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Happy days for network service providers

By Pavan Duggal, TNN | 18 Sep, 2005, 01.49AM IST

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There have been recent reports about proposed amendments to the IT Act 2000. What are the amendments that could impact network service providers?

MM

The recent Baazee.com case brought into the limelight the issue of the liability of network service providers. For the first time India Inc. saw the CEO of a company arrested because of the company's liability for third party electronic data or information as per section 79 of the Information Technology Act 2000.

Under Section 79 of the IT Act, all network service providers are made liable for all third-party data or information made available by them in all conditions barring two. The two exceptions: That the service provider has proof that he had no knowledge of any contravention of the law or that despite exercise of due diligence, he could not prevent the commission of any offence under the IT Act 2000.

An expert committee set up by the Government of India has proposed that this provision in the law be amended. The said section 79 is now proposed to be deleted in fact, by the proposed amendments, which have done away with the requirements of network service providers. They have instead provided for exemption from liability of intermediaries in certain cases.

The 'intermediaries' have been defined in the widest possible terms to include telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines including on-line auction sites, online-market places, and cyber cafes. The new language of the proposed amendments states that an 'intermediary' shall not be liable under any law for the time being in force, for any third party information, data, or link made available by him, except when he has conspired or abetted in the commission of the unlawful act.

It is pertinent to note that this is a dramatic shift in the onus of proof because there is no liability for intermediaries, except when it can be proved that they conspired and abetted in the commission of the act. Under the existing law, the onus of proof is upon the intermediary and the network service provider is presumed to be guilty unless he can prove he is innocent. By changing this, the proposed amendments have also created tremendous problems for netizens who do not now have any effective remedy against intermediaries in their disputes with them.

Another problem with the language of the proposed amendments is that they have completely done away with the requirements of due diligence to be undertaken by the intermediaries, including network service

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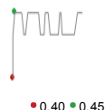


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providers. This is a major shift in the policy of the government and is not in sync with the original object and intentions of the lawmakers.

Under the existing law, it is prescribed that network service providers need to exercise "all due diligence" in order to shake off the liability for third party data or information made available by them. Rather than modifying the same to "reasonable due diligence" and prescribing parameters for this, the proposed amendments have completely done away with any such requirements.

This is not the correct approach and intermediaries may treat it as a freedom from all liabilities for third party data. Such an approach would not only be legally prudent but would also have a negative impact on all further growth of e-commerce in India, where the ground realities are completely different from those existing in the west.

Further, a lot of times, the intermediaries deliberately or unintentionally delete electronic logs and other records. In such a case, one would not be able to prove that the intermediary had "conspired or abetted" in the commission of the unlawful act. This is gives intermediaries the kind of freedom that may not be conducive to the overall growth of e-commerce in the country.

It is important to note that the stringent requirements of proving that the intermediary actually "conspired or abetted" in commission of the acts in question by the accused person is a very high onus of proof which invariably cannot be discharged by the normal netizen who would not have access to the digital records, logs and other electronic documentation that would be in the possession of the intermediary. This, in my view, is not a legally prudent approach and is not likely to hold India as a nation in good stead.

The proposed section 79 will empower intermediaries to such an extent that almost everyone may want to come within the ambit of "intermediaries" so as to limit their liabilities for third party information. In fact, the definition of intermediaries is so wide that it gives this section the ticket to come outside the ambit of their liability.

In the long run, the proposed amendment may negatively impact the growth of BPO sector in India as BPO companies too come within the ambit of "intermediaries". By providing for an intermediary protection law, this may have the effect of decreasing the comfort factor that foreign clients have, and may negatively impact the future growth of BPOs in India.

Foreign clients would have no effective remedy against BPO companies in India, given the massive statutory protection provided to them in the proposed amendments. This could drive away substantial BPO business from India. There is an urgent need to re-examine the long term consequences of the proposed amendments before they are pushed ahead.

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