



SAFE HARBOUR FOR INTERMEDIARIES

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Introduction

Intermediaries are governed under the Information Technology Act, 2000 as amended up to date (“IT Act”), which defines an intermediary as “any person who on behalf of another person receives, stores, or transmits any particular electronic record or provides any service with respect to that record”¹. The ambit of this definition is pretty wide and covers diverse service providers such as social media platforms, internet service providers, web hosting service providers, cloud service providers, e-commerce platforms, etc.

As the internet bestows a greater freedom of speech and expression, apart from various challenges that come with it, one is to regulate the abuse of platforms by its users due to the convenience of anonymity that comes with it which makes it paramount for the authorities to provide a regulatory framework which strikes a harmony by ensuring a greater freedom of speech and expression over the internet and at the same time prevents it from the abuse by its users. In order to regulate the same, safe harbour provisions were introduced in order to protect the intermediaries from the liability for the acts of third parties who use the platforms for their own purposes, however, this protection is not absolute.

Indian Law

Originally, the safe harbour provisions under the IT Act were very limited and had a lot of shortcomings. These shortcomings were addressed in 2004 when a CD containing an obscene MMS clip was put up for sale by a user on the online auction site bazee.com.² As a result of this, both the user, Mr. Ravi Raj and CEO of bazee.com, Mr. Avnish Bajaj, were arrested and charged with the same offence. This case dealt with the void in the then IT Act, as the intermediary was exposed to the liability whereby he only provided for the platform for the content and was nowhere related with it. Accordingly, in 2008 an amendment was introduced under the IT Act which broadened the scope of safe harbour provisions for intermediaries.

¹ Section 2(w) of the IT Act

² Avnish Bajaj v. State, 150 (2008) DLT

Presently, IT Act along with the Information Technology (Intermediaries Guidelines) Rules 2011 ("Intermediary Guidelines")³ provides a conditional safe harbour to intermediaries under Indian law which is similar to the safe harbour rules of European Union. Section 79 of the IT Act provides that an intermediary is not liable for any third-party content hosted/made available through such intermediary when:

1. the function of the intermediary is limited to providing access to the system over which information made available by third parties is transmitted or temporarily stored or hosted; or
2. the intermediary does not initiate, select the receiver of or select/ modify the information contained in transmission; and
3. the intermediary observes due diligence and abides by other guidelines prescribed by the Government.

However, in order to avail the safe harbour under Section 79, Intermediary Guidelines lay down a stringent diligence framework to be followed by the intermediaries such as

- (i) the need to inform the users not to transmit any information that among other things is harmful, obscene or defamatory;
- (ii) the requirement to "act within 36 hours" of receiving knowledge of the transmission of any prohibited information; and
- (iii) the requirement to disable information that is contradictory to the IT Act and Intermediary Guidelines.⁴

There is ambiguity when an intermediary can be deemed to have "actual knowledge" of an unlawful act on their platform. In the case of *Shreya Singhal v Union of India*⁵ it was broadly held that 'actual knowledge' would only be through a court order. However, in the landmark case of *Myspace Inc. v. Super Cassettes Industries Ltd*, the Delhi High Court held that the *Shreya Singhal* standard was only applicable to social media intermediaries which still keeps the question open as to when the intermediary is deemed to have actual knowledge.

³ The Intermediary Guidelines were released by the Department of Information Technology, Ministry of Communication Technology vide G.S.R. 314(E) dated 11 April 2011, in exercise of the powers conferred by clause (zg) of sub-section (2) of Section 87 read with sub-section (2) of section 79 of the Information Technology Act, 2000. The Intermediary Guidelines are available at <https://www.wipo.int/edocs/lexdocs/laws/en/in/in099en.pdf>

⁴ http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Intermediaries_-_Messengers_or_Guardians.pdf

⁵ *Shreya Singhal v Union of India*, WP(Cr) No. 167 of 2012

Also, in the matter of *Swami Ramdev and Anr. vs. Facebook Inc. & Ors*, the Delhi High Court has opined that take-down requirement imposed on intermediaries mandate a global take down of any unlawful content uploaded from India. However, as most intermediaries operate on a global scale, global take down of any content might raise issues in other jurisdictions as users will be facing a violation of their right to freedom of speech and expression.

Recently in 2018, in the case of *Christian Louboutin SAS vs Nakul Bajaj and Others*⁶, the Delhi High Court held that since Darveys.com (intermediary) exercised complete control over the products being sold in so far as it was identifying the sellers, aiding the sellers actively, and promoting the products. It went on to state that the safe harbour provisions for intermediaries are meant for promoting genuine businesses which are inactive intermediaries and, *"the obligation to observe due diligence, coupled with the intermediary guidelines which provides specifically that such due diligence also requires that the information which is hosted does not violate IP rights, shows that e-commerce platforms which actively conspire, abet or aide, or induce commission of unlawful acts on their website cannot go scot free*. This judgement has cleared a lot of ambiguity by imposing an absolute obligation on e-commerce websites and online marketplaces to exercise due diligence in order for them to claim the safe harbour under the IT Act.

With the proposed amendment in Intermediary Guidelines, far more onerous provisions are introduced which the intermediary must comply with in order to avail safe harbour protection such as:

- (i) an intermediary will be required to warn its users at least once a month, of their need to comply with the intermediary's terms of use;
- (ii) Intermediaries will be required to take-down content only upon receiving actual knowledge by way of a court order or upon being notified by appropriate government agency which has to be complied within 24 hours;
- (iii) Intermediaries are required to deploy technology based automated tools or appropriate mechanisms with appropriate controls to proactively identify and remove access to unlawful content;
- (iv) Intermediaries with above 50 Lakh users will be required to get incorporated in India and will also be required to trace the originator of any information upon receiving a request by the authorized agency. All these provisions will put a greater compliance burden on the intermediaries for them to avail safe harbour protection.

⁶ Christian Louboutin SAS vs Nakul Bajaj and Ors. (2014 SCC OnLine Del 4932)

Conclusion

From the judgement in *Christian Louboutin SAS vs Nakul Bajaj and Ors.* and proposed amendment in Intermediary Guidelines, it is evident that the courts in India have started to delve deep into the extent of protection (safe harbour) that is to be awarded to intermediaries and the conditions under which such exemptions are to be awarded. The approach of Indian courts is oriented to protect the trademarks/brand owners and to increase the role of intermediaries in protecting them by introducing draconian compliance.

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