

# Technology Law Analysis

July 20, 2017

## INTERMEDIARIES UNDER THE INDIAN INFORMATION TECHNOLOGY LAW CAN BREATHE A SIGH OF RELIEF

- An intermediary may held to be liable for infringing content hosted on its platform only when it has *specific or actual knowledge or a reason to believe* that such information may be infringing.
- Insertion of advertisements and modification of content formats by an intermediary via an automated process and without manual intervention does not result in the intermediary being deemed to have *actual knowledge* of the content hosted.
- Once an intermediary has been informed by a complainant of potentially infringing content hosted on its platform, it is not obligated to proactively verify and remove content subsequently hosted on its platform that may infringe the intellectual property rights of the complainant.

## MYSPACE CASE CONUNDRUM

In 2011, in the case of *Super Cassettes Industries Ltd. v. Myspace Inc. & Anr.*<sup>1</sup>, a single judge bench of the Delhi High Court (“**Delhi HC**”) via its interim order held that intermediaries were obligated to remove content from their websites as soon as they receive a complaint from any third party alleging infringement. Moreover, it also held that a preliminary check should be conducted on all content being uploaded on their websites before such material is communicated to the public.

On appeal, the ruling of the single judge bench of the Delhi HC was overruled on December 23, 2016 by a division bench of the same court. The division bench held that intermediaries could be held liable only when they have *actual or specific knowledge and not constructive knowledge* of the existence of infringing content on their website, and do not take any steps to have such content removed. It held that since (i) advertisements were inserted on the website and (ii) modifications were made to the format of the content, both via an automated process and without manual intervention, this would not amount to Myspace having actual control, actual knowledge nor a ‘reason to believe’ that the content uploaded on its website may be infringing of third party rights. Further, the Delhi HC also held that intermediaries were not obligated to continuously identify and remove each and every piece of content being uploaded on their websites. The Delhi HC stated that as intermediaries only serve that purpose of being a conduit for the exchange of information between users, they are not equipped and cannot be obligated to pre-screen and verify all such information / content that is stored on their websites.

## KENT RO SYSTEMS CASE

In the case of *Kent RO Systems Ltd. & Anr. v. Amit Kotak & Ors.*<sup>2</sup> (“**Kent RO Systems Case**”), the question before the Delhi HC was whether once a complaint has been lodged by a complainant with the e-commerce platform service provider relating to allegedly infringing goods displayed by certain seller(s) on the platform, whether the e-commerce platform had an obligation to continuously verify whether goods subsequently displayed by the same sellers that may infringe the intellectual property rights of the complainant. The Delhi HC held that question of an intellectual property right infringement is more often than not a technical question, and intermediaries are not equipped and not required to screen all goods / information hosted on its platform for infringement of the rights of persons who have made complaints in the past relating to infringement.

## FACTS

Certain product listings such as that of water purifier systems, which were alleged by Kent RO Systems Ltd. (“**Kent RO Systems**”) to infringe its registered designs under the Designs Act, 2000 (“**Designs Act**”) were hosted on eBay.in, belonging to eBay India Private Limited (“**eBay**”). Goods sold on the platform by a merchant, Mr. Amit Kotak (“**Merchant**”) were one of the many others that allegedly infringed upon the Kent RO Systems’ registered water purifier designs.

Kent RO Systems sought an injunction against the Merchant to restrain him from selling the allegedly infringing goods on eBay.in. Kent RO Systems also pleaded that it had intimated eBay through various written complaints about such allegedly infringing goods hosted on the eBay platform and requesting for eBay to remove such goods from the platform. Kent RO Systems did not contest the fact that eBay took immediate action upon receipt of the complaints.

Kent RO Systems’ bone of contention before the Delhi HC was that an intermediary’s liability extends to not just an effective response to a complaint pertaining to infringing material. However, the intermediary was to proactively do a continuous verification of all the goods / information hosted on its platform post resolution of the complaint, so as to protect the intellectual property rights of the complainant.

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Kent RO Systems sought from the Delhi HC a direction to takedown, remove and delist all products infringing their registered designs and a prohibitory injunction from allowing infringing products being offered for sale on the eBay platform. Kent RO Systems contended that:

- i. eBay had an obligation under Section 79(3) of the Information Technology Act, 2000<sup>3</sup> ("IT Act") read with Rule 3(4) of the Information Technology (Intermediary Guidelines) Rules, 2011<sup>4</sup> to remove listings that infringe its intellectual property rights, upon receipt of a complaint. Further, Kent RO Systems contended that eBay also had an obligation to devise a mechanism that prevents further posting of any listing that may infringe its registered designs;
- ii. That omission on eBay's part to remove new listings that may infringe Kent RO Systems' intellectual property rights should be deemed as a conspiracy and eBay has abetted and aided such alleged infringement. Hence as a result, eBay should not be able to claim safe harbor protection under Section 79 of the IT Act; and
- iii. eBay's continued hosting of infringing goods amounted to piracy under Section 22 of the Designs Act. Section 22 of the Designs Act prohibits, intentionally publishing or causing to be published, articles that are imitations of designs protected under the Designs Act.

eBay in its defense argued that it had complied with all of its obligations under the IT Act. eBay contended that:

As per Section 79 of the Act, an intermediary cannot be held liable for any third party information made available or hosted by it, so long as the conditions under the section as specified below have been satisfied.

- a. *The function of the intermediary 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 initiate the transmission, select the receiver of the transmission or modify the information contained in the transmission with respect to exchange of electronic records or any service operating on it; and*
- 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.*

eBay cited and relied on the division bench decision in the *Myspace Case* to clarify and state that it was an intermediary as defined under the IT Act and did not have *actual* knowledge of the infringing goods / content hosted on its platform as the process of advertisement insertion, hosting and content modification was automated and there was no manual intervention involved. Hence, eBay could not be liable for hosting infringing listings or aiding or abetting piracy. eBay stated that it being an intermediary, was unable to screen / verify information hosted on its platform for infringement and if made to do so, would result in its business operations being affected. Further, eBay was observing its due diligence obligations, including that of informing its users of its usage policy and that the information uploaded by users should not violate the intellectual property rights of a third party or any applicable law. Hence, safe harbor protection could be claimed under Section 79 of the IT Act.

## DECISION

The Delhi HC reaffirmed that under the IT Act, an intermediary is obligated to remove / disable the goods / information hosted on its portal only on receipt of an order from the relevant governmental agency or pursuant to a court order. The Delhi HC held that an intermediary should not "*on its own, screen all information being hosted on its portal for infringement of the rights of all those persons who have at any point of time complained to the intermediary*".

The Delhi HC also held that, whether an intellectual property right has been infringed or not is a question to be determined by the courts, and an intermediary is neither equipped to determine this, nor is possessed with the required prowess for such an evaluation. The Court also accepted the fact that an obligation imposed on intermediaries to proactively remove infringing listings would bring the business of the intermediaries to a halt. The Delhi HC also interpreted the IT Act and stated that the intent of the legislature to place a limit on such intermediary liability was clear as an intermediary is only obligated to perform its due diligence obligations such as informing its users not to host, display, upload, modify, publish, transmit, update or share any information that is obscene, defamatory, unlawful or is infringing the intellectual property of third parties, etc.

## CONCLUSION

This decision is a positive step towards ensuring the protection of intermediaries, as the Delhi HC has clarified that intermediaries are only obligated to remove any infringing content on receipt of a notification from a Government authority or order from a court. Such content must be removed within 36 hours of receipt of such notification / order. In light of the above, the Delhi HC also clarified that placing an obligation on an intermediary to proactively screen content on a continuous basis would not be advisable as intermediaries are ill equipped to fulfill such an obligation and this will negatively impact their business operations.

The Delhi HC went on to clarify in the postscript of its decision that the recent decision of the Supreme Court of India in *Sabu Mathew George v. Union of India*<sup>5</sup> is only restricted to violations of Section 22 of Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994<sup>6</sup>, i.e. relating to advertisement of pre-natal determination of sex of unborn babies. Therefore auto-block obligations were placed on intermediaries in this judgment due to the extremely sensitive nature of the content that was at the center of the dispute and thereby cannot be interpreted as having a wider implication on the general functioning of intermediaries in India.

<sup>1</sup> 2011 (48) PTC 49 (Del)

<sup>2</sup> CS (Comm) 1655 of 2016, Delhi High Court; decided on January 18, 2017

<sup>3</sup> Section 79 - Exemption from liability of intermediary in certain cases

(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

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary 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 his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) 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.

*Explanation.*—For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

<sup>4</sup> The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes;

<sup>5</sup> Writ Petition (Civil) No.341/2008

<sup>6</sup> Prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention.-

1. No person, organization, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form including internet, regarding facilities of pre-natal determination of sex or sex selection before conception available at such centre, laboratory, clinic or at any other place.

2. No person or organization including Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or preconception selection of sex by any means whatsoever, scientific or otherwise.

3. Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

*Explanation.*—For the purposes of this section, "advertisement" includes any notice, circular, label, wrapper or any other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall-painting, signal, light, sound, smoke or gas.

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