

Delhi High Court: 'Safe harbour' protection is available to Intermediaries under Information Technology Act, 2000 even in criminal prosecutions

In a significant decision by the High Court of Delhi (“**High Court**”) in *Flipkart Internet Private Limited v. State of NCT of Delhi & Anr.*¹, it has been held that ‘safe harbour’ under Section 79 of the Information Technology Act, 2000 (“**IT Act**”) is available to intermediaries even in cases of criminal prosecution.

Brief Facts

Sanash Impex Private Limited had filed an FIR under Section 63 of the Copyright Act, 1957 and Sections 103/104 of the Trade Marks Act, 1999 before the Economic Offences Wing, New Delhi alleging that Flipkart Internet Private Limited (“**Flipkart**”) and Amazon India are allowing fake/unauthorised resellers to sell fake and unauthorised products of DC Dermacol through their online portal (“**FIR**”).

Against the above FIR, Flipkart filed a petition under Section 482 of the Code of Criminal Procedure, 1973 (“**CrPC**”) for quashing of FIR.

Flipkart’s case

Flipkart, *inter alia*, argued that since it is an “intermediary” under Section 2(w) of the IT Act, it is entitled to exemption from liability (safe harbour) for any information/data hosted by third parties on their platform. Flipkart further argued that in terms of the judgment of Hon’ble Supreme Court of India in *Shreya Singhal v. Union of India*² (“**Shreya Singhal Case**”), until and unless a court order is served upon Flipkart, there was no obligation, as an intermediary, to remove any material from its portal.

Respondents (State and Complainant) case

The Respondents argued that Flipkart cannot not rely upon the *Shreya Singhal Case* as that was a case related to the “freedom of expression” and restrictions under Article 19(2) and the operation of Section 66A of the IT Act. They further argued that the division bench of the High Court in *Myspace Inc. v. Super Cassettes Industries Ltd.*, 2016³ has held that the *Shreya Singhal Case* is not applicable in cases of copyright infringement. Lastly, they argued that there was no necessity of a court order since “actual information” was sent by the complainant to Flipkart, for removal of infringing content.

Findings and Rationale of the High Court

1. The High Court after framing the question that whether the FIR could have been registered at all against Flipkart for offences under the Copyright Act, 1957 and the Trade Marks Act, 1999 interpreted Section 79 and applicability

¹ W.P.(CRL) 1376/2020, CRL.M.As. 12009/2020

² 2015(5)SCC 1

³ SCC OnLine Del 6382

of safe harbour to intermediaries in criminal prosecution and held that compliance with the “due diligence” requirement under Rule 3 of the Information Technology (Intermediary Guidelines) Rules, 2011 (“**IT Guidelines**”) would render the intermediary eligible for exemption from criminal liability also.

2. The High Court held that intermediaries have been granted 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 would be entitled to claim protection under Section 79 of the IT Act.
3. On the issue as to whether the information provided by the complainant would suffice to obligate Flipkart to take down the allegedly offending information/sites/products, the High Court held that the onerous nature of such an obligation is evident when the number of transactions of all nature on the e-market portal were to be considered. To say that “actual knowledge” requiring the removal of access, etc., under Rule 3(2)(d) of the IT Guidelines can be derived on the complaint submitted by a party, without a court order, would be problematic. The claim to a trade mark or copyright is often a stoutly contested affair even before a civil court. The intermediaries are certainly not situated to determine the correctness of a claim by a complainant to a trade mark or copyright.

JSA Comment

This is a significant judgment which recognized that “safe harbour” for intermediaries in terms of Section 79 of the IT Act also extends to criminal prosecution. In the current legal landscape, this judgment assumes significance for marketplace intermediaries, who are being subjected to criminal action/prosecution for hosting third party content.

Information Technology Practice

JSA provides value added legal services across the whole range of innovative technologies. We advise creators, licensors, buyers, sellers and users of information and technology, on all aspects of technology law. JSA has developed an extensive technology practice in response to the global focus on the development of online systems and services. Our strong expertise and long-standing representation of leading software, telecommunications, and media companies have made us uniquely qualified to address the legal challenges associated with information and communication technology. JSA provides advice on highly sophisticated data management, data security and privacy issues. Our depth of experience gives our clients the crucial advantage of consistent and comprehensive, yet practical advice. We have carried out audit and risk assessments, customised global privacy and information management policies, helped create international data transfer strategies, structure and negotiate complex international data transfer agreements. JSA is well positioned to assist clients in managing the ever-increasing threat in cybersecurity. We routinely help clients in creating, managing and maintaining a secure cyber-presence in the face of escalating threats and legal requirements.

This Prism has been prepared by:



Dheeraj Nair
Partner



Manish K. Jha
Partner



Shruti Dass
Senior Associate



14 Practices and
23 Ranked Lawyers



15 Practices and
18 Ranked Lawyers



7 Practices and
2 Ranked Lawyers



IFLR1000 India Awards 2021



Among Top 7 Best Overall
Law Firms in India and
10 Ranked Practices

13 winning Deals in
IBLJ Deals of the Year

6 A List Lawyers in
IBLJ Top 100 Lawyer List



Banking & Financial Services
Law Firm of the Year 2022

Dispute Resolution Law
Firm of the Year 2022

Equity Market Deal of the
Year (Premium) 2022

Energy Law Firm of the Year 2021

10 Practices and
34 Ranked Partners

Banking & Finance Team
of the Year

Fintech Team of the Year

Restructuring & Insolvency
Team of the Year

For more details, please contact km@jsalaw.com

www.jsalaw.com



Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi



This prism is not an advertisement or any form of solicitation and should not be construed as such. This prism has been prepared for general information purposes only. Nothing in this prism constitutes professional advice or a legal opinion. You should obtain appropriate professional advice before making any business, legal or other decisions. JSA and the authors of this prism disclaim all and any liability to any person who takes any decision based on this publication.