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We are pleased to present the Fall 2013 edition of the Newsletter of the U.S.-India Business Council's Legal Services Executive Committee. This edition looks at the enforcement of judgments in New York; the protection of U.S. investments in India under bilateral investment treaties; SEBI's new regulations; the new Land Acquisition Bill; India's adoption of the Madrid Protocol; how the U.S. and India address the role of intermediaries; and the vexing issue of lobbying under Indian law. As always, we welcome your comments and suggestions.

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Intermediaries – Messengers or Guardians? How India and US deal with the role and liability of intermediaries

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Introduction

The increase in the diverse forms of use and expression on the Internet has led to a number of questions on whether or not the use of the Internet as a platform for commerce and, more importantly, communication, should be regulated. An integral part of this debate revolves around the role and liability of intermediaries, ranging from network service providers and search engines to online marketplaces and online payment sites.

The idea of regulating the Internet, whether by way of regulating actual communication itself or regulating service providers such as intermediaries, can be very controversial when discussed in light of ‘freedom of speech and expression, which is one of the fundamental rights available to citizens in a democratic state.

In the United States for example, the First Amendment to the Constitution² provides, among other things, that the State cannot make any law that abridges the freedom of speech or the freedom of the press. This results in an almost uninhibited right to the freedom of speech in the US. In India on the other hand, Article 19(2) of the Constitution³ provides that every citizen of the country shall have the right to freedom of speech subject to certain reasonable restrictions imposed by the State on the basis of various factors, ranging from integrity of India, security, friendly relations with foreign States, public order, decency or morality. In both the US and India, we see that the manner in which communication and expression on the Internet is regulated flows directly from the ideas and jurisprudence surrounding the constitutional right to free speech.

While almost all persons and entities who contribute to any content or communication on the Internet are affected by policies relating to freedom of expression on the Internet, the role played by intermediaries who facilitate the creation and transmission of content by third parties or provide Internet-based services to third parties⁴ is of particular interest.

The Importance of Internet Intermediaries

In India, intermediaries are governed under the IT Act, which defines an intermediary as “*any person who on behalf of another person receives, stores, or transmits that electronic record or provides any service with respect to that record*”. This definition is very wide and covers a diverse set of service providers, ranging from Internet service providers, search engines, web hosting service providers, to e-commerce platforms or even social media platforms.

While services provided by Internet intermediaries have become part of our everyday lives – whether it’s shopping or tweeting – the Internet also brings with it new challenges. It affords users a sense of anonymity that is absent in physical interactions. This anonymity may allow users to abuse online platforms and perform illegal activities; intermediaries, with their immediate access to such users, sometimes become the ‘one-stop shop’ for detection of such abuse as well as law enforcement. This situation throws up many important questions such as whether intermediaries should be treated as mere messengers who do not have control over the content they transmit (and accordingly have no liability) or should they assume greater sentinel roles. A natural corollary to this question is the discussion on the effect that greater intermediary control may have on the independence of the Internet and freedom of expression. One point that emerges quite clearly in most jurisdictions is that some regulation is necessary in order to provide a framework in which intermediaries and law enforcement authorities can function independently and cooperate with each other.

Regulation in India

A. *The IT Act and Intermediary Guidelines*: The Indian government grants intermediaries a conditional safe harbour under the IT Act and The Information Technology (Intermediaries Guidelines) Rules 2011 (“**Intermediary Law**”). This is similar to the safe harbour rules of the European Union. Section 79 of the IT Act provides that an intermediary is **not** liable for any third-party content hosted/made available through such intermediary when:

1. the function of the intermediary is limited to providing access to the system; **or**
2. the intermediary does not initiate, select the receiver of or select/modify the information contained in a transmission; **and**

3. the intermediary observes due diligence and abides by other guidelines prescribed by the Government.

The 2011 Intermediary Law provides a diligence framework to be followed by intermediaries in order to avail of the exemption under Section 79. Various procedures have been prescribed which need to be observed by an intermediary, such as (i) the need to inform the users of the computer resource not to transmit any information that among other things is harmful, obscene or defamatory; (ii) the requirement to “act within 36 hours” of receiving knowledge of the transmission of any prohibited information; and (iii) the requirement to disable information that is contradictory to the Intermediary Law. The requirement ‘to act’ caused much speculation in the industry as it was not clear what constituted appropriate action. The Government published a clarification in March 2013 which stated that the intermediary is required to respond to or acknowledge a complaint regarding any prohibited information and “initiate appropriate action as per law” within 36 hours of receiving the grievance/complaint. It is not clear whether the intermediary is required to initiate action under the domestic law of the country in which the intermediary is located or if the intermediary is required to initiate action under any foreign laws; the most plausible assumption could be that the clarification refers to Indian law since the IT Act itself is an Indian legislation.

B. *Intermediaries and Indian Copyright Law*: Apart from the Intermediary Law, the provisions of the Copyright Act 1957 (“**Copyright Act**”) provide a notice and take-down mechanism similar to the Digital Millennium Copyright Act in the US (“**DMCA**”). The IT Act provides overarching regulations that may override any other laws in force; however, these provisions cannot restrict the rights of the owner under the Copyright Act and the Indian Patents Act, 1970.⁵ The Copyright Act provides that any “*transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder*”⁶ is not an act of infringement of copyright unless the person responsible for such storage (i.e. an intermediary) is aware or has reasonable grounds for believing that the work/performance stored is an infringing copy. The Copyright Act also provides that if the intermediary responsible for such storage has received a written complaint from the owner of copyright in the work alleging that such storage is an infringement of the work, the intermediary should stop facilitating access to the work for a period of 21 days or until he receives an order from a competent court regarding the matter.

The case of *Super Cassettes Industries Ltd. v. Myspace Inc. and Anr.*,⁷ although pending final judgment, is already considered a landmark example of the application of copyright law to hold an intermediary liable for infringement. In this case, the Court found Myspace guilty of primary copyright infringement for allowing the

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² http://www.law.cornell.edu/constitution/first_amendment

³ Article 19(2) of the Constitution of India, available at <http://www.constitution.org/cons/india/p03019.html>

⁴ “The Economic and Social Role of Internet Intermediaries” April 2010 by OECD available at <http://www.oecd.org/sti/ieconomy/44949023.pdf>

⁵ Section 81 of the IT Act

⁶ Section 52(c), Copyright Act, 1957

viewing and sharing of images and music over which Super Cassettes claimed ownership. Though Myspace argued that they are an intermediary within the meaning of the IT Act and are thus exempted from liability for third-party activities on the website, the court did not agree with this argument on various grounds, finding that Section 79 of the IT Act (which provides safe harbours) has to be read in conjunction with Section 81 of the IT Act which gives precedence to the Indian Copyright Act. This case is pending final determination.

C. Discussion on issues faced by intermediaries under the present regime: Despite the efforts of the Indian government to introduce a balanced regime for the regulation of intermediaries in India, intermediaries and users alike have found a number of problems with the law in its current form:

1. **Lack of clarity in the Intermediary Law:** The diligence framework prescribed under the Intermediary Law is not absolutely clear on aspects such as (i) the kind of content that is not permitted and (ii) the kind of action that an intermediary needs to take if such content is made available online. This has in turn led to situations in which intermediaries may engage in self/private censorship in order to avoid any liability, therefore seemingly curtailing freedom of expression.
2. **Increasing number of take-down notices and their impact:** The transparency report released earlier this year by Google shows that there had been a 90 percent increase in the number of take-down requests by government authorities in India in the year 2012.⁸ A study conducted by the Center for Internet and Society, India, points to a “chilling effect” on free speech on the Internet as a result of providing private intermediaries with the power to decide whether or not certain content should be made available on the Internet.⁹ This study shows that where intermediaries were given take-down notices, a number of intermediaries simply took down the relevant content even where such content would not fall into any of the prohibited categories under the Intermediary Law, in order to avoid any liability.

As a result of the ambiguity in the law and the increasing number of take-down requests, ‘mouthshut.com’, one of India’s leading online platforms for consumer reviews, has filed a petition before the Supreme Court of India challenging the constitutionality of the Intermediary Law, and alleging that it violates the fundamental right to freedom of speech granted under the Constitution of India. This case is yet to be taken up by the Court and the results of the same remain to be seen.¹⁰

Long arm jurisdiction of Indian law: The IT Act is applicable to the territory of India and to any offence or contravention (of the IT Act) committed outside India by any person if the contravention involved a computer located in India.¹¹ This implies that any intermediary that is operating in any part of the world would need to implement the requirements under the Intermediary Law and be liable under the IT Act, if the foreign intermediary uses any computer resources or systems located in India. Where the foreign intermediary has no computer resources or systems located in India, there is still a possibility that action may be taken against the intermediary under copyright laws or tort law. This may raise a number of complications regarding whether the Indian courts have jurisdiction to try such a matter and whether any order from an Indian court may be enforceable against the foreign intermediary.

This issue was highlighted in the case of *Super Cassettes Industries Ltd. v. Myspace Inc. and Anr*,¹² (discussed earlier). Myspace was held liable for infringement of copyright in India, despite the fact that Myspace operates primarily out of the US and has no physical presence in India. This case is pending final determination.

Approach Seen Under US Law

In the US, liability of intermediaries in relation to third-party content is governed by two separate legislations – Section 230 of the Communications Decency Act and Section 512 of the Digital Millennium Copyright Act (“DMCA”). The Communications Decency Act provides any ‘interactive computer service’ provider or user broad immunity for any third-party content.¹³ It not only states that such providers and users shall not be treated as the publisher/speaker of such content or information, but also provides a “Good Samaritan” protection, where providers/users of interactive computer services shall not be liable for taking any action to screen or block any content they deem offensive.

The case of *Doe v. Myspace*¹⁴ is a classic example of the extensive immunity provided to intermediaries under US law. Myspace was sued for negligence on the basis that it failed to implement proper safety measures to prevent minors from lying about their age and accessing Myspace profiles through which they could communicate with potential sexual predators. The US courts held that Myspace could not be held liable for any communications published by third parties and dismissed the case of negligence against Myspace. While the Communications Decency Act provides intermediaries with broad immunity, the DMCA adopts the ‘safe harbour’ approach as used in India in order to provide a conditional safe harbour for intermediaries for claims of copyright infringement. Moreover, the DMCA specifically provides a ‘notice and take-down’ process, by which the owner of a copyrighted work can inform an intermediary of any infringing content in the form and manner provided under the DMCA.

In direct contrast to the *Super Cassettes Industries Ltd. v. Myspace Inc. and Anr* case cited above, the recent judgment by the US District and Second Circuit courts in the case of *Viacom Int’l Inc. v. YouTube, Inc.*,¹⁵ is a prime example of the extent of protection granted to intermediaries under US law. In this case, the courts held that in order to hold an intermediary liable for user-generated content that infringes copyright, the copyright owner needs to specifically show that the intermediary had specific knowledge of instances of infringement. In addition, the court also suggested that the intermediary may be held liable if it had exerted “substantial influence” on the infringing activities of users. However, the entire burden of proof to show such knowledge or influence exists lies on the copyright owner. In this case, Viacom was unable to prove YouTube had actual knowledge or awareness of specific infringing activity on its website and the courts held that YouTube could not be held guilty of copyright infringement.

Conclusion

The Indian government has attempted to provide a balanced framework for the protection of the interests of various intermediaries on the Internet, as well as the rights of the users of services provided by these intermediaries. However the laws are still in a nascent stage of development. Holding intermediaries liable for user-generated content could lead to an environment where intermediaries restrict the availability of content in order to avoid liability. This idea of self/privatized censorship has led to widespread debate on whether or not misuse of the current system can lead to restrictions on freedom of speech and expression on the Internet. It will be interesting to see how the Government deals with the task of securing individual freedoms and ensuring compliance with laws.

⁷ 2011 (48)PTC49(Del)

⁸ <http://www.google.com/transparencyreport/removals/government/>

⁹ <http://cis-india.org/internet-governance/intermediary-liability-in-india>

¹⁰ <http://www.medianama.com/2013/04/223-mouthshut-it-rules-supreme-court-of-india/>

¹¹ Section 1 read along with Section 75 of the IT Act

¹² 2011 (48)PTC49(Del)

¹³ 47 U.S.C. § 230

¹⁴ *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008)

¹⁵ 07 Civ. 2103 (S.D.N.Y. April 18, 2013)



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