



# Liability of e-commerce websites in India

**Manisha Singh, Managing Partner, Aprajita Nigam, Senior Associate, and Smrita Sinha, Associate, of LexOrbis, outline how the Indian legal system is dealing with the IP challenges created by the rapid growth of e-commerce in the country.**

The advent of e-commerce platforms has significantly transformed the Indian business and retail sector by focusing on consumers' need for convenience to shop for the necessities as well as luxuries by a mere click of a button. Rapid expansion of internet services across India and the tremendous rise in the sale of smartphones has accelerated the growth of e-commerce business. Interestingly, these e-commerce platforms have not only managed to garner the attention of the urban populace, but of those living in the semi-urban and rural areas of India.

The growing popularity of e-commerce platforms has, at the same time, brought challenges in the form of counterfeiting which affects both brand owners and consumers, and

as such, these platforms are constantly under the scanner for their role in the menace created by counterfeit products.

## Government initiatives

The Government of India has come up with the following draft policy and rules for regulating e-commerce platforms operating in India:

- **Draft National E-commerce Policy:** The measures enlisted under this policy *inter alia* are – (i) the mandate for providing seller details, (ii) publicly available undertaking by the seller to e-commerce platform regarding genuineness of the products, (iii) option of registration for trademark owner with the e-commerce platform to get a notification by the platform in case a trade-marked product is uploaded for sale, (iv) if the trademark owner desires, the e-commerce platform shall not list any trade-marked good without prior approval, (v) in case of luxury goods, cosmetics and other goods having impact on public health, prior authorization from trademark owner will be mandatory, (vi) financial disincentives for seller if found to be selling counterfeit products, and (vii) takedown of counterfeit products on a complaint made by consumer and affirmed by trademark owner, if the seller fails to produce evidence of genuineness of the product.
- **Draft Consumer Protection (E-Commerce) Rules, 2019:** These Rules have been made under the Consumer Protection Act to protect the interests of the consumers and provide for general conditions that are required to carry out e-commerce business

in India such as (i) display of complete seller details on the platform, (ii) e-commerce entity shall not influence the price of goods/services and shall maintain a level playing field, (iii) adopts any unfair methods or unfair or deceptive practice that may influence transactional decisions of consumers, (iv) falsely represent themselves as consumers or post reviews about goods and services in their name; or misrepresent or exaggerate the quality or the features of goods and services. In addition to this, the draft Rules also lay down certain liabilities on the sellers who are using e-commerce. Most importantly, these draft Rules provide for consumer grievance redress procedure which mandate that every e-commerce entity shall publish on its website the name of the Grievance Officer and his contact details as well as mechanism by which users can notify their complaints. It is also provided that the Grievance Office shall redress the complaints within one month.

## Information Technology Act and the liability of intermediaries

E-commerce platforms have found refuge under the safe harbor provisions of the Information Technology Act 2000.

Intermediaries are defined under Section 2 (1) (w) of the IT Act as:

"Intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, Internet service providers, webhosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes."

As per section 79 of the IT Act, an intermediary is not liable for any third party information, data, or communication link made available or hosted if (a) its function is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or (b) the intermediary does not— (i) initiate the transmission, (ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission; (c) the intermediary observes due diligence while discharging its duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

The Act further provides that the above safe harbor provisions shall not apply if –



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- the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;
- 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 fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

## Judicial scrutiny of Section 79 of the IT Act

The courts have scrutinised the said provision to determine the responsibility of intermediaries in IP matters. In *Myspace Inc. v. Super Cassettes Industries Ltd. (2016)*, the Delhi High Court noted that while Section 79 grants a measured privilege to the intermediaries, liability can be imposed on the intermediary if it has actual knowledge of the infringement and not just general awareness/knowledge.

Thereafter, in *Christian Louboutin SAS v. Nakul Bajaj & Ors (2018)*, the Delhi High court observed that e-commerce platforms which actively conspire, abet or aide, or induce commission of unlawful acts on their website cannot go scot free. The protection afforded to intermediaries is not absolute and if they also initiate the transmission, select the receiver or select or modify the information contained in the

## Résumés

### Manisha Singh

Manisha is a founder and the Managing Partner of LexOrbis. She is known and respected for her deep expertise on prosecution and enforcement of all forms of IP rights, and for strategizing and managing global patents, trademarks and designs portfolios of large global and domestic companies.

### Aprajita Nigam

Aprajita is enrolled with the Bar Council of Delhi since 2013, and holds an LL.M. degree in IPR Law from NALSAR University of Law. At LexOrbis, her work includes trademark, copyright, and design matters, domain name complaints, agreement drafting, attending hearings etc. She has received much appreciation for her publications.

### Smrita Sinha

Smrita is an advocate enrolled with the Bar Council of Delhi since 2019 and has graduated from Amity Law School Delhi. At LexOrbis she has been involved in various IP matters related to copyright, trademark and industrial design. Smrita has also contributed to publications on the subject of arbitration, trademarks etc.



## E-commerce platforms have found refuge under the safe harbor provisions of the IT Act 2000.



transmission, then they may lose the exemption given under safe harbour provision.

A recent judicial development has come in the form of a dispute between Direct Selling Entities (Plaintiffs) and e-commerce websites (Defendants), wherein a Single Judge of the Delhi High Court ruled in favour of the plaintiffs, and awarded interim injunctions restraining the defendants from displaying, advertising, selling, and facilitating repackaging of the plaintiffs' products, except of those sellers who produce written permission/consent of the plaintiffs for listing their products.

In an appeal preferred by Amazon, Snapdeal and Cloutail (Appellants) against the aforesaid interim injunctions, a Division Bench of the Delhi High Court noted that the appellants provide services in addition to access and thus, they have to show compliance with Section 79(2) of the IT Act and establish that they do not - initiate the transmission, select the receiver of the transmission and do not select or modify the information contained in the transmission. The appellants contended that the consumers initiate the transmission and they neither select the receiver, nor modify any information.

Among other observations, the court noted that Section 79 of the IT Act ensures that the

liability for non-compliance and/or violation of law by a third party, i.e. the seller, is not imposed on the e-commerce websites. The court disagreed with the Single Judge's view that the e-commerce websites will have to meet the due diligence requirement, failing which the benefit of safe harbour provision would not be available to them, and observed that there is a *prima facie* merit in the appellants' contention that as online marketplaces they provide value-added services; however, it does not dilute the safe harbour granted to them.

The jurisprudence relating to intermediary liability is constantly evolving in India and finality on the same is much awaited.

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