

Legal Issues in ‘Intermediary Liability & Safe Harbor’

Issue: Can Over-The-Top Platforms Claim Immunity Under The Safe Harbour Doctrine?

Concepts & Definition

❖ **Over-The-Top Platforms –**

- A media service offered directly to viewers via the Internet, such that it bypasses cable, broadcast, and satellite television platforms. These are companies that traditionally act as controllers or distributors of such content.

❖ **Intermediary –**

- A person or an organization that helps other people or organizations to make an agreement by being a means of communication between them (Oxford Dictionary).

❖ **Intermediary Liability –**

- The liability imposed upon an intermediary on account of its users' conduct on their platforms.

Relevant Legal Provisions

❖ Rule 2(s), Information Technology Rules, 2021 –

“‘publisher’ means a publisher of news and current affairs content or a publisher of online curated content;”

❖ Rule 2(q), Information Technology Rules, 2021 –

“‘online curated content’ means any curated catalogue of audio-visual content, other than news and current affairs content, which is owned by, licensed to or contracted to be transmitted by a publisher of online curated content, and made available on demand, including but not limited through subscription, over the internet or computer networks, and includes films, audio visual programmes, documentaries, television programmes, serials, podcasts and other such content;

Relevant Legal Provisions (Contd.)

- ❖ **Rule 2(u), Information Technology Rules, 2021 –**

“publisher of online curated content’ means a publisher who, performing a significant role in determining the online curated content being made available, makes available to users a computer resource that enables such users to access online curated content over the internet or computer networks, and such other entity called by whatever name, which is functionally similar to publishers of online curated content but does not include any individual or user who is not transmitting online curated content in the course of systematic business, professional or commercial activity;

- ❖ **Rule 3(1), Information Technology Rules, 2021**

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- ❖ **Rule 3(2), Information Technology Rules, 2021**

Relevant Legal Provisions (Contd.)

❖ Section 79, Information Technology Act, 2000 –

“Network service providers not to be liable in certain cases. ...no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.”

Explanation.—For the purposes of this section, —

(a) "network service provider" means an intermediary;

(b) "third party information" means any information dealt with by a network service provider in his capacity as an intermediary;”

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Relevant Judicial Decisions

❖ ***Nirmaljit Singh Narula v. Indijobs At Hubpages.Com & Ors.*** [CS (OS) No.871/2012, Delhi High Court, March 30, 2012]

- “...an intermediary to observe due diligence and not knowingly host or publish any information that is grossly harmful, defamatory, libellious, disparaging or otherwise unlawful. ... Such intermediary is not liable for third party content if, it removes access to defamatory content on receipt of actual knowledge. Rule 3(4) of the said rule provides obligation of an intermediary to remove such defamatory content within 36 hours from receipt of actual knowledge. ... Further, Rule 3(5) of the said rules requires an intermediary to inform its users that in case of non compliance with rules of user agreement, the intermediary has the right to terminate access or its usage rights of users and remove non compliant information.”

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Relevant Judicial Decisions (Contd.)

- ❖ ***Kent Ro Systems Ltd & Anr. v. Amit Kotak & Ors.* [CS(COMM) 1655/2016, Delhi High Court, January 18, 2017]**
 - *“To hold that an intermediary, before posting any information on its computer resources is required to satisfy itself that the same does not infringe the intellectual property rights of any person, would amount to converting the intermediary into a body to determine whether there is any infringement of intellectual property rights or not. All persons claiming any intellectual property rights will then, intimate the intermediaries of their claims and the intermediaries then, before hosting any material on their computer resources would be required to test the material vis-a-vis all such claims lodged with them, else would be liable for infringement.”*
 - *“... to require an intermediary to do such screening would be an unreasonable interference with the rights of the intermediary to carry on its business.”*

Relevant Judicial Decisions (Contd.)

❖ *Shreya Singhal v. Union of India* [AIR 2015 SC 1523]

- *“Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not...Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79....”*

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Relevant Judicial Decisions (Contd.)

- ❖ ***Aparna Purohit v. State of U.P.*** [Crl. Misc. No. 2640/2021, Allahabad High Court, February 25, 2021]
 - “... *On the one hand, the sentiments of majority community have been hurt by display of the characters of their faith in disrespectful manner and on the other hand, an attempt has been made to widen the gap between the higher castes and the scheduled castes when the object of the State is to bridge the gap between the different castes and communities and make the country a united force socially, communally and politically...*”
 - “...*the fact remains that the applicant had not been vigilant and has acted irresponsibly making her open to criminal prosecution in permitting streaming of a movie which is against the fundamental rights of the majority of citizens of this country and therefore, her fundamental right of life and liberty cannot be protected by grant of anticipatory bail to her in the exercise of discretionary powers of this Court.*”

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Relevant Judicial Decisions (Contd.)

- ❖ ***Peggy Fen v. Central Board Of Film Certification & Ors.* [WP(C) NO. 28288/2021, Kerala High Court, February 10, 2022]**
 - *“Simply making an observation that the movie contains foul language or obscene language, this court cannot direct to remove the movie from the OTT platform. I have a strong doubt that the petitioner herself has not sent the movie in full before filing this writ petition. ... There is indeed a right to freedom of speech and expression u/A. 19(1)(a) of the Constitution but the above type of criticism will be doing an injustice to the filmmaker by making comments without properly understanding the facts...Therefore, according to me, no relief can be granted in this writ petition.”*

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THANK YOU!

Questions?

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