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Safe Harbor Provision: Conditional Immunity to Online Intermediaries

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ABSTRACT

“In a democratic society, those who control the access to information have a responsibility to support the public interest...these gatekeepers must assume an obligation as trustee of a greater good.”

- Shapiro

With the drastic shift in the paradigm of technology all across the world, it is unfathomable that India could remain untouched by it. There is a considerable rise in the number of digital intermediaries such as search engines and social media platforms on the internet which is profoundly affecting our way of communication.

With the large masses using these online platforms, they have a significant control of power in their hands which can be misused like in spreading terrorist propaganda or misinformation. In the wake of such huge control of power in their hands, accountability for the content that is posted on their respective platforms also becomes notable. At the same time our constitution also enshrines freedom of right to speech and expression. Guaranteeing liberty to intermediaries is vital for the thriving online intermediaries industry.

The need of the hour is to balance both. Hence, the parliament has wisely incorporated provisions of Safe Harbor in The Information Technology Act, 2000.

This research paper is an attempt to look deeply into the aspects of Safe Harbor Protection. Since the protection of Safe Harbor is available to intermediaries, therefore at the outset, an attempt has been made to analyse the definition of an intermediary as defined under Section 2(w) of The Information Technology Act. The paper analyses the legal provisions in detail, which extend the protection of Safe Harbor to intermediaries. The paper further attempts to analyse various case laws where time and again, the judiciary has reaffirmed the constitutionality of this provision and gave clarity where there was ambiguity found in the provision.

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I. WHAT IS SAFE HARBOR PROTECTION?

Section 79 of the Act and the Intermediary rules therein enumerates the provision relating to the liability of the intermediaries. Section 79 is contained in the Chapter XII of the Act which exempts them from the liability only upon the fulfillment of certain conditions enumerated in the sub-sections. This section is popularly referred as Safe Harbor provision as it grants immunity to intermediaries from liability for any third party information, data, or communication link made available or hosted by him.

However, Immunity granted is not absolute. It is subject to the conditions enumerated in sub Section 2 and 3.

Section 79(1) with regards to liability of intermediary states,

“(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.”³

Section 79(2) envisages the situations when the protection of 79 can be afforded. The exemption from the liability would not be provided if the intermediary is an active participant or initiates the transmission or doesn't follow due diligence.

Section 79(2) reads as

“(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.”⁴

³ Section 79, The Information Technology Act, Acts of Parliament, 2000.

⁴ Supra (note 1)

Subsection 3 of Section 79 clearly states that the protection envisaged by section 79 would not be extended if any intermediary is found to be conspiring or inducing or aiding in the commission of the unlawful act.

Furthermore, it essentially covers cases where it receives takedown notice either from the appropriate Government or its agency relating to a link, data or information residing on the platform controlled by the intermediary which is being used to commit any unlawful act. If the intermediary fails to remove such communication link, data or information from its platform even after receiving the notice, it cannot claim the protection afforded by the Safe Harbor provision under Section 79 of the act.

II. WHAT IS AN INTERMEDIARY?

While discussing Section 79 of the Information Technology Act, 2000, the legislation that governs this domain, the word intermediary often finds the mention. Hence it is pertinent to understand it first.

The IT Act defines intermediary as “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, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.”⁵

It is a wide term. The key players included in the definition of intermediary are:

1. **Telecom service providers:** Telecom Service providers are also known as TSP. They are a type of communication service providers which extends telephone and telephone related services to customers. The information Technology Act, 2000 includes Telecom service providers also in the list of intermediaries.
2. **Network Service provider:** Network service provider are often called as backbone provider as they provide direct internet backbone access to internet service providers.
3. **Internet Service provider:** Internet Service provider is a company or an organization that provides the service of Internet typically through a computer to its customers. Internet service typically includes internet transit, Internet access, UseNet services, web hosting, domain name registration. Examples of Internet service provider

⁵ Section 2(w), The Information Technology Act, No. 21, Acts of Parliament, 2000.

4. Search Engines: Search engines are those websites which lets the user search their query on the web and provides the result in the form of link to other webpages. Google is one of the most common search engines used worldwide.
5. Online payment Sites: Online payment sites are those websites which enable its customers to make payment, transfer money or pay bills.
6. Cyber Cafes: Cyber cafes provide facility of computer along with internet to its customer at one specified place.

Thus, to put it in simple words, an intermediary is like a messenger, you can say like a pigeon in ancient times which used to pick messages from one place and transmit to other. In the same way the intermediaries are pigeons of modern digital times. They connect the users with each other and deliver data from the origin to the user. Data could be anything from text to a video. An intermediary is a very wide term. It encompasses a very wide range of platforms including Twitter, Facebook, Tik Tok, Google, Reddit, Yahoo. Anything which provides a platform for a point to point communications is an intermediary.

III. SAFE HARBOR PROTECTION AND FREEDOM OF SPEECH

Intermediaries can be Internet service provider, Network service provider or Telecom Service Provider which provides us access to Internet or various social media platforms like Instagram or Facebook which grants us a platform to connect to people and enable us to share content with our friends. For a user they are only a medium. They only provide a platform to enable sharing of data. It does not keep the control to itself to edit the data. Moreover, given the number of users, it isn't even possible to keep a check. Therefore, to hold the intermediaries liable altogether for the data shared by third party is not justified. Besides, charging intermediaries with the liability of third party conduct is detrimental to the freedom of speech and expression enshrined in the Indian Constitution.

Shreya Singhal⁶ is a celebrated landmark case of free speech where section 66A of the Act was struck down and clarity to the free speech jurisprudence was given. In this case, Section 66A was challenged on the ground of vagueness, chilling effects on speech and overbreadth. It clears the ambiguity and the notions of jurisprudence of free speech. The impugned provision was struck down by the court as unconstitutional as the grounds which were enumerated in 66A were not within the ambit of grounds specified in 19(2)⁷. While the SC bench struck down one provision as unconstitutional, it upheld another in the same case. Section 79 of the

⁶ Shreya Singhal v. Union of India, AIR 2015 SC 1523.

⁷ The Constitution of India, 1950, Article 19.

act was held valid by the court but with a few changes. Court expressed that the interpretation of the term ‘actual knowledge’ can be very wide. It could mean any information which is received from any person, which could result in millions of pending requests from the users. For an intermediary, it won’t be possible to handle millions of requests. Therefore, ‘Actual knowledge’ would mean an intermediary receiving takedown notice from a court asking it to expeditiously remove the offensive content.

IV. JUDICIAL INTERPRETATION OF SAFE HARBOR PROVISION

A. MYSPACE INC. VS. SUPER CASSETTES INDUSTRIES LTD⁸

This is a landmark judgment also known as MySpace Case, concerning the liability of internet intermediaries. Such infringement was claimed by Super Cassettes against MySpace. MySpace is an online online platform that allows its users to upload audio content and enable sharing of the same, whereas Super Cassettes is a company involved in the production and distribution of music. Super Cassettes filed a civil suit against MySpace in Delhi High Court alleging infringement of copyright of its works by MySpace by enabling its users to upload the audio content of the Plaintiff without obtaining its prior approval. It further contended that the Defendant was generating revenue out of the infringing works by getting the ads.

Issue before the court was that whether the act of the Defendant to enable its users to upload the music content of the plaintiff without prior approval would amount to infringement under Section 51(a) (i) of The Copyright Act⁹. The single judge bench held that there was a prima facie case against the Defendant. The protection under Section 79 of The Information technology Act was unavailable to the copyright infringement cases. Hence, the court restrained Defendant from dealing with Plaintiff’s work.

On an appeal by MySpace, the findings of this case were reversed by a division bench of High Court.

Few noteworthy findings of the judgment are:

1. MySpace qualifies as an Intermediary falling within 2(1) (w) of the IT Act, 2000. It acts a conduit and a service provider by enabling users to upload, view, stream and share content.
2. MySpace is merely a neutral platform which enables third parties to upload content on the platform. The users are free to upload any data. It could be infringing somebody’s

⁸ Myspace Inc. v. Super Cassettes Industries Ltd., 2011 (48) PTC 49 (Del).

⁹ Indian Copyright Act, 1957

right or not. What MySpace does is provide neutral platform where users are free to upload data in any form. Therefore, all the content on MySpace qualifies as “User Generated Content”.

3. The users are required to enter into a user agreement which states that the users should refrain from posting any content that infringes any Trademark, Copyright, Patent, Trade Secret,. It clearly places an embargo on the users by stating that the repeated infringers’ membership will be terminated as per MySpace policy. If a person believes that its copyrighted work or Trademark is being infringed on MySpace’s platform, they can notify MySpace through Copyright Infringement form and the Trademark Infringement Notice form.
4. Through section 79, the Parliament has conferred a limited immunity to the intermediaries. It can be invoked only upon the fulfillment of certain conditions mentioned therein.
5. The Copyright Act and the Information Technology act are complementary to each other and should be harmoniously construed.

B. AMAZON SELLER SERVICES PVT LTD VS. MODICARE LTD & ORS¹⁰

This is a case where the court dealt with the question of infringing content on an intermediary platform where the platform is an e-commerce site. The grievance of the plaintiff viz. Amway in the present case was that the defendant is selling their products on their platform without obtaining consent.

While looking at the incidental functions like packaging, delivering by Amazon, the Single Judge Bench held that Amazon could not avail protection under 79. The single Judge bench passed injunction order against Amazon.

On an appeal against the Single judge bench judgment, the division bench of High Court reversed the order. The division bench observed that application of section 79 is not restricted to passive intermediaries. In fact, in the entire provision, there is no mention of active or passive intermediary. The protection under Safe Harbor Provision is available for any website, internet service provider or organization which is an intermediary under section 2(w) of Information Technology act, 2000 and fulfills the conditions enumerated in section 79.

C. CHRISTIAN LOUBOUTIN SAS VS. NAKUL BAJAJ & ORS¹¹

¹⁰ Amazon Seller Services Pvt Ltd vs. Modicare Ltd & Ors FAO(OS)134/2019 (DHC)

¹¹ Christian Louboutin SAS v Abubaker & Others, 2018 SCC OnLine Del 9185 : (2018) 250 DLT 475.

This case holds importance in the domain of intermediary liability since intermediary liability was discussed extensively in respect of trademark infringement in this case. This case, certainly gave a much needed clarification but at the same time, left with bewilderment on some subjects. Mr. Christian Louboutian is a famous designer of high end luxury products. He runs a company by his name. The plaintiff contends that his brand enjoys enormous repute in the fashion industry. He claims that he sells his products only through an authorized network. The grievance of the plaintiff is that the defendant sells the plaintiff's products bearing the name of the Plaintiff uses. The website of the defendant further claims that the products on the website are 100% authentic. Plaintiff's image is also used on Defendant's website. This results in violation of Plaintiff's personality Rights and infringement of Trademark. The court held that plaintiff holds a prima facie case against the defendant and granted interim injunction.

High Court examined in detail what constitutes an intermediary under section 2(w) of The Act. Court observed that to avail exemption under Section 79, the intermediary should not have active participation in the selling process. On perusal of Defendant's website, it was observed that the Defendant claimed of 100% authenticity and also took membership fee from the members. The defendant was acting more than its capacity as an intermediary. Therefore, the court held that the defendant could not avail protection under section 79.

D. FERMAT EDUCATION VS. SORTING HAT TECHNOLOGIES PVT. LTD.¹²

Fermat education was an online and offline coaching institute for competitive exams running since 2014. The plaintiff claimed that 200 questions from its question bank has been copied and uploaded on the online website of 'Unacademy'. 'Unacademy is an online education providing website operated by the Defendant that is 'Sorting Hat Technologies Pvt. Ltd'. Upon the discovery of its content on Unacademy's website, the plaintiff approached Defendant for removing the infringing content. Defendant assured the plaintiff that the problem would be resolved at the earliest. But the infringing content remained on the website.

Madras High Court observed that there was a prima facie case against the Defendant. The defendant sought exemption under Section 79 of The Act, claiming itself as an intermediary. Interestingly, the court did not concur with the defendant. The court perused the terms and conditions of defendant's website and held that the defendant could not be considered as an intermediary under Section 2(w) of The Act. This was because according to Defendant's terms and conditions, no content could be uploaded before approval of defendant. They have the power to accept, reject, edit or delete user's content.

¹² Fermat Education v. Sorting Hat Technologies Pvt. Ltd, Civil Suit No. 330/2018.

V. INTERNATIONAL LEGAL POSITION IN EUROPEAN UNION ON INTERMEDIARY LIABILITY

Intermediary liability in European Union is governed by the following directive:

- a. *EC Directive 89/104 - "Rights conferred by a trademark";*
- b. *EC Directive 2000/31 - "Directive on electronic commerce";*
- c. *Regulation 40/94 - "Rights conferred by a Community Trademark".*
- d. *Directive 2004/48/EC - "the enforcement of intellectual property rights"*

A. GOOGLE FRANCE SARL, GOOGLE INC. v. LOUIS VUITTON MALLETIER SA & ORS.¹³

This is a leading case where the European Court considered the position of intermediaries. Few noteworthy observations regarding Intermediary liability by the European court are as following:

1. An intermediary gets the exemption from the liability if its activity is merely technical and passive. The activity of the intermediary should only be limited to providing access and no active role should be followed by it.
2. An intermediary can claim for protection from liability if it is not involved in the transmission of information.
3. It should only be acting as a ‘mere conduit’.
4. An intermediary to get the benefit of exemption should after getting knowledge of any infringement or violation should act expeditiously to remove the infringing data.

B. L'OREAL SA & ORS. v. EBAY INTERNATIONAL AG & ORS.¹⁴

This is another leading judgment on trademark violation on online platforms decided by Court of Justice of European Union (hereinafter referred as ‘CJEU’). The judgment of this case was in respect of sale of L’Oreal cosmetics on eBay by sellers. L’Oreal alleged that counterfeited products were being sold on eBay. Important question which was decided by the court was whether the operator of an online platform entitled to claim exemption from liability. It was held that to be entitled for exemption from the liability, the platform should not be playing active role. Even If the platform assists in promoting an offer for sale or optimizing them, it can’t be considered as playing active role. However, if upon the knowledge of any unlawful offer on its platform, it fails to expeditiously disable or remove the content, it won’ be entitled

¹³ Google France SARL, Google Inc. v. Louis Vuitton Malletier SA & Ors. [Case C-236/08 decision dated 23rd march, 2010]

¹⁴ L’Oreal SA & Ors. v. eBay International AG & Ors. [Case C-324/09 decision dated 12th July, 2011]

for exemption.

VI. POSITION OF INTERMEDIARIES PRE AND POST AMENDMENT

Chapter XII of Information Technology Act, was introduced by the 2008 amendment Act. Prior amendment, exemption under section 79 did not exist. It was only on 27 October, 2009 that IT act was amended to extend the protection to online intermediaries from criminally defamatory content. The pre amendment version of this act, did not

GOOGLE INDIA PVT. LTD. V. VISHAKHA INDUSTRIES AND ANR¹⁵

This is a matter of criminal defamation under 499/500 of IPC where the complainant alleged that a defamatory article was published by Ban Asbestos India, a group hosted by Google India. The complainant alleged that the said article has caused substantial harm to his reputation. It is service providers like Google which has made the dissemination of information much easier than ever before. Google has not taken due care and diligence. In fact, it misused its dominant position by targeting a particular company. Even after multiple requests made by the complainant, Google failed to take down the defamatory article. Appellant took reliance under 79 of The Information Technology act. High Court rejected Google's plea. It observed that to take plea of section 79, an intermediary has to take due care and diligence which Google clearly failed to take. Google appealed in the Supreme Court against High Court order. Supreme Court also rejected its plea of protection under Section 79. Supreme Court observed that the protection under Section 79 is not absolute. To claim protection, an intermediary has to take due care and diligence. Google could take down the defamatory article but it didn't.

It further observed that prior to amendment, Section 79, did not protect an intermediary in regard to the offence under Section 499 and 500 of IPC. Since this case was instituted in January, 2009 that is much prior to the amendment, it cannot seek refuge under post amendment act.

VII. CONCLUSION

In the process of proliferation of the digital world, the concerns of the Government have also increased. The social media has been misused by miscreants for spreading hate speech, terrorist propaganda or to cause communal disharmony, while e-commerce sites for counterfeiting or infringing goods. All of this can't be allowed to be done by hiding behind computer screens. In the Shreya Singhal case, while discussing the importance of intermediary liability, court highlighted the importance of free online speech also. IP law has always been able to find a

¹⁵ *Google India Pvt. Ltd. v. Vishakha Industries and anr* Criminal Appeal no. 1987 OF 2014(SC)

middle way to protect Work of an author and safeguard the interest of society. The Safe Harbor Provision serves the purpose by balancing the online free speech and accountability. Section 79 of the IT Act doesn't provide a blanket protection to the intermediaries. Protection under Section 79 is subject to fulfillment of conditions specified therein. The protection is available only when an intermediary is not behind the conspiracy and performs due diligence. As the old adage states, "One who comes to the court, must come with clean hands".
