Intermediary Liability in India:
Chilling Effects on Free Expression on the Internet 2011

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1. Executive Summary

(References are provided in the footnotes of the subsequent sections of the paper)

Intermediaries are widely recognised as essential cogs in the wheel of exercising the right to freedom of expression on the Internet. Most major jurisdictions around the world have introduced legislations for limiting intermediary liability in order to ensure that this wheel does not stop spinning. With the 2008 amendment of the Information Technology Act 2000, India joined the bandwagon and established a 'notice and takedown' regime for limiting intermediary liability.

On the 11th of April 2011, the Government of India notified the *Information Technology (Intermediaries Guidelines) Rules 2011* that prescribe, amongst other things, guidelines for administration of takedowns by intermediaries. The Rules have been criticised extensively by both national and international media. The media has projected that the Rules, contrary to the objective of promoting free expression, seem to encourage privately administered injunctions to censor and chill free expression. On the other hand, the Government has responded through press releases and assured that the Rules in their current form do not violate the principle of freedom of expression or allow the government to regulate content.

This study has been conducted with the objective of determining whether the criteria, procedure and safeguards for administration of the takedowns as prescribed by the Rules lead to a chilling effect on online free expression. In the course of the study, takedown notices were sent to a sample comprising of 7 prominent intermediaries and their response to the notices was documented. Different policy factors were permuted in the takedown notices in order to understand at what points in the process of takedown, free expression is being chilled.

The results of the paper clearly demonstrate that the Rules indeed have a chilling effect on free expression. Specifically, the Rules create uncertainty in the criteria and procedure for administering the takedown thereby inducing the intermediaries to err on the side of caution and over-comply with takedown notices in order to limit their liability and as a result suppress legitimate expressions. Additionally, the Rules do not establish sufficient safeguards to prevent misuse and abuse of the takedown process to suppress legitimate expressions.

Of the 7 intermediaries to which takedown notices were sent, 6 intermediaries over-complied with the notices, despite the apparent flaws in them. From the responses to the takedown notices, it can be reasonably presumed that not all intermediaries have sufficient legal competence or resources to deliberate on the legality of an expression. Even if such intermediary has sufficient legal competence, it has a tendency to prioritise the allocation of its legal resources according to the commercial importance of impugned expressions. Further, if such subjective determination is required to be done in a limited timeframe and in the absence of adequate facts and circumstances, the intermediary mechanically (without application of mind or proper judgement) complies with the takedown notice.

The results also demonstrate that the Rules are procedurally flawed as they ignore all elements of natural justice. The third party provider of information whose expression is censored is not informed about the takedown, let alone given an opportunity to be heard before or after the takedown. There is also no recourse to have the removed information restored. The intermediary is under no obligation to provide a reasoned decision for rejecting or accepting a takedown notice. The Rules in their current form clearly tilt the takedown mechanism in favour of the complainant and adversely against the creator of expression.

The research highlights the need to:

- increase the safeguards against misuse of the privately administered takedown regime;
- reduce the uncertainty in the criteria for administering the takedown;
- reduce the uncertainty in the procedure for administering the takedown;
- include various elements of natural justice in the procedure for administering the takedown; and
- replace the requirement for subjective legal determination by intermediaries with an objective test.

2. Introduction

2.1. Context

Intermediaries, such as hosts, transitory communication systems, information location tools etc are widely recognised as essential cogs in the wheel of exercising the right to freedom of expression on the Internet.[1] Most major jurisdictions around the world have introduced legislations for limiting intermediary liability in order to ensure that this wheel does not stop spinning.[2]

Pursuant to outrage in the Indian media over a case[3] wherein an intermediary was prosecuted by the state for a legal claim arising from hosting of user generated content, India amended Section 79[4] of the Information Technology Act 2000[5] (hereinafter referred to as the Act) in 2008 and joined the club of nations that limit intermediary liability.

Subsequently, on the 11th of April 2011, the Government of India, in exercise of its powers under Section 79(2) read with Section 87(2)(zg) of the Act, notified[6] the *Information Technology (Intermediaries Guidelines) Rules 2011* (hereinafter referred to as the Rules). In essence, the Rules (read with the Act) prescribe a privately administered '*notice and takedown*' regime for limiting intermediary liability in India.

Though the guiding principles[7] for intermediary liability policy in India are derived from the European Union E-Commerce Directive (2000/31/EC)[8], such principles have been incompletely[9], yet along with their loopholes[10], incorporated into the Rules without adapting them to the requirements of India in the current context.

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[1] Center For Democracy & Technology, Intermediary Liability: Protecting Internet Platforms For Expression And Innovation (2010).

[2] If the liability of an intermediary is not limited then an intermediary would be required to pre-screen all content which would render its services impractical or technically infeasible. United States offers a vertical framework to limit intermediary liability. Separate liability regimes exist for (i) copyright claims under Section 512 of the Digital Millennium Copyright Act; (ii) trademark claims under Section 32(2) of the Lanham Act; and (iii) non-intellectual property rights claims under Section 230 of the Communications Decency Act. The European Union E-Commerce Directive (2000/31/EC), in its minimum requirements, mandates a horizontal framework i.e. a single intermediary liability regime dealing with all types of claims.

[3] *Avnish Bajaj* v. *State (N.C.T.) Of Delhi*, 116 (2005) DLT 427. Commonly referred to as the Baazee.com case.

[4] Refer to Appendix 1.

[5] The Information Technology Act 2000 (21 of 2000), as amended in 2008.

[6] G.S.R. 314(E), New Delhi, the 11th April, 2011, Part II-Sec. 3(i), The Gazette of India : Extraordinary.

[7] "This section is revised in lines with the EU Directives on E-Commerce 2000/31/EC issued on June 8th 2000". Refer to Report of the Expert Committee (August 2005), *Proposed Amendments to Information Technology Act 2000*.

[8] Article 12-15, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal L 178 , 17/07/2000 P. 0001 – 0016.

[9] Example: The Rules do not clearly distinguish between different classes of intermediaries; whereas the European Union E-Commerce Directive (2000/31/EC) prescribes class specific qualifications and due diligence requirements (for mere conduits, system caching and hosting).

[10] Example: Both, the Rules and the European Union E-Commerce Directive (2000/31/EC), are silent about a counter-notice and put-back procedure.

Under the Rules, limitation of intermediary liability has been made contingent to a privately administered takedown mechanism[11], presumably in order to provide a faster alternative to the redressal mechanisms offered by the judiciary and the executive. Once the knowledge requirement[12] is satisfied, the takedown mechanism requires intermediaries to deliberate on the legality of the allegedly unlawful expressions and accordingly disable/remove such expressions in order to claim exemption from liability. As a result, intermediaries have donned the hat of a censor and other stakeholders such as the consumers and creators of information are expected to actively police the Internet and issue *takedown notices*[13] to the intermediaries to ensure that free expression on the Internet does not encroach on its opposing rights and duties[14].

Contrary to the objective of promoting free expression, at the face of it, the Rules seem to encourage privately administered injunctions to censor free expression without even the benefit of judicial review. The takedown procedure prescribes a limited timeframe of 36 hours for the intermediary to disable the content—arguably[15] precluding any investigation of a complaint's legitimacy. The Rules lack many elements of natural justice[16] and expand the scope of restrictions[17] on the right to freedom of speech and expression beyond those as prescribed by Article 19(2) of the Constitution of India. The Rules also fail to clearly distinguish between the roles and responsibilities of different classes of intermediaries.

It is widely recognised that fear of persecution by the intermediary will lead to a chilling effect on free expression wherein the subject indulges in excessive self-censorship in order to avoid undue and unfair liability.[18] Given the growing scale of user generated content with the advent of Web 2.0, it is believed that

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[11] Rule 3(4). "The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2)."

[12] Section 79(3)(b) creates a knowledge requirement standard of "receiving actual knowledge" for administering the takedowns. However, Rule 3(4) prescribes an alternate standard of "obtaining knowledge by itself"; or "brought to actual knowledge by an affected person".

[13] The term "takedown notice" is not used anywhere in the Rules. This paper uses the term to refer to the instrument by which the allegedly unlawful expression is "brought to actual knowledge by an affected person in writing or through email signed with electronic signature".

[14] The right to freedom of speech and expression, codified in Article 19(1)(a) of the Constitution of India, is not an absolute right. The state can impose reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

[15] New Indian Internet Intermediary Regulations Pose Serious Threats to Net Users' Freedom of Expression | Electronic Frontier Foundation, http://www.eff.org/deeplinks/2011/06/new-indian-internet-intermediary-regulations-pose (last visited Sep 2, 2011).

[16] Example: The third party provider of information is not required to be heard by the intermediary either before or after administering the takedown.

[17] Rule 3(2) prescribes an exhaustive list of types of expressions which are not permissible. The list includes terms such as "disparaging" or "grossly harmful", which are not defined in the Rules, the Act or any other statute.

[18] The chilling effect doctrine, with respect to the right to freedom of speech and expression, is concerned with excessive self-censorship. An individual may indulge in excessive self censorship and refrain from disseminating a perfectly legitimate expression, if he fears that on expressing himself: (i) liability will be incorrectly imposed on him, or the law will adversely affect him; (ii) cost of legal defence will be very high (iii) doubts the legitimacy of the expression and faces high damages if found incorrect. On the internet, since expressions have to flow through various intermediaries, any chilling effect on the intermediaries also has an indirect chilling effect on the creators and seekers of expressions. By inducing fear into any cog in the machine, one can halt the whole apparatus.

the Rules have magnified the chilling effect and tilted the balance of convenience in favour of mechanical compliance with takedown notices, even if the takedown process is abused by the complaining party.

2.2. Need for the study

The Rules have been extensively criticised by both national[19] and international[20] media. The media has projected that the Rules have a chilling effect on freedom of expression and enable the government to regulate content. The Government has responded through press releases[21] and assured that the Rules in the current form do not violate the principle of freedom of expression or allow the government to regulate content.

Chilling effects on free expression as a result of DMCA takedown notices for copyright claims have been documented extensively in the United States.[22] In India, the issue needs far greater attention as the takedown regime extends across different types of legal claims including defamation, obscenity etc (all excluding copyright and patent claims).[23] Given the nascent yet evolving nature of intermediary liability related law and policy in India, need is recognised to document and analyse the chilling effects on free expression as a result of the takedown requirement prescribed by the Rules.

2.3. Objectives of the study

The following were recognised as the objectives of the study:

- To determine whether the privately administered takedown mechanism as prescribed by the Rules has a chilling effect on online free expression.
- If there is a chilling effect, to document at what points in the process of takedown, free expression is being chilled.

2.4. Methodology

The study comprises of the following methodologies:

1. Comparative study of law and policy related to intermediary liability in India and other major jurisdictions of the world including United States and the European Union.
2. Documenting the response of different intermediaries to takedown notices issued under the privately administered takedown regime for limiting intermediary liability in India as prescribed

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[19] New rules to ensure due diligence: IT dept - Times Of India, http://articles.timesofindia.indiatimes.com/2011-05-11/internet/29531713_1_draft-rules-due-diligence-google-spokesperson (last visited Sep 2, 2011).

[20] India's new Internet rules criticized - The Washington Post, http://www.washingtonpost.com/world/indias-new-internet-rules-criticized/2011/07/27/gIQA1zS2mI_story.html (last visited Aug 2, 2011).

[21] Press Information Bureau English Releases, http://pib.nic.in/newsite/erelease.aspx?relid=73756 (last visited Sep 2, 2011).

[22] Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 Harvard Journal of Law & Technology (2010).

[23] CS (OS) No. 2682/2008 in the High Court of Delhi at New Delhi. "Section 79 is, thus, meant for all other internet wrongs wherein intermediaries may be involved including auctioning, networking servicing, news dissemination, uploading of pornographic content but not certainly relating to the copyright infringement or patent infringement which has been specifically excluded by way of proviso to Section 81. This can be only possible harmonious construction between the two Acts which makes both the Acts workable."

under the Rules: Different policy factors were permuted in the takedown notices in order to understand at what points in the process of takedown, free expression is being chilled.[24]

2.5. Sample: targets of the takedown notices

A sample of 7 prominent[25] intermediaries was selected from the following two classes of intermediaries:

1. hosts; and
2. information location tools.

2 of the 7 selected intermediaries belong to both of the above mentioned classes of intermediaries. Further parameters for selection of the sample cannot be revealed in order to protect the identity of the intermediaries.

The author chose not to target "transitory communication systems" because there is an overwhelming number of theoretical arguments to support that the takedown mechanism should not be applicable to such intermediaries.[26]

The sample comprised of the following 7 intermediaries (names anonymised):

1. Intermediary-A: information location tool
2. Intermediary-B: host
3. Intermediary-C: information location tool + host
4. Intermediary-D: information location tool + host
5. Intermediary-E: information location tool
6. Intermediary-F: host
7. Intermediary-G: host

[24] It has been brought to the attention of the author that such a methodology may be considered unethical by some institutions. However, the author found this methodology essential for understanding the takedown regime as the existing literature on the subject is limited. Adequate care has been taken to anonymise the names of all intermediaries to which the takedown notices were issued. In support of the methodology adopted, it is brought to the attention of the reader that one of the criticisms of the Rules is that there are no codified safeguards to prevent the abuse of the takedown process.

[25] The adjective "prominent" may be considered vague by the reader. Unfortunately, parameters for selection of the sample cannot be revealed in order to protect the identity of the intermediaries. However, the reader can safely assume that the selected intermediaries are mainstream (not fringe players).

[26] The immunity granted to both "mere conduits" and "transitory digital network communications", in the European Union and United States respectively, is not contingent to a takedown requirement. This class of intermediaries is excluded from the takedown process because: (i) Any blocking by this class of intermediaries will lead to unintentional over-blocking of information. For example, if the there is a single comment on a URL that is required to be removed, this class of intermediaries would instead need to block the entire URL and would not be able to specifically block an individual comment on that URL; because of their upstream functionality and lack of control over any specific content on the URL; (ii) Any blocking by this class of intermediaries can easily be circumvented; and (iii) Any removal of data is also redundant because they store data for a very short period of time i.e. transient and intermediate storage for packet switching etc.

3. Individual Results

3.1. Intermediary-A

3.1.1. Details of the intermediary

Intermediary-A is an information location tool; specifically a search engine. At the time of sending the takedown notice, Intermediary-A had not appointed a Grievance Officer as required under Rule 3(11)[27] or modified its content policy as required under Rule 3(2)[28].

3.1.2. Details of the takedown notice

A takedown notice was issued to Intermediary-A for removal and disablement of 3 *communication links*[29] provided in its search engine results on searching for the keywords "online gambling". Through the takedown notice, it was brought to the actual knowledge[30] of the intermediary that:

> 1. The aforesaid *communication links* hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URL are "relating or encouraging money laundering or gambling" as provided in Rule 3(2)(b) of the Rules.
> 2. the aforesaid *communication links* hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URL are "otherwise unlawful in any manner whatever" as provided in Rule 3(2)(b) of the Rules read with Section 9 & 11 of the Prize Competition Act 1955 and Section 3 & 4 of the Public Gambling Act 1867.
> 3. the aforesaid *communication links* hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URL "violate any law for the time being in force" as provided in Rule 3(2)(e) of the Rules read with Section 9 & 11 of the Prize Competition Act 1955 and Section 3 & 4 of the Public Gambling Act 1867.

The 3 communication links mentioned in the notice were base URLs of 3 websites. Each of these websites had over 2000 URLs indexed by Intermediary-A. The takedown notice did not specifically identify or discuss any individual URL on any of the 3 websites. The takedown notice was also silent about the cause of action and did not suggest any legal injury.

For establishing himself as an affected person, the author argued that criminal offences, or incitement thereof, under the Public Gambling Act 1867 and the Prize Competition Act 1955 are against the state and the society at large; therefore the complainant is established as an *affected person* for the purpose of Rule 3(4) of the Rules.

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[27] Rule 3(11). "The intermediary shall publish on its website the name of the Grievance Officer and his contact details as well as mechanism by which users or any victim who suffers as a result of access or usage of computer resource by any person in violation of rule 3 can notify their complaints against such access or usage of computer resource of the intermediary or other matters pertaining to the computer resources made available by it."

[28] Rule 3(2). "Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that (a) … (i)…."

[29] Rule 2(1)(b). "*Communication link* means a connection between a hyperlink or graphical element (button, drawing, image) and one or more such items in the same or different electronic document wherein upon clicking on a hyperlinked item, the user is automatically transferred to the other end of the hyperlink which could be another document website or graphical element."

[30] Section 79(3)(b) creates a knowledge requirement standard of "receiving actual knowledge" for administering the takedowns. However, Rule 3(4) prescribes an alternate standard of "obtaining knowledge by itself"; or "brought to actual knowledge by an affected person".

Based upon the foregoing, it was demanded that Intermediary-A confirm by email/writing within 36 hours that (i) it has removed the impugned communication links from its computer resources; (ii) it will refrain from, and also prevent it's users from, hosting, displaying, uploading, modifying, publishing, transmitting, updating or sharing any similar communication links using its computer resources; and (iii) it has terminated the user accounts from which such communication links were hosted, displayed, uploaded, modified, published, transmitted, updated or shared and taken sufficient measures to prevent further access or usage of its computer resources by such users.

Further, Intermediary-A was notified that given the nature of the legal injury, time is the essence of the notice and if the aforesaid content is not removed within the lawfully required 36 hours, it will be deemed to have waived the exemption from liability as provided under Section 79 of the Information Technology Act.

3.1.3. Response of the intermediary

The intermediary responded to the takedown notice after 120 hours. In its response, Intermediary-A claimed that the takedown regime is not applicable to search engines as they fall within the scope of the exemption offered by Rule 3(3)proviso(a).

Despite claiming exemption under Rule 3(3)proviso(a), Intermediary-A still removed the 3 communication links mentioned in the takedown notice (and additionally[31] all other URLs of the 3 websites, including sub-domains), presumably to avoid legal risk and to err on the side of caution.

The relevant portions of Intermediary-A's reply to the notice are as follows:

> "The 'Communication Links' that you are referring to in your letter are not sponsored links (i.e. our client has not received any consideration from any of these gambling websites to host and display their links on its website) neither are they generated by any user of our client's website. These 'Communication Links' are algorithm results that are displayed as a result of a 'Keyword' search, which is entered on our client's search engine. Being the result of a 'Keyword' search, these 'Communication Links' are covered by the exemption contained in Rule 3 (3) (a) of the Rules, which states as follows:
>
> *Provided that the following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information as specified in sub-rule (2)*
> *(a)temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource.*
> *(b)...*
>
> A plain reading of Rule 3(3)(a) clearly indicates that it applies to an Intermediary, such as our client, because our client is a provider of a service, which is a search service that enables users to obtain information with the help of a related keyword that is entered by a user (such as yourself) on our client's website. When any user inserts a keyword, our client's computer resource, searches for any link, website or a URL on the internet, that is related to such a keyword and displays links, websites or URLs and information that deal with, or relate to such a keyword on its website. As an example, a user must have typed the keyword "Gambling" or "Gamble" on our client's search service webpage, and our client's computer resource would have automatically conducted an algorithmic search (without the exercise of any human control) on the internet and displayed the related results (i.e. links, websites and URLs) on its website.

[31] Note that the only base URLs of the 3 websites were mentioned in the takedown notice.

> Search results are always displayed without any human editorial control and which by the nature of the 'Search' feature, the information that is sought by a user by inserting a keyword, is automatically stored temporarily within our client's computer resource, which is an intrinsic feature of a Search engine and then displayed as a link (on our client's website) for onward transmission or communication to another computer resource. By clicking on these 'Communication Links' the user is directed to another computer resource, which does not belong to our client. This exemption has been specifically provided only for the benefit of search engines that are available on the internet, such as our client's.
>
> In these circumstances, it is incorrect on your part to allege that our client is responsible to promote, encourage and facilitate gambling and the question about removal of the impugned information from our client's website or preventing the hosting, displaying, uploading etc of such impugned information and the termination of a user account using any such impugned information does not arise at all as it is wholly irrelevant to the issue.
>
> Being an Intermediary and the provider of a search engine, our client is protected from any legal liability arising from any illegal information as specified in Rule 3 (2) that may be temporarily stored/displayed automatically as an intrinsic feature of a Search service, which does not involve any human editorial control, and forwards the user or establishes communication to another computer resource, solely for the benefit of that user.
>
> As regards your other observations concerning the Terms of Use etc., our client is in the process of updating them as per the Rules and our client appreciates your diligence in drawing its attention to the same."

To summarise, Intermediary-A claimed that the question about removal of the impugned information does not arise because the exemption codified in Rule 3(3)proviso(a) has been created specifically to exempt search engines from legal liability arising from any illegal communication links that may be temporarily stored/displayed automatically as an intrinsic feature of a Search service, which does not involve any human editorial control.

3.1.4. Learnings from the takedown notice issued to Intermediary-A

3.1.4.1. Mechanical compliance with takedown notice in the absence of sufficient legal competence or resources to determine legality of an expression:

Though the author is not aware of the processes initiated or resources consumed by Intermediary-A pursuant to the takedown notice, circumstances suggest that it did not have sufficient legal competence or resources (or the willingness to devote such resources) to determine whether all the expressions on the 3 websites under contention were legal or not. It accordingly decided to err on the side of caution to avoid legal risk by mechanically (without application of mind or proper judgement) removing all the URLs (including sub-domains) of the 3 websites from its search index.

Note that the 3 communication links mentioned in the notice were *base* URLs of 3 websites. In response, Intermediary-A has removed all the URLs (including sub-domains) of the 3 websites from its search index. To determine whether or not Intermediary-A devoted the requisite number of legal resources one must determine whether Intermediary-A devoted as many lawyer man hours as required in determining the legality of all expressions on every URL (over 2,000 URLs per website) of the 3 websites which were removed from the search index, as per both state and central laws. Additionally, since the author did not

assert any cause of action, and as demonstrated later in the paper, since the removed websites were not given an opportunity to be heard, it implies that one must also determine whether Intermediary-A devoted as many resources as required to seek the requisite facts in the course of legal determination.

It is important to note here that 2 of the 3 websites mentioned in the takedown notice offer online gambling services as a result of which these websites could possibly be construed as common gaming houses under Section 3 of the Public Gambling Act. However, these 2 websites also simultaneously run sub-domains dedicated to games involving skills (like chess) and do not offer any prize money for such games. The lack of application of legal resources can be reasonably presumed because if Intermediary-A had dedicated adequate resources for determining the legal validity of all URLs on the websites, it would easily have identified that there is no element of gambling in the sub-domains dedicated to games involving skills and titled 'Skilled Games'.

Additionally, the 3rd website removed from the search index merely publishes white papers which discuss the underlying mathematics in various gambling games to provide an insight into the probability of winning in such games. The website does not offer any services that can be provided in a common gaming house as defined in Section 3 of the Public Gambling Act. The lack of application of legal resources can be reasonably presumed for the 3rd website under the assumption that Intermediary-A did not literally interpret "relating to gambling" provided in Rule 3(2)(b) as a prohibited expression.

Further, the takedown notice sent by the author was clearly defective as it did not specifically identify and discuss any individual URL on the 3 websites, or present any cause of action, or suggest any legal injury. It is therefore questionable whether the processes initiated by Intermediary-A pursuant to the takedown notice involved absolutely any subjective legal determination of the claims made therein; the response offered only an interpretation of the Rules wherein it was argued that the takedown process is not applicable to them.

3.1.4.2. Lack of natural justice:

The 3 websites removed pursuant to the takedown notice were contacted by the author to determine whether they were given an opportunity to be heard and whether they were given a reasoned decision after the takedown etc. Response was received from only 1 of the 3 websites. The respondent disclosed that neither were they informed about the complaint either before or after the takedown, nor were they given an opportunity to be heard at any time during the process. They were also not provided with any reasoned decision thereby robbing them of the right to appeal or challenge the decision. Additionally there was no general notification on Intermediary-A's website about the removal of the search results.

3.1.4.3. Need for put-back procedure:

The respondent, as mentioned hereinabove, additionally enquired whether there was any provision for him under the Indian law to file a counter notice to put-back the website onto the search engine, similar to the recourse offered by DMCA; thereby clearly establishing the need for such recourse in India.

3.1.4.4. Roles and responsibilities of different classes of intermediaries not clearly defined:

In jurisdictions with slightly more developed jurisprudence, four different classes[32] of intermediaries are recognised i.e. hosting services, transitory communication systems (mere conduits), information location

[32] DMCA in the United States recognises all four classes of intermediaries. The EU Directive mandates only three of the four classes (it is silent on 'information location tools'); however a few member states have notified legislations with safe harbours for 'information location tools' as well.

tools and caching services. Each such class of intermediaries is treated differently and assigned different due diligence requirements according to the function that it performs.

Unfortunately, the Rules in India fail to clearly create this distinction between different classes of intermediaries. The uncertainty created as a result of the absence of such classification is evident from the response of Intermediary-A.

In its reply, Intermediary-A claimed benefit of the exemption codified in Rule 3(3)proviso(a)[33]. In the interpretation offered in its response, it argued that the exemption is provided ***specifically*** for the benefit of search engines (information location tools). Interestingly, Intermediary-D, as described in detail later, has offered an interpretation whereby its hosting services also fall within the scope of Rule 3(3)proviso(a). In complete contrast to the above two interpretations, the author will offer an alternate interpretation in the following few paragraphs to show that Rule 3(3)proviso(a) is wide enough to provide an exemption for caching services and also for temporary storage in packet switched communications etc.

The varied interpretations, though a part and parcel of how law works, demonstrate that the Rules do not clearly specify the roles and responsibilities of different classes of intermediaries and therefore create uncertainty. Rule 3(3)proviso(a) provides an exemption on the basis of actions performed by an intermediary (temporary or transient or intermediate storage); but such actions do not clearly map onto those performed by any particular or distinct class of intermediaries. In the absence clear and specific assignment of due diligence requirements (or exemptions) to a distinct class of intermediaries, there is uncertainty in the steps to be followed by an intermediary as it cannot affirmatively determine whether the requirement (or exemption) is applicable to it.

In the opinion of the author, it is owing to this uncertainty, that Intermediary-A removed the 3 communication links despite claiming that the takedown regime is inapplicable to the class of intermediaries to which it belongs: information location tool, specifically a search engine (as did Intermediary-D despite claiming that the takedown regime is inapplicable to its hosting services). Intermediary-A clearly wasn't sure about the interpretation offered by it and therefore erred on the side of caution and chilled free expression.

Uncertainty in the interpretation of the Rules also follows from the lack of definitions for the terms used. Rule 3(3)proviso(a) borrows terms like 'transient' and 'intermediate' from Article 12 and 13 of the European Union E-Commerce Directive (2000/31/EC) but does not define them. As interpreted by the government of the United Kingdom, the term "intermediate" means that the "storage of information is made in the course of the transmission," and the term "transient" refers to the fact that "the storage of the information is temporary and not to be stored beyond the time that is reasonably necessary for the transmission."[34] In the EU Directive, such terms have been used as qualifications for temporary storage in the course of transmission (for packet switching etc.) and for temporary storage by caching services.

The similarity in Rule 3(3)proviso(a), Article 12 and Article 13 is highlighted in the following table:

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[33] 3(3)proviso(a). "Provided that the following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information as specified in sub-rule (2):

(a)temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource."

[34] The Electronic Commerce (EC Directive) Regulations 2002 (UK).

Rule 3(3)proviso(a)	**Article 12 – Mere conduit exception for packet switching etc**	**Article 13 – Caching**
temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource	automatic, intermediate and transient storage of the information	automatic, intermediate and temporary storage of that information
involving no exercise of any human editorial control	...referred to in paragraph 1 (does not modify the information contained in the transmission)	...the provider does not modify the information
for onward transmission or communication to another computer resource	...for the sole purpose of carrying out the transmission in the communication network	...for the sole purpose of making more efficient the information's onward transmission

Note that Rule 3(3)proviso(a) uses an "or" between the qualifiers unlike the use of "and" in Article 12 and 13. It is for this reason that the author has suggested that if intermediaries can offer interpretations that information location tools and hosting services qualify for Rule 3(3)proviso(a), then it will not be very difficult for other intermediaries to offer interpretations that caching services and packet switching also qualify for Rule 3(3)proviso(a).

Proponents of total immunity, similar to that offered by Section 230 of the Communications Decency Act in the United States, would feel that such a broad proviso is an excellent invention of law. However, the current example of Intermediary-A clearly demonstrates that uncertainty created by such drafting has a chilling effect as well.

3.1.4.5. Scope of affected person not clear:

Since gambling is a cognizable offence against the state, the author had argued that every person is an affected person as a result of the expression. The intermediary did not raise any objection to this assertion. This raises questions as to the scope of an affected person for the purpose of the Rules if the expression relates to a criminal offence.

3.2. Intermediary-B

3.2.1. Details of the intermediary

Intermediary-B is a host; specifically it is a website which disseminates news with its primary target audience in India. Besides the core offering which is news, the website allows user generated comments to be published below news articles. At the time of sending the takedown notice, Intermediary-B had not appointed a Grievance Officer as required under Rule 3(11) or modified its content policy as required under Rule 3(2).

3.2.2. Details of the takedown notice

A takedown notice was issued to Intermediary-B for removal and disablement of 1 user generated comment published below a news article relating to the Telengana movement[35]. The text of the user generated comment was as follows:

> "Telangana cause is justified, no one is denying that. But have you come to the point, you want to burn India? This is what I am opposing, burning demolition, killing etc. is the hidden agenda of vested interests. And we Hyderabadis (Hindus and Muslims) will not allow any one to burn our homeland.
> I have seen this movement since 1968. These leaders who are leading the agitation are selfish, short sighted and they hav no vision and mission. can any of Telangana leaders answer to the following?
> 1-How will you share water from Nagarjuna Sagar dam which is build at the border of Guntur and Nalgonda and is benefiting Prakasham,Guntur and Krishna districts of Andhra region and Khammam & Nalgonda of Telangana?
> 2- How you will share water from Krishna and Godavri rivers? If Telanagana wants to build Dams there will be endless litigation expected from Andhra users.
> 3-Where will you get money for Real estate Development, trading, Tour operations etc?
> 4-Do we have any standard educational Institute which can produce more than 1000 ranks in eamcet?
> 5-We can never displace the settlers form andhra who are in Telangana for more than 20 years, no law allows for that
> 6-Telangana will turn out to be extortionists Hub, like Bombay.
> 7-KCR has announced 15% reservation for Muslims, will any political party agree for that?
> 8-KCr wants to see a Dalit as CM and Muslim as Dy. CM, will the Reddy's and Rao's accept it?
> If all the participants of Telangan struggle accept the above then all Hyderabadis will participate in Telangana Struggle and we will get Telangana."

To summarise, the comment (i) condemns the violence in the Telengana agitation; (ii) blames the leaders of the movement for being selfish and having no vision; and (iii) supports the cause and promises support to the Telengana movement contingent to getting answers to questions raised by him about the movement.

Through the takedown notice, it was brought to the actual knowledge of the intermediary that:

> (i) The comment on the impugned URL is "racially and ethnically objectionable" as provided in Rule 3(2)(b) of the Rules.
> (ii) The comment on the impugned URL is "hateful" as provided in Rule 3(2)(b) of the Rules.
> (iii) The comment on the impugned URL is "disparaging" as provided in Rule 3(2)(b) of the Rules.
> (iv) The comment on the impugned URL is "defamatory" as provided in Rule 3(2)(b) of the Rules.
> (v) The comment on the impugned URL "violates any law for the time being in force" as provided in Rule 3(2)(e) of the Rules read with Sections 124A, 153A, 153B, 292A, 295A and 499 of the Indian Penal Code 1860.

Please note that terms like 'objectionable' and 'disparaging', though a part of the mandatory content policy[36], are not defined anywhere in the Rules or elsewhere under Indian law. This has been criticised extensively by the media, specifically because the content policy meant to appraise the users is also the

[35] The Telangana movement refers to a group of related political activities organised to support the creation of a new state of Telangana, from the existing state of Andhra Pradesh in South India. The proposed new state corresponds to the Telugu-speaking portions of the erstwhile princely state of Hyderabad.

[36] Rule 3(2).

criteria[37] for administering the takedown. Therefore for determining whether the comment should be removed or not would require subjective legal determination by Intermediary-B without clarity about the scope of such terms.

From the research perspective, through this takedown notice, the author wanted to determine whether the user generated comment mentioned in the takedown notice, falls within the scope of Intermediary-B's interpretation of any of the aforesaid terms.

The notice did not state the cause of action or establish the author as an affected person.

3.2.3. Response of the intermediary

No written response was received from the Intermediary-B.

> However, after approximately 72 hours, it was noticed that, instead of removing just the 1 comment as identified in the takedown notice, Intermediary-B had removed all 15 comments published below the newspaper article.

Telengana is a sensitive issue and one can never say with certainty which comment may be taken adversely by another. However, in the opinion of the author, some of the comments deleted were perfectly legitimate expressions as they only posed questions for other users. The text of 1 such comment from the 14 additional comments that were deleted is as follows:

> "osmania university has been at the center of the agitation and has witnessed a lot of violence. does anybody know if the students are involved or are they goondas in the disguise as students?"

3.2.4. Learnings from the takedown notice issued to Intermediary-B:

3.2.4.1. <u>Mechanical compliance with takedown notice in the absence of sufficient legal competence or resources to determine legality of an expression:</u>

Please refer to the analysis for Intermediary-A on the same learning. In the current example, Intermediary-B deleted all the comments published below the newspaper article even though such comments were not the subject matter of the takedown notice. It is apparent from the circumstances that Intermediary-B was not willing to inherit the liability for the comments posted by its users or devote any legal resources to subjectively determine whether any of the comments were legitimate or not. Further, the notice was silent about the cause of action; thereby clearly establishing that the deletion of the comments was a precautionary measure without application of legal resources; administered solely to be cautious and in order to limit its liability.

3.2.4.2. <u>No requirement to give a reasoned decision:</u>

No explanation or reasoned decision was given by Intermediary-B after the removal of comments. The author was not even informed which out of the 10 allegations was finally accepted (disparaging, defamatory, hateful, objectionable, 124A, 153A, 153B, 292A, 295A or 499); and for what reasons.[38]

[37] Rule 3(4) refers to Rule 3(2).

[38] It is to be noted that the Rules do not mandate the Intermediary to provide the complainant or the third party provider of information with a reasoned decision. The Rules do not even mandate that the third party provider of information be informed of the complaint or of the removal.

3.3. Intermediary-C

3.3.1. Details of the intermediary

Intermediary-C is a host and an information location tool; specifically it is a website which disseminates news with its primary target audience in India. Besides the core offering which is news, the website (i) allows user generated comments to be published below news articles; (ii) has advertisements in and around the news articles; and (iii) offers a search engine to search for news articles on the website and alternatively for other information on the entire internet. Intermediary-C had appointed a Grievance Officer as required under Rule 3(11) and modified its content policy as required under Rule 3(2).

3.3.2. Details of the takedown notice & Response of the intermediary

Intermediary-C was sent a takedown notice for the following:

3.3.2.1. User generated content

The website allows user generated comments to be published below news articles. One such comment on a news piece about a Government proposal for legalisation of gambling was identified and targeted in the takedown. The text of the comment was as follows:

> "Good that government is legalizing gambling in sports, this way corruption can be reduced besides getting revenues. But it should be well researched before implementing and tips can be followed from US & UK."

It was brought to the actual knowledge of Intermediary-C that the comment was "relating or encouraging money laundering or gambling" as provided in Rule 3(2)(b) of the Rules. Please note that the term "relating to gambling" is not defined anywhere in the Rules and may possibly be interpreted literally. The notice was not accompanied by a cause of action and did not establish the author as an affected person.

The following response was received within 36 hours:

> "We have initiated appropriate action in pursuance to your Cease and Desist notice below and will keep you updated on the status of the same."

After approximately 48 hours it was noticed that instead of removing just that 1 comment as requested in the takedown notice, Intermediary-C removed 7 additional comments which were posted by other users (there were a total of 22 comments on the page before the takedown). Note that all the 7 removed comments were posted consecutively below the comment which was targeted in the takedown notice.

All the removed comments were arguments either in support of or against the proposed call for legalisation of public gambling, the discussion of which is essential in any democracy.

An example of the additional user comments that were deleted:

> "It is shocking to note that the Government is considering legalising gambling in sports. The whole approach to the matter seems to be woefully wrong... putting the cart before the horse, that is, if the administration cannot check an evil (instead of strengthening the measures) better legalise it. Besides, there are four serious objections to the feared initiative by the Government. One, gambling in sports attracts a very large number of youths who stake their precious money (often taken from parents on the pretext of financing education). Two, it encourages gambling seeking unearned income or easy money that would tend to cascade to other spheres as well. Three, it would provide an opportunity for justifying (whitening) black money by the economic sharks. Four, it will make a mockery of the competitive sports inasmuch as the gambling would naturally lead to match fixing. etc Finally, it is against the canons of public finance that emphasize that the manner of mobilizing revenue (the justification given in the instant case) should conform to the ideals and values of the society. We should not, therefore, be guided by what is happening in USA and UK; we are not

> obliged to borrow all the evils of the western society. Promotion of gambling does not make our society strong in any way."

After the takedown was administered, Intermediary-C was asked to share the contact details of the 8 users so that notice could be served to such users directly. However, this could not be followed up due to the time constraints of the research. Only the following response was received:

> "We are looking into the details of all 8 user accounts (including full name, e-mail address, location and IP address) from which the aforesaid 8 messages on the URL <some-url> were posted and will revert on the same."

3.3.2.2. Non-user generated content

The takedown regime is inapplicable to any information which is not user generated or not provided by a third party. If the intermediary creates its own content then the takedown regime is not applicable to such expressions. To verify whether this was clear to the intermediary, a takedown notice was sent for a news article (not user generated) which was related to gambling.

In retrospect, the author is of the opinion that the test was incorrect because even if an intermediary is aware that the takedown regime is not applicable to non-user generated content, it is still in its best interests to not deliberate on the issue.

It was brought to the actual knowledge of Intermediary-C that the article was "disparaging" as provided in Rule 3(2)(b) of the Rules.

In response, Intermediary-C wrote that:

> "This is an article containing the viewpoints expressed on a public issue and it does not promote gambling and is in no way illegal or disparaging in nature."

The news article was not removed from the website.

3.3.2.3. Advertising links

Intermediary-C uses a system for contextual advertising wherein advertisements relating to the content on the webpage are served. However, different advertisements are served each time the page is refreshed. Additionally, sometimes, advertisements out of context are also served (for various reasons).

This system of contextual advertisements has been subcontracted by Intermediary-C to another intermediary, as a result of which, Intermediary-C does not have any particular control over the advertisements.

On a specific news article about gambling, on refreshing the webpage, sometimes advertisements relating to gambling would be displayed, and at other times, advertisements not relating to gambling would be displayed.

The author sent one screenshot of an advertisement relating to gambling and brought to the actual knowledge of Intermediary-C that the advertisement was "relating or encouraging money laundering or gambling" as provided in Rule 3(2)(b) of the Rules.

In its reply, Intermediary-C sent its own screenshot of the URL that displayed an instance which did not have an advertisement related to gambling. Along with the screenshot, it sent the following statement:

> "We checked and did not find any advertisements promoting gambling on the URLs provided by you. Please find attached the screenshots of the same"

3.3.2.4. Search engine results related to online gambling

A takedown notice was issued to Intermediary-C for removal and disablement of 3 *communication links* provided on its search engine results on searching for the keywords "online gambling". These search engine results were sub-contracted by Intermediary-C to another intermediary. It was to be tested here whether 36 hours are sufficient for the intermediary to remove the communication links in question as it was technically infeasible for Intermediary-C to remove any specific communication link in contention without involving the sub-contracted intermediary, despite its best intentions.

In response, Intermediary-C wrote:

> "It is a search powered by <*some-intermediary*> and they have been duly intimated about the notice sent by you."

Notice of all of the above (user generated, non user generated, advertising links and search engine results) was sent in a single takedown notice. The author did not establish himself as an affected person for any of them.

3.3.3. Learnings from the takedown notice issued to Intermediary-C:

3.3.3.1. Prioritisation of allocation of legal resources to expressions

Given that the legal resources at the disposal of any intermediary are limited, if the intermediary needs to subjectively determine the legitimacy of different expressions, it will need to prioritise the application of its legal resources according to the perceived importance (e.g. on the basis of commercial value) of each expression. As a result, the intermediary decides which expression is important and which expression is not. In the current example, Intermediary-C spent considerable legal resources in determining the legitimacy of the main news article. Only then did it come to the conclusion that "This is an article containing the viewpoints expressed on a public issue and it does not promote gambling and is in no way illegal or disparaging in nature." Unfortunately, the Intermediary could not apply similar resources to determine the legitimacy of user comments below the news article. This is evident from the fact that all 8 consecutive comments were deleted; most of which were simple statements either in support of or against continuing with the ban on public gambling; and according to the author, perfectly legal expressions.

3.3.3.2. 36 hours is an insufficient timeframe:

Sometimes it may be technically infeasible for an intermediary to comply with a takedown request within the requisite time period (36 hours) despite the best of intentions. In the current example, even though Intermediary-C apprised the complainant that actions have been taken towards disabling the impugned content pursuant to the complaint, it still failed to perform the requisite actions within 36 hours as stipulated under the Rules.

3.3.3.3. No established procedures for producing evidence

The intermediary is required to make the determination whether the expression is legal or not despite there not being established procedures for producing evidence before an intermediary. In the current example, it was a case of the authors snapshot versus the intermediaries snapshot.

3.4. Intermediary-D

3.4.1. Details of the intermediary

Intermediary-D is a host and an information location tool; specifically it is a website providing multiple services to its users including news, search engine, shopping etc. At the time of sending the takedown notice, Intermediary-D had not appointed a Grievance Officer as required under Rule 3(11) or modified its content policy as required under Rule 3(2).

3.4.2. Details of the takedown notice

The takedown notice sent to Intermediary-D was very similar to the notice that was sent to Intermediary-A. The takedown notice was issued for removal and disablement of 3 *communication links* provided on its search engine results on searching for the keywords "online gambling". Through the takedown notice, it was brought to the actual knowledge of the intermediary that:

> 1. the *communication links* hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URL are "relating or encouraging money laundering or gambling" as provided in Rule 3(2)(b) of the Rules.
> 2. the *communication links* hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URL "violate any law for the time being in force" as provided in Rule 3(2)(e) of the Rules read with Section 9 & 11 of the Prize Competition Act 1955 and Section 3 & 4 of the Public Gambling Act 1867.

The 3 communication links mentioned in the notice were base URLs of 3 websites (same as those mentioned in the notice sent to Intermediary-A). Each of these websites had over 2000 URLs indexed by Intermediary-D. The takedown notice did not specifically identify and discuss any individual URL on any of the 3 websites, or present any cause of action or suggest any legal injury.

3.4.3. Response of the intermediary

In the response to the takedown notice, Intermediary-D

1. rejected the notice because the author had not established himself as an affected party; and
2. built sufficient grounds to claim benefit of the exemption in Rule 3(3)proviso(a).

Despite rejecting the takedown notice, Intermediary-D still removed the 3 communication links mentioned in the takedown notice (and additionally[39] all other URLs of the 3 websites, including sub-domains), presumably to avoid legal risk and to err on the side of caution.[40]

The argument presented by Intermediary-D was as follows:

> That from your above said notice under reply, my client has failed to understand your capacity to serve a notice of this nature. Your notice lacks clarity on following points:
> (a)What is your locus standi to send such a notice?
> (b)Have you sent it on behalf of a client? If yes, then you have failed to identify such client?

[39] Note that the only base URLs of the 3 websites were mentioned in the takedown notice.

[40] ***UPDATE: We have been informed that there is an unconfirmed possibility that Intermediary-D had outsourced its search engine to Intermediary-E. We have requested Intermediary-D to confirm the same but have not received a response till date. In that case, when Intermediary-E complied with the takedown notice, the three links were also removed from the search results of Intermediary-D despite having rejected the takedown notice. This forms an interesting variation of undue censorship arising from the Rules. The remaining results for Intermediary-D should be interpreted with this caveat.***

> (c) Have you sent it in the capacity of an aggrieved person/affected person? If yes, are you using any of the channels/services provided by <Intermediary-D> on its portal? Even if you are using any such channels/services, which are presently being offered by <Intermediary-D>, my client has every right to know what has made you an aggrieved person/ affected person?
> .....
>
> That your claim that my client has continued to host, publish and share information "relating or encouraging money laundering or gambling" as provided in Rule 3(2)(b) read with Rule 3(3) of the Rules is vexatious, false, incorrect and thus denied. That my client as an intermediary is either transmitting or routing digital online communications or providing access to such communications, without modifying, manipulating or editing the content of the material sent or received on behalf of the third party. The transmission/routing of the content is automatic. It is thus facilitating "mere conduit operations" by providing an intermediate and transient storage of third party content.
>
> The role of my client is that of a "mere conduit" having no control over the third party information passing through its online platform. However, my client has already put in place a vigorous due diligence mechanism of checks-and-balances to disable any such information violating its user terms and conditions.

3.4.4. Learnings from the takedown notice issued to Intermediary-D:

3.4.4.1. Mechanical compliance with takedown notice in the absence of sufficient legal competence or resources to determine legality of an expression:

Similar to that as discussed for Intermediary-A.

3.4.4.2. Lack of natural justice:

Similar to that as discussed for Intermediary-A.

3.4.4.3. Confusion due to lowering of knowledge standard

Section 79(3)(b) creates a knowledge requirement standard of “receiving actual knowledge” for administering a takedown. However, Rule 3(4) prescribes an alternate knowledge requirement standard of “obtaining knowledge by itself”; or “brought to actual knowledge by an affected person”.[41]

Therefore, in the case where a complainant sends a notice which is defective for the reason that the complainant has not established himself as an affected person; but such notice sufficiently appraises the intermediary of specific and identifiable facts and circumstances from which the violation is apparent, it should bring about a rebuttable presumption that the intermediary has now obtained knowledge on its own.

The author suspects that this is the reason why Intermediary-D complied with takedown notice despite claiming that the notice is defective.

[41] The Rules have been notified in exercise of the powers conferred by Section 87(2)(zg) read with 79(2). Therefore, the takedown and knowledge requirement under 79(3)(b) exists independently of the takedown and knowledge requirement under 79(2).

3.4.4.4. Roles and responsibilities of different classes of intermediaries not clearly defined:

In its response, Intermediary-D has:

(a) asserted that it is a "mere conduit".
(b) built sufficient grounds to claim exemption under Rule 3(3)proviso(a); and

One would have noticed that in the description of Intermediary-D, it has been classified as a "host" and an "information location tool"; but in its response, Intermediary-D has asserted that it is a "mere conduit". This difference in opinion exists because different classes of intermediaries are not clearly defined in the Act and the Rules. A "mere conduit" as understood as per the EU Directive, and its equivalent, "transitory digital network communications" as per the DMCA in the United States, is essentially a class of intermediaries which is solely involved in transmission, routing and provision of connections. If a similar class of intermediaries was clearly defined in the Indian context, then telecom service providers, network service providers and internet service providers like Bharti Airtel, Reliance and BSNL could claim defence under it. The following analysis attempts to explain why Intermediary-D may have possibly attempted to project itself as a "mere conduit":

Mere Conduit

Text of Section 79(2)(b):

> "(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;"

Section 79(2)(b) prescribes 3 disqualifiers for intermediaries from claiming exemption from liability under Section 79. This provision is a partial replica of the 'mere conduit' principle mandated by the European Union E-Commerce Directive (2000/31/EC)[42]. It is partial because even though the crux of the mere conduit principle has been copied in verbatim, the precondition and additional inclusion for packet switched networks, before and after the three disqualifiers respectively, have been (un)skilfully excluded by the legislators.

The precondition for application of the mere conduit principle is that:
The intermediary will not be liable for the information transmitted if the service provided consists of

1. the transmission in a communication network of information provided by a recipient of the service; or

[42] Article 12: Mere conduit

"1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement."

2. the provision of access to a communication network.

Therefore, it is only for the 'act of transmission' or the 'act of provision of access to a communication network' (e.g. providing an Internet connection) that the intermediary is given an exemption from liability by virtue of the mere conduit principle. The three disqualifiers which follow thereafter, as mentioned in Section 79(2)(b), are extra disqualifications in the course of transmission or in the course of provision of access to a communication network. Other acts such as long term storage of information are not covered by the mere conduit principle. But in the Indian context, by excluding the precondition to the three disqualifiers, any act which is completely unrelated to transmission or provision of access would automatically escape the three codified disqualifiers and bring the intermediary one step closer towards claiming exemption from liability.

At this point, one must note that an intermediary can provide multiple services at the same time. Such services can be provided independently of each other or as any combination thereof. Even if such services are provided in combination by the intermediary, it is important to treat each such service independently of the others while determining its applicability to the law. It is for this reason that any service (like hosting) must be broken to the lowest level of granularity as recognised in the definition of intermediary (i.e. receive, store, transmit and provide service) to determine its applicability to law.

Consider the example of an intermediary that stores and transmits information. The mere conduit principle as per the European Directive would be applicable only to the act of transmission and not to the act of storing. In the Indian context, as a result of the omission of the precondition, the mere conduit principle is also applicable to all other acts of the intermediary including storing in the current example.

If the court ever comes to the conclusion that the precondition to 79(2)(b) is implicit in its reading and that services completely unrelated to transmission (like storing) cannot claim the benefit of 79(2)(b), then as a result, 79(2)(b) would become completely redundant, because the disqualifications under 79(2)(b) would become extra disqualifications in the course of transmission and therefore a subset of the transmission as mentioned in 79(2)(a).

The above can be understood from the tabular representation below. For determining the scope of intermediaries which can claim benefit of Section 79, there are three levels of qualifications which need to be looked into (in the same order):

1. Qualifications for intermediaries as per definition of "intermediary" under Section 2(1)(w)
2. Qualifications for intermediaries under Section 79(1)
3. Qualifications for intermediaries under Section 79(2)(a) or Section 79(2)(b)

2(1)(w)[43]	**79(1)**[44]	**79(2)(a)**[45] **→ or**	**79(2)(b) with Precondition Implicit**	**79(2)(b) with Precondition <u>Not</u> Implicit**
Receive	Receive (Make Available) (OR) Receive (Hosting)[46]	Receive (Hosting)		Receive (Make Available) (OR) Receive (Hosting)
Store	Store (Make Available) (OR) Store (Hosting)	Temp Store (Make Available) (OR) Store (Hosting)		Store (Make Available) (OR) Store (Hosting)
Transmit	Transmit (Make Available) (OR) Transmit (Hosting)	Transmit (Make Available) (OR) Transmit (Hosting)	Qualified[47] Transmit (Make Available) (OR) Qualified Transmit (Hosting)	Qualified Transmit (Make Available) (OR) Qualified Transmit (Hosting)
Provide Service	Provide Service (Make Available) (OR) Provide Service (Hosting)	Provide Service (Hosting)		Provide Service (Make Available) (OR) Provide Service (Hosting)

If the precondition is implicit in Section 79(2)(b), from the above analysis it can be seen that the functions of an intermediary under Section 79(2)(b) are a subset of the functions under Section 79(2)(a). Since both clauses are separated by an "or", Section 79(2)(b) will be redundant as any intermediary qualifying for Section 79(2)(b) will always also qualify for Section 79(2)(a).

In the opinion of the author, the pre-condition is implicit in the reading of Section 79(2)(b) and therefore Section 79(2)(b) is redundant. In contrast, in the MySpace judgment[48], though the court does not

[43] An intermediary is defined on the basis of the functions that such intermediary performs. Under Section 2(1)(w), any person who performs any of the following functions qualifies as an intermediary: (i) Receives a record on behalf of another person; (ii) Stores a record on behalf of another person; (iii) Transmits a record on behalf of another person; and (iv) Provides any service with respect to that record.

[44] Section 79(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 ***made available*** or ***hosted*** by him." (emphasis added)

[45] Section 79(2)(a). "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 ***hosted***;". Please note that "hosting" has been included as is from Section 79(1); therefore "transmitting" and "temporarily storing" must map onto the act of "making available".

[46] "Receive(Hosting)" refers to receiving in the course of hosting. As explained above, every service must be broken to the lowest level of granularity as recognised in the definition of intermediary (i.e. receive, store, transmit and provide service) to determine their applicability to law.

[47] "Qualified Transmit" refers to transmissions which are not disqualified by the 3 disqualifiers codified in Section 79(2)(b).

[48] CS (OS) No. 2682/2008 in the High Court of Delhi at New Delhi. "The acts of the defendants also may not fall with Section 79 (2) (b) as the said situation prescribed in the provision has to be satisfied conjunctively or collectively as the word used between the (i), (ii), (iii) is "and" which means all the situations must be satisfied else, the said conditions in the provision are not met with. In the present case, the defendant's acts do not satisfy the criteria of modification of information. The defendants have attained the licence to modify the works provided by the users suitably. The complaint of the plaintiff is that adding the advertisement also infringes their rights. Thus, the act of modification of the works by the defendants also excludes the defendants from the purview of Section 79 (2) (b) of the Act."

specifically deliberate on this issue, it appears to have assumed that the precondition is not implicit, as it observes that MySpace is disqualified from 79(2)(b) solely for the reason of modification, and not for the reason that many of its functions (like storing) are completely unrelated to the act of transmission.

Intermediary-D appears to have adopted a stand where the precondition is not implicit by asserting that it is a "mere conduit".

Rule 3(3)proviso(a)

In the opinion of the author, the exemption codified in Rule 3(3)proviso(a) has its roots in the second aspect of the mere conduit principle which has been excluded by the legislators from 79(2)(b); i.e. the additional inclusion for packet switched networks:

> "2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission."

This provision is essentially meant to provide an exemption for techniques such as packet switching, statistical multiplexing or any other store and forward techniques. All modern day transmissions need to usually break down the information into packets at various layers of abstraction, temporarily store such packets, and then send them onwards for forward transmission. The provision creates an exemption for such an act of temporary storing in the course of transmission.

The Rules provide a modified version of the exception for packet switching in Rule 3(3)proviso(a).

> "(a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource;"

The modified version of the exception has played with words in a very interesting manner which has resulted in broad and varied interpretations by intermediaries. Please refer to the response of Intermediary-A wherein it has been argued that the proviso is applicable only to search engines.

Rule 3(3)proviso(a) is wide in scope because it uses "or" between the qualifiers i.e. "temporary or transient or intermediate"; whereas the EU uses "and" between the qualifiers. Unfortunately, both terms are not defined. However, if one were to import the definitions from the European Union, as explained in the analysis of Intermediary-A, the term "intermediate" means that the "storage of information is made in the course of the transmission," and the term "transient" refers to the fact that "the storage of the information is temporary and not to be stored beyond the time that is reasonably necessary for the transmission."[49] In the current example, Intermediary-D claims to be providing "intermediate" and "transient" storage of third party information. In the opinion of the author, though the long term storage by Intermediary-D may qualify for "intermediate", it definitely does not qualify for "transient".

However, all the preceding confusion created by the Rules can be easily avoided if the Rules were to create distinct classes of intermediaries and accordingly assign class specific due diligence requirements.

[49] The Electronic Commerce (EC Directive) Regulations 2002 (UK).

3.5. Intermediary-E

3.5.1. Details of the intermediary

Intermediary-E is an information location tool; specifically a search engine. At the time of sending the takedown notice, Intermediary-E had not appointed a Grievance Officer as required under Rule 3(11) or modified its content policy as required under Rule 3(2).

3.5.2. Details of the takedown notice

The takedown notice sent to Intermediary-E was very similar to what was sent to Intermediary-A. The takedown notice was issued for removal and disablement of 3 *communication links* provided on its search engine results on searching for the keywords “online gambling”. Through the takedown notice, it was brought to the actual knowledge of the intermediary that:

> 1. the *communication links* hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URL are "relating or encouraging money laundering or gambling" as provided in Rule 3(2)(b) of the Rules.
> 2. the *communication links* hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URL are "otherwise unlawful in any manner whatever" as provided in Rule 3(2)(b) of the Rules read with Section 9 & 11 of the Prize Competition Act 1955 and Section 3 & 4 of the Public Gambling Act 1867.
> 3. the *communication links* hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URL "violate any law for the time being in force" as provided in Rule 3(2)(e) of the Rules read with Section 9 & 11 of the Prize Competition Act 1955 and Section 3 & 4 of the Public Gambling Act 1867.

The 3 communication links mentioned in the notice were base URLs of 3 websites (same as those mentioned in the notice sent to Intermediary-A). Each of these websites had over 2000 URLs indexed by Intermediary-E. The takedown notice did not specifically identify and discuss any individual URL on any of the 3 websites, or present any cause of action or suggest any legal injury.

3.5.3. Response of the intermediary

The following response was received for the takedown notice when it was sent (via email) to their office in United States:

> Your message was deleted without being read on <data, time>.

The following response was received for the takedown notice when it was sent (via post) to their local office in India:

> For all purposes, <Intermediary-E> India is a distinct legal entity enjoying a separate existence from its parent corporation - <Intermediary-E> United States. In view thereof, <Intermediary-E> India denies that it maintains any responsibility for hosting, displaying, uploading, modifying, publishing or transmitting any information links or other content on any online offerings, as alleged or at all.
>
> Accordingly, as <Intermediary-E> India has no stake whatsoever in the ownership, control and management of the relevant product in question (i.e. the computer system on which any information is stored or hosted or published), it cannot by any stretch be considered an 'intermediary' as defined under Section 2(l)(w) of the Information Technology Act, 2000. As an independent company, <Intermediary-E> India cannot, in the absence of any direct/ indirect control or management over any computer system:
> - allegedly receive, store and transmit information on such website;

> - be authorized to host, display, upload and publish unlawful communication links on such website, as alleged or at all; and
> - be authorized to terminate any user accounts by virtue of which the communication links were posted onto the website.
>
> <Intermediary-E> India does not qualify as an intermediary, or initiates any transmission of information, or selects the recipients of such transmission or modifies the information the subject matter of the alleged transmission, and therefore it stresses that it is as such not governed by the provisions governing intermediaries as addressed under the terms of the Information Technology Act, 2000 and the attendant Rules framed there-under.
>
> In view of the manifest non-applicability of the relevant provisions governing intermediaries to its own case, <Intermediary-E> India is not required to undertake any of the obligations set out under Rule 3(4) of the Intermediary Rules, such as (i) acting within 36 hours to disable the information (ii) preserving such information for a period of 90 days, or (iii) publishing on its website the name of any Grievance Officer.

Though the takedown notice was cold shouldered in both locations, surprisingly enough, the 3 communications links under contention were removed after 7 days and replaced with a general notification that the search results have been removed. Obviously, the notice must have been passed to the officer in-charge of such complaints through channels unavailable to the public.

Unlike Intermediary-A and Intermediary-D, after removing the websites from the search index, Intermediary-E published a general notification that certain URLs had been blocked.

3.5.4. Learnings from the takedown notice issued to Intermediary-E:

3.5.4.1. Details of Grievance Officer should be published**:**

This was clearly a case where the author could not contact the concerned person because the contact details of the Grievance Officer were not published on the website. Therefore it is essential that the contact details of the intermediary be published prominently on the website. Nevertheless it must be noted that not every intermediary has a website. Alternatively, it may be mandated that every intermediary register its Grievance Officer with DIT, and then DIT publish a list of all Grievance Officers. However, such a requirement to register may prove detrimental for the smaller intermediaries.

3.5.4.2. Mechanical compliance with takedown notice in the absence of sufficient legal competence or resources to determine legality of an expression:

Similar to that as discussed for Intermediary-A.

3.5.4.3. Lack of natural justice:

Similar to that as discussed for Intermediary-A.

3.5.4.4. Scope of affected person not clear:

Similar to that as discussed for Intermediary-A.

3.6. Intermediary-F

3.6.1. Details of the intermediary

Intermediary-F is a host; specifically it is an online shopping portal which provides a platform for buyers and sellers to connect with each other. Intermediary-F had appointed a Grievance Officer as required under Rule 3(11) and modified its content policy as required under Rule 3(2).

3.6.2. Details of the takedown notice

In the takedown notice, the author targeted the sale of a particular brand of baby diapers with the argument that such diapers cause Irritant Diaper Dermatitis (commonly referred to as baby rashes) on the convex surfaces of the minor (commonly referred to as the baby's butt) when the skin is exposed to prolonged wetness, increased skin pH caused by urine and faeces (commonly referred to as baby's poop).

It was brought to the actual knowledge of the intermediary that the information hosted, displayed, uploaded, modified, published, transmitted, updated or shared on the impugned URLs can "harm minors in any way" as provided in Rule 3(2)(c) of the Rules.

The notice was not accompanied with any supporting document or medical report because the Rules do not mandate such a requirement (additionally because the author had none). The notice sent by the author was completely frivolous but it was still theoretically within the scope of the content policy prescribed in Rule 3(2): any diaper would result in rashes if the skin of the minor was exposed to prolonged (unreasonably prolonged) wetness – thereby "harming minors in any way".

3.6.3. Response of the intermediary

A written response was received from Intermediary-F within 36 hours. Thankfully, the takedown notice was rejected. Apparently, the intermediary's interpretation of "harm minors in any way" was different from that of the author. And it should have been, since the phrase is not defined anywhere in the Rules and neither does it refer to any other provision that exist in other Acts. The following argument was presented:

> The description of the product depicted on our clients' website does not in any manner 'harm minors in any way'. The alleged 'information' is in fact a broadly and commercially accepted product-specific description. This information is available and on display publicly on the internet, and in the open market.

Unlike all other intermediaries, Intermediary-F recognised that the takedown notice of the author was completely frivolous:

> Based upon the foregoing, we submit that the claims made by you in your notice are frivolous in nature. Furthermore, prima facie it appears that the notice is motivated, and in bad faith. Under the circumstances, you are called upon to withdraw your notice with immediate effect, under written notice to us. Furthermore, if you fail to comply with the same, our client will initiate appropriate, civil and/ or criminal, legal action immediately, without any further notice to you.

Unfortunately for Intermediary-F, the Rules do not envision or prescribe any recourse for an intermediary even if such intermediary knows that the takedown notice is frivolous and that the process is being abused.

3.6.4. Learnings from the takedown notice issued to Intermediary-F:

3.6.4.1. <u>Undefined terms in the content policy can create confusion:</u>

Rule 3(2) prescribes a content policy, which has an exhaustive list of types of expressions which are not permissible. However, some of these prescribed types of expressions are not defined and others clearly

go beyond the reasonable restrictions as envisioned in the Constitution of India. In the current example, 'harm minors in any way' is the type of expression which was contested by the author in the takedown notice. The term is not defined as a result of which the intermediary offered an alternate interpretation and standard for the term. It has to be appreciated that Intermediary-F is an established company which has at its disposal legal resources which might not be available to smaller intermediaries. Smaller intermediaries with limited resources might unknowingly accept an interpretation and chill otherwise legitimate expressions. Further, the author concedes that the interpretation offered by him was a little farfetched, but unarguably, situations may arise wherein even an established intermediary might not be able to determine which interpretation is correct.

3.6.4.2. No codified recourse in case of abuse of process:

The Act or the Rules do not prescribe any recourse for an intermediary even if such intermediary knows that the takedown notice is frivolous and that the process is being abused. The law firm which responded on behalf of Intermediary-F must clearly have nicked its client off some substantial amount of money; but there is no definite or codified process which an intermediary can follow to recover money lost in the course of such legal determination, or worse as a result of a takedown pursuant to a notice which is later proved to be an act of misrepresentation.

3.7. Intermediary-G

3.7.1. Details of the intermediary

Intermediary-G is a host; specifically a website which disseminates news with its primary target audience in India. Besides the core offering which is news, the website allows user generated comments to be published below news articles. At the time of sending the takedown notice, Intermediary-G had not appointed a Grievance Officer as required under Rule 3(11) or modified its content policy as required under Rule 3(2).

3.7.2. Details of the takedown notice

Comments posted below a newspaper article relating to the Telengana movement were targeted before Intermediary-G.

The author identified the following comment posted by <some-user-of-Intermediary-G>:

> "Why are students agitating and resorting to violence..why they can not study and make good of their lives.. look at the pictures.. they appear to be vandals and rioters. they should be severly thrashed. their parents should also be admonished for not taking control of their children. this is a democracy and there should be no space for non-violence and hooliganism"

Thereafter, the author posted a comment below the comment posted by <some-user-of-Intermediary-G>:

> "I agree with the comment by <some-user-of-Intermediary-G>; but only to the extent that agitating students should not resort to violence."

The above two comments were brought to the actual knowledge of the intermediary:

> (i) The aforesaid comments on the impugned URL are "racially and ethnically objectionable" as provided in Rule 3(2)(b) of the Rules.
> (ii) The aforesaid comments on the impugned URL are "hateful" as provided in Rule 3(2)(b) of the Rules.
> (iii) The aforesaid comments on the impugned URL are "disparaging" as provided in Rule 3(2)(b) of the Rules.
> (iv) The aforesaid comments on the impugned URL are "defamatory" as provided in Rule 3(2)(b) of the Rules.

(v) The aforesaid comments on the impugned URL "violate any law for the time being in force" as provided in Rule 3(2)(e) of the Rules read with Sections 124A, 153A, 153B, 292A, 295A and 499 of the Indian Penal Code 1860.

The grounds for bringing actual knowledge to Intermediary-G were same as those in the takedown notice sent to Intermediary-B.

The notice did not state the cause of action or establish the author as an affected person.

3.7.3. Response of the intermediary

No written response was received from the Intermediary-G.

12 days after sending the notice, it was observed that the 2 comments had been deleted. No additional comment had been removed from the website.

3.7.4. Learnings from the takedown notice issued to Intermediary-G:

3.7.4.1. Lack of natural justice:

The following observation is made in the capacity of both the complainant and the third party provider of information. The comment posted by the author on Intermediary-G's website was deleted without giving the author a chance to be heard (to show that the comment was not objectionable, hateful, disparaging or defamatory as alleged in the notice sent by the author). This sufficiently establishes that <some-user-of-Intermediary-G> was also not given a chance to be heard. It is to be noted that the Rules do not mandate the Intermediary to hear the third party provider of information. Further, no explanation or reasoned decision was given by Intermediary-G after the removal of comments. The author was not even informed which out of the 10 allegations was finally accepted (disparaging, defamatory, hateful, objectionable, 124A, 153A, 153B, 292A, 295A and 499); and for what reasons. The Rules do not even mandate that the third party provider of information be informed of the complaint or of the removal.

3.7.4.2. Undefined terms in the content policy can create confusion:

Rule 3(2) prescribes a mandatory content policy, which has an exhaustive list of types of expressions which are not permissible. Please note that terms like 'objectionable', 'hateful' and 'disparaging', though a part of the mandatory content policy , are not defined anywhere in the Rules. The content policy is also the criteria for administering the takedown. From Intermediary-G's act of removal of the comments, it is apparent that the removed comments came within the scope of Intermediary-G's interpretation of at least one of the aforesaid four undefined terms.

4. Conclusion

4.1. Overview of Learnings from takedowns:

The following *Learnings* highlight the different factors in the takedown process that can chill free expression:

- Not all intermediaries have sufficient legal competence or resources (or the willingness to devote such legal resources) to deliberate on the legality of an expression, as a result of which, intermediaries have a tendency to err on the side of caution.
- The qualifications and due diligence requirements of different classes of intermediaries have not been clearly defined in the Rules resulting in uncertainty in the steps to be followed by the intermediary.
- The third party provider of information whose expression is censored is not informed about the takedown, let alone given an opportunity to be heard before or after the takedown.
- There is no recourse for the third party provider of information to have the removed information restored or put-back.
- The intermediary is under no obligation to provide a reasoned decision for rejecting or accepting a takedown notice.
- Depending on the nature of a service, it may be technically infeasible for an intermediary to comply with the takedown within 36 hours.
- There is no codified recourse for an intermediary to claim damages even if it knows that such takedown process is being abused.
- There is no requirement of disclosure or transparency in the takedown process.
- The content restrictions prescribed in the Rules are not defined resulting in varied interpretations of the same restriction by different intermediaries.
- Intermediaries have a tendency to prioritise the allocation of legal resources for determining the legal validity of expressions according to the perceived importance of the expressions.
- There are no established procedures, such as those prescribed in the CPC or CrPC, thereby creating procedural uncertainly.
- Claimants are not required to state their entire cause of action and provide reasonable level of proof (prima facie)

4.2. Analysis and recommendations

The responses of intermediaries to the takedown notices demonstrate that the privately administered takedown mechanism prescribed by the Rules has a chilling effect on free expression. Of the 7 intermediaries to which takedown notices were sent, 6 intermediaries removed and disabled the targeted information or communication links despite the legitimacy of the expressions contained therein and also despite apparent flaws in the takedown notices that were sent to them.

4.2.1. Uncertainty in subjective determination

The chilling effect can primarily be attributed to the requirement for private intermediaries to perform subjective judicial determination in the course of administering the takedown. From the responses to the takedown notices, it is apparent that not all intermediaries have sufficient legal competence or resources to deliberate on the legality of an expression, as a result of which, such intermediaries have a tendency to err on the side of caution and chill legitimate expressions in order to limit their liability. Even if such intermediary has sufficient legal competence, it has a tendency to prioritise the allocation of its legal resources according to the perceived importance of impugned expressions. Further, if such subjective determination is required to be done in a limited timeframe and in the absence of adequate facts and

circumstances, the intermediaries have no choice but to mechanically (without application of mind or proper judgement) comply with the takedown notice.

> **Recommendation 1.** *It is recommended that the requirement for private intermediaries to subjectively determine the legality of an expression be replaced with an objective test[50]. Such an objective test can be introduced by changing the knowledge requirement[51]. For example, for the 'hosting' class of intermediaries, the objective test should be to determine "whether or not the third party provider of information is willing to defend his expression in court". By legal fiction, Actual Knowledge can be attributed to the intermediary only if the third party provider of information refuses to defend his expression or fails to reply with a counter notice within the notice deadline.[52]*

4.2.2. Uncertainty in criteria

The content policy (criteria for administering the takedown) uses terms that are not defined to describe prohibited expressions. The responses of the takedown notices demonstrate that multiple interpretations of the same term can create uncertainty and thus a chilling effect - as it induces the intermediary to adopt the broadest possible interpretation of the term and to err on the side of caution.

> **Recommendation 2.** *It is recommended that all terms used in the content policy (criteria for administering the takedown) be clearly defined or be replaced with a statement that prohibits all expressions which "violate any law for the time being in force" so that only specific legislatively barred expressions, within the scope of reasonable restrictions as envisioned in the Constitution of India, can be taken down.*

4.2.3. Uncertainty in procedure

The Rules provide exemptions from due diligence requirements on the basis of actions performed by an intermediary (e.g. temporary or transient or intermediate storage); but such actions do not clearly map onto those performed by any particular or distinct class of intermediaries. In the absence a distinct classification of intermediaries, there is uncertainty in the steps to be followed by an intermediary as it cannot affirmatively determine whether a due diligence clause is applicable to it. Procedural uncertainty as a result of this has been demonstrated to have a chilling effect on free expression wherein the intermediary takes

[50] The *objective tes*t should be such that it does not create an obligation for the intermediary to go into the adjudication of a legal claim or into the investigation of facts and circumstances. For example, for hosting services, the objective test could be "whether or not the creator of expression wants to defend his expression?". However, the objective test should not preclude the intermediary from voluntary subjective legal determination of a claim and subsequent good faith removal of the impugned expression.

[51] For details of proposed objective test and for the proposed procedure for attributing actual knowledge, please refer to Annexure 2.

[52] In line with the recommendation, for 'caching services' the objective test could be to determine "whether or not the information for which the transmission is sought to be made more efficient has been removed at its source". By legal fiction, Actual Knowledge can be attributed to the intermediary only if such information has been removed at its source. For 'information location tools' the objective test could be to determine "whether or not the information at the other end of the communication link has been removed". By legal fiction, Actual Knowledge can be attributed to the intermediary only if the information at the other end of the communication link has been removed.

down the expression despite claiming that the takedown requirement is not applicable to the class of intermediaries to which it belongs.

> **Recommendation 3.** *It is recommended that distinct classes of intermediaries be created and due diligence requirements be assigned as per the functions performed by each class of intermediaries.*

4.2.4. Absence of natural justice in procedure

The results demonstrate that the Rules are procedurally flawed as they ignore all elements of natural justice. The third party provider of information whose expression is censored is not informed about the takedown, let alone given an opportunity to be heard before or after the takedown. There is no recourse for the third party provider of information to have the removed information restored or put back once it does come to his knowledge. The intermediary is under no obligation to provide a reasoned decision for rejecting or accepting a takedown notice. There is also no requirement for disclosure or transparency in the takedown process.

> **Recommendation 4.** *It is recommended that the procedure prescribed in the Rules ensure that the Intermediary comply with all forms of natural justice.*

4.2.5. Absence of safeguards against abuse

The Act or the Rules do not prescribe any recourse for an intermediary even if such intermediary knows that the takedown notice is frivolous and that the process is being abused. The results demonstrate that the Rules do not establish sufficient safeguards to prevent misuse and abuse of the takedown process to suppress legitimate expressions. This clearly induces the complainant to abuse the takedown process to suppress free expression without worrying about the repercussions.

> **Recommendation 5.** *It is recommended that the Rules codify the recourse for the intermediary or the third party provider of information to recover damages if it is later proved that the takedown notice was an act of misrepresentation.*

5. Appendix 1 – Section 79, Information Technology Act 2000

The text of the Section 79 is:

> "(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 made available or 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 hosted; or
>
> (b) the intermediary does not-
> (i) initiate the transmission,
> (ii) select the receiver of the transmission, and
> (iii) select or modify the information contained in the transmission;
>
> (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
>
> (3) The provisions of sub-section (1) shall not apply if-
>
> (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;
>
> (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.
>
> Explanation.-For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.
> Section 79 of the Information Technology Act"

6. Appendix 2 – Abridged Version of Proposed Objective Test

Objective test for attributing actual knowledge to hosting services: To determine whether or not the third party provider of information is willing to defend his expression in court. If the third party provider is willing to defend his expression, then such expression is not brought to the actual knowledge of the intermediary. If the third party provider is not willing to defend his expression, then such expression is brought to the actual knowledge of the intermediary.

Proposed Steps:

- an affected person (complainant) files a "***complaint***" with the intermediary hosting the information under contention
- within 36 hours of receiving a complaint, the intermediary issues a "***notice***" to the third party provider of information along with a copy of the complaint
    - if the information under contention was hosted within the preceding 7 days of the intermediary receiving the notice, the third party is given a notice deadline of 36 hours to respond.
    - in all other cases, the third party is given a notice deadline of 14 days to respond.
- the third party provider may choose to contest the notice by filing a "***counter-notice***" (the counter notice may be filed anonymously through a representative if there is a need to protect the identity of the third party)
- if the third party provider **chooses to contest** the notice by responding with a counter notice then the intermediary is required to continue hosting the information and share the counter notice with the complainant, so that the complainant may directly approach the court against the third party provider of information.
- if the third party provider **chooses to accept** the allegations in the complaint, **or fails to reply** within the notice deadline, the intermediary is required to remove the information under contention if it wishes to claim exemption from liability (the intermediary may continue to host the information under contention if it chooses to waive its exemption from liability; any act of waiving exemption from liability is only with reference to that particular information under contention and not a blanket waiver of such exemption from liability)
- regardless of the notice deadline, the third party information provider may contest the notice by responding with a counter notice within a period of 60 days of receiving the notice. If the information has already been removed by the intermediary, then the information is required to be **restored** and the complainant is required to be provided with the counter notice.
- the removed information is required to be replaced with a general notification that the information under contention has been removed in pursuance of an order under the Act.
- at any stage of the process, if the intermediary comes to the conclusion that the information under contention is against its terms of service or any law for the time being in force, it may voluntarily chose to remove access to such information; and it cannot be held liable for any such voluntary removal regardless of whether the information under contention is later proved to be within the scope of its terms of service or any law for the time being in force.
- the grievance officer appointed by the intermediary is required to notify the DIT of all takedown and counter notices received; and maintain a copy with itself for a period of 1 year.

Objective test for attributing actual knowledge to information location tools and caching services*:

- **For information location tools**: To determine whether or not the information reached by using the communication link has been deleted or removed pursuant to any order under the Act.
- **For caching:** To determine whether or not the information, for which transmission is sought to be made more efficient, has been deleted or removed pursuant to any order under the Act.

***Note that the takedown procedure for information location tools and caching services is self explanatory**
***Note that the takedown procedure is not applicable to mere conduits.**