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it" yet in several other decisions¹⁵, additionally, it was decided that distributors, book stores, and libraries are not responsible if they are unaware of the offensive material.

In **Smith v. California**,¹⁶ the court overturned an ordinance that held a bookstore liable for possessing "an obscene book, regardless of whether the shopkeeper was aware of the contents". The court regarded this provision as trying to achieve the impossible because a bookseller is neither expected nor he is capable of reading each and every book in his shop. "When CompuServe carries the publication as part of a forum that is managed by a different company, it has absolutely no editorial control over the contents". This is analogous to the librarian of a public library or a bookseller who has nothing to do with the editorial job of the books in his possession. "A computerised database is thus, functionally equivalent of a librarian or a news vendor" and hence, to put a greater liability on an online distributor as CompuServe is nothing but hampering the free flow of information which is against the letter and spirit of the First Amendment.

The "plaintiff failing to establish that CompuServe had knowledge, or had reason to know" (as required by the First Amendment) that Rumorville statement had some defamatory element; allowed the court to rightly reach the conclusion that CompuServe was

¹¹Robert Dunne, *Computers and the Law: An Introduction to the Basic Legal Principles And their Application in Cyberspace*, 83 (Cambridge University Press, 1st edition-2009)

¹²Dr. Talat Fatima, *CYBERCRIMES* 51 (Eastern Book Company, 1st edition, 2011)

¹³776 F Supp 135 (SDNY 1991).

¹⁴639 F 2d 54, 61 (2d Cir 1980).

¹⁵*Lerman v. Chuckleberry Publishing Inc.*, 521 F Supp 228, 235 (SDNY 1981); *Macaluso v. Mondadori Publishing Co.*, 527 F Supp 1017, 1019 (EDNY 1981).

¹⁶361 US 147, 152-53 (1959).

the distributor without knowledge of the contents and was hence, not liable. It is thus obvious that as CompuServe neither installed any such electronic gadget of scrutiny nor made arrangements of censorship, his job is restricted to that of a distributor editorial powers and so far as the law provisions go, he is not under obligation to pre-censorship of contents. He is thus rightly absolved from liability.

2. "Liability as a publisher of Defamatory material"

Here, the publisher, who is reviewing and editing the content to be published, is responsible before the law if such content damages someone's reputation. A judicial pronouncement of the Internet Age in "**Stratton Oakmont Inc. v. Prodigy Services Co.**¹⁷(Prodigy)", takes into consideration role of technology in the matter of censorship. "The plaintiffs, Stratton Oakmont Inc., a securities investment banking firm brought an action of defamation against Prodigy, the operator and owner of the computer network on which the defamatory statements appeared".

Prodigy had around "two million subscribers who communicate with each other on his bulletin board Money Talk on which the said statement appeared and members can publish statements on stocks, investments, and other financial topics" on the bulletin board, which is the biggest in the US. "Prodigy contracts with bulletin board leaders who participate in board discussions and also take promotional efforts to encourage usage and increase users". The entire matter revolved around one question and that is whether Prodigy, involved in above activities, is a publisher.

It was shown in the course of the proceedings that Prodigy himself held out that he did exercise editorial power over its contents and this surely draws the distinction between CompuServe and Prodigy. "Prodigy exercised this control through its automatic software screening program, and the guidelines which board leaders were made to follow". Constantly using "technology" as well as "manpower" to erase notes on the basis of offensive and "bad taste" from their computer bulletin boards, they assumed the role of a publisher. Thus, here the precautionary measures, both technical and manual, taken by the defendants to give to its subscribers healthy and pure information, entrenched him in the liability for defamation when such content offended against the plaintiff's reputation while all such restriction even spoke against the freedom of expression.

Perhaps this was one big reason when soon after Prodigy verdict, Congress came up with a covering piece of legislation vide 47 USC Section 230(c)(1)¹⁸ which provided immunity to the ISPs and states. Any provider or consumer of a digital software shall not be regarded as author of any information conveyed by some other provider of information content.

The wordings clearly indicate that the aim of the legislation is to remove the hurdle in the way of free flow of information by imposition of censorship, etc. by the service providers and also to allow the service providers to work in an atmosphere without being apprehensive about the consequent liabilities which may arise from an incriminating content transmitted by an originator. The provision contains the word "publisher" so as to avoid any controversy in future regarding the role of service providers in such situation.

IV. INDIAN PERSPECTIVE OF LIABILITY OF INTERNET SERVICE PROVIDERS (ISPs)

The internet is a relatively new medium that enables everyone to communicate a significant amount of information virtually without geographical or time restrictions.

¹⁷ 23 Media L Rep 1794 (NY Sup Ct 1995).

¹⁸ Added by Communication Decency Act, 1996, S.509, & Pub. L. No. 104-104, 110 Stat. 137, 137-39 (1996).

Practically speaking, this chance is accessible without specialised technological skills.¹⁹ The great potential for the spread of unlawful content is made possible by modern internet and telecommunications technology. According to the categories of the content, liability might relate to many different kinds of content and pose various difficulties.²⁰ Defamatory and libellous content are the most notable types of violations that arise when information is disseminated online.

INDIAN LEGAL PROVISIONS RELATING TO LIABILITY OF INTERNET SERVICE PROVIDERS (ISPS)

The only law in India that specifically refers to the regulation of ISP liability is the IT Act, 2000. The legislation has undergone a significant transformation, expanding the scope of service providers' responsibility, clarifying their legal responsibilities, and limiting and configuring their exemptions. "The IT (Amendment) Act, 2008 (10 of 2009), features a slew of new sections related to the responsibility of the intermediaries" and their legal accountability. "Chapter XII comprising Section 79 has been replaced and the term intermediaries is redefined". "Apart from the IT Act, 2000, rules made by the Central Government and the guidelines issued by the Telecom Department also circumscribe such liability within the legal framework when at the time of issuing the licence to provide service, the ISPs are not only bound to follow the guidelines but they are also to abide by the security conditions of the licensor, i.e. the Government of India". All these provisions specify the ISPs' responsibility exemptions.

"Section 79 of the I.T. Act, 2000 (Information Technology Act, 2000) deals with the Network Service Providers Liability". "The explanation given in this section provides that Network Service Providers means an Intermediary". "According to Section 2 (w) of the IT Act- defines Intermediary, with regard to any specific electronic message 'refers to a person who receives or transmits and stores on behalf of another person or record or provides any service with respect to that message or electronic record'".²¹

Following this, the section specifies that the word includes computer cafés, electronic banking websites, internet trade websites, online marketplaces, and web hosting providers, in addition to network providers, web service providers.²² "This list is non-exhaustive and Section 2(1)(w)²³ also covers entities such as social media websites, blogging platforms, message boards, consumer review websites and so on". This means that, in accordance with

¹⁹ Pablo Baistrocchi, "Liability of Internet Service Providers in EU Directive on Electronic Commerce" 19 Santa Calra Computer and High Technology Law Journal 12 (2018).

²⁰ Lilian Edwards, Role and Responsibility of Internet Intermediaries in the field of Copyright and related Rights (2018), available at: https://eprint.ncl.ac.uk/file_store/production/257356/20EDB711-6EB2-4D63-9E5D-25C951E08167.pdf

²¹ An 'intermediary' has been defined in Section 2(w) of the IT 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-housing service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes".

²² Smt. Jyothi Vishwanath & Srinivas C Palakonda, Legal Scenario Relating to the Role and Responsibility of the Internet Service Providers in India: An Assessment, available at: <https://www.doccity.com/en/legal-scenario-relating-to-role-and-responsibility/4486586/>

²³ Section 2(1)(w) reads: "Intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, Internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes."

"Section 2(1)(w) of the IT Act, almost any website that hosts user-generated material and has a significant number of Internet service providers meets the criteria of an intermediary".

According to Article 19 of UDHR's 2013 report titled "Internet Intermediaries: Dilemma of Liability"²⁴, three general models of intermediary liability have arisen internationally as a result of these conflicting perspectives. These are:

(1) The strict liability model: User-generated content is subject to absolute liability for intermediaries. In order to comply with the law, intermediaries must monitor material to a sufficient degree; if they fail to do so, they may lose their business licence or face other legal repercussions. China and Thailand are two examples.

(2) The safe-harbour model: If intermediaries adhere to specific legal standards, they are granted conditional exemption from liability stemming from user-generated material.

"This model can be further divided into":

(a) "The vertical model": Depending on the kind of content in question, liability is decided. There are no differences made between the types of services that intermediaries offer, such as hosting vs transmitting.

(b) The horizontal model: Depending on the type of function the intermediary performs, liability is decided. Thus, intermediaries functioning just as content transmitters may be completely protected from responsibility, but intermediaries serving as hosts may be subject to stricter regulations. If the latter do not promptly delete illegal information after being told, they risk losing their immunity. The "notice-and-removal protocols, which are legally required procedures that specify how content takedown requests must be received and handled by intermediaries", are another characteristic of the safe-harbour paradigm. To further stop the dissemination of illegal information, intermediaries may be urged to use technology-based or self-regulatory content filters. This type of intermediary regulation is used by the "Indian IT Act, the US Digital Millennium Copyright Act, and the EU e-commerce Directive".

(3) The broad immunity model: The exemption from responsibility for user-generated content that is granted to intermediaries is generally wide and occasionally conditional. Notably, intermediaries are explicitly released from any responsibility to check for illegal information. Instead of treating intermediaries as content providers, this model views them as messengers who only transfer material on behalf of users. The Communications Decency Act's Section 230 serves as an illustration of this approach.²⁵

Almost all legislative frameworks governing Internet intermediaries, regardless of the model, require intermediaries to take down illegal content from their platforms when requested to do so in compliance with existing legal procedures. "Regulators and intermediaries alike must be aware of the impact of their actions on freedom of expression, which is a fundamental human right recognised under almost all major national and international jurisdictions". This is because "freedom of expression is a fundamental human right" and immunity from liability is only available under some regulatory regimes if takedown requests are complied with quickly.

²⁴Internet intermediaries: Dilemma of Liability, available at: https://www.article19.org/data/files/Intermediaries_ENGLISH.pdf

²⁵Intermediary Liability 2.0: A Shifting Paradigm,7(SFLC.in, New Delhi ,India)available at : https://sflc.in/sites/default/files/reports/Intermediary_Liability_2_0_-_A_Shifting_Paradigm.pdf.

The freedom of expression will be negatively impacted by regulators who impose ambiguous content restrictions, "ask intermediaries to remove content based on their own judgement while running the risk of losing safe-harbour protection" for failure to do so, and intermediaries who overly comply with takedown requests. According to Google's transparency reports, the amount of material removal requests from governments has sharply increased in recent years. In the second half of 2016, Google received 15,961 such requests, a fifteen-fold increase from the "1,031 such requests it received in the second half of 2009".²⁶

"Section 79 is currently the provision that guarantees safe-harbour protection to intermediaries for third party content". "Section 79 of the original Act only protected network service providers²⁷ from liability arising from third party content, if they proved absence of knowledge; or positive application of due diligence on their part to prevent commission of an offence/ contravention".²⁸

As previously stated, internet intermediaries that host defamatory information are likewise subject to content responsibility. In the year since the Supreme Court issued its key decision in the matter of *Shreya Singhal v Union of India*, there are various open problems surrounding the accountability of intermediaries for online material until the Central Government issues a new set of Intermediary Guidelines.

"Section 79 (Clause1) of the IT Act exempts internet intermediaries like Facebook and Google from liability for defamatory information on their websites". "It does, however, condition such exemption on either

- (1) The intermediary just playing a technical, mechanical function, or
- (2) The intermediary not intervening with the content in any way, such as starting or amending".

While the new amendment does not shift the presumption of evidence from the accused to the complainant, it does make it easier for the accused to defend their actions in the incident by claiming that they acted in good faith and met the requirements of "Section 79 of the Act and Rule 3 of the IT Rules, 2011". Despite the fact that ISPs are not technically accountable for publishing and transmitting defamatory content, they are routinely named as defendants in defamation lawsuits due to their larger financial resources.²⁹

The issue emerges, however, when private intermediaries "receive complaints regarding content" and are compelled to make judicial judgements as to the legality of material and to remove defamatory content upon acquiring "actual knowledge" of such content on their

²⁶ Google, Government Requests to Remove Content, Google Transparency Report, available at: <https://transparencyreport.google.com/government-removals/overview?hl=en>

²⁷ According to the previous Section 79 of the IT Act, network service providers meant - 'intermediaries' as defined under the Act

²⁸ Sec. 79 - Network service providers not to be liable in certain cases: For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

Explanation. –For the purposes of this section, – (a) "network service provider" means an intermediary; (b) "third party information" means any information dealt with by a network service provider in his capacity as an intermediary

²⁹ Vivek Kumar Verma "Cyber Defamation & liabilities of Internet Service Providers(ISPs)and Intermediary in India & UK", available at: <https://indiancaselaws.files.wordpress.com/2014/04/cyber-defamation-liabilities-of-internet-service-providers-isps-and-intermediary.pdf>

websites. "Clause 3 of Section 79, as well as Rule 3 (4) of the Information Technology (Intermediary Guidelines) Rules of 2011", require this. According to a research done by the Centre for Society and Internet, intermediaries are ill-equipped to determine the legality of information and will err on the side of caution, often eliminating perfectly lawful content.³⁰

Furthermore, the requirement of "actual knowledge" was not established or defined under the IT Act, creating confusion about when intermediaries were required to delete such potentially defamatory information. Was it, for example, mandatory that they remove content if a single private individual complained about it? In *Shreya Singhal*³¹, the Supreme Court held unequivocally that "actual notice" amounted to nothing less than a court order, lifting this responsibility from intermediaries. They also stated that Rule 3 (2) of the Intermediary Guidelines should not be interpreted to limit expression beyond what is permitted for in Article 19 (2) of the Constitution.

By virtue of "Section 79 Clause 2 (c) read with Section 87 Clause 2 (zg) of the IT Act, the Central Government is entitled to issue a new set of Intermediary Guidelines". "In light of the *Shreya Singhal* decision, a new set of guidelines followed:

- (a) establish a 'notice and notice' regime for defamation cases,
- (b) align the language of Rule 3 (2) Intermediary Guidelines with Article 19 (2) of the Constitution, and
- (c) include additional safeguards to ensure the transparency and accountability of all content that is removed".

The conventional "Notice and Takedown policy is giving way to a Notice and Notice" approach. The initial regime mandated by "Clause 3 of Section 79 and Rule 3 (4) of the Intermediary Guidelines obliged intermediaries to remove content upon notification", giving rise to the "notice and takedown regime".

"In *Shreya Singhal* case, the Supreme Court has consistently explained that no limit imposed, either through court order or even by government regulation, must be greater than the reasonable restrictions provided in Article 19 (2) of the Constitution". "Rule 3 (2) of the Intermediary Guidelines vicariously censors users beyond what Article 19 (2) of the Constitution permits by requiring intermediaries to publish agreements that make it unlawful for users to upload, modify, transmit or publish content that, among other things;- is extremely offensive, insulting, sacrilegious, slanderous, lewd, immoral, pedophile, libelous, intrusive of the privacy of others, hateful or racist, ethically unacceptable, disgusting, involving or promoting money laundering or gambling, or even unlawful in some manner whatsoever (Rule 3(2)(b))". "Rule 3 (2) of the Intermediary Guidelines has been severely criticised by several groups including, but not limited to; the Centre for Internet and Society, Software Freedom Law Centre and the Centre for Communication Governance, for being excessively wide and exceeding the ambit of Article 19 (2)".

"In light of the discussion in *Shreya Singhal* on Section 66 of the IT Act, and the brief discussion on Section 79, it is clear that any newly promulgated Intermediary Guidelines will have to be limit the scope of Rule 3 (2) to the existing framework provided by Article 19 (2) of the Constitution". Given the significant revisions required to make "Rule 3 (2) and Rule 3 (4) in accordance with *Shreya Singhal*, the

³⁰ Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet*, Centre for Internet & Society, Bangalore (2011), available at: <http://cisindia.org/internet-governance/intermediary-liability-in-india.pdf>.

³¹ [(2015) 5 SCC 1]

purpose of new guidelines should be to promote the openness of the whole takedown process”.

“The following inferences can be drawn to broadly sum-up India’s Intermediary Liability law: (a) Intermediaries need to fulfil the conditions under Section 79 of the IT Act as discussed above (conditional safe-harbour);

(b) Intermediaries are required to comply with all requirements listed under the Intermediaries Guidelines (due diligence rules); and

(c) Intermediaries, other than enforcing their own terms and conditions and privacy policies, are liable to take down content from their platforms only when notified by a court or an authorised government agency and that too for matters listed under Article 19(2) of the Constitution (the actual knowledge requirement)”.

“The Manila Norms, recently adopted by the United Nations Special Rapporteur on Freedom of Expression”, are fostering global agreement on intermediary responsibility principles. “Any re-promulgation of the Intermediary Guidelines should build on them and provide an effective right to be heard before content is removed”. “Furthermore, court orders for takedown should specify how long content should be removed for, and intermediaries should explicitly disclose when content has been removed when users attempt to access such content”.³²

The Manila Principles are a collection of rules describing the precautions that must be applied to intermediary responsibility in all legal frameworks. A collection of digital rights activists and civil society organisations spearheaded the paper during “Rights Con, South East Asia, a multi-stakeholder conference held in Manila, Philippines in 2015”. “In line with the International Covenant on Civil and Political Rights (ICCPR), Universal Declaration of Human Rights (UDHR), also the UN Guiding Principles on Human Rights and Business, the primary function of the Manila Principles is to accelerate the development of interoperable and harmonized liability regimes that can encourage innovation while respecting the rights of users”.

The six broad principles are as:³³

- (1) The intermediaries should be protected from third-party content liability by law.
- (2) Content should not be “restricted without an order from a legal authority”.
- (3) “Content restriction requests must be clear, unambiguous and must follow the due process of law”.
- (4) “Laws and content limiting orders and procedures must conform with the necessity and proportionality tests”.
- (5) Laws and policies and practices relating to content restrictions must respect due process of law.
- (6) Accountability and Transparency “must be built into laws and policies and practices” to restrict content. By offering Internet intermediaries safe harbour protection conferred by “section 79 of the IT Act, India can be said to conform with the first of these principles (Intermediaries must be protected from third party content liability by law)”. The protection

³²Indian defamation law and regulation of online content, vol. 1 Law & Policy Brief 2(2015), available at: http://www.jgls.edu.in/wp-content/uploads/2019/03/law-and-policy-brief_nov-2015-issue-11.pdf

³³ Manila Principles on Intermediary Liability, available at: <https://www.manilaprinciples.org/>

enjoyed by intermediaries is, “of course, conditional, and there is uncertainty in the legislation that makes compliance difficult”, but immunity is nonetheless provided for by the law.

V. INDIAN JUDICIAL APPROACH TOWARDS INTERMEDIARY LIABILITY IN INDIA

Google India v. Visaka Industries³⁴ Visaka Industries has been involved in the production of cement and other related products for asbestos. On 21st November 2008, Gopala Krishnan published an article on a webpage hosted by Google entitled "Poisoning the System; Hindustan Times". The cited article listed many politicians who had been eventually discovered not to have any relation with Visaka Industries management. Again, an article published in July 2008 entitled "Visaka Asbestos Industries Make Gains" included defamatory remarks against the corporation made available via Google to the global audience. Google was fined under Sections 120-B³⁵, 500³⁶, and 501³⁷ of the Indian Penal Code for hosting certain articles as an intermediary.

Google argued that through offering a forum for end-users to upload material, it operated purely as an intermediary, and thus had not published the articles as necessary for liability for defamation. It is contended that Section 79 of the amended Information Technology Act was the epitome of this principle and hence Google could not be held liable. Although Andhra Pradesh 's State High Court accepted that the amended Information Technology Act broadened the protection of intermediaries to crimes under the Indian Penal Code, the court ruled that Google could not demand immunity under section 79 because it did not delete the material promptly once it had received notification of it, as specified by section 79(3). Google is currently appealing this case to the Supreme Court.

Vyakti Vikas Kendra & Others v. Jitender Bagga & Google³⁸ This case, often known as the 'Art of Living' case, is an illustration of how vulnerable public personalities in India are to internet defamation. The Vyakti Vikas Kendra, India Public Charitable Trust was established to encourage and support the Art of Living Foundation of India's spiritual, educational, and developmental initiatives. It is a humanitarian and educational organisation run entirely by volunteers. The Trust filed a defamation claim against Mr. Jitender Bagga for allegedly posting writings that were obscene and disrespectful to the proprietor of the Art of Living Foundation, Sri Sri Ravi Shanker, as well as against Google for broadcasting the challenged content on its website www.blogger.com. The Trust has requested Rs. 5,09,00,000 in damages as well as everlasting and mandatory injunctions against the site.

The court relied on “section 79(3)(b)”, which requires intermediaries to delete unlawful content if actual knowledge is obtained. “Rule 3(4) of the Intermediary Guidelines” further requires libellous data to be destroyed within 36 hours. “Rule 3(3) and Rule 3(2)” also require an intermediary to exercise due diligence on content that is clearly harmful, defamatory, libellous, or otherwise prohibited. The court ordered the removal of the content from www.blogger.com under these terms, “as well as all links containing defamatory content, within 36 hours of becoming aware of the Court's order”.

VI. CONCLUSION

³⁴Google India Pvt. Ltd. v. Visaka Industries 2009 Criminal Petition 7207 of 2009 (India).

³⁵ Indian Penal Code Section 120-B (punishment for criminal conspiracy.)

³⁶ Indian Penal Code Section 500 (punishment for defamation.)

³⁷Indian Penal Code Section 501 (printing or engraving matters known to be defamatory).

³⁸Vyakti Vikas Kendra & Others v. Jitender Bagga & Google, CS (OS) No. 1340/2012, (2012) Delhi High Court (India).

The role and liability of intermediaries in cases of defamation in cyber space is a complex issue that has been widely debated in legal and academic circles. "Intermediaries, such as internet service providers (ISPs) and social media platforms", play a crucial role in facilitating online communication, but they also face a unique set of legal challenges when it comes to defamation. The main issue is whether "intermediaries should be held liable for defamatory content that is posted by third-party users on their platforms". On one hand, some argue that "intermediaries should be held liable for defamatory content" in order to provide victims with a means of redress and to deter intermediaries from hosting defamatory content. On the other hand, others argue that intermediaries should not be held liable for defamatory content because they are not the creators of the content and should not be held responsible for the actions of their users. The question of intermediary liability in cases of defamation in cyberspace is further complicated by the fact that different legal jurisdictions have adopted different approaches to this issue. The problems of jurisdiction, anonymity and flow of data, amongst other, could continue to intensify. The duty of our courts to decipher the technological features of the Internet and to devise well-established precedents cannot be overlooked. For the future, the need to engage in discussions to consider codifying digital defamation in a specific Act may be critical to jettisoning trivial claims, avoiding huge court backlogs, addressing and balancing conflicting interests of freedom of expression and reputation damage as well as addressing online jurisdiction and anonymity challenges among others. In fact, international collaboration may need to be pursued to protect the credibility of the global networking infrastructure in order to resolve cross-border jurisdictional problems and potential global internet concerns.

List of Abbreviations

- EU- European Union
- ICCPR - International Covenant on Civil and Political Rights
- IPC -Indian Penal Code
- ISPS-Internet Service Providers
- IT ACT - Information Technology Act
- UDHR - Universal Declaration of Human Rights
- US- United States

Bibliography

A: BOOKS

- Chris Reed, Chap 2 "From Each According to his Ability: Actors and Activities in the Internet World "in *Internet Law: Text and Materials*, Cambridge University Press, 2004.
- Dr.J.P. MISHRA, *An Introduction to Cyber Law*, Central Law Publications, Allahabad, 2nd edition, 2014.
- Dr. Talat Fatima, *CYBERCRIMES*, Eastern Book Company, 1st edition, 2011.
- Ernst-Jan Louwers & Prof. Corien E.J. Prens, Vol 2, *International Computer Law*, Lexis Nexis, 2004.
- IAN J. LLOYD, *Information Technology Law*, Oxford University Press, 5th edition, 2011.
- Nakul Sharma, *Information Technology Law and Practice*, Universal Law Publishing co. Pvt. Ltd., Delhi, 2005.
- Robert Dunne, *Computers and the Law: An Introduction to the Basic Legal Principles And their Application in Cyberspace*, Cambridge University Press, 1st edition, 2009.
- Sharon K. Black, *Telecommunications Law in the Internet Age*, Morgan Kaufmann Publishers, 2002.

B: ARTICLES/JOURNALS

- Prof. Y.R. Bhatnagar & Abhilasha Bhatnagar, "Online Defamation: A Comparative Analysis and evaluating the responsibility of the Internet Service Providers in the Indian Legal framework", International Journal of Advances in Engineering Research (IJAER,2013).
- Nikita Barman, "Legal Implications of Cyber Crimes on Social Networking Websites", International Journal of Scientific and Research Publications(2015).
- Pablo Baistrocchi, "Liability of Internet Service Providers in EU Directive on Electronic Commerce", Santa Calra Computer and High Technology Law Journal (2018).

C: WEBSITES

- Lilian Edwards, Role and Responsibility of Internet Intermediaries in the field of Copyright and related Rights (2010), available at: https://eprint.ncl.ac.uk/file_store/production/257356/20EDB711-6EB2-4D63-9E5D-25C951E08167.pdf.
- Internet intermediaries: Dilemma of Liability, available at: https://www.article19.org/data/files/Intermediaries_ENGLISH.pdf
- Intermediary Liability 2.0: A Shifting Paradigm,(SFLC.in, New Delhi ,India,2019)available at : https://sflc.in/sites/default/files/reports/Intermediary_Liability_2_0_-_A_Shifting_Paradigm.pdf.
- Google, Government Requests to Remove Content, Google Transparency Report, available at: <https://transparencyreport.google.com/government-removals/overview?hl=en>
- Vivek Kumar Verma "Cyber Defamation & liabilities of Internet Service Providers (ISPs)and Intermediary in India & UK", available at: <https://indiancaselaws.files.wordpress.com/2014/04/cyber-defamation-liabilities-of-internet-service-providers-isps-and-intermediary.pdf>
- Rishabh Dara, Intermediary Liability in India: Chilling Effects on Free Expression on the Internet, Centre for Internet & Society, Bangalore (2011), available at: <http://cisindia.org/internet-governance/intermediary-liability-in-india.pdf>
- Indian defamation law and regulation of online content, vol .1 Law & Policy Brief 2(2015), available at:http://www.jgls.edu.in/wp-content/uploads/2019/03/law-and-policy-brief_nov-2015-issue-11.pdf
- Manila Principles on Intermediary Liability, available at: <https://www.manilaprinciples.org>
- Smt. Jyothi Vishwanath & Srinivas C Palakonda, Legal Scenario Relating to the Role and Responsibility of the Internet Service Providers in India: An Assessment, available at: <https://www.docsity.com/en/legal-scenario-relating-to-role-and-responsibility/4486586/>