

# **Intermediary Guidelines Amendment Proposed on 24<sup>th</sup> December 2018**

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# What is Section 79

- Introduced in ITA 2000 on 17<sup>th</sup> October 2000 and amended in ITA 2008 on 27<sup>th</sup> October 2009.
- Intermediary Guidelines issued on 11<sup>th</sup> April 2011 are now proposed to be amended.
- On 18/3/2013, clarification was issued regarding the action to be taken within 36 hours ..to mean acknowledgement and initiation of appropriate action as per law
- Grievance Officer to redress within 1 month

# Sec 79 under ITA 2000

- For the removal of doubts, it is hereby declared that
  - no person providing any service as a Network Service Provider shall be liable under this Act, rules or regulations made thereunder
  - for any third party information or data made available by him
  - **if he proves** that the offence or contravention was committed
    - without his knowledge or that
    - he had exercised all due diligence to prevent the commission of such offence or contravention.
      - .. Explanation. - For the purposes of this section –
      - (a)"Network Service Provider" means an intermediary;
      - "Third Party Information" means any information dealt with by a network service provider in his capacity as an intermediary.

# Sec 79 as it exists now

- (1) Notwithstanding anything contained in any law for the time being in force but **subject to the provisions of sub-sections (2) and (3)**,
  - **an intermediary shall not be liable for any third party information, data, or communication link hosted by him.** (corrected vide ITAA 2008)
- (2) The provisions of sub-section (1) shall apply **if-**
  - (a) the function of the intermediary is **limited** to providing access to a communication system over which **information made available by third parties is transmitted or temporarily stored**; or
  - (b) the intermediary **does not-**
    - (i) initiate the transmission,
    - (ii) select the receiver of the transmission, and
    - (iii) select or modify the information contained in the transmission
  - (c) the intermediary **observes due diligence** while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf (Inserted Vide ITAA 2008)

# Due Diligence

- (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 (ITAA 2008)
  - (b) **upon receiving actual knowledge**, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act,
    - **the intermediary fails to expeditiously remove** or disable access to that material on that resource without vitiating the evidence in any manner.
      - Explanation:- For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

# Guidelines

- On 27<sup>th</sup> October 2009, the Information Technology [Intermediaries Guidelines (Amendment)] Rules, 2018 were notified
  - Due diligence under para 3 contained 11 paras/Sub rules
- Now proposed to be modified
  - New Guidelines contains 13 paragraphs/sub rules under Due diligence

# Minor Changes

- Definitions of “Appropriate Government” and “Critical Information Infrastructure” added.
- In Rule 3 words “user agreement” replaced with “Privacy Policy”

# Notable Changes...1

- In Rule 3, new sections j and k added as follows
  - (j) threatens public health or safety; promotion of cigarettes or any other tobacco products or consumption of intoxicant including alcohol and Electronic Nicotine Delivery System (ENDS) & like products that enable nicotine delivery except for the purpose & in the manner and to the extent, as may be approved under the Drugs and Cosmetics Act, 1940 and Rules made thereunder;
  - (k) threatens critical information infrastructure.



## Notable Changes..2

- Clause regarding removal of information modified in tune with the Shreya Singhal judgement. Rule 3(4) deleted and new para (5) and (8) added.

# Notable Changes..2

- Deleted Para
- ~~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). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes,.~~

# Notable Changes..2

- (5) When **required by lawful order**, the intermediary shall,
  - within 72 hours of communication, provide such information or assistance as asked for by any government agency or assistance concerning security of the State or cyber security; or investigation or detection or prosecution or prevention of offence(s); protective or cyber security and matters connected with or incidental thereto.
  - Any such request can be made in writing or through electronic means stating clearly the purpose of seeking such information or any such assistance.
  - The intermediary shall enable tracing out of such originator of information on its platform as may be required by government agencies who are legally authorised.

# Notable Changes..2

- (8) The intermediary upon receiving **actual knowledge**
  - in the form of a court order, or on being notified by the appropriate Government or its agency under section 79(3)(b) of Act
  - shall remove or disable access to **that unlawful acts relatable to Article 19(2)** of the Constitution of India
  - such as 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, on its computer resource without vitiating the evidence in any manner,
  - **as far as possible immediately, but in no case later than twenty-four hours** in accordance with sub-rule (6) of Rule 3.
  - Further the intermediary shall preserve such information and associated records for at least ~~ninety days~~ one hundred and eighty days for investigation purposes, or for such longer period as may be required by the court or by government agencies who are lawfully authorised.

# Notable Changes...3

- The intermediary shall inform its users
  - at least once every month,
  - that in case of noncompliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource,
  - the intermediary has the right to immediately terminate the access or usage rights of the users to the computer resource of Intermediary and remove noncompliant information.

# Significant Changes.1

- (7) The intermediary who has more than fifty lakh users in India or is in the list of intermediaries specifically notified by the government of India shall:
  - (i) be a company incorporated under the Companies Act, 1956 or the Companies Act, 2013;
  - (ii) have a permanent registered office in India with physical address; and
  - (iii) Appoint in India, a nodal person of contact and alternate senior designated functionary, for 24x7 coordination with law enforcement agencies and officers to ensure compliance to their orders/requisitions made in accordance with provisions of law or rules.

# Significant Changes.2

- (9) The Intermediary shall deploy
  - technology based automated tools or
  - appropriate mechanisms,
  - with appropriate controls,
  - for proactively identifying and removing or disabling public access to unlawful information or content

# Suggestions outside the published note

- 1. There are certain guidelines already issued under ITA 2000/8 on matrimonial websites, Cyber Cafes and online Child Sexual abuse material filtering.
  - These are on dates subsequent to 11<sup>th</sup> April 2011
  - To avoid confusion on whether these are overridden by the new guidelines are not,
    - A clarification should be added that they prevail



# Conflict Resolution

- Presently it is mandatory for the Intermediaries to designate a “Grievance Officer” to resolve disputes between users of intermediary service and the Intermediary.
  - This is inadequate to address the issues of clarification in terms of law or the intentions behind the notifications and could lead to flimsy litigations

# Conflict Resolution

- A Solution is to introduce an
  - Intermediary Dispute Resolution Mechanism on the lines of UDRP for domain names
    - Incorporating a standard contract which all users need to agree to at the time of using a service which could incorporate the privacy principles under data protection requirements as well as the due diligence requirements
    - Backed up a dispute resolution process which includes an Ombudsman, Mediation and Arbitration through an online dispute resolution mechanism

# Intermediary-User relationship

- Presently, the relationship between the Intermediary and the user customer is a contractual relationship determined by the Terms and Conditions
- However the PDPA 2018 will require the relationship to be a Data Principal-Data Fiduciary whenever personal data is exchanged.
- The IDRPs system can incorporate these multiple requirements of compliance into one IDRPs process so that the intermediaries can focus on developing their contracts purely on functional terms.

# Discussions

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