

Legal Issues in ‘Social Media & Networking’

Issue: Is there a threshold for the extent of due diligence observed by an intermediary to avail safe harbour in a trademark infringement suit?

Relevant Legal Provisions

- ***Section 79(1) of the Information Technology Act, 2000***

Section 79(1) - Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

- ***Section 79(2)(c) of the Information Technology Act, 2000***

Section 79(2)(c) - The provisions of sub-section (1) shall apply if– (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

Relevant Legal Provisions (contd.)

- ***Rule 3(1)(c) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021***

3. (1) Due diligence by an intermediary: An intermediary, including 1 [a social media intermediary, a significant social media intermediary and an online gaming intermediary], shall observe the following due diligence while discharging its duties, namely:—

(c) an intermediary shall periodically inform its users, at least once every year, that in case of non-compliance with rules and regulations, privacy policy or user agreement for access or usage of the computer resource of such intermediary, it has the right to terminate the access or usage rights of the users to the computer resource immediately or remove non-compliant information or both, as the case may be

Relevant Judicial Decisions

- ❖ **My Space Inc. v. Super Cassettes Industries Ltd. [FAO(OS) 540 of 2011, High Court of Delhi, judgement dated December 23, 2016]**

*“57. The other aspect that needs to be complied with is the “due diligence” clause under Section 79(2)(c). Here once again, the Intermediary Rules are relevant-especially Rule 79 (3). MySpace’s website -for purposes of viewing does not require the user subscription to its terms and conditions. However, for the purpose of uploading, sharing, commenting etc. subscription with MySpace is needed and for this purpose an agreement is entered into between the parties. To comply with the due diligence procedure specified in the Rules, MySpace has to publish its rules, regulations, privacy policy and user agreement for access of usage. These agreements and policies on the appellant’s website must comply with Sub Rule 2 of the Rules. MySpace has annexed its user agreements and privacy policies which suggest due compliance with the said rules. It requires its users to comply with its privacy policy and user agreements before they can create their accounts with the appellant in order to modify, add, host, upload, and transmit etc. their data. **This however, does not end the list of duties MySpace has to follow.**”*
(emphasis supplied)

Relevant Judicial Decisions (contd.)

- ❖ **My Space Inc. v. Super Cassettes Industries Ltd. [FAO(OS) 540 of 2011, High Court of Delhi, judgement dated December 23, 2016] (Contd.)**

*“...There are several users who may agree to the terms and conditions and still upload infringing content. Under Section 79(3) read with Rule 3(4) of the Rules posit **an intermediary on receiving “actual knowledge” or upon obtaining knowledge from the affected person in writing or through email to act within 36 hours of receiving such information disable access to such information. If copyright owners, such as SCIL inform MySpace specifically about infringing works and **despite such notice it does not take down the content, then alone is safe harbor denied.** However, it is for SCIL to show that despite giving specific information the appellant did not comply with its notice.**” (emphasis supplied)*

5

Relevant Judicial Decisions (contd.)

- ❖ **Christian Louboutin Sas v. Nakul Bajaj & Ors. [CS(Comm) 344 of 2018, High Court of Delhi, judgment dated November 2, 2018]**

“62. While the so-called safe harbour provisions for intermediaries are meant for promoting genuine businesses which are inactive intermediaries, and not to harass intermediaries in any way, 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.”

“64. So long as they are mere conduits or passive transmitters of the records or of the information, they continue to be intermediaries, but merely calling themselves as intermediaries does not qualify all e-commerce platforms or online market places as one.” (emphasis supplied)

Relevant Judicial Decisions (contd.)

- ❖ **Flipkart Internet Private Ltd. vs State Of NCT Of Delhi & Anr. [W.P. (CRL) 1376 of 2020, High Court of Delhi, judgement dated August 17, 2022]**

“25. It is trite that the standard for fixing criminal liability is far higher than that under civil law, one requiring proof ‘beyond reasonable doubt’ and not just a ‘balance of probabilities’. ... There is no reason why that higher standard should not be available to courts to determine whether an intermediary would be liable under the criminal law for action or inaction. It would also stand to reason that when the intermediaries have been granted the “safe harbour” qua civil liability, and when a higher standard of culpability is required for a criminal prosecution, such “safe harbour” should be available even in respect of criminal prosecution. Thus, unless an active role is disclosed in the commission of the offences complained of, the intermediary, such as the present petitioner, would be entitled to claim protection under Section 79 of the I.T. Act. In other words, the question must be answered in the affirmative that when compliance with the “due diligence” requirement under Rule 3 of the I.T. Guidelines is evident, ex facie, the exclusion of liability under Section 79 of the I.T. Act would include exclusion from criminal prosecution.” (emphasis supplied)

Relevant Judicial Decisions (contd.)

- ❖ **Puma Se vs Indiamart Intermesh Ltd. [CS (Comm) 607 of 2021, High Court of Delhi, judgement dated January 3, 2024]**

“46.7. Clause (c) of Section 79(2) is also not applicable as IIL has clearly not observed due diligence while discharging its duties under the IT Act. A mere incorporation, in its terms and conditions of use, or the requirement of an undertaking being required to be given by the prospective seller that he would not be infringing any intellectual property right of third party, is hardly due diligence. There is no inquiry conducted by IIL regarding the genuineness of the sellers who peddle their wares on its platform. All that is sought, from the prospective seller, are his statistical details such as his name, email ID, phone number and the like. As Mr. Narula has correctly pointed out, even furnishing of GST/PAN number is not mandatory. IIL has not, in its written statement, drawn attention to any step that it takes to verify the genuineness, credibility or antecedents of the prospective sellers. It cannot be said, therefore, that any diligence is shown by IIL, much less due diligence.” (emphasis supplied)

Conclusion

- ❖ The language of the statute provides that the intermediary shall not be liable if it exercises due diligence on its part. However, the statute is silent about the threshold of due diligence that the intermediaries are required to exercised.
- ❖ The Courts have differed on opining that the merely providing a disclaimer in their user agreements and privacy policy that a user shall not infringe upon any other person's intellectual property shall be allowed to take protection under the safe harbour under the IT Act and Rules.
- ❖ However, the Courts have not discussed regarding the specific threshold of due diligence which has to be exercised by the intermediaries. The views of the Courts have changed from mere compliance in their user agreements and privacy policies to observing even more due diligence to be able to avail safe harbour provisions.

THANK YOU!
Questions?

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10

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