IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. OF 2013
(Under Article 32 of the Constitution of India)

IN THE MATTER OF:

RAJEEV CHANDRASEKHAR
s/o. Air Cdr M.K. Chandrasekhar (Retd.)
r/o. No. 375, 13th Main
3rd Block, Koramangala
Bangalore - 560034 ...PETITIONER

VERSUS

1. UNION OF INDIA
   Through the Secretary,
   Department of Telecommunications,
   Sanchar Bhavan,
   20 Ashoka Road,
   New Delhi – 110001.

2. DEPT. OF ELECTRONICS & INFORMATION TECHNOLOGY,
   Through the Secretary,
   Ministry of Communications &
   Information Technology,
   Electronics Niketan,
   6-CGO Complex,
   New Delhi – 110003. ...RESPONDENTS

WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 32 OF THE CONSITUTION OF INDIA

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TO

HON'BLE THE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUDGES OF THE
SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONER ABOVE NAMED-

MOST RESPECTFULLY SHOWETH:

1. The present Writ Petition under Article 32 of the Constitution of India is being filed in public interest to challenge Section 66A of the Information Technology Act, 2000 (the "IT Act"), as inserted by the Information Technology (Amendment) Act, 2008, and the Information Technology [Intermediaries Guidelines] Rules, 2011 (the "Rules") for being arbitrary and uncanalized, *ultra vires* the IT Act, and in violation of the rights available to citizens under Articles 14, 19 and 21 of the Constitution. The Petitioner has not approached any concerned authority for similar relief.

2. The Petitioner herein is a citizen of India and has been an independent Member of Parliament in the Rajya Sabha, since May 2006. The Petitioner was elected to the Rajya Sabha in 2006 and once again, re-elected unopposed in 2012. The Petitioner holds a Bachelor's Degree in Electrical Engineering from the Manipal Institute of Technology, Mangalore

University, Karnataka; a Master's Degree in Computer Science from Illinois Institute of Technology, Chicago (which has also recognized him as a distinguished Alumnus); and has attended Management Programmes at Harvard University, Boston. Before being elected to Parliament, he founded BPL Mobile Communications Limited ("BPL Mobile"), and was one of the pioneers in developing India's first and largest greenfield telecom infrastructure. BPL Mobile had invested in and built world-class telecom infrastructure in the metropolis of Mumbai and the circles of Maharashtra, Tamil Nadu and Kerala and laid the foundation for the telecom revolution in India. The Petitioner is widely recognized for his significant role in the development of the now successful telecom sector, and his expertise in relation to the complexities regarding the techno-economic and regulatory issues facing the telecom sector since its liberalization in 1993. The Petitioner does not have any interest – direct, indirect or financial – in the telecommunications business since 2005, or in any businesses relating to the Internet Industry.

3. Apart to being an industry leader in the telecom domain, the Petitioner was one of the youngest national Presidents of the Federation of Indian Chambers of Commerce and Industry (FICCI), India's apex industry body. As the President of

FICCI, the Petitioner was responsible for initiating wide ranging reforms in multiple industry verticals. Since his election to the Upper House of the Parliament in 2006, the Petitioner in his capacity as an Independent Member of the House, has raised various issues of concern relating to the telecommunications industry and internet freedoms. The Petitioner consistently fought for transparency in policies and processes pertaining to the telecom sector and in particular, has been instrumental in ensuring transparency in the process of distribution of government largesse in the telecom sector. The Petitioner consistently fought for declaring spectrum as a scarce national asset and for the need for allocation of spectrum through a transparent and competitive bidding process, so as to ensure that the scarce national resource is distributed in a manner so as to subserve public good. The Petitioner raised each of these issues in Parliament. The Petitioner has also raised issues concerning the Rules in multiple fora, on several occasions. As an active Member of Parliament, the Petitioner has made mentions in Zero Hour, raised questions to the Ministry of Communications and Information Technology and has further, on multiple occasions, brought issues concerning freedom of the Internet and freedom of speech and expression thereon, to the Hon'ble Prime Minister. The

Petitioner has had multiple correspondences with the Hon'ble Prime Minister on the Government of India's proposal to the United Nations for control of the Internet through a fifty-member, intergovernmental body. Copies of letters 15.5.2012 and 1.6.2012 addressed by the Petitioner to the Hon'ble Prime Minister on this issue are collectively annexed hereto and marked as **ANNEXURE P-1 (Colly.)** (At page 46 to 64). The Petitioner has written several articles and participated in many interviews and sessions wherein the Petitioner has expressed concerns and misgivings in relation to the curtailing of freedom of speech and expression, especially on the Internet.

4. The Petitioner further has championed the cause of freedom of speech and expression of all classes of citizens, as a representative of the people, as a member of the political class who believes in the right of political dissent and right to express one's views, and as an active user of the Internet and the various modes of expression afforded on the same.

5. In view of the fact that the right to information and the freedom of speech are guaranteed by the Constitution, the present Petitioner seeks to invoke his right under Article 32 of the Constitution to check the excesses committed by the Respondents in notifying rules that are well beyond the

people's mandate as reflected by the Parliamentary enactment of the IT Act. As this is an issue affecting users across the country, and as the Internet, by use or definition has no territorial nexus, the Petitioner has approached this Hon'ble Court, where the freedom of expression and the freedom to access information are *guaranteed* by the Constitution. Additionally, the issue will also have a percolating effect on the wider perception of people across the globe on the stance of the Indian administration on the Internet. The petitioner is a proud citizen of the largest democracy of the world, and ardently believes that the independent and highest judiciary will uphold the ethos and spirit of free speech and freedom of expression embodied in our Constitution as envisaged by our founding fathers and ensure that this country remains an upholder of free speech.

6. The Brief Facts giving rise to the present petition are as follows:-

a. On 29.07.1988, the United Kingdom enacted the UK Malicious Communications Act to make provision for the punishment of persons who send or deliver letters or other articles for the purpose of causing distress or anxiety. The UK Malicious Communications Act deals restricts offences

similar to those dealt with in Section 66A of IT Act to one-on-one communications.

b. On 08.02.1996, the US Communications Decency Act was enacted, which inter alia deals with obscene, harassing and wrongful utilization of telecommunication facilities. The provisions of the US Communications Decency Act which dealt with 'indecent transmission and patently offensive display' have been struck down as being unconstitutional despite affirmative defenses and held to be an abridgment on freedom of speech as protected by the First Amendment, by the Supreme Court of the United States of America.

c. On 30.01.1997, the General Assembly of the United Nations resolves to adopt the Model Law on Electronic Commerce which had been adopted by the UNCITRAL. The Resolution *inter alia* states as follows:

> "*Noting* that the Model Law on Electronic Commerce was adopted by the Commission at its twenty-ninth session after consideration of the observations of Governments and interested organizations,

Believing that the adoption of the Model Law on Electronic Commerce by the Commission will assist all States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists,

1. *Expresses* its appreciation to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Electronic Commerce contained in the annex to the present resolution and for preparing the Guide to Enactment of the Model Law;

2. *Recommends* that all States give favourable consideration to the Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information;

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3. *Recommends* also that all efforts be made to ensure that the Model Law, together with the Guide, become generally known and available."

d. The Digital Millenium Copyright Act, 1998 (the "DMCA") came into force in the United States of America. The DMCA defines 'service provider' in a twofold manner and provides an elaborate takedown notification mechanism, for the removal of content by intermediaries.

e. The European Parliament adopted Directive 2000/31/EC (the "EU Directive") on 08.06.2000. The EU Directive related to information society services [i.e., any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service] and service providers thereof. Article 14 of the EU Directive provides:

"1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a). the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information."

f. Pursuant to the Model Law, India enacted the Information Technology Act, 2000 ("the IT Act"), which came into effect on 17.10.2000 *vide* G.S.R.788(E).

g. Between August and October 2002, the Electronic Commerce (EC) Directives Regulations, 2002 (the "UK Regulations") were promulgated and came into force in the United Kingdom. Regulation 19 of the UK Regulations provides:

"Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—

(a) the service provider—

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information; and

(b) the recipient of the service was not acting under the authority or the control of the service provider."

A copy of the Electronic Commerce (EC) Directives Regulations, 2002 is annexed hereto and produced as **ANNEXURE P-2** (At page 65 to 76).

h. In December 2008, Mr. Avnish Bajaj, the CEO of Bazee.com (now eBay India) was arrested by police in Delhi as one of the 7.5 million listings on his website was that of a widely circulating obscene video clip.

i. In July 2003, the UK Communications Act was enacted by the United Kingdom to inter alia, make provisions for regulation of the provision of electronic communications networks and services and of the use of the electro-magnetic spectrum requires. The UK Communications Act requires mens rea as a pre-requisite for invocation of its provisions similar to Section 66A of the IT Act. Maximum punishment laid down by the United Kingdom's Communication Act, 2003 is only up to six (6) months, as contrasted with the three (3) years mandated by Section 66A.

j. Thereafter, on 27.10.2009, the Government of India brought into effect various wide-ranging amendments to the IT Act, the most relevant of which are as follows:

- Amending the definition of "Intermediary" in Section 2(1)(w) to specifically include telecom, network and internet service providers, as well as online hosts, sites and market places.

- Inclusion of Section 66A, in terms of which any person who sends, by means of a computer resource or other communication device, information which *inter alia* is "grossly offensive" or "has menacing character" or any electronic mail or electronic mail message "for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages".

- Substitution of Chapter XII containing Section 79 to expand the protection of network service providers to all intermediaries (given the expansion of the definition), and also providing circumstances in which the immunity would be available.

- Insertion of sub-section (zg) in Section 87(2) enabling the Central Government to make Rules with reference to the "guidelines to be observed by the intermediaries" under S.79(2).

Sections 66A and 79, which are relevant for the purposes of the present Petition is as follows:

66A. Punishment for sending offensive messages through communication service, etc.

Any person who sends, by means of a computer resource or a communication device, -

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation:-For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

...

79. Exemption from liability of intermediary in certain cases

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf (Inserted Vide ITAA 2008).

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation:- For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

k. On 13.04.2011, in pursuance of its powers under Section 87(2)(zg) and 79(2), the Central Government brings into effect the Information Technology [Intermediaries Guidelines] Rules, 2011 ("the Rules"). These rules lay certain onerous conditions upon the intermediaries, going beyond the provisions of the parent Act in their scope and ambit. Copies of the relevant Sections of The Information Technology Act, 2000 alongwith Information Technology (Intermediaries Guidelines) Rules, 2011 dated 11.4.2011 are annexed herewith and marked as **ANNEXURE P-3(Colly)** (At page 77 to 86).

l. The present Writ Petition under Article 32 of the Constitution challenges The Information Technology [Intermediaries Guidelines] Rules, 2011 for being arbitrary and uncanalized, *ultra vires* the IT Act, and in violation of the rights available to citizens under Articles 14, 19 and 21 of the Constitution.

7. The Petitioner is aggrieved by the vague and all encompassing terminology adopted in Section 66A of the Act, which overreaches the Constitutional mandates, as clearly laid out in Article 19(1)(a) and Article 14.

8. The present Petitioner is further aggrieved by the fact that the Rules are *ultra vires* the scope of the Act, and also impede the rights of the users by interfering with their fundamental rights to free speech, to privacy, to natural justice and to be treated equally with those who use different media to communicate.

9. The Petitioner submits that most compelling objections to the Rules stem from the fact that they are vague, unconstitutional, lack transparency contain a presumption of illegality and permit government and private censorship. This petition is a result of public recognition of the fact that inequitable, incomplete, vague and poorly thought out rules and legislations provide the government with ample power to abuse the system and restrict access to information if it is in the government's interest to do so.

10. The Petitioner also submits that the Act was intended to be a self-contained code that governs the conduct and affairs of intermediaries in India. The *non obstante* language in the Acts leads to the logical conclusion that the Act overrides all other laws for the time being in force that may be applicable to intermediaries. Such being the case, multiple actions have been initiated in India against intermediaries for third party content that is available on such platforms. Intermediaries

operate on a global scale and therefore need to have a common platform of regulations for effective and smooth operations. The activities of intermediaries also should not be curtailed in a manner such that would lead to ultimately curtailing free speech. Typically, intermediaries host on their platforms third party information or user generated content. Responsibility for such user generated content vests upon the third party users, who are the authors of such content. In recent times, multiple actions have been initiated in India against intermediaries, for the criminal offence of defamation under Section 500 of Indian Penal Code. By virtue of such action, intermediaries have been muzzled not to upload third party content which typically consists of user generated views and opinions, which reflect free speech. The actions that have been initiated for defamation against intermediaries have, at times, forced intermediaries not to provide a platform for free speech, in the fear of being hauled up in a criminal proceeding for defamation. This has led to an indirect obstruction of free speech, in complete contradiction to the fundamental rights enshrined in the Constitution. The Petitioner also therefore seeks for declaration from this Hon'ble Court that pursuant to the Act, it would be impermissible to initiate action against intermediaries under

traditional criminal law and in particular, for the offence of criminal defamation under Indian Penal Code.

11. Hence being aggrieved by Section 66A of the Act and the Rules, and the various actions that have been initiated against intermediaries in India, the Petitioner submits this petition under Article 32 of the Constitution of India, *inter alia* on the following grounds which are set out herein below without prejudice to each other:

GROUNDS

A. At the outset, the Petitioner seeks to submit that the impugned provisions reveal no application of mind, and are arbitrary in nature, wholly in breach of Article 14 of the Constitution. They permit the State to take action against those who upload content that is deemed to be annoying, inconvenient or deceptive, and this would include innocent third party hosts who have done nothing to prevent such use.

B. The impugned provisions are also broad in their sweep, imposing statutory limits on the exercise of internet freedom which are well beyond the Constitutional parameters enshrined in Article 19(2) of the Constitution, thereby rendering themselves illegal and *ultra-vires*.

C. Even in the context of the reasonable restrictions imposed on the exercise of the right under Article 19(1)(a), it is well settled that the right extends to cover speech that may be regarded by certain individuals or sections of people as offensive, annoying, insulting or inconvenient. However, precisely such speech is sought to be subject to criminal penalties, including imprisonment for a period of up to 3 years, by virtue of the operation of Section 66A of the IT Act, which therefore deserves to be and should be struck down.

D. The wide import of Section 66A of the IT Act restricts any communication or message, in the form of critique, satire, hyperbole or otherwise, on pain of imprisonment if it causes mere 'annoyance' or 'inconvenience' to recipients. Section 66A contains several words/terms as reasons for restricting free speech that are vague, easy to misinterpret, and thus problematic, with no definition to specify the scope of these phrases. It also restricts, on pain of imprisonment, communications containing deliberately false information sent for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, or ill will. The Petitioner submits that as long as such communications are not in violation of the grounds listed in Article 19(2) of the Constitution, they cannot be curbed on the grounds specified

in Section 66A, as this would amount to a violation of Article 19(2).

E. The current equivalent laws in the United Kingdom are Section 127 of the UK Communications Act and Section 1 of the UK Malicious Communications Act. Whilst Section 66A(a) uses the terms 'grossly offensive' or 'menacing', it remains ambiguous as to whether the information shall be treated as such on the basis of the impression of the receiver of such information, or on reasonable grounds, as may be determined. It is pertinent that UK Malicious Communications Act, whilst dealing with similar offences, restricts the same to one-on-one communications. Further, Section 66A(b) of the IT Act treats communication that causes 'annoyance' and 'inconvenience', 'insult', 'ill will' and 'hatred' on par with communication that causes 'injury', 'danger', and 'criminal intimidation'. *Mens Rea* is a pre-requiste for invocation of similar provisions under the UK Communication Act. It is also pertinent that provision is applied in a restrictive manner to a communication between two (2) persons using public electronic communications network i.e.- mails, written persistently to harass someone and not individual instances of tweets or status updates, as may be, that are available for public consumptions and which are not intended for harassment. Additionally, the maximum punishment laid

down by the UK Communication Act is only up to six (6) months, as contrasted with the three (3) years mandated by Section 66A. Section 66A(c), although intended as an anti-spam provision, fails to include unsolicited and bulk messages, which are actually in the nature of spam. Further, by extending the definitions of 'electronic mail' and 'electronic mail message' to include every electronic communication, including communication that may not be sent to defined recipients the way an electronic mail is sent, fails to cover 'spam'. The wide scope of Section 66A as a whole, which applies to all communication, whether direct or otherwise, and the unreasonably broad import of terms such as 'grossly offensive', 'menacing', 'annoyance', 'inconvenience', 'insult', 'ill will', 'hatred', 'electronic mail' and 'electronic mail message', render the section unconstitutional. Given that the Constitution of India clearly defines the grounds of free speech and that the Constitution of the United Kingdom is an unwritten constitution, it may be said that reasonable restrictions allowed under Article 19(2) of the Constitution of India are more comprehensive in detailing the restrictions of free speech and the language of Section 66A, whether borrowed from its UK counterpart, or otherwise, ought to tested within the confines of Article 19(2) of the Constitution of India.

F. Section 66A is also likened to Sections 501 (indecent transmission) and 502 (patently offensive display) of the US Communications Decency Act. The United States Supreme Court's majority and concurrence opinions in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), dated June 26, 1997, struck down the two provisions of the US Communications Decency Act. Both the 'indecent transmission' provision and its 'patently offensive display' provision were found unconstitutional by the Court, despite affirmative defences, because the provisions were held to abridge the freedom of speech protected by the First Amendment.

G. The Petitioner submits that the impugned provision on its terms effectively adds a new offence to the penal law of India i.e., criminalizing speech by reason of the subjective annoyance or inconvenience it causes to Intended or even unintended recipients by reason simply of the medium that is employed for the communication of such speech (i.e., 'a computer resource or a communication device"). The speech that is swept within the coverage of the provision includes political satire, social commentary or political debate, all of which undoubtedly enjoy the protection of Article 19(1)(a) and are not actionable otherwise than under Section 66A. Such a

provision lends itself to use by authorities to control certain content or censor certain views, including those critical of the powers that be or alleging corruption in high places. On its plain language as well as in its operation till date, the provision therefore criminalizes speech that cannot be regarded as actionable under any existing penal provision, including Section 499 of the Indian Penal Code, which defines defamation.

H. The Petitioner submits that defining the offence with reference to the medium employed for communication of the same does away with the threshold requirement that speech be 'published', for the same to be actionable. Rather, under Section 66A, any person who "sends" such purportedly annoying, insulting or offensive communication, even if only to a private group, can nevertheless be subject to penal sanction. That such speech is actionable is apparent from the text of the provision. In addition, there is no requirement of *mens rea* for the provision, which would result in even mistakenly sent emails or SMS messages being used to prosecute the sender. Moreover, it has also been interpreted as such till date, with arrests having been carried out for email forwarding of supposedly offensive content to a closed group as well as remarks on a social network that could be viewed only by a group of selected recipients.

I. The Petitioner submits that Section 66A on its plain language as well as in its operation has led to a constitutionally unsustainable position wherein the protection afforded to free speech under the Indian Constitution is practically done away with on the internet and in electronic communication. Criminalizing otherwise permissible speech on the basis of its communication through the internet is a blatant violation of Article 14. Additionally, such restrictions have a 'chilling effect' on the exercise of freedom of speech by users of the email and social networks. A provision of law that forces people to self-censor for fear of criminal sanction deprives the constitutional guarantee of any meaningful content and as such is unconstitutional. That such censorship may also take place at the level of the intermediary providing the user the means to connect to the internet and communicate on electronic media is also a very real prospect, with Section 79 of the Act laying down an uncertain exemption from liability for such entities. That either a user or an intermediary would err in favour of suppressing content for fear of criminal sanction is incompatible with the values of a constitutional democracy. The overhanging threat of criminal prosecution for exercise of civil liberties by virtue of a vague and widely worded law is also therefore in violation of Article 21 of the Constitution of India.

J. A perusal of Section 66A would reveal that it uses the following words that are not defined in the Act: 'offensive', 'menacing character', 'annoyance', 'inconvenience', 'danger', 'obstruction', 'hatred or ill-will', 'enmity' and 'mislead'. The interpretation required of these phrases endows uncanalised powers on the State to decide at its whim or fancy as to when a prosecution may be initiated, and when ignored. Thus, this provision is in breach of Article 14 of the Constitution.

K. Article 14 is also impacted in the manner in which wholly dissimilar offences are treated on par by Section 66A. For example, the causing of danger or criminal intimidation has been equated with the causing of some annoyance or inconvenience for the purposes of the provision. In addition, the same sentence of imprisonment upto 3 years and fine applies to where stolen computer resources or communications devices are dishonestly received, or to one guilty of identity theft or cheating by impersonation.

L. The Petitioner submits that while administrative guidelines including requiring the approval of a senior police official prior to registering complaints under the said provision may be issued, the same do not cure the facial unconstitutionality of Section 66A on its very language. Firstly, such directives are of uncertain legal provenance and require to be harmonized

with Sections 78 and 79 of the Act. Secondly, the threat of criminal prosecution, even if purportedly muted to a certain extent nevertheless exists and will doubtless serve to 'chill' speech on the internet till such time as clarity is obtained as to the contours of actionable speech. The Applicant submits that this Hon'ble Court in *Ajay Goswami v. Union of India*, (2007) 1 SCC 143 highlighted the need for case-by-case determination of the validity of all restrictions on the exercise of free speech, which protection should equally be afforded to free speech on the internet. Any provision of the law that fails to satisfy the exacting standard laid down by this Hon'ble Court is therefore facially invalid.

M. It is submitted that the underlying principle in the right to equality as enshrined in Article 14, is for equals be treated equally and it follows that unequals shall be on unequal platforms. It is submitted that the impugned Rules are clearly in contravention of this fundamental legal premise enshrined in the Constitution. By way of illustration, it is submitted that a live video sharing service cannot be treated the same as an online bulletin board, for reasons relating to differences in nature, frequency of content being uploaded on each of these *websites, and other parameters that are unique to the particular services. It is further submitted that the In the* United States of America, the DMCA defines 'service

provider' in a twofold manner by incorporating it in two different subsections, as:

a. Section 512(k)(1)(a) an 'entity offering transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of the material of user's choice, without modification to the content of material as sent or received'.

b. Section 512(k)(1)(b) a 'service provider' is a 'provider of online services or network access or the operator of facilities therefore'.

It is submitted that the DMCA defines a service provider in a broad sense so as to include universities and other institutions providing Internet access to their students, professionals, researchers, etc. Further definition under Section 512(k)(1)(a) and Section 512(k)(1)(b) is broad enough not only to include all current intermediaries but also to encompass technically new providers in the future.

N. The Petitioner further submits that the impugned Rules essentially endow the intermediary with the power of determining what information is objectionable, and then allowing it to both disable access to the information and

terminate access of the user to the intermediary's computer system. This is a delegation of a State function to a private entity, which is impermissible and violative of Constitutional norms, as it amounts to an abdication of an essential Governmental function.

O. The adherence to the impugned Rules provides the intermediary immunity in terms of Section 79 of the Act. However, in laying down several detailed parameters which are outside the Act, and imposing very brief time limits (thirty-six hours), the intermediary is forced to act in haste against the users, all of which is *ultra vires* the Act. The impugned Rules have the effect of compelling intermediaries to act within thirty six hours, and disable content, thereby stifling the freedom of expression of users. It is submitted that the State has thus delegated a subjective, discretionary function to a private party which would be bound to either act as per its economic interests, or act in such a manner as to prevent any liability from accruing to it.

P. The impugned Rules create a legal and logical inconsistency, inasmuch as an intermediary which in any manner selects or modifies the information contained in a transmission is not entitled to the exemption granted by Section 79 of the IT Act; and by virtue of abdication of power to the intermediary by

the State, the intermediary is forced under the Rules, to select and modify information by removing information objected to by "affected parties".

Q. The application of the impugned Rules has resulted and will further result in a waste of judicial time, inasmuch as on every count of refusal to remove content, where the request for removal was frivolous or could not be undertaken by an intermediary without an authoritative adjudication of the same (such as a request for removal in the case of allegedly defamatory content), the affected party may initiate civil and criminal actions against the intermediary. This would result in numerous frivolous litigations being initiated before the already overburdened courts in the country, apart from increasing legal costs for intermediaries and users alike, who would be required to defend themselves against such frivolous suits.

R. Rule 3(2) of the impugned Rules lists the various type of information that ought not to be carried on a computer system. Only clause (i) may be traced to Article 19(2) of the Constitution which contains the permissible grounds to restrict the exercise of free speech. Content that is "invasive of another's privacy", "ethnically objectionable", "disparaging", "harms minors in any way", "impersonates another person" or

"misleads the addressee about the origin of such messages" are all considered objectionable and requires steps to be taken for their removal when the intermediary knows of them. This Rule violates Article 14 in being arbitrary and overbroad, and in granting the private intermediary the right to subjectively assess such content. It breaches Article 19(1)(a) in creating restrictions which are alien to the Constitutional framework and is also beyond the scope of the Act which is restrictive in administering such regulation.

S. Rule 3(3) bars the intermediary from hosting any of the content referred to in Rule 3(2). Section 79 makes it clear that the intermediary is free of liability if it does not actively participate in the transmission. As a result of the subordinate legislation, this protection is watered down to expose the intermediary to prosecution even if it merely 'hosts' such content. Apart from being *ultra vires* the Act, Rule 3(3) suddenly provides for an objective test to assess the objectionable content under Rule 3(2) against which the subjective judgment of the intermediary will be tested. As a result, it is arbitrary and violates Article 14 of the Constitution.

T. Rule 3(4) provides for the intermediary to disable the information that is in contravention of Rule 3(2) either on its own or on the basis of information received within 36 hours. It

is submitted that the turnaround period of thirty six (36) hours for removal of content is completely impractical and infeasible for intermediaries which process enormous quanta of data, to implement, especially given that an incredibly large number of take down notices would be issued to such large and popular intermediaries. It is submitted that information providers only offer an opportunity to publish and are unable to exercise any influence on, or what people say on the Internet, as was held in *Religious Technology Service Centre v. Netcom*, 907 F.Supp 1361, 37 USPQ2d 1545. As was held in this case, it is further submitted that a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred, is not workable. The Court observed that billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from the non-infringing bits.

U. It is further submitted that Rule 3(4) permits an unguided application of mind by the intermediary as to whether Rule 3(2) has in fact been violated, and then rushes it into taking punitive action without even granting the alleged offender the right to be heard. This provision endows uncanalised power on the intermediary, and violates the user's valuable natural justice rights, and is therefore in breach of Article 14 of the

Constitution. In this respect, reference may also be had to recent decisions in the United Kingdom, which relied upon the UK Regulations to hold that a service provider for internet society services (such as an intermediary) cannot be expected to determine what constitutes "unlawful content". In *Payam Tamiz v. Google Inc., Google UK Ltd* [2012] EWHC 449 (QB), Eady, J. of the Queen's Bench held that an intermediary was not a publisher in Common Law, and relying upon the decision in *Bunt v. Tilley* [2006] EWHC 407 (QB), it was noted that in order to be able to characterise something as 'unlawful', a person would need to know something of the strength or weaknesses of the available defences. In *Andrea Davison v. Sameh Habeb, Peter Eyre, Gordon Bowden, The Palestine Telegraph Newspapers Ltd., Google Inc., Google UK Ltd.* [2011] EWHC 3031 (QB), it was observed, with reference to an intermediary, that:

> "It may well be unrealistic to expect the fifth defendant to take down material which is complained of as defamatory, where it is not in a position to determine for itself whether a complaint is or is not justified. If it were to respond to every complaint by requiring the offending material to be taken down, it would be making significant inroads into freedom of expression."

It is submitted that as suggested in *Davison's* case, the Rules cause significant inroads into freedom of expression, by

requiring intermediaries to determine and effectively adjudge whether any content complained of by an "affected person" is "grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever".

V. It is submitted that the impugned Rules provide a 'notice-and-take-down' procedure which does not conform to international standards, especially given the vagueness of the grounds for taking down content, and the procedure set out as well. In this regard, it is submitted that Section 512(c) of the DMCA contains similar procedures wherein the service provider is required to remove or disable access to material that is claimed to be infringing or subject of infringing activity. However, the procedural requirements for notification under the DMCA are elaborate, in that the specific contents of the notification are provided for under Section 512(c)(3)(A) of the DMCA. Further, the DMCA recognizes the immense potential for abuse posed by the notice and take down procedure and it is not without protection of the intermediary's interests, whose service is potentially jeopardized by any claim of infringement brought to the attention of the servicing intermediary. In this regard, the DMCA contains counter

notification procedures, stating essentially that the intermediary is legally obligated to restore access to material at the direction of an alleged infringer who feels he/she has been wronged by an infringement allegation. Where the alleged infringer receives notice from the intermediary that his or her material is going to be removed due to a claim of infringement alleged by another party, or where the material has already been removed, the alleged infringer may send the intermediary a counter notice that the material in question is not infringing Upon receipt of the counter notification, the intermediary must then inform the copyright holder that counter notice has been filed, and that the material will be replaced or access to it restored in a period of 10 days. If the copyright holder intends to pursue the matter and prevent the material from being replaced or restored, it must then file suit in appropriate court within ten day period, and obtain and order restraining the subscriber from engaging in infringing activity. In absence of any notice by the complainant regarding the filing of such suit, the intermediary is required to replace the removed material and cease disabling access to the material in not less than 10 days and not more than 14 days from the receipt of the counter notice. The IT Act lacks similar provisions, thereby failing to strike a balance between

the interests of the right holders and those of the online service providers and presents immense potential for abuse.

W. It is further submitted that incorporating specific provisions dealing with the procedure to avail benefits of limitations on liability will establish a proper standard of liability of intermediaries. In this regard, it is submitted that the DMCA lays down a comprehensive procedure for intermediaries to obtain the benefits of safe harbor protection (Section 512(c)(1) provides for procedure for notice and take-down). Section 512 of the DMCA not only specifically defines the scope of the safe harbor but also sets out specific conditions and exemptions for its application. In India, it is submitted that the two defences available to intermediaries are 'lack of knowledge' and 'due diligence', both of which are vaguely defined. Moreover, there is a lack of clear and specific procedure to take the benefits of safe harbor provision in under the impugned Rules.

X. Rule 3(4) requires the intermediary to keep apparently offending information and associated records preserved for at least 90 days. Rule 3(7) calls upon the intermediary to provide any information or assistance to a Government agency seeking such information in writing. Both of these sub-rules violate the user's right to privacy enshrined in

Article 21 in sharing or retaining information which the intermediary in many cases is not permitted to access, and which in all cases cannot be shared without prior consent. These sub-rules are also *ultra vires* as they go beyond the scope of Sections 67C, 69 and 69B of the Act, for which separate guidelines have also been issued in the form of Rules in 2009.

Y. It is further submitted that Rule 3(2) also creates discrimination between the internet and other media like newspapers, magazines and television. Parameters for being dubbed offensive content ought to be consistent across these various modes of disseminating information, but in laying down several additional factors, the internet as a medium is singled out for greater restraint. In being arbitrary, this is violative of Article 14 of the Constitution, in affecting internet entrepreneurs, it breaches Article 19(1)(g), and in depriving users of the right to share and access such otherwise unobjectionable content, it impacts Article 19(1)(a).

Z. It is submitted that once action as contemplated under the Rules is taken by the intermediary relying on his subjective assessment, if the same is later found to be misplaced or incorrect, there is no safeguard for the user, and no legal means to compensate him for the loss caused. In lacking a

reasonable forum for adjudication and sans the basic principles of natural justice, the Rules are illegal and ought to be struck down.

AA. It is also submitted that if at all, information on the Internet should be governed by more liberal rules, as it is truly international in content and instant in creation. This has been reflected in the Report of the Special Rapporteur Frank La Rue on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2011) and the UN Human Rights Council Resolution on Internet Freedom (2012). As such, the Rules are excessively restrictive, and cannot be sustained under the present Constitutional scheme.

BB. It is submitted that the *non obstante* language in the Act provides a clear indication that the Act is intended to be a self-contained code governing the conduct and affairs of intermediaries in India. In that light of the matter, it would be impermissible for action to be initiated against intermediaries under traditional criminal laws for third party user generated content available on the platforms of intermediaries or hosted by intermediaries. In particular, no action can be initiated against intermediaries for third party user generated content under Section 499 of Indian Penal Code. The offence of defamation cannot be made out against intermediaries for the

alleged defamatory content that may be uploaded by third party users/ authors of content. As long as the Act continues to be in force, the Act alone governs the conduct of intermediaries in India and their actions cannot be assailed nor can they be prosecuted under Section 499 of Indian Penal Code.

CC. It is submitted that promising Indian technology start-ups and foreign service providers are being deterred from setting up business in India by the unclear intermediary liability scenario in India, and resist from investing their time, effort and money in a jurisdiction that does not clearly define their liabilities. The current framework not only results in a direct los of right to freedom of speech and expression to the public at large, but also a loss to the exchequer in terms of taxes which may potentially be collected from such internet intermediaries – Indian and foreign, had they invested in India and established presence in India.

DD. The arbitrary blocking of websites by the Respondents is without any basis and is an uncanalized and arbitrary exercise of power, which is violative of Article 14 of the Constitution of India.

EE. It is finally submitted that at the purely practical level, it is impossible for intermediaries to monitor the millions of new

bits of information being uploaded on their sites in penalizing them for information continuing to be hosted despite their knowledge, a great burden is placed on the intermediary to show that such information was in fact not within his knowledge. By way of illustration, 72 hours of video are uploaded every minute, on YouTube, and over 4 billion hours of video are watched on YouTube, every month. It is submitted that it would not practically be feasible for an intermediary to monitor and respond to requests in respect of such large quanta of information/content. The Rules would violate the due process requirement under Article 21 as a result. It is further submitted that the EU Directive specifically provides that no general obligation of monitoring shall be imposed on service providers. It is submitted that this would ensure the protection of free speech and to prevent an unduly harsh obligation being imposed on such service providers.

FF. It is finally submitted that this Hon'ble Court ought to appreciate that the Amendment Act by which Section 66A was inserted in the IT Act was one of 8 important bills passed within 15 minutes by the Parliament with hardly a few words of debate. It would be most appropriate that the impugned provisions be placed in abeyance until a final resolution is provided to the issues at hand.

12. The Petitioner submits that he has not filed any other Petition arising out of the same cause of action or facts before this or any other Court in the country.

13. The Annexures P/1 to P/3 (Colly) produced along with the Writ Petition are true copies of their respective originals.

14. The Petitioner has no other better or more efficacious remedy available than to file the instant Writ Petition in public interest under Article 32 of the Constitution since the issue is of overarching importance and requires the urgent intervention of this Hon'ble Court.

PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

a) Issue a writ of mandamus or any other appropriate writ quashing / striking down Section 66A of the Information Technology Act, 2000 as being in violation of Articles 14, 19 and 21 of the Constitution, and hence *ultra-vires*;

b) Issue a writ of mandamus or any other appropriate writ quashing Rules 3(2), 3(3), 3(4) and 3(7) of the Information Technology [Intermediaries Guidelines] Rules, 2011;

c) Declare that Rules 3(2), 3(3), 3(4) and 3(7) of the Information Technology [Intermediaries Guidelines] Rules, 2011 violate the fundamental rights enshrined in Articles 14, 19 and 21 to the Constitution;

d) Declare that Rules 3(2), 3(3), 3(4) and 3(7) of the Information Technology [Intermediaries Guidelines] Rules, 2011 are inconsistent with Sections 67C, 69, 69B and 79 of the IT Act;

e) Declare that Intermediaries under the Act cannot be prosecuted under Section 499 of Indian Penal Code for third party user generated content that may be hosted or otherwise available on their platforms;

f) Any other relief which this Hon'ble Court may be pleased to grant in the interests of justice.

AND FOR THIS ACT OF KINDNESS THE PETITIONER SHALL AS IN DUTY BOUND EVERY PRAY.

DRAWN BY:
Sajan Poovayya
Haripriya Padmanabhan
& Harini Sudersan

FILED BY:

(E.C. AGRAWAL)
ADVOCATE FOR THE PETITIONER

DRAWN ON: 11.12.2012
FILED ON: 10.01.2013
NEW DELHI