Role of intermediaries in protecting Indian IP

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This article on the intermediary liability for IP infringement in India was originally published in the 10th November 2021 edition of the Asia Business Law Journal. Authors: Madhu Rewari and Madhurima Gadre In this digital age, where social media has become all the rage and sharing content on the internet has become possible with just a click of a button, businesses need to be more vigilant on the content available on social media platforms or intermediaries. As per section 2(w) of the Information Technology Act, 2000 (IT Act), 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. This includes telecoms service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment agencies, online auction sites, online marketplaces and cyber cafes. By this definition, most, if not all, popular social media platforms qualify as intermediaries in India. Previously, section 79 of the IT Act and IT (Intermediary Guidelines) Rules, 2011, regulated the duties and liabilities of intermediaries in India. Briefly, an intermediary was required to exercise due diligence to claim safe harbour protection, and to post policies on its platform to warn users not to infringe on IP rights. To this extent, several e-commerce platforms had come up with mechanisms for IP owners and/or their legal representatives to report IP violations and take infringing content down conveniently. As long as these measures were taken, any IP violations emanating from content shared by users of the platforms would not typically make the intermediary liable for the same. Several court orders have directed intermediaries to take down infringing content after being notified by the IP owner. Notably, in *MySpace v Super Cassettes Industries (2017)*, Delhi High Court considered the near impossibility of sifting huge volumes of data received by an intermediary to identify infringing content unless specific information regarding the infringement is given to the intermediary by the IP owner. These observations of the court leaned in favour of intermediaries being given full immunity with regard to infringing content shared by users of their platforms. In sharp contrast, in *L'oreal v Clues Network (2016), Skull Candy v Clues Network (2016)*, and *Christian Louboutin v Nakul Bajaj (2018)*, Delhi High Court directed intermediaries to take certain steps to reduce counterfeiting, such as disclosure of seller details and procuring an assurance from sellers who list goods on the intermediaries' platforms that the said goods are genuine. In *Luxottica Group and Ors v Mify Solutions and Ors (2018)*, Delhi High Court also directed that the intermediary in question shall notify and obtain permission from Luxottica before offering a product bearing Luxottica's marks for sale on its platform. The intermediary shall also seek a guarantee from sellers that the product has not been impaired in any manner and that all warranties and guarantees of Luxottica are applicable and shall be honoured by the seller. On 25 February, the Ministry of Electronics and Information Technology, under section 87 of the IT Act, notified the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Intermediary Rules), suspending the IT (Intermediary Guidelines) Rules, 2011. Under the intermediary rules, a social media intermediary is required to conduct due diligence while discharging its duties

and follow proper procedure as laid down in rules 3 and 4. The rules require intermediaries to set up a grievance redressal mechanism for resolving complaints. Under the new rules, even over-the-top (OTT) entities that were traditionally not considered intermediaries are being brought under governance and required to comply with the code of ethics. The rules require OTT platforms to formulate a three-tier redressal mechanism. The intermediary rules have also retained the sum and substance of the previous legal provisions when it comes to the responsibilities of the intermediaries to protect IP. However, the rules see a departure by imposing strict compliance on intermediaries and OTT platforms. The intermediaries falling under the category of "significant social media intermediaries" will need to take a few additional measures, including putting in place automated tools to block future content that has already been determined to be infringing by a court of law. It also calls for appropriate human oversight and a periodic review of the tools used for content moderation. The new regime is expected to shake up the e-commerce sector and social media platforms, especially given that failure to comply with the new rules could result in loss of safe harbour protection.

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