

Free as in free speech

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Abstract

The Information Act amendments were supposed to bring clarity, but they place harsh burdens on online platforms, cybercafes and users.

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Regulating the Internet, as with any medium of speech and commerce, is a delicate balancing act. Too little regulation and you ensure that criminal activities are carried on with impunity; too much and you curb the utility of the medium. The Internet has managed to remain the impressively vibrant space it is because of the careful choices made by most countries, eschewing over-regulation. India, however, seems to be taking a different tack with three sets of new rules under the Information Technology Act.

These rules deal with the liability of intermediaries (a large and diverse group of entities and individuals, that transmit and allow access to third-party content), the safeguards that cybercafes need to follow if they are not to be held liable for their users' activities, and the practices that intermediaries need to follow to ensure security and privacy of customer data.

By not observing these provisions, the intermediary opens itself up for liability for actions of its users. Thus, if a third-party defames someone, then the intermediary can be held liable if he/she/it does not follow the stringent requirements.

The problem, however, is that many of the provisions of these rules have no rational connection with the due diligence to be observed by the intermediary to absolve itself from liability.

What does the Act require? Section 79 of the IT Act states that intermediaries are generally not liable for third party information, data, or communication link made available or hosted. It qualifies that by stating that they are not liable if they follow certain precautions (basically, to show that they are real intermediaries). They observe "due diligence" and don't exercise an editorial role; they don't help or induce commission of the unlawful act; and upon receiving "actual knowledge", or on being duly notified by the appropriate authority, they take some kind of action.

So rules were needed to clarify what “due diligence” involves (that is, to state that no active monitoring is required of ISPs), what “actual knowledge” means, and to clarify what happens in case of conflicts between this provision and other parts of IT Act and other Acts.

However, that is not what the rules do. They instead propose standard terms of service to be notified by all intermediaries. This means everyone, from Airtel to Hotmail to Facebook to Rediff Blogs to YouTube to organisations and people that allow others to post comments on their website. What kinds of terms of service? It will require intermediaries to bar users from “engaging in speech that is disparaging”. And this does not cover only public-oriented intermediaries. So this means that your forwarding a joke via e-mail, which “belongs to another person and to which the user does not have any right” will be deemed to be in violation of the new rules. While gambling (such as betting on horses) isn’t banned in India and casino gambling is legal in Goa, for example, under these rules, all speech “promoting gambling” is prohibited.

The rules are very onerous on intermediaries, since they require them to act within 36 hours to disable access to any information that they receive a complaint about. Any “affected person” can complain. Intermediaries will now play the role that judges have traditionally played. Any affected person can bring forth a complaint about issues as diverse as defamation, blasphemy, trademark infringement, threatening of integrity of India, “disparaging speech”, or the blanket “in violation of any law”. It is not mandatory to give the violator an opportunity to be heard. Many parts of the Internet are in fact public spaces, and a law requiring private parties to curb speech in such a public sphere is unconstitutional insofar as it doesn’t fall within Article 19(2) of the Constitution.

Since intermediaries would lose protection from the law if they don’t take down content, they have no incentives to uphold freedom of speech. They instead have been provided incentives to take down all content about which they receive complaints without a considered evaluation of the content.

The cybercafe rules require all cybercafe customers be identified with supporting documents, their photographs taken, all their website history logged, and these logs maintained for a year. Compare this to the usage of public pay-phones. Anyone can use a pay-phone without their details being logged. Indeed, such logging allows for cybercafe owners to blackmail their users if they find some embarrassing websites in the history logs, which could be anything from medical diseases to sexual orientation to the fact that you’re a whistle-blower.

The cybercafe rules also require that all of them install “commercially available safety or filtering software” to prevent access to pornography. In two cases along these lines in the Madras high court (Karthikeyan R. vs Union of India) and the Bombay high court (Janhit Manch vs Union of India), the high courts refused to direct the government to take proactive steps to curb access to Internet pornography stating that such matters require case-by-case analysis to be constitutionally valid under Article 19(1)(a) (Right to Freedom of Speech and Expression). Besides, such software tends to be ineffective — non-pornographic websites also get wrongly filtered, and not all pornographic websites get filtered — and the high courts were right to be wary. If the worry is about children’s impressionable minds, it is up to parents to provide supervision, and not for the

government to insist that software do the parenting instead.

All these concerns were pointed out by civil society organisations, news media, and industry bodies when the draft rules were released, but virtually none of their suggestions have been incorporated by the government in the final rules.

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