RESPONSE TO
INFORMATION TECHNOLOGY INTERMEDIARIES GUIDELINES (AMENDMENT) RULES, 2018

THE INTERNET MUST NOT BE A SAFE HAVEN FOR THOSE WHO MISUSE IT

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Introduction

Technology especially the Internet is a major disruptive force that is changing everything and turning every model known and unknown on its head.

At a basic level it is connecting the average citizen to information and data and empowering them in an unprecedented way. This puts all Institutions under pressure to change and adapt.

While it is my belief that intermediaries must be liable for unlawful and illegal content on their platforms, the approach to regulating Intermediaries should be carefully thought through - should not be a one-size-fits-all approach, nor should it be a brute force approach that causes unintended censorship and fettering of free speech and innovation.

The internet has played a key role in connecting people across the globe, enabling collaboration and allowing access to information and news on an unprecedented scale. The internet has also created opportunities for mischief makers, lawbreakers, terrorists and a whole new group of people bent on misusing the power and span of the Internet, to create disharmony and violence. The need to address this is urgent as more and more Indians get online with almost 60 Crore Indians and growing.

Safe Harbor and Intermediary Liability in a Changing World

Way back in 2007, as a member of Standing Committee on Information Technology working on Fiftieth Report on 'Information Technology (Amendment) Bill, 2006', I had anticipated the growth of Technology intermediaries and its ramifications for the real world. I had suggested that intermediaries will have to be made accountable at some point of time. I am enclosing a relevant section from that report.

Information intermediaries are no longer the companies they were when intermediary liability laws first developed, and the role of platforms in society is changing. Technological change driving much of the industry is the scale of

content and the velocity and speed of amplification of content on platforms. With the emergence of modern cutting-edge technologies like Artificial Intelligence (AI) and other tools, the intermediaries have significantly higher capabilities of pre-emptively filtering the unlawful content than they were in the previous years. Hence my contention that intermediaries must no longer enjoy the safe harbor exemption and must be made responsible for the content on their platforms to some extent. *How to regulate them and to what extent can be the subject of discussion and debate.*

Different Regulations for Different Information Intermediaries

I repeat again - While I agree that intermediaries must be liable the approach should not be a one-size-fits-all approach, nor should it be a brute force approach that causes unintended censorship and fettering of free speech.

Therefore, intermediaries must be treated differently based on their capacity and means to filter the content. The following could be the suggested categories and redefinition of intermediaries in this context.

1. Internet access and service providers (ISPs)
2. Data processing and web hosting providers which Transform data, prepare data for dissemination, or store data or content on the Internet for others
3. Internet search engines and portals which Aid in navigation on the Internet
4. E-commerce intermediaries and online aggregators which enable online buying or selling
5. Social Media and Messaging Platforms like Facebook, Twitter, WhatsApp etc (which are also described as Participative Networking Platforms and aid in creating content and social networking including Internet publishing and broadcasting platforms but do not themselves create or own the content being published or broadcast)

Proactive takedown of Unlawful Content and Traceability

The intermediaries of today are not "mere conduits" as they were in early days of internet. Intermediaries today make conscious decisions about their design to yield certain kinds of content; they closely study their users and enable micro-target advertisements at them or sell user data to others. They can leverage the knowledge they acquire about users to potentially influence their behavior. In summary they exercise significant power and influence and current regulations vis-à-vis these platforms lag their power and influence especially to be misused. Hence exempting intermediaries of this scale and capability under safe harbor regime is to stay within a bubble of unaffordable innocence.

I accept that the concern is not unjustified that the proactive obligation to remove "unlawful" content could lead to over-censorship. However, there are ways for regulations to address this. It is also necessary to ensure more competition amongst such platforms and not allow one platform to dominate the market and therefore have users multiple choices and options.

While deploying technology tools to curate the content may not be the silver bullet to curb misinformation and unlawful content, it still would be a good step towards altering the current free-for-all culture that exists in many of these platforms. It must be recognized these platforms are no longer simple technology innovations but entities that exercise tremendous influence and power that could be used positively but can also be deployed to cause harm and disruption in societies and communities in our country and around the world.

Conclusion

Technology and innovation and the change they represent is meant to be for public and societal good. But when the same is misused with intention of harm, crime, division etc. the technology intermediaries and the Government must close ranks and act decisively and robustly to ensure that our country, our democracy and our way of life doesn't get disrupted by those who wish to do so.

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STANDING COMMITTEE ON INFORMATION TECHNOLOGY (2007-2008)

FOURTEENTH LOK SABHA

MINISTRY OF COMMUNICATIONS AND INFORMATION TECHNOLOGY
(DEPARTMENT OF INFORMATION TECHNOLOGY)

INFORMATION TECHNOLOGY (AMENDMENT) BILL, 2006

FIFTIETH REPORT

LOK SABHA SECRETARIAT
NEW DELHI

August, 2007/*Bhadrapada,* 1929 *(Saka)*

Auditing of Electronic Records

7. The Committee note that according to the representatives of the industry auditing of electronic records is desirable as per the global practice to provide some legal sanctity to these records and check frauds that are constantly occurring in corporate India. The DIT, while concurring with the appropriateness of the suggestion, have regrettably passed on the onus to the industry to find out more details regarding the global practices and standards in this regard. The Committee disapprove such an attitude of the nodal Department as they themselves should have done all the spade work in this regard. However, after interaction with the industry representatives, the Committee feel that auditing of electronic records is a pressing need in the present scenario when more and more data and records are not only being generated digitally but even the existing ones are being digitalised for excellent retention value and easy storage and retrieval. During the course of the examination, the Committee could comprehend that even DIT are not fully clear about the status of digitally generated records, albeit they being official government documents. The Committee, therefore, desire that a suitable clause be inserted in the Bill to make auditing of electronic records mandatory so that electronic records both in terms of information system and information security are accorded clarity, authenticity and legal sanctity.

Definition and role of Intermediary and liability of network service providers
(Clause 4 and Clause 38)

8. Section 2 (w) of the IT Act defines 'intermediary' with respect to any particular message as any person who on behalf of any other person receives, stores or transmits that message or provide any service with respect to that message. The Committee note that Clause 4 sub-clause (F) of the Bill now seeks to define the term 'intermediary' as any person who on behalf of another person receives, stores or transmits electronic records or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes. It also seeks to explicitly exclude 'body corporate' as referred to in Section 43(A) of the principal Act as an intermediary. The Committee also find that Clause 38 of the Bill proposes to substitute the entire Chapter XII of the principal Act whereby the intermediaries are absolved of liability in

certain cases. In some other situations, the culpability of the intermediaries has been fixed. To exercise further control over the intermediaries, Clause 38 also stipulates that they shall observe such other guidelines as the Central Government may prescribe in the matter under sub-section 4 of Section 79. After carefully going through the various proposals, the Committee are constrained to point out that the definition and role of intermediaries sought to be made through the amendments are not very clear, particularly with regard to the exclusion of body corporate referred to in Section 43 (A) of the Bill. They, therefore, desire that the Department should reexamine Clause 4 (F) of the Bill so that there is no scope for ambiguity while interpreting the definition and role of the intermediaries.

9. The Committee observe that under the existing provision of the IT Act, 2000 the network service providers are made liable for all third party content or data. But under the proposed amendments, the intermediaries/service providers shall not be liable for any third party information data, or communication link made available by them, except when it is proved that they have conspired or abetted in the commission of the unlawful act. The Department's reasoning for not making the intermediaries/service providers liable in certain cases is that a general consensus was arrived at, while discussions were going on the amendments to the IT Act, to the effect that the intermediaries/service providers may not be knowing what their subscribers are doing and hence they should not be penalised. The Committee do not agree with this. What is relevant here is that when their platform is abused for transmission of allegedly obscene and objectionable contents, the intermediaries/service providers should not be absolved of responsibility. The Committee, therefore, recommend that a definite obligation should be cast upon the intermediaries/service providers in view of the immense and irreparable damages caused to the victims through reckless activities that are undertaken in the cyber space by using the service providers' platform. Casting such an obligation seems imperative, more so when it is very difficult to establish conspiracy or abetment on the part of the intermediaries/service providers, as also conceded by the Department.

10. What has caused further concern to the Committee, in the above context, is that the Bill proposes to delete the words 'due diligence' as has been existing in Section 79 of the principal Act. The Department's logic for the proposed removal of the words 'due diligence' is the intention to explicitly define the provisions under Section 79 pertaining to exemption from liability of network service

providers. The Department have further contended that the words 'due diligence' would be covered under the guidelines which the Central Government can issue under sub-section 4 of Section 79 of the principal Act. The Committee do not accept the reasoning of the Department as they feel that removing an enabling provision which already exists in the principal Act and leaving it to be taken care of by the possible guidelines makes no sense. They are in agreement with the opinion of some of the investigating agencies that absence of any obligation to exercise 'due diligence' would place some of the intermediaries like online auction sites/market places in an uncalled for privileged position thereby disturbing the equilibrium with similar entities that exist in the offline world. The Committee also feel that if the intermediaries can block / eliminate the alleged objectionable and obscene contents with the help of technical mechanisms like filters and inbuilt storage intelligence, then they should invariably do it. The Committee are of the firm opinion that if explicit provisions about blocking of objectionable material/ information through various means are not codified, expecting self-regulation from the intermediaries, who basically work for commercial gains, will just remain a pipedream. The Committee, therefore, recommend that the words 'due diligence' should be reinstated and made a pre-requisite for giving immunity to intermediaries like online market places and online auction sites.

Contraventions of serious nature
(Clause 19)

11. Section 43 of the IT Act, 2000 provides for payment of compensation not exceeding rupees one crore as penalty for damages to computer, computer system, etc. It enlists eight situations under Clauses (a) to (h) where the damages are liable to be paid. The Committee note that the amending Bill proposes that the marginal heading of Section 43 be changed from 'Penalty' to 'Compensation'. An additional Clause [(i)] relating to destruction/alteration, etc. of information in a computer resource has also been added. While agreeing with the additional Clause, the Committee tend to share the apprehensions of some of the investigating agencies regarding gravity of contraventions enumerated in Clauses (c) to (i). These contraventions are of serious nature and may have calamitous consequences in many cases, more so where Intellectual Property Right (IPR) or related aspects and security matters are involved. They, therefore, feel that merely a compensation not exceeding one crore rupees may not suffice. The Committee, therefore, desire that Clauses (c) to (i) of Section 43 be made cognizable offences punishable with