

AN ANALYSIS OF LIABILITY OF INTERMEDIARIES
UNDER INFORMATION TECHNOLOGY
(INTERMEDIARIES GUIDELINES) 2011

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[Abstract]

The article starts by discussing events which led to the passing of the Information Technology (Intermediaries Guidelines) Rules, 2011 (herein after referred to as “The Guidelines”) and the extent to proposing amendments in the proposed model under the guidelines.

The article applauds the move to bring Intellectual Property under the scope of Intermediary Guidelines. The author attempts to examine the percussion of holding the Intermediary liable in situations of infringement of rights of IP owners and breach of freedom of speech and expression.

Further the author attempts to compare the statutory provisions of around 11 nations and suggests a model whereby all the segments of the society can benefit, without any entity being left to be heard.

Thereafter, the author discusses the present model and the proposed model, relating to the Guidelines. The author also makes relevant suggestions to make the existing model of law a more robust and effective one, which would further propel the growth of India.

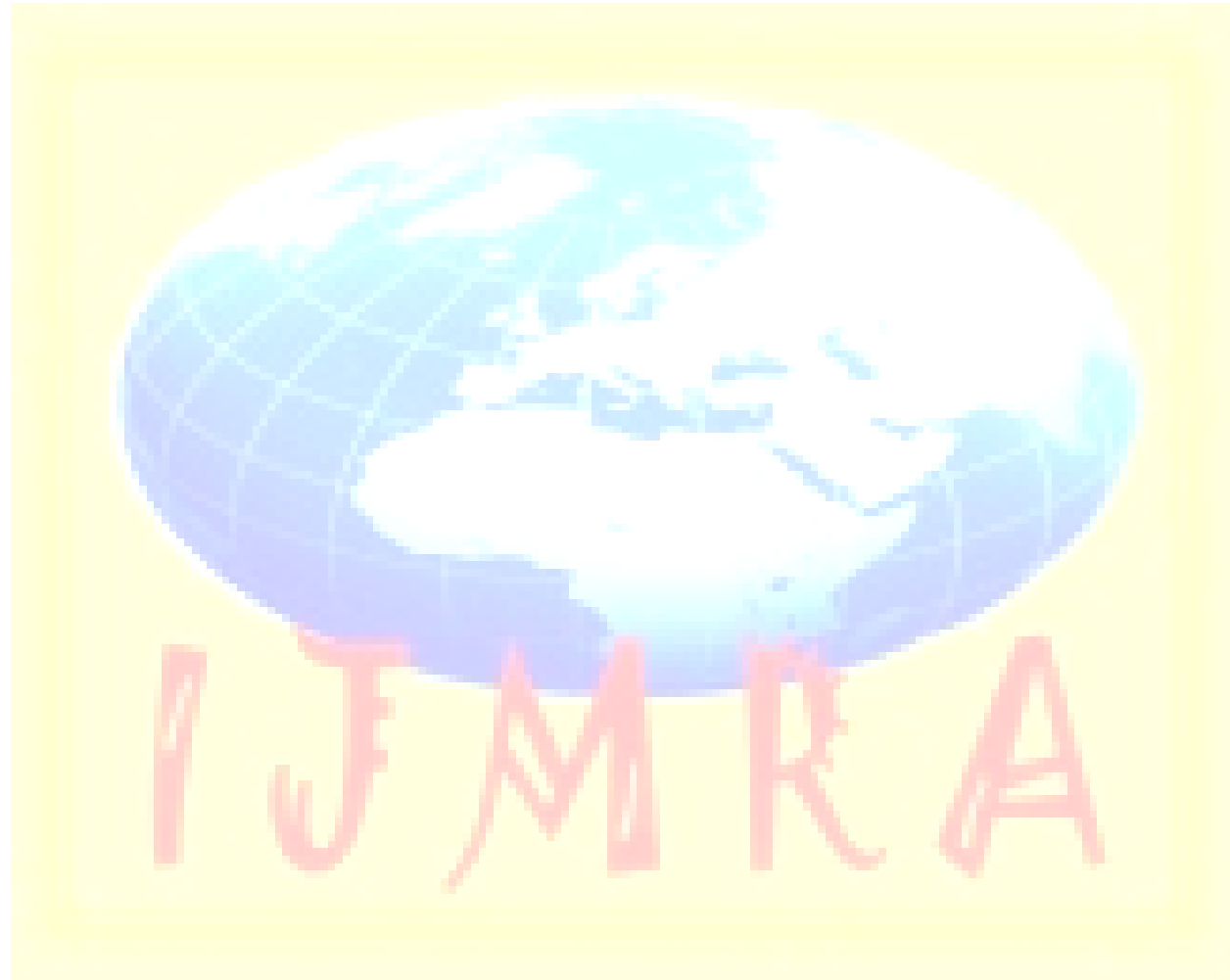
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The article has been divided in Chapters with each chapter highlighting the in depth analysis of the guidelines.

[Keywords]: Intermediaries Guidelines, Information Technology, Liability of intermediaries, Freedom of speech and expression, Principle of natural justice, Proposed Model.



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INTRODUCTION

In the recent past, the new Information Technology Guidelines¹ has become a bone of contention. The controversy began when a criminal complaint was filed in the Delhi High Court, by Mr. Vinay Rai, a journalist, against Facebook and 10 other social networking sites². The complaint alleged that the content was “ethnically objectionable,” “grossly harmful,” “defamatory” or “blasphemous”³. On the onset the question which arose was whether the intermediaries should be held liable for the user generated content hosted on their websites.

To address the question, the Information Technology (intermediaries guidelines) Rules, 2011 were introduced on 11th April 2011 by the Central Government, in the exercise of the powers conferred by clause (zg) of sub-section 2 of Section 87 read with Section 79 of the Information Technology Act, 2000 (21 of 2000)⁴.

Unfortunately the guidelines brought some dissatisfaction to the IT Industry and also to other relevant stakeholders. There are several reasons which triggered resistance towards these Guidelines.

It is alleged that the impugned Guidelines are contrary to the Section 79 of the parent act, Information Technology Act, 2000 which provides immunity to the intermediaries such as ISPs, from being held liable for third party content hosted on their websites.

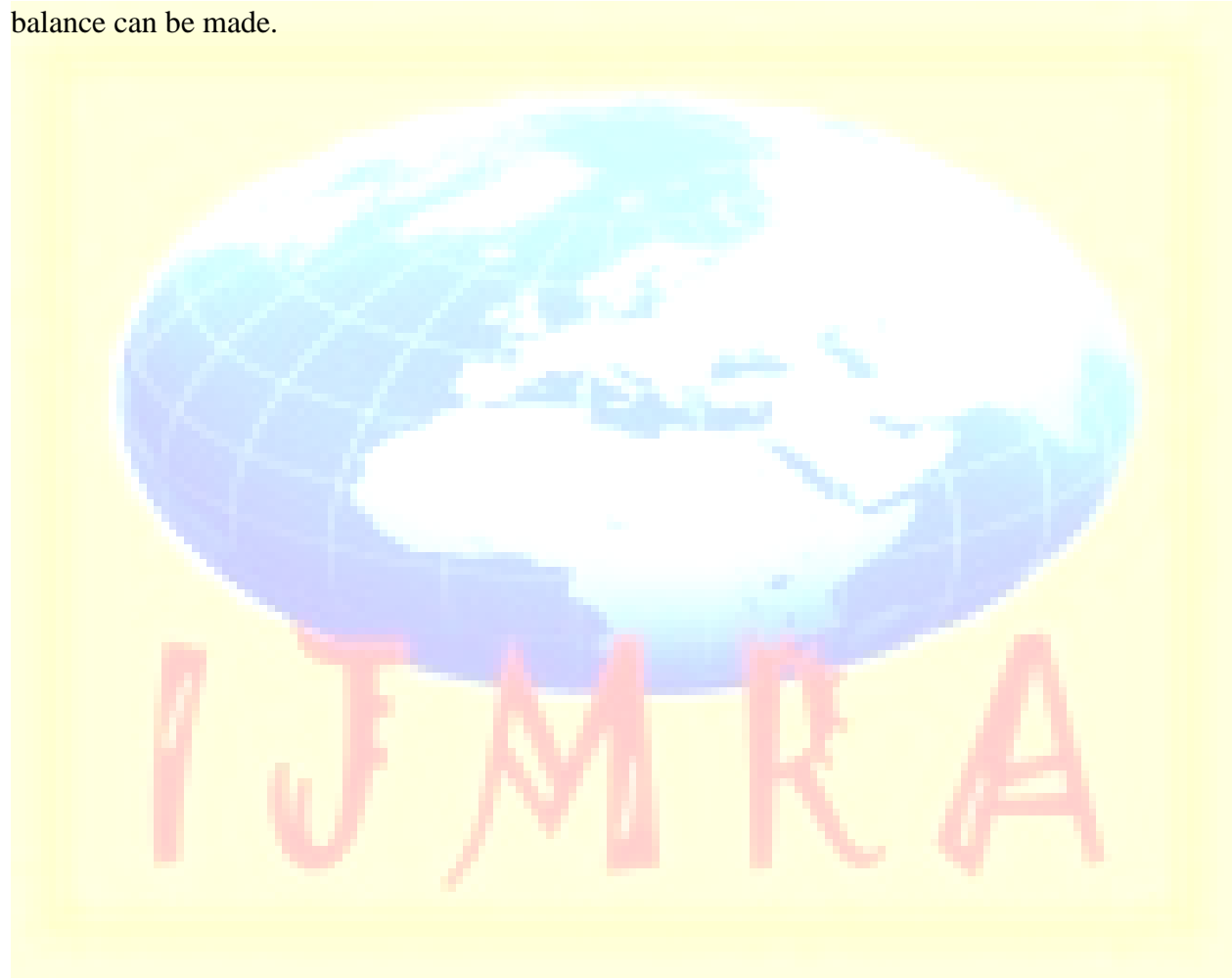
Owing to opposition from ISPs, Web activists, Members of Parliament (MPs), an annulment motion was moved in the Rajya Sabha. Shri. P.Rajeeve, CPI (M) said⁵ “*These Rules are ultra vires to the parent Act. Section 79 (of the Act) intended to give protection to the intermediaries. But the Rules have gone against the intent of Parliament by introducing a private censorship mechanism,*”

NASSCOM and the Internet and Mobile Association of India (IMAI) expressed their concerns on the vagueness of the Guidelines. Mr.Subho Ray of IMAI reportedly has said⁶, “*We have asked them to clarify what exactly we are expected to do in 36 hours of receiving a take-down notice and also, who can send such a notice. Everybody can't be an affected party*”.

The advocates of the annulment motion argued that the Guidelines (rules) violated the freedom of speech and expression. However, the annulment motion was defeated.

The article starts by covering the definition and obligations of Intermediaries and extends to attempt to bring out the lacunae in the present Guidelines and further extending to propose a better model on the basis of the comparative study of the legislation of countries across the globe, as conducted by the author.

The author aims to propose a model whereby all relevant stakeholders can benefit from, and a balance can be made.



CHAPTER ONE

AN OVERVIEW OF THE GUIDELINES

Definition of intermediaries-

Before discussing the Guidelines at length, we must acquaint ourselves with the basic terminology.

For a lay man to understand, an intermediary is akin to a middleman in the cyberspace.

Section 2 (w) of the Information Technology Act, 2000 (IT Act, 2000) defines Intermediaries as the following-

“intermediary’, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes, Telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes”.

The Liability of Intermediary-

As per the guidelines, it is proposed to be held the intermediary liable in such as mentioned under the rules. The Intermediary, who is a medium of providing access to website, can be held liable if he delays in acting on the complaint of the complainant. It is noteworthy that liability of intermediaries is a subjective issue and therefore requires judicial interpretation.

Exemption to intermediaries from liability in certain cases-

Section 79 of the parent Information Technology Act, 2000 mentions,

Network service providers not to be liable in certain cases- 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 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. Act, rules or regulations made thereunder for any third party Explanation- For the purposes of this section,-

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

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

A bare reading of the sections brings out situations under which if the intermediary observes due diligence activity, he is not to be held liable under the act, i.e. he is exempted from the liability.

The new guidelines of the Information Technology Act, 2008, outline certain cases under which the intermediaries are exempted from liability.

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-section (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 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.*

Pertinacity (due diligence) to be observed on the part of the intermediaries:

The term “due diligence” and “prudence” have a similar connotation. The intermediaries are under a statutory obligation to observe caution while disseminating data. In matters of non-compliance of the Guidelines they will be strictly held to be liable. *The Guidelines mandate intermediaries to notify users by way of disclaimer, not to use information including that which belongs to another person, is harmful, threatening, abusive, harassing, blasphemous, objectionable, defamatory, vulgar, libellous, hateful, or racially, ethnically or otherwise objectionable and disparaging*⁷.

Moreover, an intermediary would lose “safe-harbor protection”⁸ if he has abetted the commission of an unlawful act.

The most applauded part of the proposed guidelines is the inclusion of infringement of Intellectual Property under the scope of liability of the intermediary. This has shown the good intentions of the government to provide better protection and enforcement of IP rights.

CHAPTER TWO

THE SHORTCOMINGS OF THE GUIDELINES

The following chapter highlights the shortcomings in the present Guidelines. These shortcomings are discussed below. The author has also suggested possible solutions to overcome them.

- **Time fixation for intermediaries to act-**

An affected party, or a person who has any objections to the “content” hosted by an internet intermediary, may file a complaint before it to take suitable action against the offender within the stipulated time period. Under Rule 3(4) of the Guidelines, the intermediaries are bound to act on a complaint within 36 hours from the date of receipt of the complaint.

Rule 3(4) of the Guidelines, reads as,

“(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,”

To remove the lacuna in the guidelines, it is proposed that the appropriate action ought to be taken “expeditiously” or within not more than 24 hours from the date of receiving of complaint. Such a move will compel the intermediaries to remove the illicit content with immediate effect.

From the intermediary’s end it is noteworthy to note that it takes much lesser time than 36 hours to remove/ block any illicit content. This has been evident from the incidents which have taken place in the past.

One such incident brought to light was in context of online music piracy⁹. The request of Indian music industry was taken up on priority by the intermediaries and acted immediately to block the websites which allow unauthorized downloading of songs which result in online piracy.

The author has after conducting a comprehensive research has been carried out wherein the model laws various countries around the globe, have been studied and verified, and brings out a

comparison on the basis of the time taken by each of them in taking down/ removing/ blocking the content from the website.

The model of around 11 leading nations of the world, namely US, Australia, Canada, Korea, Japan, New Zealand, UK, Brazil, was studied. The results showed that the stipulated time period of thirty-six hours to take appropriate action, is way too long.

Following are the time span that the laws in below mentioned countries specify:

	Name of countries	Law	Article	Time for taking down the notice
1.	USA	Digital Millennium Copyright Act	Section 512	Expediently
2.	South Africa	Electronic Communications and Transactions Act, 2002	Section 75 & 76	Expediently(s 75) within a reasonable time(s 76)-ISPA organization mentions 3 days
3.	Australia	Copyright Act and Regulation 20I-20M Copyright Regulations	Section 116AH	Expediently
4.	Korea	Korean Copyright Act	Section 133bis, Article 133-3, Article 102	Expediently
5.	UK	The Directives of the ECD regulations of 2002	Regulation 17-19	Reasonable period of time
6.	Egypt	The Protection of Intellectual Property Rights 82 of 2002	Article 147, 171(9)	Expediently
7.	Brazil	Internet legal framework bill pending	Article 20-24	Within reasonable time
8.	Japan	Limitation of Liability	Article 3	7 days-if the creator

		for Damages of Specified telecommunication service and the right to demand disclosure of identification information of sender		does not reply back
9.	Canada (works on the principle of Notice)	CANADA- Bill c61	Section 41.25-41.27	Nothing as such. Only removed after an order from the court.
10.	European Union	The Directives of E-commerce in EU	Section 4:Article 12-15	Expeditiously
11.	New Zealand	New Zealand Copyright Act	Section 122C-122I	Within 7 days Sec. 122 (c)

Considering the above depicted graphical representation, the author suggests that the time period in which the intermediaries are required to act on a complaint, should be reduced from 36 hours. Considering this situation, it is proposed that the legislation in India should bring down the proposed 36 hours timeline and require the intermediary to act “expeditiously” or within 24 hours from the date of receipt of complaint. This will certainly help, because an intermediary cannot take a plea that he acted expeditiously and then also took more than 24 hours time. Upper limit would act here as a maximum time that can be taken by intermediary.

- **Principle of natural justice-**

(Giving a chance to be heard)

A review of the guidelines reveals that they are *procedurally flawed as they seem to ignore elements of natural justice*¹⁰. The third party provider of information, herein referred to as the creator of the work, whose expression is censored is on complaint not informed about the takedown. He is not being given an opportunity to defend his act, while we cannot ignore the facts that there could be some fake complaints or wrong complaints made in good faith.

Several countries across the globe have incorporated such provisions in their laws to provide an opportunity to the content owner to contest the claim. It is imperative in the interest of the society, that such provisions must be incorporated in the proposed intermediary rules. This will not only give an equal opportunity of presenting claim, but also reduce as well as limit the number of fake complaints in this context.

One such example is that of US; where the creator of the content is given a specified time to counter the claim of the complainant. This is given under section 512 of the Digital Millennium Copyright Act, 1998.

The principle of natural justice is should be applicable also for the Internet service providers. Their revenues are directly proportional to the downloading and uploading of content by its users. An ISP should also be given an opportunity to ask the complainant to validate its complaint if he proves his business is getting affected by blocking the access of the content which was asked by the IP owner/complainant. This will prove as deterrence for fake complainants and further shall not prejudice the business of intermediary.

Several countries across the globe have incorporated such provisions in their laws to provide an opportunity to the content owner to contest the claim.

We may take precedence from an Australian Court Judgment from the Case, “*Roadshow Films Pty Ltd v iiNet Limited (No. 3) [2010] FCA 24*”, the federal court has held that intermediary shall be given an opportunity of being heard.

The table below shall depict the time given in the law to respond to the complaint by the creator of the content-

	Name of countries	Law	Article	Time to respond
1.	USA	Digital Millennium Copyright Act	Section 512	Promptly
2.	South Africa	Electronic Communications and Transactions Act, 2002	Section 75 & 76	---
3.	Australia	Copyright Act and Regulation 20I-20M Copyright Regulations	Section 116AH	3 months

4.	Korea	Korean Copyright Act	Section 133bis, Article 133-3, Article 102	5 days
5.	UK	The Directives of the ECD regulations of 2002	Regulation 17-19	The user's identity records are kept hidden by the ISP for 1 yr
6.	Egypt	The Protection of Intellectual Property Rights 82 of 2002	Article 147, 171(9)	Silent
7.	Brazil	Internet legal framework bill pending	Article 20-24	Silent
8.	Japan	Limitation of Liability for Damages of Specified telecommunication service and the right to demand disclosure of identification information of sender	Article 3	7 days
9.	Canada (works on the principle of Notice and Notice)	CANADA- Bill c61	Section 41.25-41.27	Nothing. The user's identity records are kept hidden by the ISP for six months
10.	European Union	The Directives of E-commerce in EU	Section 4:Article 12-15	Discretion of members
11.	New Zealand	New Zealand Copyright Act	Section 122C-122I	Within 14 days. Sec 122(g)

Through the comparison of different countries opportunity of being heard out, the author would like to propose if there is a counter to the complaint, the person claiming should be given an opportunity and it should be made mandatory on the part of the person making the first complain

to get an order from the court declaring him as the right full owner of the work uploaded on the website.

Also the opportunity to counter pot to get the credentials of the complaint rectified, the Intermediary should also be allowed be given the opportunity to ask the complainant to get an order from the court, authenticity of the complaint, because the criteria's mentioned under the act require defamatory material to be removed/ blocked, but as it is said, defamation is a subjective issue and is based on the emotional balance of the person. Considering the subjective nature of defamatory statements which could high or low or none for one to the other, it is advisable that an order from court will avoid confusion arising in future.

The complaint should be given a time of at least 21 days to get an interim injunction form the court restraining the intermediary to remove the content till further orders. This will also suffice the problem of fake complaints filed if any. The court order should be made mandatory only if there is a counter claim not otherwise.

- **Restriction on freedom of speech and expression-**

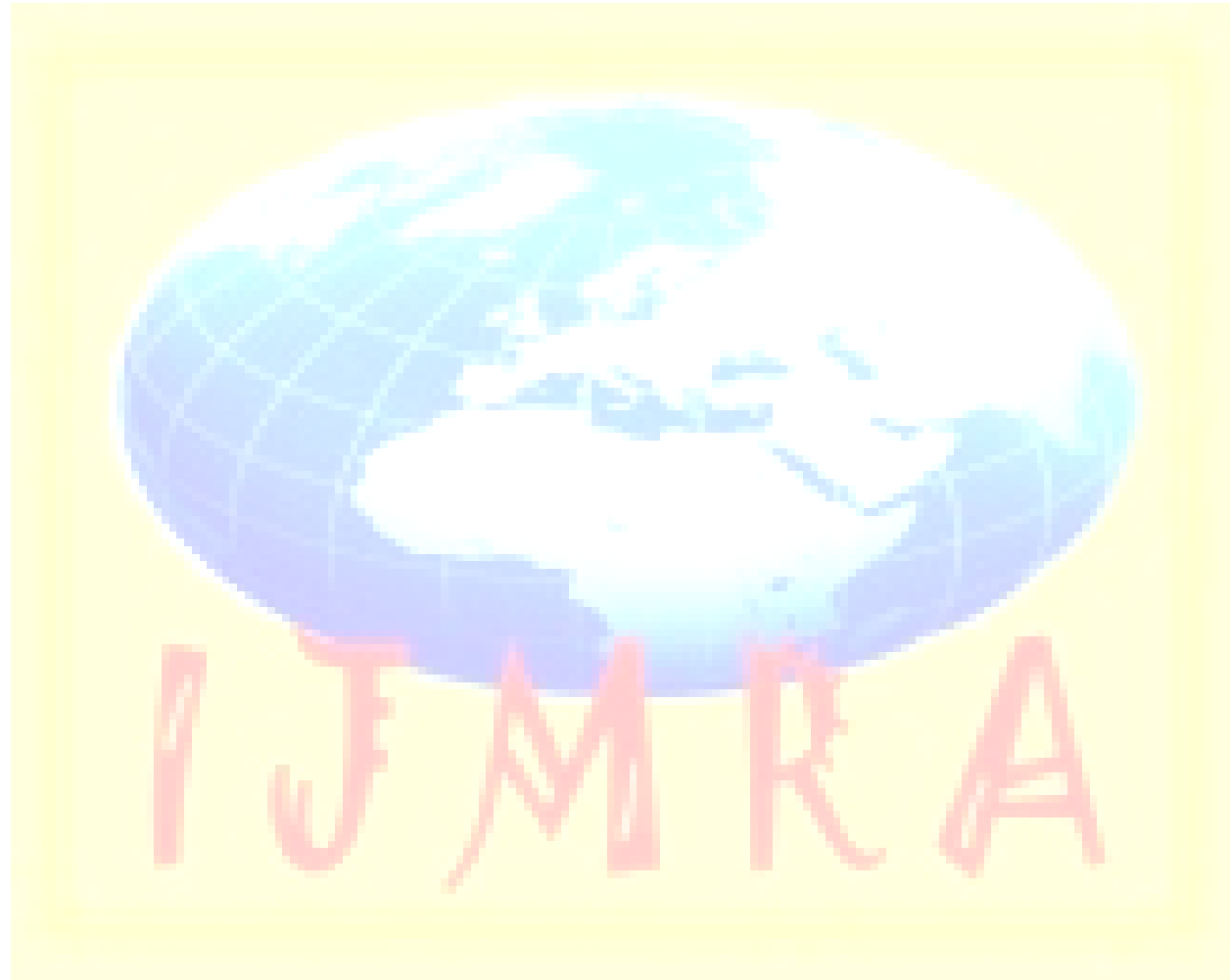
A UN special reporter on freedom of opinion and expression once noted that the internet intermediaries play a pivotal role in shaping public opinion. Nowadays, it is believed that internet has created an atmosphere wherein the sphere of public speech is more boisterous.

Hence, Governments across the world have enacted laws to keep a check on the intermediaries, making them liable for failing to prevent access to content deemed to be illegal¹¹.

A similar model has been adopted by India to keep a tab on the internet intermediaries.

The Intermediaries Guidelines recently introduced by the Union government are disguised in a way to show that they have been introduced to strike a balance between different segments of the society. The right to freedom of speech and expression is enshrined under Article 19(1) (a) of the Indian constitution. Rule 3(4) of the Guidelines, makes it mandatory for the intermediaries to act within 36 hours on the complaint of the affected party, and where applicable, work with the user or the owner of such information to disable such information which is contravention of sub-rule

(2) of Rule 3 of the Guidelines. The terms such as “*blasphemous*”, “*obscenity*”, “*defamation*”, etc are subjective and require judicial interpretation. Article 19(2) of the constitution imposes reasonable restrictions on the freedom of speech and expression. However, the Rule 3(2) of the Guidelines is beyond the reasonable restrictions. In the recent past intermediaries have been compelled through court orders to block/remove content, from various popular websites, which has left the bloggers, web users, high and dry.

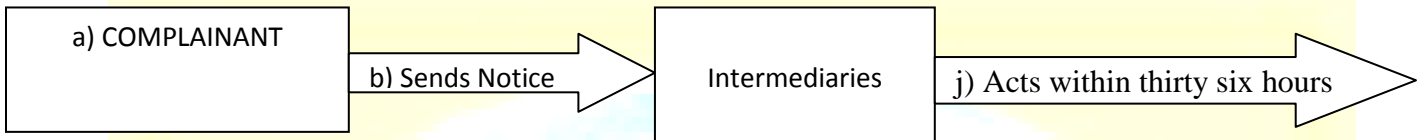


CHAPTER THREE

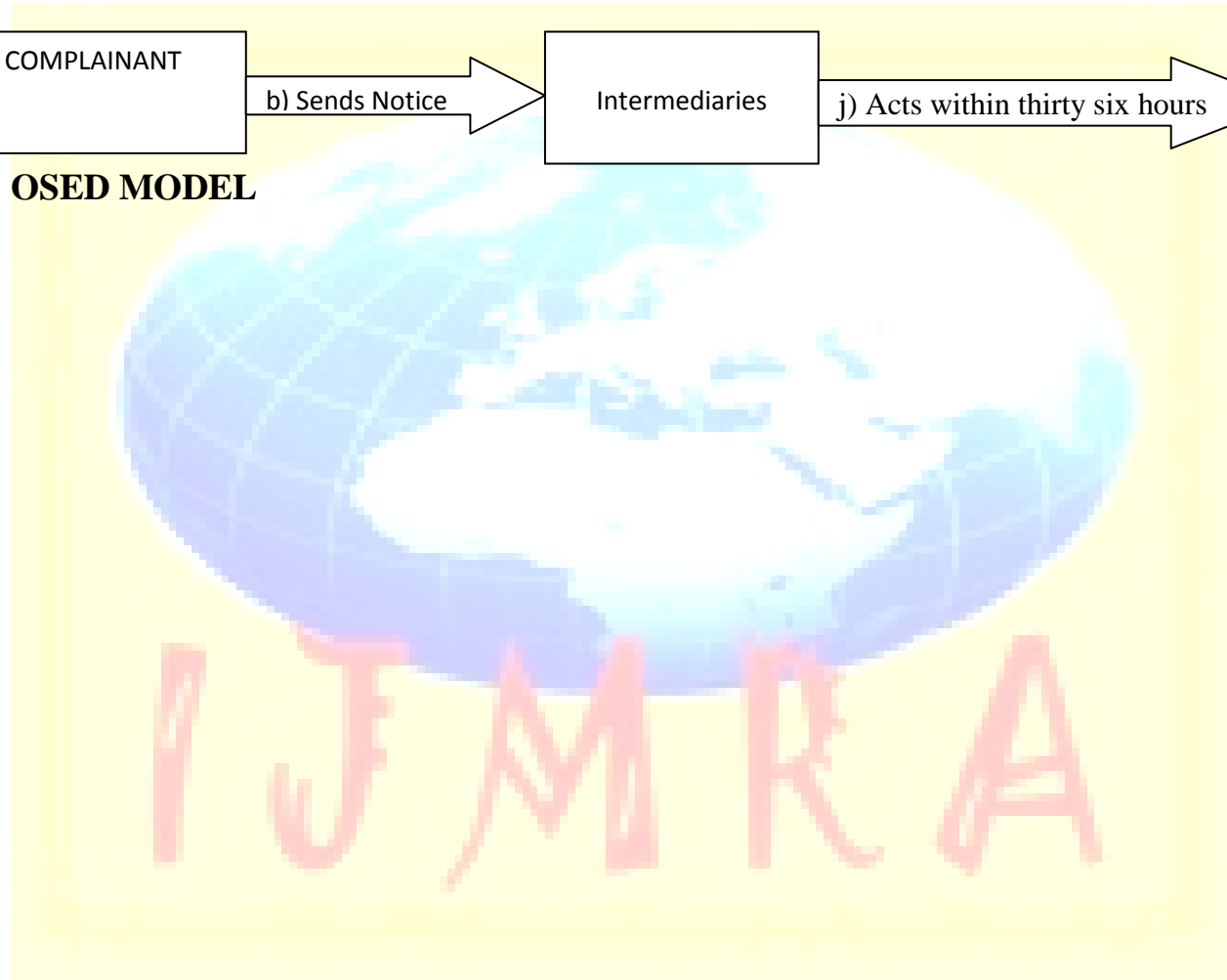
PRESENT MODEL VS PROPOSED MODEL

PRESENT MODEL

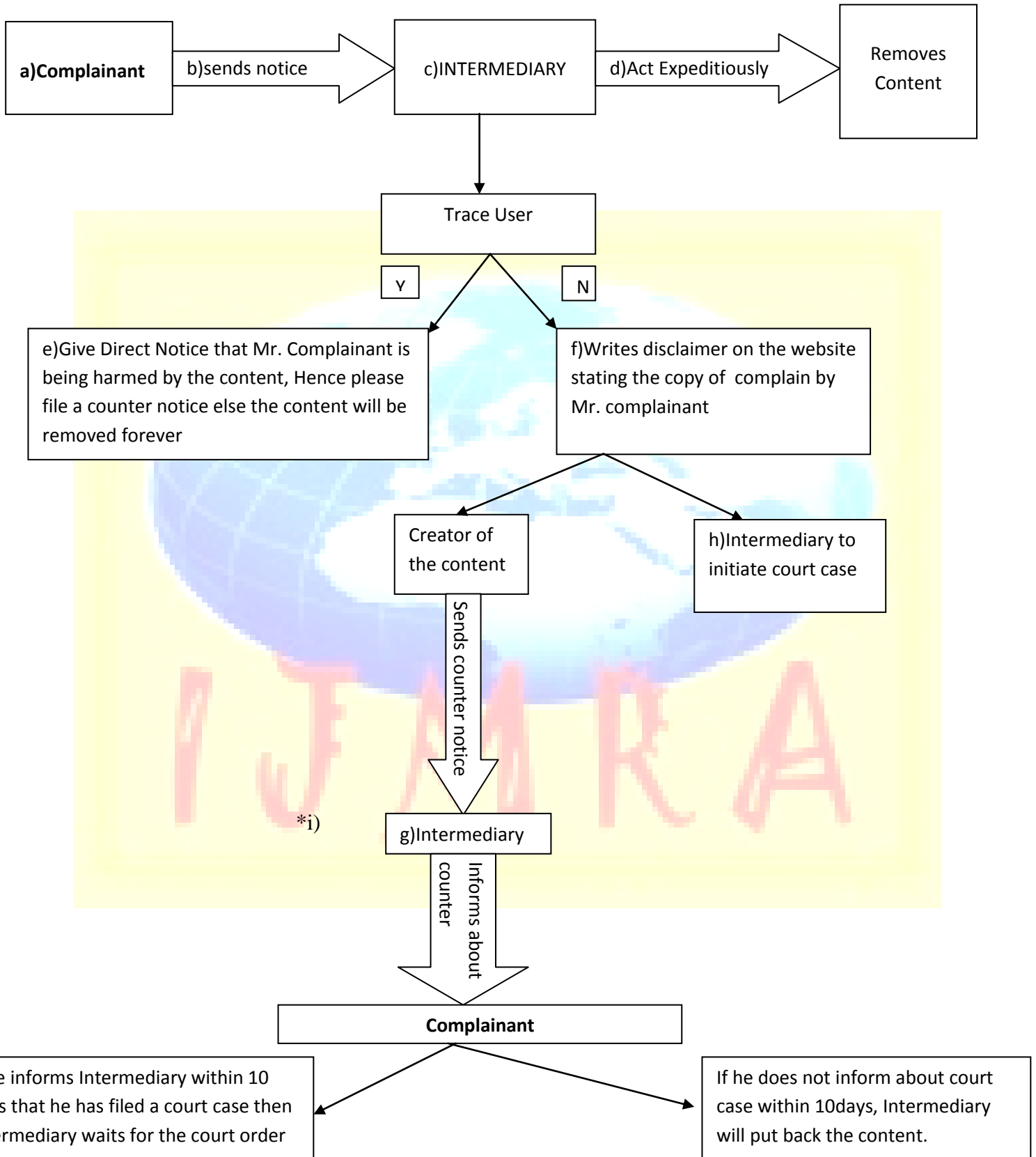
The flowchart shown below depicts the channel presently followed by the complainant.



POSED MODEL



PROPOSED MODEL



Highlights of the proposed model-

- a) **Complainant:** The person harmed by the content that is being posted on the website files a notice to the intermediary to remove the content. He claims for Prevention and Suspension of Infringement or damages caused. He requests suspension or deletion of infringing material.
- b) **Sends Notice:** Notice contains the warning against the content creator that the intermediaries are removing the content and hence if the creator wants the content back he has to counter claim for it and inform the intermediary about the counter notice.
- c) **Intermediary:** Intermediaries such as ISPs, website hosting companies, search engines, email services, social networks, and other neutral hosts of information should stop reproduction and transmission thereof when made aware that copyrights or other rights protected under the Act would be infringed upon due to the reproduction and interactive transmission of works by the other persons.
- d) **Act Expeditiously or within 24 hours:** The ISP must remove the content or disable access expeditiously or not later than 24 hours from the date on which the complaint has been filed.
- e) **Direct Notice:** If the intermediary finds the direct contact of the content creator then a direct notice is to be sent to the concerned person stating the warning regarding the content being posted on the website and asks to send a counter notice to the intermediaries if he wants the contents back.
- f) **Disclaimer** contains the warning against the content holder that he has caused damage to the complainant and hence his content is being removed. If he wants the content back has to send a counter notice.
- g) **Inform about counter notices:** Intermediary has to be informed about counter notice so that he can inform the complainant to file a court case within 10 days and hence Intermediary waits for the court order. Thus if the complainant does not inform about court case within 10 days, Intermediary will put back the content.
- h) **Intermediary to initiate court case only when there is a counter-claim:** Intermediary should also be given a chance to initiate the court orders if the creator of the content holder doesn't respond. Intermediary should have the right to ask the

complainant to bring the court orders because the contents are removed as soon as the notice is sent. Hence in order to check the genuineness and authenticity of the complain Intermediaries should ask for court orders. However, an intermediary must ask for a court order only when there is a counter-claim. In U.S.A also a court order becomes mandatory only in case of a counter-claim by the affected party/IP Owner. In Canada and Japan, the complainant is required to show a Unique Identification number, to prove that he/she is a genuine complainant. In Australia, the internet service provider themselves have the power to adjudicate.

- i) **Natural Justice:** The user is provided with the opportunity to be heard after his contents have been removed. A time period should be provided to respond to the notice issued by the intermediaries in the form of Counter Notice. Natural justice means the right to a fair hearing based on principle of *audi alteram partem*. In the present rule natural justice is not given but it should be ensured to the user. With reference to USA Section 512 of Digital Millennium Copyright Act states that after receiving counter notice not less than 10 nor more than 14 business days the material will be put back unless the complaint filed an action seeking a court order to restrain the infringing activity relating to the material on the service provider's system. Hence in India also some time period should be given as per the principle of natural justice.

Acts within reasonable time period: When an affected person in writing or through email signed with electronic signature informs the intermediaries about the infringement or damages caused due to the content posted on the website, the intermediaries should act expeditiously or latest within 24 hours from the date of cause of action.

CONCLUSION

With the emerging trends in the global marketplace, the traditional brick and mortar system has been replaced by the contemporary brick and click system. Internet has widened the horizons, shrunken economies and evolved a system of global interdependence. An intermediary is a link that binds netizens across the globe. They facilitate exchange of ideas, technology, goods and services, etc. They create a platform for the formation of public opinion, freedom of speech and expression.

In the wake of such developments, the governments of various countries felt the need to enact laws which would keep a check on the unprecedented influence of internet over billions of users across the world.

Hence, to keep a tab on the activities of the intermediaries, to block illegal content generated by third parties, the Indian government introduced the Information Technology (intermediaries guidelines) Rules, 2011. However, these Guidelines suffer from several shortcomings.

These Guidelines cause an obligation on the intermediaries to remove access to any content within 36 hours on receiving complaint from the affected person, without conducting a preliminary enquiry. It must be noted that impromptu removal of user's content would be detrimental to the revenues of the intermediaries. Moreover, the chances of fake complaints may arise. They do not provide an opportunity to the user of the website content to answer the complaint and prove their innocence.

After a thorough analysis of the Guidelines, the author comes to a conclusion that inclusion of Intellectual Property is a good move from the side of the Government; however the lacunae mentioned needs to be addressed to make a good law a more robust and better one sufficing the needs of all segments of society.

With valuable support of:

- Niyati Jigyasi, BALLB(H), 5th year, NLIU Bhopal
- Sidharth. S. Kumar, BALLB(H), 1st year, National University of Advanced Studies, Kochi

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