

Regulating E-Commerce in India A Work in Progress

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ABSTRACT:

“Electronic-Commerce “means buying or selling of goods and services over an electronic or a digital network. The digital revolution has provided access to a large variety of products at competitive prices and India has also been a significant part of this digital revolution. In recent years India is witnessing consistent growth in the E-Commerce market. With large increasing digital literacy and mobile use across India, the Indian e-commerce sector has seen a boom which no industry has ever witnessed. Electronic commerce technologies have changed the structure and environment of business worldwide. E commerce is gaining popularity over traditional commerce because it offers versatility and advantages of business and customers.

For an E commerce merchant world’s online population is its potential market. It creates boundary less virtual market place without any geographical limitations. The e-commerce growth has not only affected the businesses by giving a virtual space for selling products online and create more avenues for revenue but also led to the creation of a number of job opportunities and eased out lives of modern day consumers. This paper deals with privacy and protection issues of E commerce. The government of India enacted Information and Technology Act in year 2000 to give legal recognition to digital records, digital signature and other electronic transaction. This paper explains the laws governing Ecommerce in India and what are the drawbacks in these laws while providing some suggestions for the same.

Keywords: India, protection, legal, privacy, intellectual property.

I. INTRODUCTION

E-commerce is the use of electronic communications and digital information processing technology in business transactions to create, transform, and redefine relationships for value creation between or among organizations, and between organizations and individuals [1]. In laymen’s language E-commerce means dealing in goods and services through the electronic media and internet. Today, Ecommerce is a remarkable experience. It has transformed traditional shopping beyond recognition. It is much better than any other way of shopping. A vendor creates website on the Internet, who trades products or services directly to the customer from the portal. The portal uses a digital shopping cart or digital shopping basket system and allows payment through credit or debit card or EFT (Electronic fund transfer) payments.

The main types of electronic commerce are [2]:

- Business-to-business (B2B);
- Business to- consumer (B2C);
- Business-to-government (B2G);
- Consumer-to-consumer (C2C); and

- Mobile commerce (mcommerce).

History

The ecommerce was introduced when CompuServe (a safe online transaction technology) was founded by electrical engineer students Dr. John R. Goltz and Jeffrey Wilkins in 1969 [3]. Boston Computer Exchange was the world's first ecommerce company which was launched in 1982 [4] and its primary function was to serve as an online market for people who were interested in selling their used computers. Later Book Stacks Unlimited launched as the first online book marketplace in 1992 and in 1994, Marc Andreessen and Jim Clark co-created Netscape Navigator as a web browsing tool [5]. In 1995 Jeff Bezos introduced Amazon and Pierre Omidyar introduced AuctionWeb (now eBay) [6]. Since then, both have become massive ecommerce selling platforms that enable consumers to sell online to audiences around the globe. In 2000 a great number of business companies in the United States and Western Europe represented their services in the WWW (World Wide Web). At this time the meaning of the word ecommerce was changed for people and People began to define the term ecommerce as the process of purchasing of available goods and services over the Internet using secure connections and electronic payment services. By the end of 2001, the largest form of ecommerce, Business-to-Business (B2B) model, had around \$700 billion in transactions [7]. Ecommerce sales continued to grow in the next few years and by the end of 2007, ecommerce sales accounted for 3.4 percent of total sales [8]. In year 2017, ecommerce growth broke a new record with online sales \$6.5 billion on Cyber Monday – a 17% increase from the year before [9].

II. ECOMMERCE AND INDIA

E commerce in India was introduced when Rediff.com added online shopping to its portal in 1999. In year 2000 Baazee.com (Later acquired by ebay.com) launched a market place model where users could buy and sell pre owned products. Rediff came in as the first company of Indian E-commerce market followed by Baazee.com and IRCTC. IRCTC (Indian Railways Catering and Tourism Corporation) launched online ticket booking in year 2002 [10] and IRCTC was the first company to create a successful E commerce portal. Inspired by IRCTC, Airline agencies also followed online ticket booking to reduce the cost of tickets and save the commission given to agents [11]. Afterward Makemytrip, Yatra.com, book my show and many other companies entered the market providing services like holiday packages, entertainment ticket bookings etc.

The product based E commerce market in India started with entry of Flipkart in year 2007 [12]. Their deep discounted model, cash on delivery, net banking, card payment options and customer services made a lasting impression on their customers. Snapdeal and Amazon two of the largest online market places in India were launched in 2010 and 2013 respectively. In year 2014, Flipkart acquired online fashion retailer Myntra.com in

an estimated 200 crore rupees deal [13]. And later on, Walmart acquired (77% stake) Flipkart for \$16 billion in May 2018 and it was world's largest ecommerce deal [14].

Increase in use of internet and Smartphone have triggered growth of the Indian Ecommerce industry. It is expected that India's total internet user's base will be increased to 829 billion by 2021 [15]. Internet economy of India is expected to double from US \$125 billion (April 2017) to US\$ 250 billion by 2020 and Ecommerce revenue is expected to jump from US \$ 39 billion (2017) to US \$ 120 billion in 2020, growing at annual rate of 51% ,the highest in the world [16]. The Indian e commerce market is expected to grow US\$ 200 billion by 2020 from US \$ 38.5 billion as of 2017[17].

III. REGULATING E COMMERCE IN INDIA

ORIGIN OF INFORMATION TECHNOLOGY LEGISLATION IN INDIA

Government of India following the UNCITRAL [18] model law on electronic commerce drafted first legislation "E Commerce Act 1998"[19] but when a separate Ministry for Information Technology came into existence, this legislation was re-drafted as "Information Technology Bill 1999" and passed it in May 2000. Later The IT (Amendment) Bill 2006 [20] was introduced by the Government to bring harmonization with model law on electronic signatures and to add vide provisions for new breed of cybercrimes. This bill was passed by both the houses of parliament on 23rd December 2008 and received the assent of the President on 5th February 2009.

The main objects of the IT Act were:

- Promotion of e-commerce and e-governance,
- Appointment of an appropriate government certifying authority for wider acceptance and enforcement of digitally signed documents.
- Delineating offenses and contraventions and outlining justice dispensation systems for cybercrimes.
- Appointing adjudicating officers and establishing Cyber Appellate Tribunal.

E COMMERCE AND INDIAN LAWS

Under this study evaluation of e-commerce law in India has been done on the basis of ten relevant issues which are identified on the basis of literature review of e-commerce law in India, books and reputed journals etc.

Table 1. The legal issues in e-commerce and India laws.

Sno.	E-commerce value chain	IT Act 2000	IT(A) Act 2008	Other relevant Act/Rules

1	Legal validity Of e- transactions	-	Section 10A	Indian Contract Act 1872
2	<u>Security</u> Authentication and Identification Privacy Data protection Security of systems	Section 3 Sections 67 & 72 - Sections 65 & 66	Section 3A Sections 66E, 67, 67A, 67B & 72A Section 43A Section 66	- - Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011. Information Technology

				(Reasonable security practices and procedures and sensitive personal data or information) Rules 2011
3	Junk mail and spamming	-	Section 66A	-
4	Content regulation	-	Sections 66A, 67 & 67A	Sections 292, 469, 499, 501 and 503 of IPC 1860 Indecent Representation of Women (Prohibition) Act 1986 Information Technology (Intermediaries Guidelines) Rules 2011
5	Intellectual property issues	Sections 43 & 65	-	Trade Marks Act 1999, Copyright Act 1957, Copyright Rules 1958, Patents

				(Amendment) Act 2005
6	Payment	-	-	Payment and Settlement Systems Act 2007
7	Taxation of e-commerce transactions	-	-	Income Tax Act 1961, Service Tax Rules 1994, Finance Act 1994, Central Sales Tax Act 1956, Customs Act 1962, Central Excise Act 1944
8	Intermediary	liability Section 79	Sections 69A, 69B, 72A & 79	Information Technology (Intermediaries Guidelines) Rules 2011, Copyright (Amendment) Act 2012, Patents (Amd.) Act 2005
9	Jurisdiction issues	Sections 1(2) & 75	-	Section 3 of IPC 1860

10	Consumer Protection	-	-	Consumer Protection Act 1986.
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- ***Legal validity of electronic transactions***

Like any other contracts, e-contracts should fulfill the requirements as per the Indian Contract Act 1872. The IT Act 2000 [21] fortifies validity of e-contracts; and the IT (Amendment) Act 2008 clearly states under **section 10A** [22] that “Where in a contract formation, the communication of proposals, acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such electronic contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.”

- **Security**

- **Authentication and identification**

It's very important to establish person's capacity, authority and legitimacy to enter a contract or to authenticate electronic record. Section 3 of the IT Act 2000 discuss about authentication of electronic records. Further, a new section i.e. 3A was inserted in the IT (Amendment) Act 2008 and digital signatures were substituted with “electronic signatures”.

- **Privacy**

While completing an online transaction, a lot of personal information is collected i.e. user's identity, preferences, patterns of search and financial information. This may give rise to two primary privacy concerns, i.e. misuse and unauthorized access of personal information. The IT Act 2000 partially covered privacy issue under section 72, which mentioned about penalty for breach of confidentiality and privacy; section 67 also talks about publication of obscene information in electronic form.

Privacy was further discussed in the IT (Amendment) Act 2008 and provisions were chalked out pertaining to punishment for violation of privacy (Section 66E), punishment for disclosure of information in breach of lawful contract (Section 72A), punishment for publishing or transmitting obscene material in electronic form (Section 67), punishment for publishing or transmitting of material containing sexually explicit act etc. in electronic form (Section 67A) and punishment for publishing or transmitting of material depicting children in sexually explicit act etc, in electronic form (Section 67B). Concept of violation of privacy is dealt with limited sense

under the IT (Amendment) Act 2008, in a way that privacy of a person is deemed to be violated where images of private body areas are captured.

- **Data protection**

The IT Act 2000 was not addressing data protection issues but a provision of “compensation for failure to protect data” was introduced under newly inserted section 43A of the IT (Amendment) Act 2008. Later, Reasonable security practices and procedures and sensitive personal data or information rules 2011[23] provided framework for protection of data in India [24]. The Data Protection Rules set guidelines and compliances for body corporate or any person on its behalf handling SPDI, regarding transfer, collection, disclosure of information and reasonable security practices and procedures to protect it.

- **Security of systems**

As sensitive information like passwords, personal details etc. are kept on servers of e-commerce companies; security of such information becomes crucial. The IT Act 2000 lists out about hacking with computer system (Section 66) and related penalties. Similarly, section 65 brings up about tampering with computer source documents and Reasonable security practices and procedures and sensitive personal data or information rules 2011 lists out security practices and standards.

- i). **Junk mail and spamming**

Spam, refers to electronic mail advertisements that are addressed to a recipient with whom the initiator has no existing business or personal relationship and they are not sent at the request of or with the express consent of the recipient. It is the most cheap and efficient mean of contacting potential customers with wide coverage area. Although spamming has not been specifically mentioned in the IT Act 2000 but it can be interpreted in the provisions mentioned in section 66A of the IT (Amendment) Act 2008 that, sending of menacing, annoying messages and also misleading information about the origin of the message is punishable with imprisonment up to three years with fine.

- ii). **Content regulation**

Content regulations and compliance is extremely important for e-commerce ventures as these ventures distribute content or act as platform for distribution or exchange of third party information/content. According to The Intermediary Guidelines Rules, content of specific nature on the internet is prohibited and an intermediary, such as a website host, is required to block such content. According to Section 79 of the rules made under the IT (Amendment) Act 2008, intermediaries must observe due diligence to oversee appropriateness of all the contents. These rules indirectly allow the Indian government to control content being published on the Internet.

iii). Intellectual property issues

Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. Under the agreement and obligations created by Trade Related Intellectual Property Rights (TRIPS) [25], India has compiled the necessary statutes and amended the existing statutes. Not just computer software but underlying design, contents, links, original text, audio, graphics on a web page are copyrighted and protected under Article 10 of the TRIPS agreement and Article 4 and 5 of WIPO Copyright Treaty [26]. Main form of intellectual property vis-a-vis e-commerce are Copyrights, which include content, design, software underlying the website and its platform; Trademarks, which includes logos, taglines or words through which an e-commerce business is known and it also includes protecting trademarks of brands it sells through its platform; Patents, includes software functionality and methods underlying e commerce.

On the issue of protection of intellectual rights (patents, trademarks, copyrights) including domain names the IT Act is silent, but the IT Act in India, is enabled by other Acts to protect Intellectual Property infringements. For instance dispute resolution in connection with domain names is under the Trade Marks Act 1999, and amendments have been done in 2012 in the Indian Copyright Act 1957 to protect computer databases and software (Amendment) Act 2005 has also been amended thrice since 1999 to comply under TRIPS.

iv). Payment

In India both traditional and electronic payment systems are regulated by the Payment and Settlement Systems Act 2007.

v). Taxation of e-commerce transactions

Assessing tax and collecting revenue for transactions carried over cyberspace is difficult because of rapid technological developments, absence of boundaries and intangible nature of transactions in goods/services. Introduction of separate tax regime for e-commerce transactions was excogitated by the High Powered Committee (HPC) constituted by the Central Board of Direct Taxes, but quoting principle of 'neutrality', HPC maintained that no separate regime for the taxation of e-commerce transactions is required and existing laws are sufficient [27]. To get a piece of growing e-commerce revenue, Indian states are looking at ways to tax e-commerce transactions. Tax laws are trying to keep pace with evolving business models and corporate structures, especially in the context of most large e-commerce companies boasting marketplace models.

vi). Intermediary liability

Under section 2 (w) of the IT (Amendment) Act 2008, intermediary is defined as -

“Intermediary”, means any person who on behalf of another person receives stores or transmits that record or provides any service with respect to that record. Intermediary includes telecom, network, internet, web-hosting

service providers, and search engines, online-market places and cyber cafes etc. Liability regime for Indian online intermediaries, are covered by two key legislations i.e. the IT (Amendment) Act 2008 and the Copyright Act (as amended in 2012), supplemented by the Information Technology (Intermediary guidelines) Rules, which act as secondary legislation. The IT Act grants intermediaries a conditional safe harbor under section 79 by providing that an intermediary is not liable for any third-party content hosted/made available through such intermediary under certain circumstances. An e-commerce company can pre-empt any liability arising by virtue of providing a platform for third parties, by following these guidelines.

vii). Jurisdiction issues

Business disputes for an e-commerce business can be contractual disputes (between B2B and B2C) or non-contractual disputes (copyright, data protection, right of free expression and competition law and domain name disputes) [28]. A court can hear on a matter if it has both subject-matter jurisdiction and personal jurisdiction. Due to borderless nature of internet 'territorial' jurisdiction gets complex.

With respect to jurisdiction, Section 1(2) of the IT Act 2000 provides that, the Act extends to the whole of India and, it also applies to any offence or contravention there under committed outside India by any person. Section 75 further strengthen the Act regarding its application for offence or contravention committed outside India, For enforcement of laws under the IT Act 2000, there is provision for appointment of Controller of Certifying Authorities (Section 17), adjudicating officers (Section 46) and one or more Cyber Appellate Tribunals (Chapter 10). Cyber Appellate Tribunal (CAT) was established by Central Government in accordance with the provisions contained under Section 48, the Tribunal has same powers as are vested in a civil court but it's guided by principles of natural justice. If any person is aggrieved by an order made by the Controller or by an Adjudicating Officer then appeal can be made before the Tribunal. A further appeal can be made to High Court.

viii). Consumer protection issues

In India, with regard to consumer protection, there is no separate consumer protection law which is specifically regulating online transaction, therefore the IT Act rely on the Consumer Protection Act 1986 which governs the relationship between consumers and goods/ service providers. Any service which is delivered free of charge, do not fall under the scope of CPA, 1986. Various remedial actions that can be imposed under CPA are removal of defects/ deficiencies, replacement of goods, return of price paid, compensations and discontinuation of unfair trade practice or the restrictive trade practice or not to repeat them.

IV. SUGGESTIONS

- *ODR an alternative approach*

Online Dispute Resolution (ODR) can play significant role in settling B2C, B2B, C2C, B2G, intellectual

property, copyright, e-banking and privacy issues in cyberspace. Currently ODR has three approaches; cyberspace, non-adjudicative and arbitration. Arbitration is being used at National Internet Exchange of India (NIXI), but other two approaches are not very popular in India. ODR is infancy stage in India; there is need of proper education and training to general public and workforce; lawyers can be educated to give priority to conciliation/mediation to save time and money while settling disputes.

- Customers should be educated regarding safety rules for on-line payments and about their rights and obligations when numbers of parties (such as mobile operators, Internet service providers, and social media) are involved in a transaction.
- A stronger international legal framework is necessary for successful e-commerce on regional level.
- Complexity related to taxes for firms selling goods and services abroad can be reduced via agreements between states or by providing domestic firms with assistance in navigating the requirements in foreign jurisdictions. Taxes on e-commerce are regulated by extension of the current tax laws. An all-inclusive framework for e-commerce has to be developed.
- The IT (Intermediary guidelines) Rules need to be revisited, which may include, statements explicitly specifying the imperative to safeguard intermediaries from liability where a third party is the source of the content at stake and qualified immunity for intermediaries, if they are complying with court orders.
- Secondly, clarity in written legislation should be sought to remove heterogeneity between state and local level enforcement and a legal framework should be made which ensures clear expectations by aggrieved parties and clear compliance by intermediaries, with regard to legal remedy.
- Information centers should be established by policy makers to provide information to buyers and sellers regarding regulations and procedures involved in trans-border e-commerce activity.
- Lastly, along with the strengthening of the legal and statute framework, efficient and comprehensive infrastructure has to be built for monitoring of all e-commerce transactions.

V. CONCLUSION

Understanding the fact that proliferation of new technologies like e-commerce requires solid legal framework and one of the most important factors, which are causing poor implementation of e-commerce in India, is poor legislation. Though the Indian government made an attempt to address number of issues and made the IT Act as a mixture of too many provisions. As a result, several provisions which are essential for development of e-commerce environment are incomplete or unaddressed. E-commerce industry had a hope of getting an improved version when the IT Act 2000 was amended in 2008. But certain issues still remained unanswered,

for example, formation of online contracts and legal enforceability of online contracts involving international parties is still cumbersome. Because of inadequate provision of the IT Act 2008, the Reasonable security practices and procedures and sensitive personal data or information rules was introduced in 2011 to provide framework for protection of data and it lists out security practices and standards. High Powered Committee (HPC) constituted by the Central Board of Direct Taxes quoting principle of 'neutrality', maintained that no separate regime for the taxation of e-commerce transactions is required and existing laws are sufficient, but in reality India is struggling with e-commerce taxation issues (direct and indirect taxes). It can be observed that present form of the e commerce laws is too weak and it has to depend on other legislations to cope up various legal issues in e-commerce. Only a strong legal framework can create a business environment which is conducive for e-commerce industry in India. Therefore, policy makers should introduce a separate e-commerce law to keep pace with rapid technological developments.

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