

UPDATE

This Update has been prepared by Ronodeep Dutta and Fatima Anwar.

Are social media companies ‘intermediaries’? One’s syllepsis is another’s dilemma

A. *Setting the Context*

In a recent development, the Hon’ble Union MoS Rajeev Chandrasekhar, under Ministry of Electronics and Information Technology (“**Hon’ble MoS**”), in an interview with one of the leading news publisher, had indicated the need for ‘*considering a separate legislation for social media companies*’ and also recommended that ‘*social media companies must be accountable for content on platforms*’.¹

Further, as reported by various news publishers, the Joint Committee of Parliament (the “**Committee**”) studying the Personal Data Protection Bill, 2019 (“**PDP Bill 2019**”), vide its report on the PDP Bill 2019, full text of which is not available in the public domain, has recommended, among other things, that all social media platforms, which do not act as intermediaries, should be treated as publishers and be held accountable for the content they host, and should be held responsible for the content from unverified accounts on their platforms.²

The rules on the intermediary and digital media have already been notified vide the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**2021 Intermediary Rules**”) under the Information Technology Act, 2000 (“**IT Act**”) in February 2021. However, the renewed mention by the Hon’ble MoS, as well as the recommendation by the Committee to treat the social media companies as ‘*publishers*’, in consonance with the Hon’ble MoS view that, ‘*to a large part, they are publishing content*’, ... *the only dispute was whether they are responsible for content that is published on their platform by somebody else, or is somebody else responsible?*’, has created uncertainty amongst the social media companies.

B. *Key provisions in the IT Act and the 2021 Intermediary Rules*

Clause (w) of sub-section (1) of S 2 of the IT Act defines ‘*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 ...*’

Clause (w) of sub-section (1) of R 2 of the 2021 Intermediary Rules defines, the ‘*social media intermediary means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify, or access information using its services*’.

¹ ET Bureau | Last Updated: Nov 25, 2021, 12:54 AM IST

² The Hindu | Last Updated: Nov 23, 2021 07:59 IST

Further the FAQs (the “**FAQs**”) released by Ministry of Electronics and Information Technology, Government of India (“**Ministry**”) on Part II of the 2021 Intermediary Rules released in October 2021 clarifies, among other things, the position with respect to ‘intermediaries’.

C. *The Syllepsis*

As reported by various news publishers, the Hon’ble MoS has therefore expressed deep concern over the accountability of all intermediaries to their users. Clarifying that the social media companies cannot claim immunity under S 79 of the IT Act, while declining to reveal the identity of users who post harmful content since such user accounts are mostly anonymous and the social media companies does not have mandatory user verification mechanism for using their platforms. To put in perspective, S 79 of the IT Act, also referred to as ‘safe harbor rules’, which came into existence as a result of the 2008 amendment to the IT Act, keeping in mind the Avnish Bajaj case³, was modelled on United States of America’s S 230 of the Communications Decency Act 1996, and thus S 79 provided exemption from liability of an intermediary for any third party information, data, or communication link made available or hosted by the intermediary on its platform, where, *inter alia*, the intermediary does not initiate the transmission, select the receiver of the transmission, modify the information contained in the transmission and the intermediary has not conspired or abetted or aided or induced the putting up of such harmful content.

Further, in its report proposed to be tabled this winter session along with the PDP Bill 2019, the Committee, amongst other things, has recommended that all social media platforms, which do not act as intermediaries, should be treated as publishers and be held accountable for the content they host, and should be held responsible for the content from unverified accounts on their platforms. As a consequence the Hon’ble MoS has indicated that the Government of India is deliberating a “*global standard law*”⁴ for social media companies to curtail user harm, amid allegations that tech giant Meta (earlier known as Facebook) was promoting its subsidiary Instagram to children despite potential harm.

D. *The Dilemma*

The Ministry with an endeavour to accommodate social media companies within the exhaustive definition of ‘intermediaries’ as per the IT Act 2000, clarifies through Q 11 of the FAQs that *‘with the evolution of technologies and hence proliferation of digital businesses and services, many other platforms of different kinds may qualify as intermediaries with respect to the third-party content made available, shared, hosted, stored or transmitted on their platforms including websites and mobile apps’*.

It is trite that the word ‘may’ in regular usage refers to a choice to act or not, or a promise of a possibility. Also the words *‘many other platforms of different kinds’* indicates to the application of the definition of ‘intermediary’ to platforms other than those covered in the definition. Therefore, the phrase *‘many other platforms of different kinds may qualify as intermediaries’* indicates an admission of the Ministry of an instance wherein ‘intermediaries’ as per the IT Act, may not be expansive and mature enough to hold social media companies within its realm. Applying a fundamental rule for interpretation of statutes that, the text of the statute should not be sacrificed by any lofty references to purpose or objectives which are not discernible, it appears that the 2021 Intermediary Rules bears elements of an overarching legislation over the legislated IT Act.

Having said that it is important to note that, ‘intermediaries’ as per the IT Act covers *‘intermediary with respect to any particular electronic records, means person who on behalf of another person ... provides any service with respect to that record’*. Hence it poses a question, as to whether by virtue of the same, the 2021 Intermediary Rules may cover social media companies also.

³ Avnish Bajaj vs. State (N.C.T.) Of Delhi on reported on (2005) 3 CompLJ 364 Del, 116 (2005) DLT 427, 2005 (79) DRJ 576

⁴ The Hindustan Times | Last Updated: Nov 26, 2021 04:57 AM IST

Moreover, vide R 7 of the 2021 Intermediary Rules, '*where an intermediary fails to observe these rules, provision of sub-section (1) of S 79 of the IT Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including ... the Indian Penal Code*' Therefore, in the event the social media companies, comply with Part II of the 2021 Intermediary Rules, barring R 5 of the said Rules, such social media companies shall be exempted from any liability for any third party information, data, or communication link made available or hosted by such social media companies on its platform, subject to sub-section (2) and (3) of S 79 of the IT Act (*supra*). In that situation, the social media companies, being categorized as 'intermediaries', shall be exempted from any liability contrary to what is being contemplated by the Government.

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