

# Liability of Intermediaries in India



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# **LIABILITY OF INTERMEDIARIES IN INDIA**

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## **PREFACE**

This e-book aims to clarify the liability of intermediaries that provide goods and services on internet. It seeks to clarify the definition and scope of who can be considered as an ‘intermediary’ and has been written with a special focus on Indian law. Does an intermediary only mean and include carriers of information such as an email service provider or also include an online shopping mall? Are payment gateways like Paytm also an ‘intermediary’? Are social media sites like facebook also an intermediary? The e-book aims to clarify what is an intermediary and when are they liable for publishing defamatory/illegal data posted by thirds parties. Will an intermediary be liable for copyright infringement if it offers music sharing services which are P2P based, that is, peer to peer sharing? Will a social media site be hauled into court for publishing any defamatory content? Are intermediaries liable for publishing child pornography or the blue whale game? These are some of the pertinent questions this book aims to answer using appropriate examples, illustrations and caselaw. The e-book elucidates liability of intermediaries and due diligence practices that Intermediaries may adopt to claim exemption from liability under the extant Information Technology Law of India.

While handling cyberlaw litigation in India, liability of Intermediaries is often considered by Indian courts in one context or the other and I felt the need to pen down an e-book on the subject for useful reference of lawyers, intermediaries, consumers and businesses at large that may have to deal with these questions at some point of time! I hope it will be a useful read.

Your questions are welcome. Please feel free to write to me at [karnika@sethassociates.com](mailto:karnika@sethassociates.com).

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## **ABOUT THE AUTHOR**

**Dr. Karnika Seth** is an internationally renowned Cyber law expert & is the Founder Partner at Seth Associates law firm in India. Dr.Seth is also the Chairperson of Lex Cyberia at Seth Associates, the World's first integrated cyber laws research, forensics and legal consulting centre. Dr. Seth is one of World's leading authorities on cyber law & also known as a prolific Author & Educator on the subject. Her contribution to growth & development of cyber laws and spreading its awareness internationally and in India is widely acknowledged in the corporate world and by International organisations. She contributes to various Working Group Consultations and ICANN discussion forums aimed at designing policies for Next Generation Internet. She is part of Expert Panel of UNICEF working on children safety in the online world and actively associates with International Centre for Missing and Exploited Children (ICMEC) in its Think Tanks & cyber awareness activities in India. She is also associated with the International Telecommunication Union's initiatives and is a member of the Global Cyber Security Forum. Her expert views on cyber safety have been solicited by Indian Parliament and the Ministry of Information Technology, National Commission for the Protection of Child Rights for strengthening cyberlaws in India. She is empanelled as legal expert to advise National Internet Exchange of India and the Office of Comptroller of Certifying Authorities constituted under the IT Act, 2000. She is member of Advisory Board of various educational institutions and was conferred title of Honorary Professor by Amity University in 2017.

Dr. Seth practices law at the Supreme Court of India and is principal legal advisor to many multinational groups and government entities. She has actively resolved complex Cybercrime cases in conjunction with the law enforcement authorities in India. She is also an Expert IT law Educator & Trainer to law enforcement authorities in India including the National Judicial and Police Academy, Central Bureau of Investigations and The National Investigation agency.

Dr. Seth writes extensively on key legal and cyber awareness issues for newspapers, journals and periodicals from time to time. Ms. Seth's book titled 'Computers, Internet and New Technology Laws' published by Lexis Nexis Butterworths elucidates the key developments in the field of Cyber laws across many important jurisdictions, India, United States and European nations. Dr. Seth was conferred the Law Day Award from the Chief Justice of India for authoring the comprehensive reference book in 2012. She received the Digital Empowerment Award for the year 2015 and the Law Day Award in 2015 for authoring the book, Protection of Children on Internet. In 2017, Dr. Seth was conferred the National Gaurav Award for exemplary contribution to the field of cyber laws in India. She regularly contributes her views on the subject in conferences, print & electronic media and television.

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# CHAPTER 1

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## 1 INTRODUCTION

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An Intermediary is an Internet Service Provider which provides its platform for selling any goods or services or providing any service relating to an electronic record or communication. It would include any web hosting company, online auction site, online market place, or online payment sites and cybercafes. It includes network and telecom service providers too. Thus, it would include carriers of information (such as gmail service) and also a payment gateway (such as Pay pal, or Pay tm service)

### **1.1 Definition of Intermediary under the Information Technology Act, 2000:**

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Under Information Technology Act, 2000, Section 2(1) (w) defines an '*Intermediary*' as 'any person who on behalf of another person receives, stores, transmits that record or provides any service with respect to electronic record and

includes telecom service providers, internet service providers, web hosting service providers, search engines, online payment sites, online auction sites, online market place and cyber café. Thus, it includes any website that facilitates and brings together two interest groups such as retailers and consumers in an online shopping mall or carrier of mail service such as gmail or yahoo mail service. Before the IT (amendment) Act,2008, an intermediary was erstwhile defined with respect to an electronic message as “any person who on behalf of another person receives, stores or transmits that message or provides any service”. This was a narrow definition as compared to the present definition that has broadened both the scope and ambit of the term ‘intermediary’.

# CHAPTER 2

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## **LIABILITY OF INTERMEDIARIES**

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In India, Section 79 of the Information Technology Act, 2000 specifically deals with the issue of liability of Intermediaries. It states that an Intermediary is not liable for any third party information, data or communication link made available or hosted by him except as specified in Sections 79(2) and (3) of the IT Act, 2000. The 'third party information' is described in explanation 2 to Section 79 of the IT Act, 2000 as any information dealt with by an Intermediary in his position as an Intermediary. For example, a social media portal is an intermediary where users may post third party information by posting the user generated content such as pictures, comments or other posts. According to Section 79(2) of the IT Act, 2000, an Intermediary is not liable if its only role is to provide access to a communication system over, which information is posted by third party and 'transmitted or temporarily stored or hosted'. Further, the section provides that an Intermediary is not liable if it neither initiates the transmissions nor selects recipients and select

or change the information contained in the message which is transmitted.<sup>1</sup> An Intermediary is liable not for third party information if it complies with due diligence requirements laid down by the Central Government. Section 79(3) of the IT Act,2000 prescribes the conditions when an Intermediary is liable for third party information. An Intermediary is liable for third-party information, if it conspires or abets or aids or induces through threats or promises or otherwise to commit an unlawful act. The Intermediary is liable if on receiving actual knowledge or receiving a notice from the Government or its Agency that any information residing in or connected to a computer resource which is managed by an Intermediary used to commit an illegal act and the Intermediary thereafter does not efficaciously remove that material without tampering or destroying the evidence in any manner.

## **2.1 - The liability of Intermediaries before the I.T. (Amendment) Act, 2008:**

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Before the I.T. (Amendment) Act,2008 was passed, Section 79 dealing with liability of intermediaries was ambiguously worded. The erstwhile Section 79 stated that an Internet Service Provider was not liable under the Act for any third party information or data made available by him if he could prove that the offence or contravention was committed without his knowledge or he has exercised due diligence to prevent the commission of such offence or such contravention. There the

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<sup>1</sup> Section 79(2)(b) of I.T. Act,2000

onus to prove lack of knowledge or exercise of due diligence was on the Intermediaries without any exemption given to any class of Intermediaries. Section 79(3) of I.T. Act,2000 post the amendment in 2008, shifts onus of proof on the person affected. The affected person needs to prove that the Intermediary has conspired or abetted the commission of unlawful act (which is quite onerous to prove).

Also, Section 79(3)(b) of the IT Act,2000 makes an Intermediary liable for failure to take necessary action if after actual knowledge or notice a Government Agency, it does not disable access or removing illegal content without destroying the evidence. This means actual notice will be required to establish liability of any Intermediary. The earlier Section 79 of the IT Act,2000 was only applicable to network service provider which were regarded as an Intermediary. An Intermediary was erstwhile defined as “with respect to an electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service”. This was a narrow definition as compared to the present definition which expressly includes categories such as telecom service providers, network service providers, cyber cafes within the ambit of the definition. This safe Harbor protection is available to an Intermediary irrespective of any inconsistency with any other law applicable in India as Section 79 of the IT Act,2000 begins with the terms “notwithstanding anything contained in any law for the time being in force”. It is similar to the position in United States

and the safe Harbor provisions applicable to Intermediaries.<sup>2</sup>

## **2.2 Case Law on liability of Intermediaries:**

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Before Section 79 of the I.T. Act,2000 was amended in 2008, the Intermediaries were under an obligation to prove lack of knowledge and that they have adopted due diligence in order to escape liability. It was not clarified whether the requirement of knowledge is constructive or actual knowledge. In *Sanjay Kumar Kedia v. Narcotics Control Bureau*<sup>3</sup> the petitioner's plea to escape liability under the old section 79 was rejected by the court as the petitioner's company had actual knowledge of the malafide actions of sale of 'psychotropic substance' through their website which violated the Narcotic Drugs Psychotropic Substance Act, 1985. On this ground they were not considered to fall within the immunity provision provided under Section 79 of the I.T. Act,2000.

*Obscene video on Intermediary website*-In a case, *Avnish Bajaj v State*<sup>4</sup> the CEO of Baze.com failed to prove lack of knowledge and adoption of due diligence when a third party uploaded MMS of two students of a school on its auction site. The FIR against the Director was not quashed as Section 85 of the I.T. Act,2000 made a Director vicariously liable for acts committed by the company as the Director was in charge of the conduct of the business of the company when such contravention was made.

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<sup>2</sup> Digital Millennium Copyright Act, 2000, 17 US Code Section 512(I) (US).

<sup>3</sup> [2010] 1 S.C.R. 555

<sup>4</sup> (2005) 3 CompLJ 364 Del

The court held that under Section 272 of Indian Penal Code there is no automatic liability of a Director for publishing obscene material by a third party in the absence of mensrea. FIR was quashed against the Director but vicarious liability existed due to the deeming provision of Section 85 of the I.T. Act,2000 r/w Section 67 of the I.T. Act,2000 which provides publication of obscene contents is an offence. According to Section 85 of the I.T. Act,2000 where an offence is made by a company every person who at that time was responsible for the conduct of the business of the company shall be liable to be prosecuted and punished unless the Director proves the lack of knowledge and compliance with due diligence. The provision of Section 85 of the IT Act,2000 fails to provide whether the knowledge should be constructive or actual knowledge. However, it is clear if a contravention is made with consent or connivance of a Director such person may be liable. Hence, the FIR was not quashed as despite actual notice the illegal material (MMS clip) was not removed for two days and the filtering mechanism failed to block publication of such content. Later this decision was overruled in *Anita Handa v. God Father Travels and Tours (P) Ltd.*<sup>5</sup> wherein the Hon'ble Supreme Court considered the case of *Avnish Bajaj v. State*<sup>6</sup> popularly known as the Baze.com case along with the other Criminal Appeals to decide the question of liability. The Court considered the material question whether a Director shall be liable in case a company is not arraigned as

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<sup>5</sup> 2012(5)SCC661

<sup>6</sup> (2005) 3 CompLJ 364 Del



an accused in the complaint. The court held that in Section 85 of the I.T Act which provides for deemed liability of the Directors where an offence is committed by a company, a Director shall not be liable when complainant has not made the company as an accused. On this reasoning, the court quashed the proceedings against the Director as the company was not arraigned as an accused in the complaint.

After the amendment of Section 79 of the I.T. Act,2000, the liability of an Intermediary has been clarified to some extent. The current law states that an Intermediary is not liable unless there is an actual knowledge with Intermediaries or the Intermediaries modify/select third party content and publishes it (provided it observes due diligence requirements and other conditions mentioned in Section 79 of the IT Act,2000) or is proved to have conspired/abetted in the commission of unlawful act by threats or promise.

*Defamatory material on Intermediary website*-In the case of *Nirmaljeet Singh Narula v. Yashwant Sinha*,<sup>7</sup> the Plaintiff filed a suit for permanent injunction and damages against Bhadas4media.com a news portal. The Plaintiff filed an application for interim relief of temporary injunction against the Defendants on the ground that Defendants published false and malafide allegations against the Plaintiff which were defamatory in nature. It was alleged that the freedom of press was being misused by the Defendants as its sole agenda was to defame the Plaintiff. The court granted a conditional injunction restraining the Defendants from licensing, writing, publishing,

<sup>7</sup> 2012(132)DRJ370

hosting, advertising defamatory material against the Plaintiff through their website or other media. In defamation cases, a party may ask for compensation and/or prosecute accused under Section 500 of Indian Penal code, 1860, which prescribes punishment of imprisonment of upto 2 years and fine or both.

In another case, *Vyakti Vikas Kendra v. Jitender Bagga*<sup>8</sup> the Delhi High Court granted interim injunction against the Defendant restraining them from publishing defamatory materials about the founder of Art Living Foundation on [www.blogger.com](http://www.blogger.com). The court held that Defendant No.2 was an Intermediary within the definition of Section 2(1)(w) and Section 79 of the I.T. Act, 2000. On receiving actual notice the Defendant ought to remove such defamatory content within 36 hours. By virtue of this order, the Defendant No.1 was enjoined from sending any email or posting any materials defamatory to Plaintiff.

*Infringing material in intermediary account*-In *Olive e-business pvt ltd vs Kirti Dhanawat*, (CS(OS) 2393/2011) the Hon'ble High court of Delhi directed Google India to freeze the email accounts of defendants who had allegedly stolen data of its ex employer and the account contained infringing material. Thus, an intermediary could be directed by courts to suspend/freeze email accounts if plaintiff seeks an injunction restraining defendants from using the email account. However, Intermediary would not be liable as it is only a carrier or provider of service and has no knowledge of contents being

<sup>8</sup> 2012 AIR(DEL)108

transmitted through its service nor selects a sender or receiver of emails.

### **2.3 Due diligence requirement of Intermediaries:**

According to the Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(2) requires Intermediaries to inform the users about the prohibition to host, display, upload, modify, publish, update or share any information which is defamatory or obscene, invades by the privacy hates speech, integrates money laundering or other illegal or harmful content to minors, infringes intellectual property, violates law ,communicates grossly offensive or menacing message or spoofing, phishing, impersonation, vires or other worms to damage a computer resource or threaten unity, integrity, defense, security or sovereignty of India, friendly relations with foreign states or public order or incitement to commission of any cognizable offence or prevents any investigation of any offense. The guidelines also make it mandatory for every Intermediary to publish on its websites the privacy policy and terms of use on its website.

Rule 3 of the said Rules requires that an Intermediary shall not knowingly host or publish such materials or not initiate transmission or select the receiver or select or modify the transmitted information. After the *Shreya Singhal v. Union of India* case<sup>9</sup>, the Section 66A of the I.T. Act was struck down as unconstitutional on the ground of ambiguity wherein similar

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<sup>9</sup> AIR 2015 SC 1523

words were used such as ‘grossly offensive’ or ‘menacing’. It is yet to be clarified whether by virtue of striking down of Section 66A of the I.T. Act, the provision in Rule 3 of the I.T. (Intermediaries Guidelines) Rule will still hold good. Rule 3(4) states that on receiving actual knowledge of a complaint from an affected party in writing, an Intermediary ought to have disabled such content within 36 hours of receipt of such notice. The Rules clarify that mere transient of information with no human editorial control or removal of objectionable information on actual knowledge will not render an Intermediary liable. In a Landmark case, *Nirmaljeet Singh Narula v. Indijobs@hubpages.com*<sup>10</sup>, the Plaintiff filed a suit for permanent injunction against the Defendant from publishing defamatory articles about the Plaintiff on its website hubpages.com. In the application for interim injunction the court granted *ex parte ad interim* from publishing any defamatory articles about the Plaintiff on its website within 36 hours from the service of the court order failing which it directed the Registrar to block the web site from public access within India. This is the first case in India where I.T. (Intermediary Guidelines) Rules, 2011 were relied wherein the 36-hour deadline rule was used. The Plaintiff referred to and relied on *Banyan Tree v. A. Muar Murali Krishna Reddy*<sup>11</sup> to prove that the Delhi High Court had jurisdiction over the foreign defendants as it conducted business in India and effectively targeted Indian customers.

<sup>10</sup> CS(OS) 871/2012 order passed on 30th March, 2012

<sup>11</sup> 2008(38) Ptc288(DEL)

In According to Rule 3(8) of the said Rules, an Intermediary is required to adopt reasonable security practice to safeguard sensitive personal information it collects from any person. It recommends adoption of ISO 27001 as security measure. Rule 3(9) of the said Rules provides reporting requirements of Intermediaries to intimate Computer Emergency Response Team for cyber security incidents. Rule 3(10) of the said Rules prohibits Intermediaries from circumventing any law by adopting technical means which effects computer resource's normal functioning. It mandates Intermediaries to publish the name of the Grievance Officer and establish a redressal mechanism for complaint by users within a specified timeframe.

# CHAPTER 3

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## **LIABILITY OF INTERMEDIARIES IN COPYRIGHT INFRINGEMENT CASES:**

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In copy right infringement cases, one pertinent question to determine liability of an intermediary is whether the Defendant intermediary has the ability to control and check the infringing material on its site and has '*obvious direct financial interest in exploiting copyright materials*'. If answer is in the affirmative, the Defendants would be liable as an Intermediary. In India, however, we also require actual knowledge or actual exercise of monitoring control to prove that an Intermediary is liable for third party materials posted on its websites. An Intermediary that reserves right to block its service to any consumer may be vicariously liable if it reserves the right and ability to control third party materials and in effect supervises posting of any materials by a third party.<sup>1</sup> The new Section 79 of the IT Act,2000 excludes Intermediaries from liability where it only provides access to a communication system

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<sup>1</sup> A&M Records, Inc versus Napester, Inc, 239F3d1004, 1023(9th circuit-2001), Play Boy Enterprises versus Webb World, 991FSupp543, (N.D. Texas 1997)

and neither initiates transmission or selects a receiver or alter information being transmitted and observes due diligence norms.<sup>2</sup> Telecom Service Providers, Blog Hosting Companies would escape the liability for third party content where such Intermediary does not monitor such content and cannot be attributed liability so long as they fulfill due diligence requirements. Even caching is considered temporary and temporary storing of electronic copies in Random Access Memory such as a client cache stored in browser software of client is non infringing. Operating a program from Random Access Memory does not produce infringing copy<sup>3</sup>. In case of copyright infringement, plaintiff may seek damages as well as injunction order, delivery up of infringing goods and rendition of accounts<sup>4</sup>. In criminal remedy, accused can be prosecuted for copyright infringement<sup>5</sup>. In the case of *Super Cassettes Industries v. My Space Inc.*,<sup>6</sup> the Plaintiff filed a suit for permanent injunction restraining copyright infringement and claim for damages against Defendant No.1, a social networking website wherein the users could share pirated

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<sup>2</sup> This position is similar to Section 230 of the Communications Decency Act, 1996 where immunity is granted to Internet Service Providers from liability in case of automatic and interim and transient storage till the time ISP acts as a mere 'conduit' of information posted by third party and removes objectionable material on actual notice or through court order or request by a Law Enforcement Agency.

<sup>3</sup> *Apple Computer v. Formula International*, 594 F Supp 617 (CD Cal 1984)

<sup>4</sup> Section 55 of Copyright Act, 1957

<sup>5</sup> Section 63 of Copyright Act, 1957

<sup>6</sup> 2011 (48) PTC 49

copyrighted materials, images, videos at its location in United States of America. The Plaintiff contended that the Defendant made available infringing songs, pictures that users copy and share over Internet but also material which is not yet been released officially on other authorized channels. The Defendant claimed exclusion under Section 79 of the I.T. Act being an Intermediary on the ground that it had no knowledge or control over third party materials posted on its websites and had exercised due diligence. The court held that Section 79 (2) (a) of the IT Act were not satisfied as the Defendant not only provided access communication system where the third party information is stored, transmitted or hosted but also added advertisements to the said information thereby modifying the work which means it offered its platform as the place for profit with knowledge. The court took the view that the Defendants' action did not satisfy the due diligence and the criteria of no modification of information to claim exclusion of liability. The court observed that the Defendants took limited license to amend their content from its users and the Defendants thus had "the chance to keep a check on the works". The court further held as follows: -

*"The defendants have sufficient means to modify the work by taking licenses from the users, adding advertisements to the works of the plaintiff. Consequently, the effective means for pre infringement enquires are also necessarily have to be performed by the defendants only. If the defendants state that there no means to do so due to some impossibilities, the defendants must take preliminary measures at the time of modification of the works and prior to making them available to the public so as to*



*ensure that the same does not infringe any one's copyright. In other words, the court was of the view that defendants had ability to control and had reserved rights to control, did in fact monitor content so it should filter infringing materials as matter of pre infringement due diligence and not later when it receives actual notice. This situation is different from those networks who do not modify any third party content and simply provide access to internet or other service and fall within exclusion criteria in Section 79 of IT Act, 2000.”*

In *Perfect 10 v Visa International*<sup>7</sup>, Perfect 10 sued Visa for processing payments for websites that infringed copyrighted pictures. The Ninth circuit court of Appeal held defendant was not guilty of direct, vicarious or contributory infringement as neither knowledge nor intention to commit infringement was proven. The court held that only because defendant had reserved right and ability to check direct infringement, it is not enough to hold defendant vicariously liable.

In *Vodafone India limited v M/s R.K Productions (P)Ltd*<sup>8</sup>, a civil suit for permanent injunction was filed to prevent infringement of copyright in movie ‘*Dhammu*’, and restraining defendants being internet service providers and unknown persons by John doe orders. It was contended that such internet service providers make unlawful gains by contributing to infringement of copyright and court directed on receipt of URL from plaintiff, defendants ought to block URLs that published such pirated movie links. The court took the view that Section 79 of the IT Act,2000 would not apply to copyright infringement cases

<sup>7</sup> 2007 DJ DAR 10586 (9<sup>th</sup> circuit,3 July ,2007)

<sup>8</sup> 2013(54)PTC 149 (Mad)

which is specifically excluded by section 81 of the IT Act, 2000. Relying on *Super cassette industries case*<sup>9</sup>, the court held that even where future infringements are sought to be prevented an action for permanent injunction is maintainable.

### **3.1 Liability of intermediaries for facilitating music piracy**

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According to the Digital Millennium Copyright Act 1998 (DMCA) of U.S, any act that aims to circumvent the net piracy measures is a criminal offence. The DMCA in very limited circumstances allows cracking of copyright protection devices including research in encryption technologies, assisting interoperability issue and for enhancing computer security. In the landmark *Napster case*<sup>10</sup>, Napster introduced software that enabled Peer to Peer (P2P) sharing of music MP3 files on the internet which were stored on hard disks of its members. In a claim for copyright infringement, Napster contended it cannot be liable for copyright infringement as it was only a carrier of service. The court rejected the contention holding Napster liable for copyright infringement as Napster was doing more than just being an internet service provider by enabling its members to share in a P2P model, pirated music files. Whereas in Napster users downloaded files through Napster's server, in case of Gnutella, there was no central server. Gnutella was an open source software to exchange messages. Grokster

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<sup>9</sup> 2011 (48) PTC 49

<sup>10</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001)

used MP3 and other file formats which also faced an action for copyright infringement that was dismissed by the Ninth circuit for court of appeals but the Supreme court of U.S later held that P2P file sharing companies like Grokster could be sued for inducing copyright infringement for acts taken in the course of marketing file sharing software. The Ninth Circuit court of appeals had held Grokster was neither held liable for vicarious copyright infringement nor for contributory infringement as it had no central server and the software would only be providing some method of cataloguing the available information. Grokster was not imputed constructive knowledge of infringement as software could also be used for non infringing activities. However, the Supreme court of U.S overruled the decision and held that they could be sued for inducing copyright infringement for acts taken in the course of marketing file sharing software.

In *Sega vs MAPHIA*<sup>11</sup> defendants owned and operated a Bulletin Board System called MAPHIA which facilitated sharing of videogames amongst its subscribers. The plaintiff held copyright in games which were uploaded and distributed via the service and these were downloaded by defendant subscribers with their due knowledge. MAPHIA was held guilty of contributory as well as direct infringement.

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<sup>11</sup> 857F Supp 679,682(N.D California 1994)

# CHAPTER 4

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## **BLUE WHALE CHALLENGE AND LIABILITY OF INTERMEDIARIES**

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The Blue whale game became a deadly scare as it hit India, in 2017. The notorious and illegal game that targets young children and adults to commit suicide, is reported to have originated from Russia and is allegedly responsible for spate of suicides committed by children in Russia, China, and India in last year. In author's view, the blue whale game abets suicide, which is a punishable offence under Section 305 of the Indian Penal Code, 1860 that prescribes punishment for life imprisonment or 10 years of imprisonment. As a preventive measure, the Government of India banned the game from access within India. <sup>1</sup>An important question that emerged is how far is it technically feasible to implement the ban? For an intermediary, blue whale game was not found

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<sup>1</sup> "Blue Whale Challenge: Centre's call for ban on the game is a good political statement, but it's not feasible", First Post, 17 Aug 2017 <http://www.firstpost.com/tech/news-analysis/blue-whale-challenge-centres-call-for-ban-on-the-game-is-a-good-political-statement-but-its-not-feasible-3939123.html>

on an exclusive website or app that can be blocked but used encrypted communication channels through social media or direct messaging service. It was allegedly a link shared on social media with a blue whale image that was drowned in water to evoke the curiosity and fear of a child. This brings technical challenges for blocking the game or rendering the social account inactive on social media pages where it sneaks in. A technique called Photo DNA profiling that uses hash algorithm perhaps, will be a useful tool to trace such blue whale posts on internet (akin to technology used in U.S and U.K to detect child pornographic content) as it will have same hash value if the content is same. Then, it can be blocked by contacting the service provider concerned in which the post lies. This needs a multi-stakeholder action, by intermediaries, organizations like the Internet Watch Foundation, social efforts through increasing awareness and legal steps by actively prosecuting the cybercriminals promoting this game on internet. A series of public interest litigation were filed before Indian courts (including Supreme court of India, High court in Delhi & Mumbai) seeking directions to block the game from internet. The Supreme Court of India and asked Center to take immediate action to block the game on internet and directed television channels to spread cyber awareness by telecasting programmers on dangers of blue whale game. The apex court also court directed formation of an expert committee to block such lethal games from internet. The technical challenges such as difficulty in tracing and

blocking blue whale game was also experienced when banning and blocking child pornographic websites in India<sup>2</sup>. In a PIL that flagged the concern of blocking child pornographic websites in India, the Supreme Court of India had directed intermediaries to block child pornographic websites from Internet. A special meeting of intermediaries was also convened in this regard including Facebook, Google and other tech companies. However, the intermediaries and the Government technical difficulties in blocking such websites from internet<sup>3</sup>. Such intermediaries on whose sites a third party posts a blue whale link would not be held liable unless there is actual knowledge and/or conspiracy/intention to commit the crime (provided it has followed due diligence norms) under the extant IT law in India.

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<sup>2</sup> Child pornography is an offence as per Section 67B of IT Act, 2000 punishable with imprisonment of up to 5 years and fine up to 10 lac or both on first conviction.

<sup>3</sup> child pornography: Government gets time to think about bans, The Hindu, 28 March 2016, <http://www.thehindu.com/news/national/child-pornography-government-gets-time-to-think-about-bans/article8405946.ece> (accessed on 12 Jan 2018)

# CHAPTER 5

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## **Conclusion**

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Law on liability of intermediaries is an evolving process. It will take contours differently at different times with emerging technologies. But at all points of time, liability of an intermediary will be analysed on anvil of need to allow an Intermediary the freedom to operate their services, their technical constraints and need to hold an intermediary liable where there is actual knowledge of illegal materials on its website and /or active negligence in performing its role! Social media portals, and other platforms will not be able to operate if an intermediary is held liable for third party information posted on its platform (which to a person may seem objectionable but from objective standards is not!). A clear example of this dilemma is when attributing liability to intermediaries for piracy of music. In the Napster case, Napster allowed Peer to Peer sharing of pirated music files and had control over their users and had a centralized server through which it could prevent users from infringing by downloading copyrighted files. But in case of Grokster, and

Smart Cast, it lacked a centralized server and did not have ability to prevent users from using the software even though it deactivated their systems. Although the Ninth Circuit Court of Appeals held Grokster was not liable vicariously for copyright infringement, the U.S Supreme Court later held they could be sued for inducing copyright infringement for acts taken in the course of marketing file sharing software. Therefore, interestingly, liability of an intermediary needs assessment based on evolving nature & dynamics of technology itself and application of law thereon!

The current Indian law states that an Intermediary is not liable unless there is an actual knowledge with Intermediaries or the Intermediaries modify/select third party content and publishes it (provided it observes due diligence requirements and other conditions mentioned in Section 79 of the IT Act, 2000) or is proved to have conspired/abetted in the commission of unlawful act by threats or promise. If it simply provides a platform where third parties post information or is a carrier of service such as broadband service provider, exemption from liability is available to intermediaries under the current law so far as conditions provided under Section 79 of IT Act, 2000 have been complied with.