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Indranath Gupta & Lakshmi Srinivasan

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Evolving scope of intermediary liability in India

Indranath Gupta and Lakshmi Srinivasan

Jindal Global Law School, O. P. Jindal Global Institution of Eminence Deemed to be University, Sonipat, India

ABSTRACT

The passing of the 'Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021' rekindles the age-old question about the scope of intermediary liability in India. The 2021 Code is not the first one to have raised this question. There is a long history of what the law in India wants the intermediaries to do in terms of managing the online space they own. At times, the legal structure has not made the expectations certain and definitive. The article reflects on the scope of intermediary liability in India and the extent of uncertainty that intermediaries face within the existing framework. It makes certain recommendations about bringing certainty for intermediaries. In the process, this article consults Legislation and Guidelines linked with intermediary liability. There is a critical assessment of various judgements delivered on the issue of intermediary liability in India.

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Introduction

The term 'intermediary' has been construed in a similar way across different jurisdictions for almost four decades now. The overall expectations associated with intermediaries at an early stage of their development were dependent on the prevailing technology. This reliance, in turn, led to the establishment of a limited regulatory framework. However, as technology evolved, intermediaries had to expand their responsibilities by increasing their engagement with the content they 'host' on their 'platforms'. It has been the key facilitator that pushed intermediaries to be more proactive in content management. The law, in turn, has tried to create a sustainable framework by way of balancing the expectations of different stakeholders.

With the commercialisation of the Internet, most jurisdictions struggled to keep up with the pace of rapid innovation. Internet slowly became irreplaceable and was 'no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses' (Fair Housing Council of San Fernando Valley v Roommates.com 2008). Jurisdictions took a while to navigate the means to regulate the undefined space created by the Internet (Kohl 2012). However, with growing irregularities in this

CONTACT Indranath Gupta igupta@jgu.edu.in Jindal Global Law School, O.P. Jindal Global Institution of Eminence Deemed to be University, Sonipat, Haryana 131001, India

online space, nations were forced to think about optimal solutions to regulate this space. There were other motivations to regulate the Internet. One of them was nurturing a few niche parts of the technology and becoming a global leader in the process. With the passage of time, the Internet has become a public good (Faheema Shirin R.K. Vs State of Kerala and ors 2020). Therefore, to meet the objective of social benefits, it has become necessary to regulate the Internet (Parliamentary Standing Committee on Science and Technology, Environment and Forests 2000).

On the Internet, the intermediaries or 'service providers' or 'platforms' as they are commonly known play a crucial role as gatekeepers and facilitators of different services. These intermediaries play a pivotal role in the vast exchange of electronic data in the online space. In the last few decades, many countries have pushed their reliance on data and the digital world. India, being one of the countries at the forefront of the Internet boom, has been making a transition into a digital economy. Digital India is the Government of India's flagship programme to make India a digitally empowered society. The key vision areas of the programme include making digital infrastructure a core utility to every citizen, providing governance and services on demand, and digitally empowering the citizens. The private sector is also playing a role in enabling Digital India initiatives. In this transition, India has opened its market to the companies at the forefront of this technology race. Owing to the broad range of services, many large tech-companies would be classified as intermediaries, and they would rely on the framework India adopts for intermediaries.

India has addressed the issue of intermediaries for a little over two decades. This issue has been a part of many discussions in different jurisdictions, with documented evidence of the struggle that they had to undergo. For instance, USA's Section ('S.') 512 of the Digital Millennium Copyright Act ('DMCA') has been discussed widely for the concerns surrounding fair use and free speech (for instance, Lenz v. Universal). E.U., the other pioneer jurisdiction, with its Digital Single Market Directive ('DSM Directive'), have seen discussions concerning its definition of 'communication to public' and its repercussions on the Online Content-sharing Service Providers ('OCSSPs') or more commonly known as websites involved in hosting 'user-generated content' ('UGCs') (DSM Directive, Article 17).

The position in India; however, has not always been clear, but primarily it is somewhere between what has been adopted in mature jurisdictions to a standard which is unique in many ways (Information Technology Act 2000, S. 2(w); Information Technology (Intermediary Guidelines) Rules 2011).

While India continues to address the scope of intermediary liability, there are phases when these attempts have not always been consistent. The hunt for a clear framework within which intermediaries should function is still a work-in-progress. This article embarks upon a journey of assessing the different attempts that have been made so far in India. By using three different lenses, the article reveals the scope of intermediary liability and the different levels of uncertainty that persists in the current framework. There is a table at the end that captures the changes that happened at different times (Table 2). These lenses are the Information Technology Act ('the Legislation', 'the I.T. Act'), judgements delivered by various High Courts and the Supreme Court of India and the allied Rules notified on due diligence by the Ministry of Electronics and Information Technology ('MeiTY').

In India, rules regarding intermediary liability have undergone several changes in the last two decades. These changes have been regarding two things: Firstly, placing realistic targets for the intermediaries to control their online space. Second, the pertinent rules

and regulations that expand on those targets bring about transparency and fairness in the online environment. Starting with the enactment of the I.T. Act, 2000, to the amended Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 ('2021 Guidelines'), this article traces the critical developments of the framework that governs intermediary liability. In the process, it reveals the scope of intermediary liability in India and the relative uneasiness and uncertainties that exist in different approaches adopted in the last two decades.

The article critically presents the two decades of rules governing intermediary liability in three sections. The first section revisits the legislative and judicial interventions related to India's I.T. Act. It also considers the Guidelines concerning this Act. However, the I.T. Act alone is not the law that spearheads intermediary liability in India. The Copyright Act of 1957 ('Copyright Act') also deals with this subject, although in a focused manner. Hence, starting with the Copyright Act and supporting jurisprudence concerning intermediary liability in India, the second section delves into a critical understanding of the relationship between the I.T. Act and the Copyright Act. The final section looks at the way forward for intermediaries in India.

In the process of creating a sustainable framework for intermediaries, one of the options is to increase the expectations and responsibilities of intermediaries. However, increasing expectations on intermediaries could take away their 'passive' status from them. In other words, this may lead to an existential crisis. One cannot bypass this question as these platforms are central to the Internet infrastructure, and they facilitate connectivity. A framework is required for intermediaries to grow in the ecosystem while preserving the rights of different stakeholders in a democratic society.

While tracing the overall developments, the article concludes on a note that the existing framework for intermediaries must extend further clarifications. While the previous decade has been relatively better, considerable uncertainty still exists regarding the scope within which intermediaries should function.

Section I

S. 79 of the I.T. Act is foundational to discussions concerning intermediary liability in India. Section I captures the essence of intermediary liability in India. It develops the scope of such liability and compares different versions of S. 79 – starting from the initial version in 2000 to the amendments of 2008–2009. The section further develops the scope with the help of relevant guidelines and judgements dealing with the scope of intermediary liability in India. In the process, the section identifies the relative uneasiness that is present with the scope of S. 79 vis-à-vis intermediary liability in India. It further develops and scrutinises the different approaches adopted at different times to decide on intermediary liability.

The scope of the I.T. Act was not only about intermediaries. The Act was enacted to give equal status to an online agreement as one would give to an agreement signed in a physical environment. Therefore, the overarching scope was to regulate and create a framework for the transfer of electronic data over different media (Lok Sabha, 2000. Discussion on the Information Technology Bill, 1999). The report of the Standing Committee on the I.T. Bill, 1999, summarises the Indian legislation as a 'sequel' to the UNCITRAL Model Law on E-Commerce (MLEC) adopted in 1996 (Standing Committee on Science and Technology, Environment and Forests 1999). This Model Law established rules on electronic contracts and laid the foundation

for E-Commerce regulation. Moreover, the I.T. Act in India was a wake-up call for aligning the Indian information technology ('IT') ecosystem to suit the emerging IT needs (Standing Committee on Science and Technology, Environment and Forests 1999). Broadly, the enactment of the I.T. Act was to regulate alternatives to paper-based communication methods and boost the functioning of the IT industries in India at the time (Rao 2001). Therefore, the I.T. Act had to include provisions on e-contracts, cybercrimes, governance structure and a provision on intermediaries. At the stage of ideation, the objective of the I.T. Act was to not only regulate the intermediaries. Its broad agenda was to ensure a smooth transition to a phase in the economy where e-transactions involving e-data would be prevalent in India (Lok Sabha, 2000. Discussion on the Information Technology Bill, 1999). Thus, the I.T. Act was enacted at that cusp when India was making such a transition. Therefore, the objective of incorporating a section on intermediaries was only limited to the broad objectives of the I.T. Act itself. The section on intermediaries has been amended once and continues to receive support through the passage of several guidelines, including the 2021 Guidelines. Understanding the initial framework, however, remains crucial to gauge the subsequent interventions and amendments. It was through a process of consultation amongst different stakeholders that the initial framework was approved. An overview of the opinions of different stakeholders shared at the time gives a sense of the basis that led to the enactment of S. 79. These views have been captured in Table 1 below (Standing Committee on Science and Technology, Environment and Forests 1999 [15]).

At the stage of the initial draft, the suggestions of three different stakeholders point to the growing concern about the role of intermediaries. From an industry perspective, the initial suggestions involved setting up a foundation for the legal regime. Of course, examples available from different jurisdictions suggest a notice and takedown approach where awareness of the infringing contents on the intermediary platforms would have a bearing on the liability of the intermediaries. From an operational perspective, it was believed that access to the Internet is possible through a special category of intermediaries, i.e. cybercafés. The Standing Committee on Science and Technology, Environment and Forests ('Standing Committee') subsequently placed the onus on the cybercafé owners to record information about different users (Information Technology (Guidelines for Cyber Café) Rules 2011). There was no projection on the issue of future accessibility and the scope of the commercial Internet and its use. Certain aspects of these suggestions were included in the first version of S. 79 enacted in 2000.

To begin this section, the old version of S. 79, as enacted in 2000, will be considered, followed by the amendments and the relevant guidelines before ending with the judgements on intermediary liability in India.

Table 1. Views of Stakeholders.

Stakeholder	Suggestion
Indian Music Industry	Deletion of the proposed intermediary liability provision under Clause 78 due to a conflict with S. 51 of the Copyright Act (Infringement). Further, apprehension that intermediaries may be given the benefit of doubt in case of an infringement due to lack of knowledge.
NASSCOM	Clause 78 should be at par with the DMCA (Digital Millennium Copyright Act, 1998, S. 512) and E-Commerce Directive (Directive 2000/31/E.C. 2000; Kuczerawy 2015; Karaganis, Schofield and Urban 2017)
Commissioner of Police, Delhi	Identification of users through their Permanent Account Number ('PAN') Card, issued by the Income Tax Department in India (Income Tax Department 2021)
	Maintenance of records of each cyber activity for investigation by the police in future.

A. Initial structure of S. 79 of the I.T. Act

There are three sections that deserve our attention – S. 79, S. 81 and S. 2(w). These provisions under the I.T. Act started the discussion on the scope of intermediary liability in India. S. 79, entitled 'Network service providers not to be liable in certain cases', reads:

> *… 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;*
>
> *…*

Further, S. 81, titled 'Act to have overriding effect', reads**:**

> *The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*

Intermediary, according to S. 2(w) of the Act, in the context of any particular electronic message, 'means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message'.

These three definitions allow us to understand the initial scope of intermediary liability in India. As a general rule, intermediaries should limit their activities to receiving, storing and transmitting of electronic messages. From S. 79 and S. 2(w), intermediaries are those who are engaged with the receiving, storing or transmitting third party content. In the process, whenever the content is considered unlawful, intermediaries should demonstrate no knowledge of such content on its platform and, further, should exercise certain due diligence activities. There are gaps in the two definitions. They relate to the meaning associated with knowledge and whether knowledge should be construed as actual or otherwise. Generally, just having the term knowledge in the provision expands the scope of intermediary liability. Further, what due diligence activities are intermediaries expected to exercise? Would these due diligence activities extend to proactive monitoring of online space by intermediaries? The activities of receiving, storing and transmitting are all related to network service providers who are considered intermediaries. Therefore, the further question is whether this approach reduces the scope of S. 79. These and other issues are discussed at length in the subsequent sections.

a. The limited scope of S.79 in 2000

The initial version of the I.T. Act enacted in 2000 focused on 'Network Service Providers' ('NSP'), with a particular reference to intermediaries in the explanation. One of the explanations for bringing in NSPs in the provision could be the primary focus on connectivity as part of Web 1.0. Intermediaries at that time primarily facilitated connecting users to the Internet. It was different from present-day intermediaries that maintain and handle interactive requests generated by different stakeholders.

The scope of the words 'received, stored, or transmitted electronic messages or related services' is broad. Generally, these attributes relate to all intermediaries of the past and present. An intermediary, regardless of its nature, owing to the

technicalities, cannot function without receiving or storing data either temporarily or permanently or function without transmitting an electronic message. There is no evidence to suggest that the legislators had thought of assigning a broad scope to the word intermediary at the time of drafting S. 79. The amendments of 2008–2009 led to the idea of a modern intermediary carrying out enhanced functionalities. The function of intermediaries thus expanded beyond the transmission of electronic messages (Council of Europe 2018).

In the explanation to S. 79, NSP included an intermediary. The name 'intermediary' has not changed over the years, but it has assumed different meanings due to the nature of the services that intermediaries undertake. This definition under S. 79 was a specific recognition extending to only a certain kind of intermediary (Seymour, Frantsvog, and Kumar 2011). Around this period, literature observed their primary functions to include:

> … to aggregate supply and demand; to collect, organise and evaluate dispersed information; to facilitate market processes; to provide the infrastructure; to provide trust; and to act as intermediaries, integrating the needs of buyers and sellers. (del Águila-Obraa, Padilla-Meléndeza, and Serarols-Tarrésb 2007)

Therefore, intermediaries at the time facilitated the task of merely connecting between the then evolving e-businesses and e-transactions in India and the potential users. They carried out the task of providing infrastructural support. Like modern day intermediaries, the words' storing', 'receiving', and 'transmitting' would augur well with the intermediaries considered in 2000.

b. S. 79 as a one-stop-shop for an intermediary

S. 79 (Blythe 2006) limited the liability of the intermediaries only to the I.T. Act (Information Technology Act 2000), thereby limiting the safe harbour framework to NSPs.[1] It was because S. 81 exempted NSPs from any liability concerning third-party content (Information Technology Act 2000) under any other legislation. Limiting the liability to a particular legislation would be an implicit dissociation from a standard vertical approach (Shikhiashvili 2019; Baistrocchi 2002); instead, it is closer to the horizontal approach (Myspace Inc. v Super Cassettes Industries Ltd 2017).

With the amended S. 81 in 2008–2009, an aggrieved third-party can file an infringement claim under a different legislation. It means that the intermediary liability is not restricted to S. 79 but extends to an equivalent provision under the Copyright Act. The subsequent sections show if there exists a clear demarcation between the category of intermediaries that must separately rely on the Copyright and the I.T. Act. The safe harbour framework remains horizontal, with a clear differentiation in place. Regardless of the type of intermediaries, with existing overlaps and where intermediaries rely on both sections, India's safe harbour framework will disassociate itself from the horizontal approach.

S. 79 has given us ideas about the initial scope associated with intermediary liability. With technological advancements in place, there was an urgent need to revise S. 79, which further clarified the scope and extent of such liability (Expert Committee 2005). The revision was also to accommodate and regulate evolving business models of intermediaries.[2]

B. The amended S. 79 in 2008–2009 with an extended scope of intermediary liability

In the discussions leading up to the amendment of S. 79 in 2008–2009, the Standing Committee suggested: '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' (Standing Committee on Information Technology 2007). The proposed expectations point to intermediaries proactively monitoring their network. These suggestions remained part of the proposal and never explicitly became part of the Due Diligence Guidelines in 2011 or the amended S.79.[3] The idea of putting intermediaries through a possible course of proactive monitoring was not a new development. A careful reading of the initial version of S.79 that required intermediaries to take all possible due diligence measures could amount to a possible case of proactive monitoring. This issue again regained momentum in one of the court judgements, which will be discussed later.

The amendments added the much needed clarity to the old S.79. Under chapter XII ('Intermediaries Not To Be Liable In Certain cases') of the Amended Act, the new version of S.79 entitled 'Exemption from liability of intermediary in certain cases' featured. It read:

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

S. 79 of the I.T. Act suggests a proportionate legal expectation from intermediaries. With the inclusion of the amendments, finally, there were definitive targets for intermediaries to achieve. These amendments were then left for judicial interpretation that gave clarity

to the extent of fairness associated with such changes. The amended section looked to address the issue of intermediary liability based on the nature of the services they offer. Therefore, we see reference to temporary storage and the role played by intermediaries in relation to third-party data. The section suggests that intermediaries are not expected to play an active role; instead, they need to stay away from the content available on their network. As an improvement from the previous version enacted in 2000, the amended section refers to actual knowledge and not merely general knowledge. It gives a lot of clarity to intermediaries and gives them a definite indication of the scope of their liability. Prima facie, the amended section, showcases a greater clarity compared to the old section. However, there are several aspects in the new section that need further introspection, i.e. the role-based liability of intermediaries and possible gaps in future. Following the same chain of thoughts, the amended S. 2(w) now includes intermediaries based on their nature of services.

However, S. 81 moved away from the previous intermediary liability limitation to the I.T. Act by extending such liability to the Copyright and the Patents Act. The liability structure under the Copyright Act has been discussed in later sections. This change is extremely crucial because an intermediary's reliance only on S. 79 has now ceased to exist; instead, intermediaries are further expected to fulfil responsibilities under an additional legislation. From the point of clarity, it remains to be seen whether there is a clear demarcation between these two legislations. Otherwise, the scope of intermediary liability would not be free from ambiguity.

a. Gaps in amended S.79

The amendments were a step towards redefining the scope of intermediary liability. One such change suggests that an intermediary is a mere conduit where interaction with third-party content is temporary (Software Freedom Law Centre, 2014. Intermediaries, users and the law: Analysing intermediary liability and the IT rules).

The expansion mechanism of S. 79, read with amended S. 2(w) of the I.T. Act, brought about exciting changes, but they are not free from ambiguity. First, the term 'intermediaries' was introduced instead of an NSP (Standing Committee on Information & Technology 2007). The term 'intermediary' became an umbrella term, unlike S. 79 of 2000. NSP is also present as an intermediary under amended S. 2(w). This change confirms that NSPs cannot be the only intermediary operating in India and that the previous S. 79 enacted in 2000 operated within a narrow sense of activities that intermediaries can undertake.

Secondly, the primary attributes of intermediaries – storing, receiving and transmitting are now part of the amended S. 79, and unlike previously, they did not only remain part of S. 2(w). From the amended S. 2(w), it is clear that the forms of an intermediary would imbibe the common attributes of storing, receiving and transmitting regardless of the services they provide. These attributes have remained the same under Sections ('Ss.') 79 and 2(w) of the 2000 Act and under S. 79 and S. 2(w) of the amended legislation. It means that while intermediaries may change depending on the services they provide, the fundamental attributes of storing, receiving and transmitting remain constant.

Thirdly, while storing, receiving and transmitting data on their platforms, these intermediaries should not be 'initiating the transmission', 'selecting the receiver of the transmission', and 'selecting or modifying information contained in (such) transmission'. It is not easy to dissociate intermediaries from these activities owing to advancements in

technology. For instance, while receiving requests from users, a search engine would temporarily store such requests before transmitting them forward. It would follow the same steps while fetching the results for such users. Following this provision, a search engine is not allowed to initiate, select the recipient or select or modify the information of such transmission. Due to advancements in technology, a search engine would allow end-users to use features like predictive keyword search activity. This activity would prompt users to use predictive keywords to find relevant information. Encouraging the use of these keywords would be equivalent to initiating a transmission. In fact, such search results could be customised and automated by using various profiling techniques. Further on, search engines may engage in selecting or modifying the content of the transmitted results at the time of displaying the search results.[4] Therefore, advancements in technology may lead to redundancy of certain terms in S. 79.

Fourthly, the amended S. 79 introduced the implementation strategy for intermediaries to follow. The intermediaries are expected to follow these norms while taking down infringing or unlawful content. As a two-part strategy, the amendments introduced the requirement of actual knowledge as a triggering event to activate an intermediary. Alternatively, an intermediary needs to act upon a notification by the appropriate government authority or an agency of the Government. This revised position under S. 79 was further clarified by several Courts, including the Supreme Court of India (Myspace Inc. v Super Cassettes Industries Ltd 2017; Shreya Singhal v UOI 2015). It was an explicit shift from what the initial version of S. 79 had suggested earlier, although later on, interpretations allowed us to believe that it implicitly meant actual knowledge (Information Technology Act 2000). While these are post-infringement strategies, intermediaries must adopt specific due diligence guidelines to prevent the uploading of unlawful or infringing content on their network. The Information Technology (Intermediary Guidelines) Rules ('2011 Guidelines') became part of the I.T. Act in 2011 (Information Technology (Intermediary Guidelines) Rules 2011). The delay in introducing the Guidelines left the intermediaries in an indecisive position so far as the scope of intermediary liability is concerned. It may have hindered any preventive measures that intermediaries ought to have taken. In fact, both versions of S. 79, i.e. one enacted in 2000 and the revised in 2008–2009, captured the requirement of due diligence activities.

There has been progress concerning clarity surrounding the scope of intermediary liability and the application of S. 79 under the I.T. Act. With advancements in technology and platform efficiency, it will be difficult for an intermediary to avoid the activities of initiating transmission, selecting the transmission receiver and selecting or modifying information in such transmission. It will be convenient if we rely more on the requirement of actual knowledge than the prescribed activities, which may be effective for only those platforms that do not engage in multiple interactions.

For a little less than a decade, while these were the developments in relation to the changes made in S. 79 and S.81, interpretations delivered by court judgements provided the much needed clarity and added different dimensions to the interpretation of S.79. The scope of intermediary liability became more definitive.

C. Court led interpretations of S. 79 and the scope of intermediary liability

India has a long history of courts deciding on the scope of intermediary liability. The Courts also had the opportunity to decide on the scope of S.79 in the context of the

amendments and the Guidelines that came a little later. Although the year 2000 saw the passage of S.79, its application on the ground remained questionable. There could be a suggestion that S. 79 was not that clear in terms of its scope to provide that necessary certainty to intermediaries to rely upon such a provision. One of the earlier rulings involving Bazee.com saw a possible intermediary not invoking S.79 to a large extent. The ruling in the Bazee.com case (Avnish Bajaj v State 2008) offers an insight into the Act's earlier interpretation. This website was a well-known e-commerce platform that enabled transactions between buyers and sellers. On one occasion, content containing child pornography was sold on its platform. The complainant notified Bazee.com about the illegal content hosted on their server. However, there was a delay in responding after such notification reached Bazee.com, and they continued to host the unlawful content. The I.T. Act never initially set the due diligence guidelines, although the perception was that Bazee.com failed to act expeditiously and could not match the due diligence requirement. The High Court of Delhi ('Delhi High Court') held Mr. Avnish Bajaj, the CEO of Bazee, guilty under the I.T. Act (Information Technology Act, 2000 s.67, 85). However, the Supreme Court overturned this judgement in 2012 (Aneeta Hada v Godfather Travels & Tours Ltd 2012) and 2016 (Sharat Babu Digumarti v Govt (NCT of Delhi) 2017). Strangely, in their defence, Bazee.com did not refer to S. 79. There was also no opportunity for Bazee.com to understand the extent of delay since there was no specific time limit provided within which an intermediary should judiciously act after receiving a complaint (Information Technology (Intermediaries Guidelines) Rules 2011, 3(4)). They were charged with strict liability under S.292 of the Indian Penal Code ('IPC') (Indian Penal Code, 1860) for distributing the DPS MMS video by the Delhi High Court. Whether Bazee.com had knowledge of the distribution of the unlawful content was not a relevant consideration leading to the non-applicability of the I.T. Act (Arun 2014). While the Supreme Court (Aneeta Hada 2012, [64]) overruled the existence of vicarious liability for directors for offences of companies and rejected the application of IPC in the presence of the 'lex specialis' I.T. Act (Sharat Babu Digumarti 2017, [30,31,32,39]),[5] this judgement did not interpret S. 79 to any extent.

For a long period of seven years, with advancements in technology in India, intermediaries remained uncertain about their responsibilities. Indeed, there was not much movement in the judiciary. There was, however, a greater degree of clarity in the judgement involving MySpace (MySpace Inc. v. Super Cassettes Industries Ltd (2017) 236 DLT 478).

The Division Bench's judgment in *Myspace* finally laid down the test of fairness and the overall expectations from intermediaries. *Myspace* (Myspace Inc. 2017, [77]) was the first judgement that unravelled the scope of intermediary liability under S. 79 in great detail.[6] It involved online hosting of copyrighted content by an intermediary. At the first instance, the Delhi High Court (Single Judge) rejected Myspace's argument claiming a lack of knowledge since Myspace was involved in the content modification process before such content was made online. This process provided Myspace with a sufficient opportunity to verify the rights associated with the content. According to the Single Judge, one should read Ss. 79 and 81 of the Information Technology Act together to understand the extent of intermediary liability better. In any case of I.P. [copyright] infringement, the application of S. 81 prevents an intermediary from further relying on S. 79. Reading S. 79 and S. 81 together and while accepting T-Series' (complainant) argument, the Delhi High Court, in its interim order (Super Cassettes Industries Ltd. V. Myspace Inc.

and anr. 2011), held that Myspace was liable for hosting infringing content on their network. Conclusively, the effect of this decision was a source of concern for intermediaries. It meant all future and present content must be subject to a preliminary check before being made available online. The point of contention was whether post infringement due diligence measures, i.e. notice and takedown, adopted by platforms like Myspace, was sufficient to claim immunity under S.79. The Single Judge rejected the arguments like 'lack of knowledge' and adoption of post infringement 'due diligence' steps as adequate reasons to absolve Myspace. It ordered that an intermediary platform like Myspace should pre-inspect content uploaded by users.

The Single Judge thought of the online space as a physical marketplace where stricter control can protect its precincts and territory (Super Cassettes Industries Ltd. 2011, [27, 86, 87]). Accordingly, intermediaries have an obvious obligation and a duty to monitor the contents of their network. The monitoring requirement meant turning the future Due Diligence Guidelines somewhat redundant with an already pre-existing obligation to monitor the online space.

Contrary to the initial order, the Division Bench in *Myspace* provided some 'definitive target' for intermediaries and unravelled the true scope of S. 79. While overruling the Single Judge's finding, the Division Bench considered S.79 to be 'a measured privilege' – where an intermediary has an opportunity to use the section as a shield against a possible claim of infringement (Myspace Inc. 2017, [51]). Laying the foundation of such a shield, the Division Bench explained knowledge under S. 79 as actual knowledge. The Court established that intermediaries should act upon actual knowledge and not merely constructive knowledge to avoid liability under S. 79. Upon receiving specific information about any infringing or unlawful content, Myspace must remove such content (Myspace Inc. 2017, [78]). There have been other judgements that have considered the issue of knowledge. In *Shreya Singhal* (Shreya Singhal 2015, [121,122]), the Supreme Court of India further developed the scope of intermediary liability by clarifying the extent of actual knowledge. It specified that the act of taking down content by an intermediary would be subject to an official court order and not merely based on a notice from a non-governmental entity.

As actual knowledge became a norm, there has been further guidance on active and passive intermediaries. The threshold emerged by way of deciphering the extent of intermediary involvement with the online content. For instance, *Christian Louboutin* (Christian Louboutin v Nakul Bajaj 2018; Panwar 2018) extended the scope of S. 79 only to passive intermediaries, i.e. platforms that act as mere conduits or engage in the passive transmission of electronic records (Christian Louboutin 2018, para 65, 67,81). The Court suggested that the defendant, Darveys.com, failed to qualify as an intermediary. As an e-commerce portal, it played an active role and exceeded the prescribed task of facilitating buying and selling of products. The decision clarified that an online service provider would be an intermediary if it continues to act as a conduit. Contrarily, any active involvement that indicates actual knowledge would prevent an intermediary from seeking exemption under the safe harbour framework of S. 79. The Delhi High Court, in this judgement, captured the transition of an intermediary to an active participant by listing several e-commerce portal activities that exceeded buying and selling of products. These activities have been compared with the Guidelines that came in 2011 and operated alongside S. 79.

The saga with e-commerce portals continued in subsequent judgements that decided on the issue of the active involvement of intermediaries. For instance, a Single Judge in a recent case (Amway India Enterprises Pvt Ltd v 1MG Technologies Pvt Ltd 2019)[7] held that E-commerce platforms could be 'massive facilitators' depending on their transactional involvement and run the risk of becoming an active intermediary with every transaction.[8] The Division Bench (Gupta and Srinivasan 2020)[9] overturned the Single Judge's understanding of active involvement of an e-commerce platform (Amazon Seller Services Pvt Ltd v Amway India Enterprises Pvt Ltd 2020, [137]). It made a decisive observation that S. 79, within its present scope of intermediary liability, does not differentiate between 'active' and 'passive' intermediaries. In other words, the safe harbour applies to all intermediaries as long as they fulfil the conditions mentioned under S. 79.

There is a further need to investigate various aspects of all these judgements concerning intermediary liability subject to their role in the digital space (Koetsier 2018; Thomas 2020). The following sections entail a nuanced analysis of active and passive intermediaries and the requirement of actual knowledge.

a. Court order provides certainty to notification gap in actual knowledge

The judgements in *MySpace* and *Shreya Singhal* ensured that intermediaries have no obligation when they act as a conduit. The accepted justification in *MySpace* was the volume of information that intermediaries generally handle. As an extended corollary, it becomes rather impossible to pre-screen all content manually. Therefore, the requirement of actual knowledge came as a great relief for them. Since Myspace had to work on actual knowledge and was in compliance with S.79, they were also not held liable for secondary infringement. There are, however, others requirements connected with actual knowledge that the *MySpace* judgement could not address. While there was a conversation about actual knowledge, the actual format or order of the notification process was not discussed. As a result, there could be a lot of subjectivity in how third-party right holders would communicate possible infringement cases to intermediaries. There is some relief under the Copyright Rules of 2013 (Copyright Rules 2013) of the Copyright Act. However, it is unlikely that the format of notice available under the Rules would apply to the I.T. Act or any other Acts. For instance, Rule ('R.') 75 points out the description of the work to identify, details of ownership of I.P. etc. Given the uniqueness associated with the subject matter of Copyright, such a format cannot be a uniform template for all possible notices meant for intermediaries.

The decision in *Shreya Singhal* brought a degree of certainty by making the process uniform. It ensures that an intermediary is cautious while taking down content and is not subject to frivolous takedown requests. The judgement further clarified the scope of S. 79 for intermediaries, ensuring they are not subject to exploitation. It helped establish a due process, thereby reducing the intermediary's burden of proactively monitoring the online space.[10] The Supreme Court suggested that the act of removing content is a follow-up activity to an adjudicating order (Shreya Singhal v UOI 2015, [122]). Only such an order would compel the intermediaries to remove content from their platforms. This judgment further reaffirmed and developed the Division Bench's observations in *Myspace* (Myspace Inc. 2017, [53–62,77]). As a part of due diligence activities, a court order has become the norm for intermediaries. It resolves doubt as to the format of the notice and its content. The downside could be the arduous and complex task of

securing a court order, which is often muddled with procedural hassles. It adds to the overall transaction cost, and it is desirable to make procedures less complicated for all stakeholders. There is also the question of delay in obtaining the court order and the possible economic loss associated with such delay for the complainant. Overall, a court order seems to be a better way forward.

b. Active and passive intermediaries – not the way forward

There is a fine line categorising active and passive intermediaries. It has become difficult to exactly demarcate the two different identities with the advent of interactive intermediaries in the last decade. However, the idea of introducing this distinction did not start with the interpretation of the Courts. In fact, S. 79 absolves intermediaries if they do not engage in '[initiating] the transmission [or] in [selecting] the receiver of the transmission [or] in [selecting] or [modifying] the information contained in such transmission' (Information Technology Act 2000, S.79(2)(b)). The keywords used in this section portray activities that suggest the involvement of the intermediaries. These activities and the manner of their arrangement may justify categorising between active and passive intermediaries.

There are several challenges associated with this approach of categorising intermediaries as active and passive. First, the categorisation of intermediaries should relate to the idea of actual knowledge. This inspection concerning actual knowledge vis-à-vis the involvement of an intermediary should happen simultaneously and not one following the other. It is difficult for an intermediary having actual knowledge to deny non-involvement at a later stage.

Second, no longer can we afford to decide the scope of intermediary liability based on the four-step process of initiating, selecting, modifying and transmitting content. These steps were useful when intermediaries primarily facilitated connectivity to the Internet. The level of integration that automatically happens due to advancements in technology would more or less make an intermediary liable under S.79. The design of a platform, the transmission of data, and users' experience in a combined manner would ensure that an intermediary contributes, if not directly but indirectly, to the user's choice, user's interest and user's activity on the platform. Therefore, the difference between an active and passive intermediary may not hold true. Even with a slight interference, an intermediary can be liable as a result of the threshold connected with initiating, selecting, modifying or transmitting. For instance, providing a drop-down menu to the users with certain choices will be considered an interference from an intermediary. In this example, an intermediary would check all four boxes that would make it liable, i.e. initiating, selecting, modifying or transmitting.

Third, categorising intermediaries on the basis of their involvement is a never ending process. The list would continue to grow against the backdrop of advancements in technology. It was observed in a recent ruling involving an E-commerce website. The Single Judge of the Delhi High Court provided little insight on interpreting selection/modification criteria (Amway India Enterprises Pvt Ltd 2019, [303]). Although the Division Bench reversed the judgment (Amazon Seller Services Pvt 2020, [138]) favouring actual knowledge, which is more of a traditional interpretation of S.79, the opinion of the Single Judge is a testament to the ambiguity present in the provision. The optimal way

of testing intermediaries, active or passive, would be after receiving the actual knowledge and not before they possess such knowledge.

The Courts in India have played a stellar role in bringing the required clarity about the scope of intermediary liability. However, at an early stage of these judgements, intermediaries were unaware of their tasks in hand post possession of actual knowledge. In the absence of Due Diligence Guidelines, intermediaries did not know much about the standard due diligence practices. From an explicit reference under S. 79 of the 2000 Act to the amendments in 2008–2009, starting from 2011 to the newest version in 2021, Guidelines have come a long way in deciding the scope of intermediary liability. The following sections make an assessment of what the Guidelines are likely to add to the already established scope under S. 79.

D. I.T. Act Guidelines for intermediaries in the last decade

The Guidelines of 2011 laid the foundation for supplementing the scope of intermediary liability that S. 79 regulates. These have now been replaced by the 2021 Guidelines. There is a need to start with 2011 to understand the exact scope of Guidelines in India.

The Due Diligence Guidelines became a part of the I.T. Act (Information Technology (Intermediaries Guidelines) Rules 2011) three years after the amendments were incorporated. They ('Information Technology (Intermediary Guidelines) Rules, 2011' ('2011 Guidelines')) set the ground rules of the safe harbour framework for intermediaries. The Guidelines provided an elaborate description of the notice and takedown process for intermediaries to follow. Further, the Guidelines mandate intermediaries to publish user agreements and terms of service in a conspicuous manner. Intermediaries, at all times, must inform users not to engage in unlawful activities or upload infringing content on the online space that intermediaries control (Information Technology (Intermediaries Guidelines) Rules 2011, Rule 3(2)). Rule 3(4) of the Guidelines suggests the requirement of actual knowledge, and the aggrieved person may inform the intermediary by using different means of direct communication. The Intermediary must act within thirty-six hours upon receiving knowledge about alleged infringing content (Information Technology (Intermediary Guidelines) Rules 2011). As part of the due diligence measures, they need to publish the name of the Grievance Officer, who becomes the first point of contact to resolve any complaint. The Grievance Officer must resolve a complaint within one month (Rule 3(11)). The 2011 Guidelines highlighted the importance of streamlining the complaint mechanism. After over a decade, India finally looked to give intermediaries a representative list of due diligence activities.

The 'Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021', were notified in February 2021 (Ministry of Information Technology 2021a). It came through a process of public consultation, and the Ministry finally notified the Guidelines in 2021 (Ministry of Information Technology 2021b). The scope extends to three kinds of intermediaries – social media platforms, over-the-top (OTT) platforms and digital media news agencies. Changing from what the 2011 Guidelines had suggested, these Guidelines aim at siding greater responsibilities to intermediaries (Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021). They suggest that intermediaries now have further responsibility of tracking the first originator of the information, and they should introduce technology-based methods to disable

access to content. Based on the size and nature of intermediaries, specific requirements would now apply.

One of the intents of the 2021 Guidelines was to align with some of the Supreme Court judgments (In Re: Prajwala 2015; Facebook Inc v UOI & Ors 2019) in cases where the Supreme Court had mentioned their intent and commitment to creating a safe space on the Internet. The timelines within which intermediaries should act on different requests have been further revised. Intermediaries must now acknowledge within 24 hours and have 15 days to dispose of complaints [rule 3(2)]. The takedown process of the alleged infringing content, which is an outcome of a court order or a notice from an appropriate Government, must complete within 36 hours [rule 3(1)(d)]. Intermediaries should comply with lawful requests within 72 hours [rule 3(1)(j)]. For certain specific content, the removal must be expedited. For instance, 'removal of revenge porn (sexual extortion/non-consensual porn publication/sexual act or conduct involving impersonation, etc.) and other similar content: 24 hours [rule 3(2)(b)]' (Sarkar et al. 2021).

There are concerns about Rule 4(2), where an intermediary must identify the first originator of the information. This expectation has put the Government at an impasse with intermediaries that use end-to-end encryption tools, which makes tracing the first originator extremely difficult. Moreover, the task of using technology-automated measures for removing contents places a more significant responsibility on intermediaries to comply with the Rules. The Ministry released an FAQ segment in November 2021 to clarify the context of the Rules and some of the provisions that intermediaries should follow corresponding to due diligence activities (Prasad and Singh 2021; Jha 2021; Deep 2021).

The published FAQs specify that exercises under Rule 4(2) will not violate freedom of speech and expression. However, there have been reservations about how such provisions have been activated (Sarkar et al. 2021). Instead of the Rules, the medium to bring about these changes could have been a legislative amendment.

Earlier, intermediaries with limited knowledge of unlawful or infringing content would fall under the passive category. However, advancements in technology and innovative business models will make it difficult for intermediaries to stay away from direct or indirect involvement with the content they host. Following this proposition, proactive monitoring is emerging as an alternative imagination for intermediaries.[11] The means and ways of using pro-active monitoring and its scope must be hashed out to balance the existing rights in a democratic society. After all, all the service providers' models have a socio-economic obligation against prohibited content. One has to wait and see how Courts in India, if at all, revise the scope of S. 79 as an outcome of the present Guidelines.

The Guidelines have provided insights about the requirement of actual knowledge, categorisation of intermediaries based on their involvement and the issue of proactive monitoring. The following sections revisit these issues in the context of what has been said before vis-à-vis the current changes.

a. Actual knowledge and due diligence activities

The Guidelines of 2011, like S. 79 of the I.T. Act, reiterated the requirement of actual knowledge. Following this requirement, intermediaries need not proactively monitor or work on a presumption about alleged infringement or unlawful activities on their network. The Draft Intermediary Guidelines introduced in 2018, which acted as a base document for the 2021 Guidelines, proposed some significant changes to the 2011

Guidelines. The proposal was to expand 'due diligence' guidelines to include acts of intermediaries such as publication of instructions against posting infringing content (Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018, Rule 3(2) and 3(3)). Similar to the 2021 Guidelines, it suggested including a court order as a formal requirement before taking down alleged infringing or unlawful content (Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018, Rule 3 (8)). In the process, the Guidelines went on to implement the findings of the Supreme Court in *Shreya Singhal* (Shreya Singhal v UOI 2015, [121, 122]).

The 2021 Guidelines (also 2011) suggest the use of a written mode of communication, which portrays intermediaries requiring actual knowledge about infringements. The requirement of actual knowledge was further refined since timeliness to resolve queries has now become an integral part. While a licensing agreement has become the first stage of due diligence activities, there exist significant questions of transparency with standard forms of agreement (SFA) (Belli and Venturini 2016). There are various issues connected to SFAs that intermediaries design. They range from users' understanding of the terms, consent of users, use of unfair terms, and so forth (Belli and Venturini 2016). Justifying fulfilment of due diligence by merely using an SFA may not absolve an intermediary from incurring liability under S. 79. To fulfil the compliance requirement under S.79, read with the 2021 Guidelines, intermediaries must consider increasing the operational transparency of SFAs.

b. Categorising of intermediaries for additional due diligence responsibilities

The Draft Guidelines of 2018 started the process of categorising intermediaries based on the number of customers they have in India. Therefore, intermediaries having a sizeable presence would have additional responsibilities other than fulfilling the standard due diligence activities. This position was contrary to the decision taken by the Delhi High Court in the *Christian Louboutin* judgement. Here, the Court created a category of intermediaries based on the service they provide. It came up with an exhaustive list that indicated the qualities of an 'inactive' or 'passive' intermediary (Christian Louboutin 2018, [70]). The Delhi High Court added more tasks for intermediaries who were e-commerce service providers. There is no clarity on whether these due diligence + 2011 Guidelines apply to non-e-commerce intermediaries. Even within the genre of e-commerce websites, there could be differences because of the unique ways in which intermediaries carry out their activities. Therefore, the due diligence + 2011 Guidelines could remain contextual and apply to those intermediaries that would fall within the scope of the judgement. As an implication, however, it has become risky to predict the threshold attached to the 2011 Guidelines. An exhaustive list could force intermediaries to opt for different business models in future. However, it will remain difficult to differentiate between active and passive intermediaries (Christian Louboutin 2018, [59,81,82]). In a contrasting approach, the 2021 Guidelines created different categories of intermediaries based on their reach and service (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, R 2(1)(v), R 2(1)(q)).[12]

The method of assigning additional responsibilities to intermediaries can create various challenges. First, the services that intermediaries offer would not always fit in water-tight chambers. An intermediary can engage in multiple services that may not always fall within the definitional contours of the Guidelines. It will result in situations

like intermediaries within the same establishment being forced to fulfil different 2011 Guidelines for various services they provide.

Second, moving to a categorisation based on the number of users or the type is problematic. The categorisation based on the number of users may face roadblocks because the user footfalls may go up during a particular time or may reduce drastically. Therefore, there are questions about how one should calculate the number of users before imposing additional due diligence responsibilities. Further, there could be operational challenges with such a dynamic list of users. Categorisation based on the type of intermediary may become difficult to implement with the advancement of technology. There is a need to re-visit categorisation based on this method. For example, rules concerning a traditional cybercafé under the I.T. Act have become redundant. The Internet is much more accessible now, leading to the non-requirement of a cybercafé.

c. Proactive monitoring is an emerging norm

The existing framework of notice and takedown in India is yet to face the test of time.[13] A wide range of intermediaries fell within the scope created by *Myspace* and other subsequent judgements (Myspace inc. 2017, [50, 63]). The 2011 Guidelines positively assisted the Division Bench in *MySpace* in deciding that an intermediary has no general duty or obligation to monitor the online space that it controls.

In cases concerning child pornography or pre-natal sex determination, the Courts in India have strongly favoured that intermediaries proactively filter content on their platforms. In a matter concerning advertisements of pre-natal sex determination, (Sabu Mathew George v Union of India 2018) the Supreme Court, on the argument that search engines are 'mere conduits', held that they are supposed to develop an auto-blocking mechanism to remove illegal content. The courts have adopted a different approach for specific issues involving pornography and defamation. In *Kamlesh Vaswani* (Kamlesh Vaswani v Union of India 2016), the Court expressed reservations about using proactive filtering for such content due to technical complications. This judgment impacted the Government into banning several Pornographic websites in 2015.[14] In a different precedent, the Andhra Pradesh High Court held that Google is not impervious to liability under the safe harbour regime for any defamatory content that continues to exist despite a takedown notice (as reiterated in Google v Vishaka Industries 2020). The Supreme Court overturned the High Court's approach and held that since the I.T. Act was the special enactment, it will prevails over the IPC (Indian Penal Code, 1860) (Google v Vishaka Industries 2020). Hence, one can observe restraint and a precise categorisation of subject matter that may require intermediaries to proactively monitor their platforms. This monitoring of content is not based on either the size or the reach of an intermediary but primarily on the nature of the content and the nature of infringement. Following this observation, an intermediary is required to follow different standards for different content. For some content, due to their nature, proactive monitoring may not be required. It means that setting a standard approach for a particular type of intermediary may not always be helpful. The argument is reasoned in the premise that an intermediary is unlikely to host only one specific category of content neither can a regulator expect only one type of infringement associated with online content. However, it is not clear how intermediaries get to know about infringing content

without proactively monitoring all available content. Therefore, it takes back to the same situation where intermediaries are expected to proactively monitor content.

One cannot equate online space to a physical space. Intermediaries cannot control the precincts of a borderless online space. Such a step may not incentivise the next generation of intermediaries and further hamper the digital economy, which is dependent on innovative business models.

Proactive monitoring essentially means that intermediaries must use technology-driven tools to flush out content that may be deemed illegal. It means the tools have to be intelligent enough to ensure that they adequately account for statutory exemptions (Cappello 2021). There is an ongoing discussion about proactively monitoring in other jurisdictions. For example, an intermediary has no obligation to monitor its platform in the E.U. However, the requirement of monitoring has been discussed and debated in the E.U. for over a decade (Kuczerawy 2015).[15] This issue has been further raised in the 'Digital Single Market (DSM) Directive' in the E.U. (Directive (E.U.) 2019/790 2019, Article 17). It considers user-generated content on Online Content-Sharing Service Providers (OCSSPs) (Directive (E.U.) 2019/790 2019, Article 2(6)) as 'communication to the public' (Directive (E.U.) 2019/790 2019, article 17). It suggests setting up the liability structure for these platforms as any other infringer and raises the possibility of intermediaries filtering content proactively in the name of due diligence. There is, however, 'no general monitoring' obligation in both E-commerce (Directive 2000/31/E.C. 2000, article 15) and DSM Directive (Directive (E.U.) 2019/790 2019, Article 17(8)). India seems to follow the same trend as the E.U. In future, there will be possible debates about the effective use of these technology-driven tools and how these tools are likely to implement proactive monitoring alongside the requirement of actual knowledge.

The scope of intermediary liability, as it stands under S. 79, is far from clear. Future may throw interesting results since intermediaries would be trying to balance actual knowledge and the requirement of proactive monitoring. The uncertainty is with these two approaches and will keep intermediaries guessing about the exact scope of their liability. This is where the liability structure envisaged under the Copyright Act must be considered. It would be interesting to observe its connection with the I.T. Act and the areas of possible conflict.

Section II

The Copyright Act and intermediary liabilities

The Copyright Act, amended in 2012, exempts intermediaries as part of its fair dealing defence. In all such cases, the third-party right holder should not have expressly prohibited the intermediary 'from using such electronic links, access, or integration, or the intermediary is aware or has reasonable grounds to believe that such act of storage is infringing in nature' (Copyright Act 1957, Section 52(1)(c)). In case of a specific written complaint concerning possible infringement of third-party rights, the intermediary has to refrain from engaging in such storage for 21 days or until the intermediary receives a court order about such a complaint. In case of non-receipt of a court order within 21 days, an intermediary may facilitate such access, electronic links, or integration of all such processes.

Reading S.52 points to two important exceptions. The first one connects to transient or incidental storage, which intermediary encounters while transmitting data electronically. The second exception is when an intermediary provides electronic links, access or integration to any transmission (Padmanabhan 2014). There is a takedown proviso in the second instance. S.52(1)(b) clarifies that intermediaries limiting their activities to just transferring of data are not liable because they are mere conduits (Padmanabhan 2014).

MySpace attempted to differentiate between the application of the Copyright and the I.T. Act. According to the Court, the applicability of the Copyright Act is limited to temporary storage, while the I.T. Act applies to intermediaries involved in hosting content. The judgement delivered favoured a harmonious reading of the two Acts harmoniously (Myspace Inc. 2017, [77]). The Court also looked at the applicability of the I.T. Act in case of an alleged infringement of copyright. Their view of Section 81 was that it

> … does not preclude the defence of safe harbour for an intermediary in case of copyright actions. Accordingly it is held that Sections 79 and 81 of the I.T. Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously. (Myspace Inc. 2017, [52,66,77]; Saha and Saha 2018)

There is no consensus on the meaning attached to harmonious reading of both Acts. Scholars are divided in their opinion. This difference is because of the method of interpretation. The I.T. Act read with the Guidelines expect certain responsibilities that intermediaries must fulfil. It extends even to intermediaries who are categorised as mere conduits (Padmanabhan 2014).

It has been suggested:

> … that the issue of infringement of copyright by mere conduit ISPs is governed by S.52(1)(b), which completely absolves them of any liability, while that of enforcement of copyright through the medium of such ISPs is governed by the I.T. Act. (Padmanabhan 2014)

However, such an interpretation does not hold as S.79 is only concerned with intermediary exemptions and liabilities. It does not extend to the source and substance of illegality in question. Even with the Guidelines, the I.T. Act cannot hold any party responsible for copyright infringement. It is within the Copyright Act's ambit to provide an exemption in case of a breach (Padmanabhan 2014).

Scholars have adopted a more straightforward 'letter to the law' approach. The safe harbour protection under the I.T. Act is subject to S.81. While S. 81 consolidates all the decision-making to the I.T. Act, it also allows certain other Acts, like the Copyright Act, to operate alongside the I.T. Act. The exemption provided under S.52(1)(c) allows the intermediaries to safeguard themselves from secondary infringement under S.51(a)(ii). Along these lines, the safe harbour has become a part of the fair use exception as incorporated under S. 52(1)(c). The Division Bench in *Myspace* suggested that the safe harbour framework applies to intermediaries when copyright infringement occurs. Even with the proviso of S.81 in place, a third party can still exercise any existing right under Copyright Act. As a protective layer, the safe harbour provision under Section 52(1)(b) and (c) protects an intermediary from a claim of infringement under the preceding section (Sethia 2017; Saha and Saha 2018).

There has been a suggestion that the amendment of the Copyright Act in 2012 prevented intermediaries from overusing filtering and blocking techniques on their

platforms. The proviso of S.52(1)(c) allows a notice and takedown approach by laying down specific conditions.

However, even with a restore-back feature under the Copyright Act, there is no timeline within which an intermediary must restore content on its platform (Advani 2013).

Some scholars argue that S. 52(1)(b) and (c) concern themselves with only intermediaries that are classified as mere conduits (so-called passive intermediaries), and S. 79 extend to other intermediaries (Joshi 2018). The Copyright safe harbour also extends to search engines due to their function of providing hyperlinks and their possible engagement with incidental storage. This application is a more specific and narrowed down perspective compared to the broader safe harbour framework, which extends to different kinds of intermediaries under S. 79 [S. 2(w)], so long as they are not involved in modifying or selecting content (Padmanabhan 2014).

There are three primary observations from the above illustration. Harmonious reading of S.79 and S.52(1)(b) and (c)seems to be the way forward, but the Delhi High Court has not provided much explanation in that regard. Much progress has been made on the issue of knowledge and the role of an intermediary. The following sections reflect on these three primary observations.

a. The nature of notice under the Copyright Act vis-à-vis the I.T. Act

The relevant words under the Copyright Act (transient and incidental storage) and the I.T. Act (initiate, select or modify transmission) highlight a certain difference in their approach. It relates to the knowledge of the intermediary about the infringement of third-party content on their network. The Copyright Act mentions a 'reasonable ground of belief' for triggering liability. Therefore, if an intermediary reasonably demonstrates that it is an infringement to store transient or incidental copies of certain content, such an intermediary should take down that content or risk inviting liability under the Copyright Act (Copyright Act 1957, s 52(1)(c)). This position under the Copyright Act is a shift from the requirement of 'actual knowledge' (knowledge) mandated under S.79 (Information Technology Act, 2000). The knowledge specified under the Copyright Act is only in the context of transient or incidental storage. Depending on the overlaps between the Copyright Act and the I.T. Act, intermediaries will have confusion about when to act in case of alleged infringing or unlawful content on their network. Future judgements can clearly demarcate the exclusive scope of the two Acts. The intermediary to whom the Copyright Act applies must remain more alert than those intermediaries to whom the I.T. Act applies. The requirement of actual knowledge will mean that an intermediary will wait for the notification about alleged unlawful and infringing content, unlike the sense of pro-active monitoring under the Copyright Act. The following sections further point to the contradictions and the overlaps and, in turn, the confusion for intermediaries and other stakeholders.

b. Overlapping attributes of the I.T. Act and Copyright Act

The present scope of S. 79 includes situations where an intermediary can engage in providing data or communications links. The Copyright Act also have a similar provision that includes electronic links, access, and integration of such links. Technically speaking, it is tough to differentiate between access, integration, electronic links, data, and communication links under both Acts due to the apparent overlaps (Myspace inc. 2017, [67,68]). Providing a communication link is equivalent to an electronic link, and such a link

would integrate the host intermediary to the content, which is nothing else than data. Whether it is an electronic link or a communication link, it provides access to data. Therefore, there are serious questions about the circumstances under which S. 79 of the I.T. Act and S. 52(1)(c) of the Copyright Act will apply to intermediaries.

The provision under Copyright Act relates to transient and incidental storage. According to Alan Cooper, transient data storage happens when

> a product with a transient posture program comes and goes, presenting a single, high-relief function with a tightly restricted set of accompanying controls. The program is called when needed, it appears and performs its job, then it quickly leaves, letting the user continue her more normal activity, usually a sovereign application. (Cooper, Cronin, and Reimann 2007)

It means data that remains momentarily or stored for a computer programme to function. As for incidental data, they are stored by a computer application to work effectively and efficiently on a computer. They are methods of improving an application's performance through processes like caching and indexing.

> Caching (MDN Webdocs n.d.) improves the Internet's performance by allowing search engines to quickly retrieve cached copies on its server, rather than having to repeatedly retrieve copies from other servers (Oracle Web Cache Administration and Deployment Guide n.d.). It is also helpful when the original page is not available due to internet traffic congestion, an overloaded site, or if the owner has recently removed the page from the web. (Bottomley 2004)

Therefore, for websites to run smoothly, intermediaries such as search engines, hosting service providers and others depend on indexing and caching. These operations help intermediaries to run their platforms efficiently. Those who need to share heavy multimedia content rely on caching and indexing for services such as streaming (YouTube, Netflix) and improving the speed for searching information on databases.

S. 79 of the I.T. Act also includes a situation wherein '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 hosted'. When an intermediary is transmitting electronic data, it must temporarily store or host the content in question to complete the process. Technically speaking, transient and incidental storage under the Copyright and the I.T. Act cannot be different. The 2021 Guidelines [also 2011] also suggest that during technical operations, temporary, transient or intermediate storage by intermediaries would not amount to publishing, hosting or editing for the purpose of S. 79. The keywords temporary, transient or intermediate storage brings us again to the doorstep of the Copyright Act and its overlap with the I.T. Act. The context of the two Acts is no different, and their areas are not demarcated clearly, thereby creating a lot of uncertainty amongst intermediaries.

There could be other differences that may create some independent identity for the provisions under the Copyright and the I.T. Act. The Copyright Act completely absolves an intermediary engaging in transient or incidental storage. These intermediaries have no further due diligence activities to fulfil. Section S. 52(1)(b) provides 'a blanket mere conduit exemption from liability for copyright infringement that stands uninfluenced by the presence of S. 79 of the I.T. Act or the intermediaries guidelines rules' (Joshi 2018). This blanket exemption is not available to intermediaries under S. 79.[16] Regardless

of the type of service or undertaken activity, an intermediary cannot rely on S. 79 unless it has fulfilled the due diligence activities.

Another difference is that S. 52(1)(c), other than providing a takedown mechanism, also allows an intermediary to restore the content (Software Freedom Law Centre, 2014. Information Technology (Intermediaries Guidelines) Rules, 2011 – An analysis). Without a court order, the intermediary is free to restore content after waiting 21 days from receiving the complaint. S. 79, on the other hand, had to wait for Shreya Singhal's judgment to establish that an intermediary can remove content only by employing a court order. In other words, this provision under the Copyright Act gives importance to a court-based decision-making policy over a subtle self-regulation pitch advocated under S. 79.

The Copyright Act sits uncomfortably with the I.T. Act. There is a considerable number of similarities that are difficult to justify. These similarities question the foundation and the reasons for enactment. Given the overlaps and contradictions, the Courts in India have favoured a harmonious interpretation of the provisions. It would be interesting to see how Courts reconcile the existence of these two sections under the two Acts.

c. Harmonious reading of the I.T. Act and the provision under Copyright

The suggestion of harmonious reading reinstates three issues. Contrary to the suggestion made in the previous section, harmonious reading will put to rest any existential challenges connected to the operation part of the two sections. There will, however, remain inconsistencies in terms of their application owing to the overlapping scope.

Second, harmonious reading aims to reduce contradictions. Going by the requirement of 21 days under S. 52(1)(c), a harmonious reading would ensure a similar expectation under S.79. The requirement of a court order before taking down content by an intermediary is now an established norm. The issue of restoring content has been explicitly mentioned under S. 52(1)(c) and not under S.79. A harmonious reading would extend this requirement to the I.T. Act. Harmonious reading, perhaps, is the only option given the overlaps that exist between the two provisions.

The third issue relates to the requirement of notice. Going by the threshold of harmonious reading, the condition of actual knowledge under S.79, later supported through different judgements in India, must be upheld while applying S.52(1)(c). Following this approach, one can resolve any ambiguity or contradiction.

An intermediary following the prescribed obligations under S.52(1)(c) would be shielded from an infringement under the Copyright Act (Arun and Singh 2015). The scope of S.79, read with S.2(w), applies to a broad range of intermediaries. It is much broader than the provision under the Copyright Act. In conclusion, the scope of S.79 is much more comprehensive, comprising an all-situation, all-subject matter, all-pervading clause of safe harbour to intermediaries in general. The table below captures the changes that happened in the last two decades (Table 2).

Section III

Uncertain road ahead for intermediaries in India

Intermediaries are at the crossroads of the statutory interpretation impasse of the I.T. Act and the Copyright Act. The legislative interventions are yet to focus on a path that would

Table 2. Changes mapped in two decades.

	Changes mapped in two decades				
Attributes	PHASE I – 2000 – Enactment of S. 79 under I.T. Act	PHASE II – 2008–09 Amendments of S. 79	PHASE III – Judgements Delivered	PHASE – IV Issuance of Guidelines	PHASE V – COPYRIGHT ACT
Definition of an intermediary	Any person who receives, stores and transmits messages or provides any service pertaining to those messages. (A Network Service Provider under S. 79)	Expansion of provision to include specific kinds of intermediaries similar to S 2(w).	Initial judgments such as Bazee.com interpreted 'intermediaries' to not include e-commerce websites, resulting in a narrower interpretation. However, with time, there has largely been a consensus on the definition due to the amendment in 2008.	The 2011 guidelines did not define the scope of intermediaries and remained within S.2(w). However, the 2021 Guidelines added social media companies, digital news platforms and Over-The-Top (OTT) platforms as intermediaries.	S. 52(1)(c) of the Copyright Act does not define an intermediary. There has been an illustration of a 'person' providing 'transient and incidental storage' of online content
Active or passive nature of intermediaries	The expectation was passive functioning, considering that network service providers (NSPs) were merely facilitating access to the Internet.	An intermediary must be passive – must not initiate, select receiver or modify the transmission of content in any manner whatsoever.	Initial judgments approached this question from a 'letter of the law' approach. However, lately, with judgements such as *Christian Louboutin* and *Amazon v Amway,* the Single Judges have ventured into an innovative interpretation of intermediaries. It is especially true considering their technical capacities.	The 2011 Guidelines did not make this difference. However, the 2021 Guidelines relied on the technological capacities of intermediaries. While there is no explicit differentiation, some obligations, such as the due diligence measures, proactively map the 'active' nature of intermediaries who were 'passive' once.	None
Knowledge and due diligence standards	No clarity on how intermediaries acquire knowledge and carry out due diligence activities.	Upon receiving actual knowledge through any appropriate Government or its affiliated agency, an intermediary can take down content.	Initial hesitation was met with a definitive interpretation in *Shreya Singhal,* where actual knowledge was strictly interpreted as a court order or an order from a designated agency.	While the 2011 Guidelines stuck to a basic due diligence regime in conformity to S.79, the 2021 Guidelines mandate the use of technology to remove content. Proactive monitoring, however, is still not an absolute necessity. Access to notified content (actual knowledge) must be disabled within thirty-six hours.	The act of notifying an intermediary has been clarified in the proviso when the person facilitating access is made aware of the infringing material. The intermediary must act must remove it within twenty-one days.

give a definitive indication of the scope of intermediary liability in India. The laws are evolving, so are the Guidelines, and they are yet to settle down.

Intermediaries in India have different targets to meet. First, non-involvement at the initiation selecting, modifying and transmitting stage of information and second, staying away from the category of an active intermediary. The first target is likely to be a redundant exercise owing to the advancements in technology. To meet the second target, many intermediaries would fall between active and passive categories. It would be difficult to designate an intermediary as purely active or purely passive. Due to changes in platform behaviour, there would be the involvement of intermediaries at many levels. It may not be possible to follow the strict criteria of non-involvement of intermediaries. It will depend on the activities that intermediaries generally allow on their platforms.

The idea of setting up the scope of intermediary liability in India based on the number of users may be a non-starter. Instead, the decisive factor should be the type of information shared on the intermediary platform. Given the reach of the Internet, having a small or a large customer base would be of little or no relevance. Intermediaries may need to work on content management analysis to implement the task of proactive monitoring effectively. Implementing proactive monitoring may have its own challenges. For instance, the use of a technology-driven tool to filter contents must not interfere with statutory exemptions and the legal and policy norms set up in the country.

There could be questions about how content is removed from the online space. Intermediaries, at times must act immediately, and it depends on the nature of the content in question. For instance, the intermediary must adopt the 'filtering mechanism' in New Zealand for content that may exploit children (Daalder 2021). In the case of audio-visual works (as per the proposed Bill), they may need to expedite the removal of certain objectionable content decided by a Chief Censor (Films, Videos and Publications classification amendment Bill 2021, s 119L). Similarly, in Australia, any abhorrent violent material must be removed as per the notification issued by the authorities under the Abhorrent Violent Material Act (Criminal Code Amendment Act 2019, s 474.33; Douek 2020). In India, the courts have tried to make certain exceptions to filtering mechanisms on a case-by-case basis.[17] The more significant and definite differences demanding additional due diligence are still absent.

In terms of following the Due Diligence Guidelines, intermediaries must improve upon how standard forms of agreements are presented. This activity is pivotal to the idea of due diligence. Based on the type of service, intermediaries may be required to carry out additional Due Diligence activities. The scope of these activities will be enumerated through future judgements in India.

Thus, the road ahead for intermediaries cannot be deemed certain without considering uncertainties addressed in different sections. Intermediaries must remain vigilant while they wait for further clarifications.

Conclusion

The scope of intermediary liability in India is far from clear. The two-pronged approach of the Copyright and the I.T. Act has left many questions unanswered. Intermediary obligations have increased due to their enhanced technological capability. The I.T. Act,

along with its associated guidelines, points to the ever-increasing capacity of intermediaries and places a 'necessary compliance' framework on them. In a bid to catch up with newer innovations, the law in India is progressively moving towards heavily regulating the more recent and enhanced functions that intermediaries undertake. An apt example of the same is the recent 2021 Guidelines. The amendments made to the Grievance redressal process vide a notification dated October 28, 2022, by MeiTY demonstrate the compliance required in maintaining the process and timelines in resolving a complaint raised by any stakeholder. The overseeing authority, the Grievance Appellate Committee, ensures the checks and balances necessary to make intermediaries conform to the process.

The 2021 Guidelines are also an illustration of a compliance checklist for intermediaries. It points to possible complexities that intermediaries may face in future. The list demonstrates various conditions under which intermediaries must take contents down. As a result, intermediaries must proactively work on different effective ways to meet different expectations. It may disincentivise the growth of newer intermediaries and leave them confused, eventually increasing transaction costs for all stakeholders. The ideal approach is to keep the compliance framework free from all ambiguities. It is more so when India is proving to be a crucial stakeholder in the digital economy.

In the midst of these uncertainties, courts in India have given a lot of clarity to the overall scope of intermediary liability. However, more clarifications are required on the scope of the Copyright and the I.T. Act. There are questions associated with the effective implementation of these Acts and the extent to which these statutes complement each other. As such, there is a wide gap in harmonious interpretation that future judgments must clarify. There are notable similarities between the two; however, one needs to observe how the provisions under the two Acts are applied optimally. It remains to be seen whether there are any further additions to the judgement delivered by the Division Bench in Myspace. The way forward would be for Courts in India to decide the exact scope. One of the reasons that we have faced difficulty defining the exact scope is centred around the historical space and motivations under which S. 79 and S. 52 have developed. These reasons would continue to blur the precise scope in the future until the Courts come to the rescue and provide the necessary direction.

As India is embarking upon the journey of the digital economy in a big way, the concern about intermediary liability and its existing framework is at the forefront. There is a need to re-visit the scope to ensure greater clarity. Innovators in India would be incentivised with a policy mechanism that exudes confidence through a structured approach in the years to come.

Notes

1. S. 2(w) of the IT Act (as enacted in 2000) defines 'intermediary' and reads ' … with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message'. If S. 79 and S. 2(w) were read together, the exemption under S. 79 extended only to network Service Providers and not to other intermediaries. To refer to S. 512 of the DMCA and to S.193A the Singaporean Copyright Act 1987, the terms 'service provider' and 'network service provider' are different. While service providers may encompass what we understand today as intermediaries as per the DMCA, the use of the term 'network'

narrows the scope to 'a person who provides, or operates facilities for, online services or network access'. In this regard, there is a very narrow framework of exemption provided only to a certain kind of intermediaries (Gupta and Marsoof 2019).

2. The erstwhile S. 79 only dealt with the service providers who enabled internet connection for users. With the boom of internet, there were different kind of service providers who arose within the sphere of the internet, making the experience of every user better with their inputs. Hence, a larger definition of intermediaries and nuanced understanding of their functions and the resulting control on data uploaded on their platforms. For example: sites like Search engines like Google, Social Media platforms such as Facebook, User-generated content sites like YouTube, E-commerce websites like the previous Bazee.com etc. These were not yet included within the ambit of S. 79.
3. The Indian jurisdiction never introduced forms of monitoring throughout the 2008 amendments and 2011 Guidelines. Unlike the EU, India also did not have a provision like Art. 15 of the E-commerce Directive or Art. 17(8), which put a prohibition on general monitoring. Hence, even if proactive monitoring may have been suggested in the preparatory documents, they were never realised in India.
4. For an intermediary such as YouTube or Amazon, is it appropriate to say that there is no possibility of modification of information? The question was also debated upon in *Amway India Enterprises Pvt Ltd v 1MG Technologies Pvt Ltd* (2019) 260 D.L.T. 690. (Single Judge) and in *Amazon Seller Services Pvt Ltd v Amway India Enterprises Pvt Ltd* (2020) S.C.C. OnLine Del. 454 (Appeal Division Bench). Similarly in *Sabu Mathew George vs. Union of India* AIR 2018 SC 578 and *M/s. DRS Logistics (P) Ltd & Anr. vs. Google India Pvt. Ltd.* (CS(COMM) 1/2017), the Supreme Court and the Delhi High Court respectively also emphasised on this modification capacity of search engines.
5. Holding that vicarious liability cannot be fastened on the Director in IPC or under the IT Act for an intermediary falling under S. 79, the Supreme Court completely negated the existence of liability for the Director. Also, the true intent of S. 81 was not to fasten the liability that has been exempted or negated under S. 79. Also, when there could be no case made under the IT Act as the lex specialis, there cannot be any liability under the general law that is IPC (Sharat Babu Digumarti 2017, [30, 31; 32 and 39]). In Sharat Babu Digumarti 2017, [32] 'It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply … Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC'.
6. Super Cassettes Industries in 2007 alleged copyright infringement suit under S. 51of the Copyright Act, against the social networking platform Myspace which allows a user to upload and share media content on their portal. Super Cassettes Industry claimed users were sharing their work without any authorisation on the portal.
7. *Amway India Enterprises Pvt Ltd v 1MG Technologies Pvt Ltd* (2019) 260 D.L.T. 690 (Single Judge) – This case arose from an appeal by Amazon Seller Services against a Single Judge's order injuncting them from selling products of Amway, Oriflame and Modicare on their platform. The respondents claimed to be Direct Selling Entities (DSEs) following the Model framework for Guidelines on Direct Selling dated 26 October 2016. In the injunction order, there were many questions of law that the learned Single Judge ruled in favour of the DSEs, which were disputed by the appellants in this case.

8. The Single Judge held that Amazon services, as an e-commerce platform, 'were not merely passive players but in fact, 'massive facilitators' inasmuch as they were providing warehousing, logistical support, packaging and delivery services. 'For availing the safe harbour under S.79, they had to be providing the bare minimum, that is, complied with due diligence requirements under S.79 (2)(c).
9. The Division bench erred in its interpretation. In their opinion, application of this section would not depend on the nature of the intermediary and wouldn't necessarily stop an active intermediary from claiming immunity under this section. This interpretation is connected to the application of S. 79, except the section will decide the nature of an active or a passive intermediary. Essentially for an online platform, S. 79 would be the litmus test, which is the only criterion, to decide the nature of its involvement. If the involvement goes beyond just a passive function, then the intermediary will have no exemption under S. 79 (Gupta and Srinivasan 2020).
10. Two women were arrested for posting comments on a social media platform were subsequently arrested under S.66A of the IT Act, 2000. The charges against the women were dropped however, the petitioner filed a suit on the constitutional violation of freedom of speech due to S.66A. This judgement clarified the benefit of S. 79 for intermediaries, ensuring they are not subject to exploitation but a due process is established reducing the extent of their due diligence burden.
11. There is no mention of the nature of monitoring currently. In reference to the challenge of 'Article 17 of the Digital Single Market Directive' ('*Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/*' (2019) OJ L 130) by Poland, the Advocate General has opined that there have been safeguards introduced in the impugned provision by the EU legislator to ensure that this does not translate to general monitoring (Advocate General's (AG) Opinion in '*Case C-401/19 Poland v Parliament and Council*'. Moreover, there has been an explicit provision to exclude Member States from imposing general monitoring obligations. The intent is to ensure that there could be incident-specific monitoring while upholding the rights of copyright holders. If one were to contextualise the findings on EU to India, the latest Guidelines of 2021 have not mentioned explicitly the specificity of monitoring with the requisite safeguards to freedom of speech and expression.
12. This classification of intermediaries has been seen in some other jurisdictions, albeit not as a part of the legislative text. For example, in the context of EU, Recital 58 of the proposed 'Digital Services Act' mentions the differed nature of responsibilities of 'very large online platforms'. Additionally, in interpreting 'best efforts', a Guidance by the European Commission on Article 17 of the Digital Single Market Directive, makes a similar distinction (European Commission 2019).
13. There are inherent contradictions since unlike the Due Diligence Guidelines prescribed under the IT Act, there are no Guidelines connected to S. 52(1)(b) and (c) of the Copyright Act of 1957 (as amended in 2012). S. 52 of the Copyright Act, 1957 titled 'Certain acts not to be infringement of copyright' reads as '(1) The following acts shall not constitute an infringement of copyright, namely, — …

    (b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

    (c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy … '
14. The Matter is still pending before the Supreme Court.
15. Born out of the intent of the E-Commerce Directive, this procedure has been at the receiving end of strong reactions, be it in support or against. It may seem that it is slowly moving towards monitoring when there is a special provision against general monitoring obligation. If one were to consider the aspect of due diligence, there have been many questions raised as to the supposedly mandatory nature and the scope of it. To look globally, the EU also makes

legislative errors in due diligence under its notice and takedown mechanism. The notice and takedown system under the E-commerce Directive was introduced as a tool to provide support to the safe harbour model. In other words, it acted as a regulatory exception for intermediaries applying the safe harbour to their actions. Today, considering the importance of the NTD in EU, there is no uniform NTD procedure followed in different member states which is an antithesis to the general idea of harmonisation: (Aleksandra Kuczerawy 2015).

16. The other requirements in S.79 under sub-sections 2 and 3.
17. The interpretation of actual knowledge in *Myspace Inc. v Super Cassettes Industries Ltd.*(DB) and *Shreya Singhal v Union of India* vis-à-vis cases such as *Sabu Mathew George vs. Union of India and Kamlesh Vaswani v Union of India*, where monitoring was discussed in limited contexts.

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