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### **Online Intermediaries**

## **India High Court: No Takedown Requests On Social Sites Without Court, Gov't Order**



*By Madhur Singh*

March 25 — Indian police will no longer be able to threaten Internet users and online intermediaries with jail merely on the basis of a complaint that they have posted “offensive” posts online. Following a landmark judgment by the Supreme Court of India March 24, law enforcement agencies will be able to take action in such cases only after an order has been obtained from a court or the government (*Singhal v. Union of India*, India Sup. Ct., 3/24/15).

The court struck down in its entirety Section 66A of the Information Technology Act, which authorized criminal penalties for sending “offensive” messages through electronic communication services. Opponents of the measure said the section defined “offensive” very vaguely and broadly, and that cases of arrest under the section frequently made headlines.

Freedom of speech activists and Internet-based businesses welcomed the judgment as a boost for civil liberties, freedom of speech and a conducive business environment for an entire gamut of online businesses.

The judgment is good news for intermediaries such as Facebook Inc. and the India-based review site MouthShut.com, both of which have been repeatedly inundated with takedown notices based on complaints against “offensive” posts.

### **Offensive Posts Were Actionable Under Section 66A**

Section 66A, added to the Information Technology Act of 2000 through an amendment in February 2009, prescribed imprisonment of up to three years and a fine for anyone who sends via a computer resource or communication device:

- (a) any information that is grossly offensive or has menacing character;
- (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or
- (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages.

A supporting Section 79(3)(b) stated that “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 would have to “expeditiously remove or disable access to that material or that resource.”

Together, these sections put ordinary Internet users at risk for arrest for simply posting online and obligated intermediaries such as Twitter Inc., Facebook, MouthShut.com and others to take down content simply pursuant to a complaint.

Earlier this month, Facebook revealed statistics indicating that India is second on its global list of governments demanding takedowns.

## **Court Removes Intermediaries' Discretion**

Shwetashree Majumder, partner at Fidus Law Chambers, told Bloomberg BNA March 25 that after this decision, any blocking of content can now only take place via a reasoned order after complying with several procedural safeguards, including a hearing to the originator and intermediary either by the designated officer or pursuant to an order passed by a competent court.

"So intermediaries like Google, Facebook etc. are no longer required to judge as to whether the take down notices received by them contain legitimate requests or not," she wrote in an e-mail. "As an acknowledgement that a true intermediary should not concern itself with the merits of the content posted by third parties, the court takes away the intermediary's discretion as to what content must remain and what must go."

Geetha Hariharan, program officer at the Centre for Internet and Society, told Bloomberg BNA that after "reading down" Section 79, the Supreme Court "has relieved the intermediary of its responsibility to judge the lawfulness of content. Now, the intermediary will lose immunity under Section 79(3)(b) (and be liable to prosecution or penalty) only if it does not take content down after receiving 'actual knowledge of a court order or government notification' requiring takedown of content."

Prior to the judgment, an intermediary was required to judge whether a takedown notice concerned unlawful content on its website, which would constitute "actual knowledge" under the section. If the intermediary made an affirmative determination, it was required to take the content down or lose immunity under Section 79(3)(b).

## **Supreme Court Strikes Down 66A**

Momentum against Section 66A built up over the last three years, particularly after law student Shreya Singhal filed a challenge in the Supreme Court after two Mumbai women were arrested and put in jail for 10 days in 2012 for Facebook posts against a shutdown of Mumbai city following a politician's death.

A Supreme Court bench comprising Justices Jasti Chelameswar and Rohinton F. Nariman heard ten such cases together, and ruled March 24 that Section 66A was unconstitutional as it directly affected the right of the public to know. Holding that Section 66A was "open ended, undefined, and vague" so that "virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net," the court struck it down in its entirety.

The court said that Rule 3(4) of the Intermediaries (Guidelines) Rules, 2011, which pertains to an intermediary disabling access to material that is "known" to be violative of Rule 3(2), needed to be read down in the same manner as Section 79(3)(b).

The court, however, upheld Section 69A of the Information Technology Act, which gives the government the power to block web content if doing so is in the interest of the sovereignty, integrity or security of India.

## **Impact on Intermediary Liability**

Overall, Majumder said that intermediary liability now stands significantly watered down. One particular case this might impact is the currently pending *Super Cassettes India Ltd. v MySpace Inc.* case before the Division Bench of the Delhi High Court, which is considering the validity of the high threshold of intermediary liability prescribed by a single judge in copyright infringement cases.

Hariharan wrote in an e-mail that while intermediaries such as Internet service providers (ISPs) or content hosts may "choose" to take down content when they receive a private takedown notice, they don't "need" to do so to remain immune under Section 79(3)(b) or Rule 3(4) of the Intermediaries Guidelines.

"This reduces uncertainty in intermediary liability in India. It will also hopefully keep intermediaries from taking down content in an overbroad manner to escape liability," Hariharan said, adding that the government nevertheless continues to have the ability to criminalize online acts. For instance, Sections 66B to 67B of the IT Act define and criminalize different online conduct. Additionally, sections of the Indian Penal Code that criminalize speech acts (e.g., Sections 295A and 153A for incitement; Section 292 for obscenity) have also been applied to online acts in the past.

The Internet & Mobile Association of India said in a statement on its website March 24 that the judgment will mark a new phase for the growth and evolution of the Internet in India. While Internet users will no longer fear illegal censorship or harassment, it said that "online businesses, ranging from established international companies to small Indian startups, will be able to take advantage of a more conducive

business environment.”

The IMAI added that the judgment will be especially helpful to smaller companies such as Mouthshut.com that will “now not be harassed by the frivolous and mal-intentioned notices of take down.”

*By Madhur Singh*

To contact the reporter on this story: Madhur Singh in Chandigarh, India at [correspondents@bna.com](mailto:correspondents@bna.com)

To contact the editor responsible for this story: Alexis Kramer at [akramer@bna.com](mailto:akramer@bna.com)

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