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Liability Of E-Commerce Companies As Intermediaries In India

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Notwithstanding the intermediary liability exemption provided under the I-T Act, proceedings have been initiated against online marketplaces/platforms on the grounds that they have a 'gatekeeper' function. By taking a few simple precautionary actions, e-commerce players can mitigate the effects of such a suit.



The growth of e-commerce in India brought the focus on the issue of liability of intermediaries in India. The matter first arose in the case of *Avnish Bajaj v State* (2005) 3 CompLJ 364 Del, popularly referred to as the 'Bazee.com case'. In this case, Mr Avnish Bajaj, the CEO of Bazee.com (now ebay.in) was arrested after an obscene media clip was posted by a user for sale on the website. While the Delhi High Court quashed the criminal proceedings against Mr Bajaj on procedural grounds, it held that the website hosting the video can be held liable under the Indian Penal Code 1860 and the Information Technology Act 2000 (IT Act).

This judicial decision resulted in an industry wide appeal for amendment of the I-T Act such that intermediaries may be exempt from liability for user generated content posted on their web platforms.

Legislative Changes

The definition of intermediaries under the IT Act specifically covers online market places encompassing e-commerce websites. Post the Bazee.com case, Section 79 of the IT Act was amended and the Information Technology (Intermediary) Rules 2011 (IT Rules) were issued with the intent of protecting intermediaries.

Pursuant to the aforesaid legislative changes, an intermediary is now protected against any liability for third party information, data or communication link hosted by it subject to certain conditions inter alia the intermediary only providing access to communication system for transmission of information, without itself

initiating the transmission or selecting the receiver of the transmission and observing due diligence while discharging its duties.

However, this exemption cannot be claimed if the intermediary has conspired, abetted, induced or otherwise played a role in commission of an unlawful act or failed to expeditiously remove or disable access to unlawful information upon having knowledge of such unlawful information. This is the 'notice and takedown' approach under the IT Act.

An intermediary can meet the due diligence standards under the IT Act if: (a) it publishes rules and regulations, a privacy policy and a user agreement or terms and conditions for access or usage of the intermediary's computer resource by any person (T&C); and (b) it does not knowingly host or publish such information or modify such information or select the recipient of such information.

As a practical matter, notwithstanding the availability of the intermediary liability exemption under the IT Act, proceedings have been initiated against online marketplaces/platforms in India, on the grounds that such online marketplaces have a 'gatekeeper' function and cannot completely disclaim liability for acts of the vendors, suppliers or service providers listed on the marketplace.

Judicial Approach

A. Shreya Singhal v Union of India (2015 SCC 248)

The Supreme Court in this case significantly read down the statutory provisions and held that 'knowledge' under Section 79(3) of the IT Act would only mean knowledge of the intermediary pursuant to an order of a court of law. Accordingly, the Supreme Court held that an intermediary would be liable if it does not expeditiously remove any objectionable content despite receipt of a court order directing removal of such content.

B. Myspace Inc. v Super Cassettes Limited 2017(69)PTC1(Del)

The single bench of the Delhi High Court, in this judgment, surprisingly took a view that that intermediaries cannot disclaim liability in relation to claims for infringing content posted by third party users on its website. The judgment of the single bench placed an onus on the intermediary to conduct preliminary checks on all content before such material is transmitted to the public. However, in appeal, the division bench overruled the single bench decision and held that intermediaries are immune from liability against copyright infringement for third party content unless 'actual knowledge' on their part can be proved. The courts held that Section 79 provides a 'safe harbour' to intermediaries.

Accordingly, while interpreting the provisions of the IT Act, the judicial approach has been that an intermediary would be liable for third party content only if there is 'actual knowledge' on part of the intermediary and other

conditions under Section 79 are satisfied. That said, cases are regularly filed against e-commerce entities in relation to content hosted on such websites or otherwise in relation to goods/ services sold through such websites.

Conclusion

While the current regime provides protection to intermediaries from any liability, it does not prevent third parties from instituting suits or complaints under different judicial forums.

It is possible that intermediaries may face claims: (a) as a principal under the Indian Contract Act 1872 under the laws of agency; (b) as a service provider under the Consumer Protection Act, 1986 for deficiency in services; or (c) under tort law for breach of duty of care.

Recommendations

While an individual cannot be precluded from filing claims or suits against an intermediary, intermediaries can always mitigate the effect of such claims by taking a few simple actions such as compliance with the due diligence standards set out in the IT Rules by publishing robust T&C. These T&C, for example, should inform the user not to host or share any information that belongs to a third party and other prohibited content.

Any claims under the law of torts for negligence on part of the intermediary service provider can be defended if the intermediary can show that 'reasonable care' was undertaken while providing the services and hence there was no deliberate breach of the standard of care owed during the provision of services. In order to show a standard of reasonable care, intermediaries can undertake steps such as inter alia submission of Know-Your-Customer (KYC) documents and inclusion of a right to terminate access of a user upon receipt of complaints.

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