

THE CHANGING LANDSCAPE OF INTERMEDIARY LIABILITY FOR E-COMMERCE PLATFORMS: EMERGENCE OF A NEW REGIME

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ABSTRACT *As India becomes the fastest growing market for e-commerce in the world, it is also grappling with the issue of proliferation of counterfeits on e-commerce portals. India’s judicial system has awakened to this predicament and in a spate of judgements, has sought to evolve a mechanism balancing the rights of e-commerce platforms as intermediaries vis-a-vis the rights of brand owners and public interest at large. This article explores the evolution of intermediary liability in India by examining its legal framework, as well as the jurisprudence developed by Indian courts in this regard. It traces the shift in this jurisprudence from the classical ‘free speech’ understanding to the ‘notice and takedown’ regime to a determination of whether e-commerce platforms qualified as ‘intermediaries’ in the first place. It concludes that while new jurisprudence evolved by Indian courts substantially clarifies the framework of intermediary liability vis-à-vis e-commerce platforms, several challenges lie ahead for both brand owners and e-commerce platforms in addressing this issue. It then seeks to understand these challenges in light of the policies proposed to regulate the e-commerce space, and finally recommends a self-regulatory mechanism to combat the online proliferation of counterfeits.*

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I. INTRODUCTION

With the advent of the internet, electronic commerce (‘e-commerce’) has become a driving force of the global economy. The convenience and range of possibilities for consumers, coupled with low costs of inventory management etc., as compared to traditional retail, ensures that the e-commerce industry booms. As per the United Nations Conference on Trade and Development, global e-commerce sales were an estimated USD 29 trillion in 2017, with India in ninth position with sales of USD 400 million.¹ By 2022, e-commerce is projected to become the largest retail channel in the world, surpassing retail outlets for various categories of goods and services.²

As per reports, India is the fastest growing market for e-commerce in the world, worth over USD 83 billion in 2018,³ and is envisaged to grow at 51% per annum to reach up to USD 120 billion in 2020.⁴ E-commerce has provided brand owners a new avenue for sales and the potential to penetrate previously undiscovered consumer segments of the Indian market. Market trends in 2018⁵ and 2019⁶ show that e-commerce growth is driven by the

¹ United Nations Conference on Trade and Development, ‘Lack of digital in development strategies in focus at eCommerce Week’ (2019) <<https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2032>> accessed 13 November 2019.

² ‘What’s New in Retail: Emerging Global Concepts’ (Euromonitor International Report, 2017) <<https://blog.euromonitor.com/e-commerce-is-the-fastest-growing-global-retail-channel-through-2022/>> accessed 13 November 2019; *See also*, Michelle Grant, ‘E-commerce Set for Global Domination – But At Different Speeds’ (*Forbes*, 14 August 2018) <<https://www.forbes.com/sites/michellegrant/2018/08/14/e-commerce-set-for-global-domination/#1c1941bebfaf>> accessed 13 November 2019.

³ United Nations Conference on Trade and Development, ‘India’s digital services exports hit \$83 million says new survey’ (2018) <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1917&Sitemap_x0020_Taxonomy=UNCTAD%20Home;%20-%202045> accessed 13 November 2019.

⁴ ‘E-commerce Industry in India’ (*Indian Brand Equity Foundation*, December 2018) <<https://www.ibef.org/industry/e-commerce.aspx>> accessed 13 November 2019.

⁵ Ameen Khwaja, ‘Tier II, III cities drive e-commerce in India’ *Deccan Herald* (Bengaluru, 31 May 2018) <<https://www.deccanherald.com/opinion/panorama/tier-ii-iii-cities-drive-e-commerce-india-672765.html>> accessed 13 November 2019.

⁶ ‘E-commerce brands focus on Tier 2, 3 shoppers during festivals’ *The Economic Times* (Mumbai, 28 September 2019) <<https://retail.economictimes.indiatimes.com/news/e-commerce/e-tailing/e-commerce-brands-focus-on-tier-2-3-shoppers-during-festivals/71349748>> accessed 13 November 2019.

burgeoning middle classes in Tier II and III cities, especially in the festive seasons,⁷ as e-commerce provides a convenient method of shopping for a variety of products previously unavailable in these cities.

At the same time, it has also provided a convenient and wide platform for the sale of counterfeit products. As per a survey conducted in India, nearly 20%, or one in five consumers, claimed that they had received a counterfeit product from a leading e-commerce website in the preceding six months of the survey.⁸ India's judicial system has also awakened to this proliferation of counterfeits on e-commerce portals, and in a spate of new judgements, begun coming down heavily on several e-commerce platforms which earlier escaped all liability under statutory exemptions granted to intermediaries.

This paper examines the evolution of intermediary liability in India for e-commerce companies. Part I explores the tremendous growth of e-commerce in India, and its expected growth in times to come. In Part II, we highlight the primary laws that govern intermediary liability in India and underline the roles and responsibilities of e-commerce marketplaces. Next, in Part III, we study the jurisprudence evolved by Indian courts in some detail. We begin with analysing the dictum of the Supreme Court of India (**'the Supreme Court'**) vis-à-vis free speech principles, and the subsequent shift towards a notice and takedown regime for infringements of intellectual property. We then take a look at the flurry of decisions cracking down upon e-commerce platforms for intellectual property violations and calling into question their legal status as intermediaries in this regard. Further, we examine the conflict of e-commerce marketplaces with direct selling models and end with an analysis of the recent appeal decision which substantially clarified this highly contentious and entangled jurisprudence. In Part IV, we take a look at proposed amendments to the law which will impact the roles and responsibilities of e-commerce marketplaces, and analyse their gaps. Finally, Part V highlights the challenges that lie ahead for e-commerce marketplaces and proposes a self-regulatory mechanism to combat online counterfeiting by following a balanced approach.

⁷ Peerzada Abrar, 'Festive sale: Tier-II, III cities drive big biz for Flipkart and Amazon' *Business Standard* (New Delhi, 1 October 2019) <https://www.business-standard.com/article/companies/small-cities-usher-in-festive-cheer-for-flipkart-amazon-with-big-business-119093001416_1.html> accessed 13 November 2019; *See also*, 'Tier-2 customers driving the \$14.5 billion e-commerce industry in India: RedSeer report' *Money Control* (Mumbai, 17 January 2018) <<https://www.moneycontrol.com/news/business/startup/tier-2-customers-driving-the-14-5-billion-e-commerce-industry-in-india-redseer-report-2485383.html>> accessed 13 November 2019.

⁸ 'Counterfeit or fake products on e-Commerce sites is a much bigger problem than we thought' *Local Circles*, 1 November 2018) <<https://www.localcircles.com/a/press/page/fake-products-on-ecommerce-sites#.XIqICGzblU>> accessed 13 November 2019.

II. APPLICABLE LAWS

A. The Information Technology Act, 2000

The provisions pertaining to intermediary liability were introduced by way of an amendment⁹ to the Information Technology Act, 2000 ('the IT Act') in 2008, when the CEO of Baze.com, an e-commerce marketplace, was arrested after an obscene video clip was offered for sale on the said e-commerce portal.¹⁰ Under Section 2(I)(w) of the IT Act, an 'intermediary' is defined as any person who receives, stores or transmits an electronic record on behalf of another person, or provides any service with respect to that record, and includes online auction sites and online market-places.¹¹

The primary provision pertaining to intermediary liability in India is Section 79 of the IT Act.¹² As per this provision, an intermediary will not be liable for any third-party information made available or hosted by them, provided that the function of the intermediary is limited to providing access, and the transmission is not initiated, selected or modified by it. To claim such exemption, it is also necessary that the intermediary observes 'due diligence' while discharging its duties as provided by the IT Act or other guidelines.¹³ However, as per Section 79(3) of the IT Act, an intermediary will not be exempted from liability if it has induced, conspired, abetted or aided in the commission of the unlawful act, or if it fails to expeditiously remove or disable access to the unlawful material upon receiving 'actual knowledge' or on being notified by the appropriate government agency about the said data being used to commit the unlawful act.¹⁴

The exemption granted under Section 79 of the IT Act is also referred to as a 'safe harbour' provision for intermediaries. In the context of e-commerce, some have termed these provisions as a legal 'subsidy'¹⁵ extended towards e-commerce companies, allowing them to scale rapidly, with relatively low costs and little legal compliance involved.

⁹ See, the Information Technology (Amendment) Act 2008.

¹⁰ Nikhil Pahwa, 'A serious and imminent threat to the open Internet in India' (*MediaNama*, 22 January 2019) <<https://www.medianama.com/2019/01/223-a-serious-and-imminent-threat-to-the-open-internet-in-india/>> accessed 13 November 2019.

¹¹ The Information Technology Act 2000, s 2(1)(w).

¹² The Information Technology Act 2000, s 79.

¹³ The Information Technology Act 2000, s 79(2)(c).

¹⁴ The Information Technology Act 2000, s 79(3).

¹⁵ Prashant Reddy T, 'Liability, Not Encryption, Is What India's New Intermediary Regulations Are Trying to Fix' (*The Wire*, 28 December 2018) <<https://thewire.in/government/liability-not-encryption-is-what-indias-new-intermediary-regulations-are-trying-to-fix>> accessed 13 November 2019.

There are two key phrases used in the provision – ‘due diligence’ and ‘actual knowledge’. It would not be unfair to say that the entire regime of intermediary liability revolves around demarcating the thresholds of ‘due diligence’ and ‘actual knowledge’, as we will see in the jurisprudence below.

B. Information Technology (Intermediaries Guidelines) Rules, 2011

In 2011, four sets of rules were notified under the IT Act, including the Information Technology (Intermediaries Guidelines) Rules, 2011 (‘the Intermediaries Guidelines’).

In addition to the standards already laid out in the IT Act, Rule 3 of the Intermediaries Guidelines specifies the due diligence to be observed by an intermediary. An intermediary is directed to publish rules and regulations, a privacy policy and a user agreement for its users.¹⁶ Inter alia, the rules and regulations must inform the users not to share any information which infringes any patent, trademark, copyright or other proprietary rights.¹⁷ Further, the intermediary must, upon obtaining knowledge by itself or being provided ‘actual knowledge’ by an affected person in writing, disable access to such information within thirty-six hours.¹⁸

III. THE JURISPRUDENCE OF INTERMEDIARY LIABILITY

A. Shreya Singhal and its Aftermath

*Shreya Singhal v. Union of India*¹⁹ is a landmark case which arose when the police arrested two women for posting allegedly offensive and objectionable comments about the death of a political leader on Facebook, leading to their arrest under Section 66A²⁰ of the IT Act, which in turn resulted in a challenge to the constitutionality of several provisions of the IT Act. While

¹⁶ The Information Technology (Intermediaries Guidelines) Rules 2011, r 3.

¹⁷ The Information Technology (Intermediaries Guidelines) Rules 2011, r 3(2).

¹⁸ The Information Technology (Intermediaries Guidelines) Rules 2011, r 3(4).

¹⁹ *Shreya Singhal v Union of India* (2013) 12 SCC 73 (*Shreya Singhal*).

²⁰ The Information Technology Act 2000, s 66A: Punishment for sending offensive messages through communication service, etc.

- Any person who sends, by means of a computer resource or a communication device, —
- (a) any information that is grossly offensive or has menacing character; or
 - (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,
 - (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of

Section 66A was struck down in its entirety, the Supreme Court read down Section 79(3)(b) of the IT Act and Rule 3(4) of the Intermediaries Guidelines, interpreting the word ‘knowledge’ to mean knowledge only by means of a court order or government notification. Consequently, intermediaries were not liable to takedown anything from their platforms on the basis of a mere user complaint not backed by a court order. Prior to this judgement, ‘actual knowledge’ under the IT Act and the Intermediaries Guidelines could potentially be interpreted as the intermediary exercising its own judgement, and playing judge, jury and executioner in adjudicating what constitutes ‘unlawful information’. This adjudicatory role must be played by a court of law and not a private body in order to prevent a chilling effect on online free expression through private censorship.²¹

This landmark judgement radically altered the threshold of ‘knowledge’ for holding an intermediary liable for any content it hosted or stored. While the judgement was written in the context of free speech and the liability of intermediaries such as Facebook, the decision was equally applicable to e-commerce marketplaces. Resultantly, e-commerce marketplaces were not obligated to take down listings that brand owners claimed were counterfeit, in the absence of a court order. Accordingly, the due diligence obligations of e-commerce marketplaces in the context of counterfeiting were nearly zero, unless otherwise specified under relevant rules, regulations and policies or directed by a court.

B. Evolution of the ‘Notice and Takedown Regime’

In *MySpace Inc. v. Super Cassettes Industries Ltd.*,²² the Division Bench of the Delhi High Court adjudicated upon the parameters and thresholds of intermediary liability with respect to copyright laws, and held that intermediaries must be provided with ‘specific knowledge’ and that merely a general awareness or apprehension of an intermediary that the content may be infringing will not amount to ‘knowledge’ and make the intermediary liable.

The court considered the holding in *Shreya Singhal*²³ and observed that this judgement was rendered in the context of the restrictions under Article

such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

²¹ See, Jyoti Panday, ‘The Supreme Court Judgment in Shreya Singhal and What It Does for Intermediary Liability in India?’ (*The Centre for Internet and Society*, 11 April 2015) <<https://cis-india.org/internet-governance/blog/sc-judgment-in-shreya-singhal-what-it-means-for-intermediary-liability>> accessed 13 November 2019.

²² *MySpace Inc v Super Cassettes Industries Ltd* 2016 SCC OnLine Del 6382 : (2017) 69 PTC 1 (*MySpace*).

²³ *Shreya Singhal* (n 19).

19(2) of the Constitution of India (**'the Constitution'**),²⁴ i.e. the freedom of speech, and that in the case of copyright laws, it was sufficient for MySpace to receive specific knowledge of the infringing works from the content owner without the necessity of a court order. Therefore, the court held that an intermediary, on receiving 'actual knowledge' or obtaining knowledge from the affected person in writing or through email, was to act within 36 hours of receiving such information and disable access to the infringing content. In this judgment, the Division Bench of the Delhi High Court therefore implemented a 'notice and takedown regime' for intellectual property rights issues and held that the strict free speech standards laid down in *Shreya Singhal* were not required to be applied to intellectual property rights violations, specifically those of copyright.

In the 2017 case of *Kent RO Systems Ltd. v. Amit Kotak*,²⁵ the plaintiff instituted a suit against a seller on eBay, as well as eBay itself, for offering for sale of water purifiers that infringed the designs of the plaintiff. The plaintiffs alleged that as per the IT Act and Intermediaries Guidelines, intermediaries like eBay were expected to observe due diligence such as informing their sellers not to offer infringing products for sale and taking steps to avoid the sale of such products. eBay claimed in its response that it had removed all products complained of and undertook to continue to do so in the future on receipt of any complaint from the plaintiff. eBay contended that it was exempted from liability as it expeditiously removed the infringing products on being notified by the court order, and thus, discharged its due diligence. However, the plaintiffs asserted that once intimated of counterfeiting, the obligation of eBay extends not just to removing that particular product, but also to ensuring that no other infringing products are being hosted on its website.

The Single Judge held that the Intermediaries Guidelines only requires an intermediary to remove infringing listings upon receiving actual knowledge of the same, and that the intermediary cannot be expected to remove infringing products before they have even been complained of. The court held that imposing the obligation of pre-screening on an intermediary effectively converts it into a body that determines whether there is any infringement of intellectual property rights, a legal and technical question, which

²⁴ The Constitution of India 1950, art 19(2): Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

²⁵ 2017 SCC OnLine Del 7201 : 2017 (69) PTC 551.

the intermediary cannot adjudicate upon. The Single Judge also observed that the hosting of information on eBay being automatic and without human intervention, it was not possible to direct eBay to screen all listings for violation of IP, as this would bring its business to a halt. Further, with respect to the plaintiff's contention that it cannot be expected to be so vigilant all the time to keep looking for infringing products on eBay, the court held that similarly, even eBay cannot be expected to exercise such vigilance.

This judgement was appealed by the plaintiff,²⁶ where it argued that the pattern of behaviour and conduct of eBay disclosed its knowledge of infringement. The Division Bench held that the observations made by the Single Judge virtually foreclosed the right of the plaintiffs to prove if and how the knowledge threshold was met. Accordingly, the plaintiff was allowed the liberty to establish the 'knowledge' threshold mandated by Section 79(3)(b) by leading evidence at trial. However, since no final judgement has been rendered in this matter yet, it is unclear what factual and evidentiary thresholds may be used by the court to determine eBay's knowledge of infringement.

C. The Decision in *Christian Louboutin: A Gamechanger*

In *Christian Louboutin SAS v. Nakul Bajaj*,²⁷ the plaintiff brought suit against darveys.com, a website selling imported luxury products in India, on the grounds that Darveys was offering for sale counterfeit and impaired products which infringed its trademarks.

Darveys inter alia claimed that even if there was infringement/counterfeiting, it would not be liable as it was an intermediary whose role was limited to booking orders to various sellers across the globe and dispatching the products to their customers. The question before the court was whether Darveys was an intermediary and thus, exempt from liability for trademark infringement. In this regard, the court sought to take a deeper look at the business model and policies of Darveys. It observed that Darveys was a members' only website which arranged for the transport of products to the customers. Darveys made claims that all its products were 100% genuine, so much so that its authenticity guarantee extended up to the return of twice the money in case the product turned out to be counterfeit. It also placed a seal of authenticity guarantee on the website and claimed that quality checks were

²⁶ *Kent RO Systems (P) Ltd v eBay India (P) Ltd* FAO (OS) (COMM) 95/2017 (Del) (*Kent RO*).

²⁷ *Christian Louboutin SAS v Nakul Bajaj* 2018 SCC OnLine Del 12215 : (2018) 76 PTC 508 (*Christian Louboutin*).

carried out by a third-party team of trained experts who examined the products before shipping them to customers. Notably, Darveys did not reveal its list of foreign sellers from whom the products were sourced.

The court observed that the policies of Darveys clearly show that it was responsible for listing, pricing, transporting and conducting quality tests on the products. Therefore, Darveys exercised complete control of inventory, and its role was much more than that of an intermediary, i.e. the mere provision of a technical platform as defined under the IT Act. Accordingly, it held that not all e-commerce websites can be categorised as intermediaries, and laid down a list of factors such as transporting, packaging, warehousing, providing quality assurance and authenticity guarantees, advertising the products on the platform, providing call centre assistance etc., which would indicate that the e-commerce entity had crossed the line from an ‘intermediary’ to an ‘active participant’, and could thus be liable for its role in the infringing acts. In the court’s opinion, e-commerce marketplaces providing such logistical support must not be automatically deemed as intermediaries as their conduct cannot be termed as inactive, passive or merely technical, and they are active participants in the trade.

The court also relied on *MySpace*²⁸ and interpreted the judgement of *Shreya Singhal*²⁹ as being in the context of free speech and not of intellectual property infringements in e-commerce. The court noted that in *Shreya Singhal*, Section 79(3)(b) of the IT Act was read down subject to the caveat that a court order or government notification would be necessary in respect of unlawful acts mentioned in Article 19(2) of the Constitution (such as allegedly seditious, defamatory, inciteful or indecent content etc.). Thus, the high threshold of receiving a court order or government notification to obtain ‘actual knowledge’ was not applicable in respect of intellectual property violations. Further, it held that the ‘due diligence’ criterion provided under the IT Act must be construed broadly and not restricted merely to the guidelines themselves. Accordingly, Darveys was held liable for trademark infringement, and could not take shelter under the safe harbour provisions of the IT Act.

For brand owners, this judgement was a welcome development as it distinguished between intermediaries and e-commerce companies, which would help prevent the misuse of safe harbour provisions by active participants seeking to escape liability.

²⁸ *MySpace* (n 22).

²⁹ *Shreya Singhal* (n 19).

However, for intermediaries, the judgement provided several insurmountable challenges. *First*, no rationale is provided for the list of factors which determine whether the platform is an intermediary or not, despite most e-commerce entities engaging in one or more of these activities.³⁰ *Second*, it is not clear which factors are to be construed positively for the intermediary and which are to be negative, since identification of the seller etc. surely cannot be a negative factor for a platform. Non-identification of the seller was one of the reasons the court held that Darveys was not an intermediary. *Third*, there is no clarity on whether a defaulting intermediary is liable for primary or secondary infringement. *Fourth*, the court did not elaborate on its observation that *Shreya Singhal* will not apply to e-commerce platforms as there is no violation of the right to speech. In fact, the sale and listing of products on online platforms qualifies as commercial speech which is also protected within the ambit of free speech, albeit to a lesser degree when compared with political speech.³¹ Instead of the court distinguishing or reading down the judgement in *Shreya Singhal* in the context of commercial speech, it negated its application to e-commerce in toto. *Fifth*, the judgement implies that the phrase “*any service under that record*” provided in the IT Act and Intermediaries Guidelines (which permits the intermediary to provide ancillary services) can only be with respect to electronic record and that no physical services such as transport, delivery etc. are permissible. *Sixth*, the holding that intermediaries have ‘broader responsibilities’ which go above and beyond the thresholds laid out in the Intermediaries Guidelines lacks sufficient clarity and specificity.

The judgement also presented a direct dichotomy with the Guidelines for Foreign Direct Investment in E-Commerce (‘**the FDI Guidelines**’) of 2016³² and 2018.³³ As per the said guidelines, there are two models of e-commerce: marketplace and inventory based. A marketplace model of e-commerce is that which provides an information technology platform to facilitate transactions between a buyer and a seller.³⁴ An inventory based model is that where the inventory of goods and services is owned by the e-commerce entity and

³⁰ Divij Joshi, ‘Delhi High Court Examines Intermediary Liability for Trademark Infringement (Part – II)’ (*SpicyIP*, 19 November 2018) <<https://spicyip.com/2018/11/delhi-high-court-examines-intermediary-liability-for-trademark-infringement-part-ii.html>> accessed 13 November 2019.

³¹ *Indian Express Newspapers (Bombay) (P) Ltd v Union of India* (1985) 1 SCC 641 : AIR 1986 SC 515; *Tata Press Ltd v Mahanagar Telephone Nigam Ltd* (1995) 5 SCC 139.

³² Guidelines for Foreign Direct Investment (FDI) on E-Commerce, Press Note No. 3 (2016 Series), dated 9 March 2016.

³³ Review of the Policy on Foreign Direct Investment (FDI) in e-commerce, Press Note No. 2 (2018 Series), dated 26 December 2018 (FDI Guidelines – 2018 Series).

³⁴ FDI Guidelines – 2018 Series, para 5.2.15.2.2 (iv).

sold to customers directly.³⁵ As per the FDI Guidelines 2018, a marketplace model exercising ownership over the inventory will render it to be an inventory based model.³⁶ A plain reading of this shows that companies having an inventory based model will not be deemed as intermediaries, since they own the inventory and play an active role by directly selling to the customer. However, the ambiguity arises with respect to the marketplace based model of e-commerce. As per the FDI Guidelines, an e-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre assistance, payment collection and other services, and facilitate payments for sale in accordance with the Reserve Bank of India guidelines in an arms-length manner.³⁷

Notwithstanding this, the judgement in *Christian Louboutin* indicates that these factors would go to show that the platform is not an intermediary. However, this aspect of the judgement was in the context of Darveys, an inventory based e-commerce website which was not an intermediary in any case. Accordingly, the judgement should not be read to mean that safe harbour provisions cannot be availed by any e-commerce marketplaces facilitating such ancillary services, which they are permitted to do under the FDI Guidelines. The removal of intermediary status for marketplace e-commerce companies would effectively bring the industry to a halt, as appropriately pointed out by the Single Judge in *Kent RO Systems Ltd.*³⁸

D. On the Heels of Christian Louboutin

Post the judgement in *Christian Louboutin*,³⁹ courts began to apply the principles enunciated therein even to e-commerce marketplaces (as opposed to the inventory based Darveys). In *L'Oreal v. Brandworld*,⁴⁰ as well as *Skullcandy v. Shri Shyam Telecom*,⁴¹ the respective plaintiffs inter alia sued the proprietor of shopclues.com, an online marketplace, on the grounds that it was not entitled to safe harbour protection as its role was much more than that of an intermediary. The court observed that several factors, such as the disclosure of sellers' details on the invoice and website, the existence of a takedown policy for intellectual property infringement etc., pointed to the fact that it was an intermediary. However, several other features, such as a 100% authenticity guarantee, repeated sales of counterfeits, the conduct of

³⁵ FDI Guidelines – 2018 Series, para 5.2.15.2.2 (iii).

³⁶ FDI Guidelines – 2018 Series, para 5.2.15.2.4 (iv).

³⁷ FDI Guidelines – 2018 Series, paras 5.2.15.2.4 (iii) and (ix).

³⁸ *Kent RO* (n 26).

³⁹ *Christian Louboutin* (n 27).

⁴⁰ 2018 SCC OnLine Del 12309 : (2018) 254 DLT 433.

⁴¹ 2018 SCC OnLine Del 12308 : (2019) 77 PTC 155.

the website in not taking measures to stop sales of counterfeits despite so many infringement actions, and the fact that the website had a ‘replica’ window which encouraged sellers to feature lookalikes/counterfeits, indicated abetment, which was certainly not condonable. Accordingly, the website was disqualified from exemption under Section 79 of the IT Act.

Inter alia, ShopClues was directed to seek the concurrence of the respective plaintiffs prior to uploading a product bearing the plaintiff’s marks. Further, upon being made aware of any counterfeit product being sold, it was to notify the seller and take down the product, in case the seller was unable to provide evidence that the product is genuine.

Both these orders of the Single Judge were appealed.⁴² The Division Bench held that the findings of the Single Judge that ShopClues was not an intermediary, and the observations of “*proliferation of counterfeits on ShopClues*”, “*lack of preventive measures on behalf of ShopClues despite repeated infringement actions against it*” and “*its ‘replica’ window encourages sellers to post lookalike products*” were rendered without any evidence in this regard being led by the plaintiff, and without giving ShopClues an opportunity to challenge this evidence. ShopClues also averred that the replica window was not for counterfeit products but for replicas of non-protected products. The court ruled that a trial was necessary in the matter to come to a conclusion as to the intermediary status of ShopClues and restored both suits to the Single Judge for further proceedings.

Apart from this judgement, in *Luxottica Group SpA v. Mify Solutions (P) Ltd.*,⁴³ the Delhi High Court held that the e-commerce marketplace kaunsa.com was not a ‘pure intermediary’, even in the absence of striking factors such as a replica window. The court observed that factors such as the collection of payment on behalf of sellers and the provision of authenticity guarantees were sufficient to strip a platform of its intermediary status.

E. Conflicts with the Direct Selling Model

In *Amway India Enterprises (P) Ltd. v. IMG Technologies (P) Ltd.*,⁴⁴ the Single Judge of the Delhi High Court passed interim orders in several clubbed law suits filed by direct selling entities such as Amway, Oriflame and Modicare against e-commerce marketplaces such as Amazon, Flipkart,

⁴² *Clues Network (P) Ltd v L’Oreal* 2019 SCC OnLine Del 7984 : (2019) 78 PTC 251 (*Clues Network*).

⁴³ 2018 SCC OnLine Del 12307 : (2019) 77 PTC 139.

⁴⁴ *Amway India Enterprises (P) Ltd v IMG Technologies (P) Ltd* 2019 SCC OnLine Del 9061 : (2019) 260 DLT 690 (*Amway*).

Snapdeal, 1MG and Healthkart. The plaintiffs claimed that they distributed healthcare products through a 'direct selling model' whereby they entered into distributorship agreements with their network of direct sellers who were supposed to sell their products directly to the end customer, and were prohibited from selling these products either through retail stores or e-commerce marketplaces. Further, the plaintiffs claimed that their business was regulated by the Direct Selling Guidelines issued by the Central Government, as per which, direct sellers were prohibited from selling on e-commerce marketplaces without approval from the direct selling entities.⁴⁵ Therefore, the grievance of the plaintiffs was that e-commerce marketplaces were liable for tortious interference with their contracts by enabling the sale of the plaintiff's products through their platforms. This, they claimed, violated both their contracts with their direct sellers as well as the Direct Selling Guidelines (which they maintained were legally binding upon them) and caused huge financial losses to them and their direct sellers, apart from tarnishing their brand.

The Single Judge of the Delhi High Court held that the Direct Selling Guidelines were 'law' and that they were applicable not just to the direct sellers, but also to e-commerce marketplaces. The court ruled that even in case of genuine products, if the source was dubious or untraceable to the direct seller, such sales were unauthorised by the plaintiff. However, in order to sell on the platform, the seller must be an authorised seller, and have the consent of the trademark owner. Further, the court observed that as per the policies of the concerned platforms, unauthorised and tampered goods could not be sold. Since some instances of tampering were found in the premises of the sellers, the court concluded that the platforms were permitting the sale of tampered products. It held that the return policies and warranties offered by the platforms themselves constituted an impairment of the goods. It also noted that the use of the plaintiffs' trademarks by these platforms for advertising, promotion and meta-tagging to throw up search results was unjustified.

Similar to its stance in several previous cases, the court placed a great deal of significance on the value-added services provided by platforms such as transporting, delivering and advertising. In this context, the court held that the FDI Guidelines (and the definitions therein) would be considered only

⁴⁵ Advisory to State Governments/Union Territories on Model Guidelines on Direct Selling 2016, cl 7.6: Any person who sells or offers for sale, including on an e-commerce platform / marketplace, any product or service of a Direct Selling Entity must have prior written consent from the respective Direct Selling Entity in order to undertake or solicit such sale or offer.

once the ‘actual role’ of e-commerce marketplaces, i.e. active or passive, is established. The due diligence required from a platform would include setting up proper policies and performing takedowns upon receiving ‘notice’ from the brand owners. The platforms must also implement these policies in earnest, and non-compliance with the same would take them out of the ambit of safe harbour.

Interestingly, the court also held that the platforms were liable for tortious interference with the contracts between the plaintiffs and their direct sellers, since they allowed the sale of the plaintiffs’ products despite allegedly being aware of these contracts. The platforms have an obligation to maintain the sanctity of contracts, and the very architecture of these platforms involved ‘inducing’ the direct sellers to violate their contracts. The court restrained platforms from selling the plaintiffs’ products, except by those sellers who produce written permission/consent of the plaintiff, and instructed the platforms to take down any listings pointed out by the plaintiff in the interim within 36 hours.

This judgement further entangled the jurisprudence surrounding e-commerce marketplaces. Most importantly, the judgement continues to hold that e-commerce marketplaces are not ‘passive platforms’ because they carry out ancillary services, as discussed earlier. The court failed to appreciate that advertising and promotion are automated processes that do not involve human intervention, and are thus, not even within the knowledge of the intermediary purportedly performing such acts. Further, it placed an onus on e-commerce marketplaces to ‘enforce’ their policies on their users and defined ‘due diligence’ to mean pre-screening and policing of the platform. The threshold applied was that of ‘notice’ or a general awareness of the sale of infringing products, and not ‘actual knowledge’ (by means of a court order or government notification). Therefore, the obligations of policing the brand owner’s trademarks, preserving the sanctity of the brand owner’s or manufacturer’s business model as well as enforcing contracts between the brand owner and other third parties were placed entirely on the platforms, with no efforts required from the brand owners or manufacturers.

F. The Appellate Court Clarifies

This order of the Single Judge in *Amway Enterprises*⁴⁶ was appealed in *Amazon Seller Services (P) Ltd. v. Amway India Enterprises (P) Ltd.*⁴⁷ and set aside. The Division Bench held that the Direct Selling Guidelines were

⁴⁶ *Amway* (n 44).

⁴⁷ 2020 SCC OnLine Del 454 : (2020) 267 DLT 228 (*Amazon Seller Services*).

only ‘model guidelines’ and could not be considered binding law. It also held that the established principle of exhaustion⁴⁸ was squarely applicable in the present matter, and that sellers on e-commerce platforms were free to re-sell any genuine and untampered products without the consent of the manufacturer or trademark holder. The court further held that the suits were not filed for trademark infringement or passing off, and that Oriflame and Amway were not even owners of their respective trademarks and were accordingly not entitled to these reliefs in any case.

Pertinently, the court held that the Single Judge misinterpreted Section 79 of the IT Act in concluding that it was applicable only to ‘passive’ intermediaries, since the legislation did not strike a distinction between active and passive intermediaries for safe harbour protection. Carrying forward its previous decision in *Clues Network*,⁴⁹ the court effectively set aside the dictum in *Christian Louboutin*⁵⁰ and held that the value-added services provided by marketplaces did not dilute their safe harbour protection as online marketplaces were expressly included in the definition of ‘intermediaries’ under the IT Act. The court acknowledged that the FDI Guidelines 2018 allowed marketplaces to provide these services, and that therefore, there was prima facie merit in the marketplace’s contention that packaging and transporting products is not contrary to its role as an intermediary. With respect to tortious interference, the court held that the mere knowledge of contractual stipulations is insufficient to establish this tort and that active efforts on part of the e-commerce marketplace will have to be demonstrated to make a viable case for the same.

Finally, the court held that the evidence on record had several holes and did not prima facie prove that the platforms were tampering with products. The intermediary status of online marketplaces as well as their alleged tortious interference were questions of trial which could not be determined at the interlocutory stage. The case of the direct selling entities failed the tests of prima facie case, balance of convenience and irreparable loss and injury, necessary for obtaining an interim injunction, and thus, the order of interim injunction was set aside. This judgement provides some much-needed clarity in the context of intermediary liability for e-commerce marketplaces, especially with respect to the permissibility of value-added services. It also confirms that the principle of exhaustion will be applicable to e-commerce marketplaces and that sellers are free to sell any products in the interest of a free market. Further, it clarifies that sweeping observations on an

⁴⁸ See, *Kapil Wadhwa v Samsung Electronics Co Ltd* (2013) 53 PTC 112 (*Kapil Wadhwa*).

⁴⁹ *Clues Network* (n 42).

⁵⁰ *Christian Louboutin* (n 27).

e-commerce marketplace's intermediary status cannot be made on the basis of extraneous factors, and that the same must be decided after a trial.

IV. PROPOSED AMENDMENTS TO THE INTERMEDIARY LIABILITY REGIME PERTAINING TO E-COMMERCE

A. Draft Information Technology Intermediaries Guidelines (Amendment) Rules, 2018⁵¹

The Draft Information Technology Intermediaries Guidelines (Amendment) Rules, 2018 ('the Rules') largely pertain to the cooperation of intermediaries with law enforcement agencies. The Rules suggests the removal of Rule 3(4) of the Intermediaries Guidelines⁵² and instead proposes a new Rule 3(8), whereby intermediaries will be required to takedown information relatable to Article 19(2) in the interests of the sovereignty and integrity of India, public order, decency, morality, defamation etc., upon receiving a court order or being notified by the appropriate government. In contrast, as per the proposed Rule 3(9), intermediaries are required to deploy 'technology-based automated tools' or 'appropriate mechanisms' to proactively identify and remove or disable public access to 'unlawful information or content'. The term 'unlawful information or content' is vague as it is neither defined in the IT Act nor the Rules, and thus, the scope of the intermediary's duty in this regard is ambiguous. This term also implies that the burden of adjudicating what is 'unlawful' falls upon automated technology developed and used by private actors, which could result in arbitrary takedowns of content.⁵³

The implementation of this rule will likely lead to a takedown 'overdrive' as the intermediary will have a strong incentive to takedown even lawful content by way of abundant caution to avoid costly legal proceedings.⁵⁴ This

⁵¹ See, the Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 (Intermediaries Rules 2018).

⁵² Intermediaries Rules 2018, r 3(4): 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.

⁵³ See, Gurshabad Grover and others, 'Response to the Draft of The Information Technology [Intermediary Guidelines (Amendment) Rules] 2018' (*The Centre for Internet and Society*, 31 January 2019) <<https://cis-india.org/internet-governance/resources/Intermediary%20Liability%20Rules%202018.pdf>> accessed 13 November 2019.

⁵⁴ See, Rishabh Dara, 'Intermediary Liability in India: Chilling Effects on Free Expression on the Internet' (*The Centre for Internet and Society*, 10 April 2012) <<https://cis-india.org/>

tendency can in turn lead to ‘censorship by proxy’ and have a chilling effect on free speech as well as free trade (in the context of e-commerce).⁵⁵ As per this rule, e-commerce intermediaries would be expected to carry out proactive sweeps of their portals, hire teams for the said monitoring and essentially undertake the burden of enforcing the trademarks of brand owners, which is completely contrary to the set principle that it is the onus of the proprietor to enforce his own trademarks. With Rule 3(4) removed, there will be no scope for the ‘affected person’ (brand owner) to write to the intermediary and demand takedowns of infringing content within 36 hours. While pro-active monitoring for intermediaries may be justified with respect to issues of grave public importance, such as pre-natal sex determination,⁵⁶ the same threshold cannot be applied to trademark infringement on e-commerce websites, which involves the proprietary rights of brand owners.

Even though intermediaries such as YouTube employ automated video identification technology known as Content ID,⁵⁷ these automated tools are highly capital intensive⁵⁸ and will act as a major barrier to entry for homegrown start-ups in the e-commerce space. Further, it is yet to be seen how feasible these tools will be once online marketplaces begin to carry out such assessments for hundreds and thousands of trademarks from across the world.⁵⁹ Additionally, the accuracy of automated technologies is not yet widely known, and there exists little clarity on both accountability in case of failure and oversight of decisions made by these automated tools.⁶⁰

internet-governance/intermediary-liability-in-india> accessed 13 November 2019.

⁵⁵ Grover (n 53) 20; *See*, Seth F Kreimer, ‘Censorship by Proxy: the First Amendment, Internet Intermediaries, and the Problem of the Weakest Link’ (2006) 155 *University of Pennsylvania Law Review* 11.

⁵⁶ *See*, *Sabu Mathew George v Union of India* (2018) 3 SCC 229 : AIR 2018 SC 578. Here, the Supreme Court directed search engines such as Google, Yahoo and Bing to auto-block advertisements for pre-natal sex selection as an interim measure.

⁵⁷ ‘How Content ID works’ (*YouTube*, 30 September 2015) <<https://support.google.com/youtube/answer/2797370?hl=en-GB>> accessed 13 November 2019.

⁵⁸ Nehaa Chaudhari, ‘View: Draft e-commerce policy will wreak havoc on Indian startups’ *The Economic Times* (Mumbai, 16 March 2019) <<https://economictimes.indiatimes.com/news/economy/policy/view-draft-e-commerce-policy-will-wreak-havoc-on-indian-startups/articleshow/68432844.cms>> accessed 13 November 2019.

⁵⁹ Suneeth Kartaki and others, ‘India: Comments On The Draft National E-Commerce Policy’ (*Mondaq*, 23 April 2019) <<http://www.mondaq.com/india/x/801170/international+trade+investment/Comments+On+The+Draft+National+ECommerce+Policy>> accessed 13 November 2019.

⁶⁰ Grover (n 53).

B. Draft National E-Commerce Policy, 2019⁶¹

The Department for Promotion of Industry and Internal Trade released the Draft National E-Commerce Policy (**‘the Draft Policy’**) for public consultation and comments in February 2019. The primary objective of the Draft Policy is leveraging the benefits of the digital economy and creating a regulatory framework for various stakeholders, in addition to securing data privacy, consumer protection and the promotion of a level playing field for micro, small and medium enterprises and start-ups.⁶²

Chapter III (C) of the Draft Policy pertains to counterfeiting and requires e-commerce entities to disclose seller details, ensure that sellers provide an undertaking as to the genuineness of their goods, and provide financial disincentives to sellers found selling counterfeit products. These measures are reasonable and will help to disincentivise the sale of counterfeit products online. Further, in line with the decision in *Christian Louboutin*⁶³ and its successive judgements, the Draft Policy lays down that trademark owners shall have the option to register themselves with e-commerce platforms, which must inform trademark owners whenever a product bearing their trademark is uploaded for sale.⁶⁴ Moreover, in case brand owners so desire, e-commerce platforms shall not list or offer for sale any of their products without prior concurrence.⁶⁵

Additionally, in case of ‘high value’ goods, cosmetics and goods having an impact on public health, marketplaces will be required to seek the authorisation of trademark owners before even listing the product.⁶⁶ As per the Draft Policy, although the post-sale delivery of goods is the responsibility of the seller, in case a customer makes a complaint to the effect that the product is a counterfeit, marketplaces will be liable to return the amount paid by the customer, and to cease to host the counterfeited product on their platforms.⁶⁷ Marketplaces will also have to inform the brand owner of the said complaint within 12 hours of its receipt, and takedown the listing if the seller is unable to provide evidence that the product is genuine.⁶⁸

⁶¹ See, Draft National e-Commerce Policy 2019 <https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf> accessed 13 November 2019.

⁶² ‘National E-commerce Policy, 2019 – Draft’ (*PricewaterhouseCoopers*, 26 February 2019) <https://www.pwc.in/assets/pdfs/news-alert-tax/2019/pwc_news_alert_26_february_2019_national_ecommerce_policy_draft.pdf> accessed 13 November 2019.

⁶³ *Shreya Singhal* (n 19).

⁶⁴ Draft National e-Commerce Policy 2019, para 3.4.

⁶⁵ Draft National e-Commerce Policy 2019, para 3.12.

⁶⁶ Draft National e-Commerce Policy 2019, para 3.13.

⁶⁷ Draft National e-Commerce Policy 2019, para 3.16.

⁶⁸ Draft National e-Commerce Policy, para 3.14.

Several of these aspects of the Draft Policy are problematic for the following reasons. *First*, the Draft Policy does not differentiate between e-commerce entities that are marketplace based and those that are inventory based. In fact, the policy effectively removes intermediary protection for all e-commerce platforms, by requiring them to play a more active role, in clear violation of the Intermediaries Guidelines.⁶⁹ *Second*, it promotes trade channel monopolisation by allowing brand owners to choose where their products will be sold, which is contrary to Section 30(3) of the Trade Marks Act, 1999. This also violates the principle of exhaustion, as per which the trademark owner's rights are exhausted once the goods are put into the market, and the consent of the trademark owner for reselling of goods (unless impaired) is implied.⁷⁰ *Third*, it carves out a different set of rules and creates a monopoly for certain kinds of products, such as 'high value' products without defining the term or setting any threshold of price of the product. Similarly, 'goods having an impact on public health' is also not defined, and could potentially include all drugs, tonics, supplements and food items. *Fourth*, the Draft Policy includes trademark licensees in the definition of 'trade mark owners' and gives them equal rights to enforce the trademarks, which is contrary to Section 28(1) of the Trade Marks Act, 1999, wherein only trademark owners have the right to obtain relief in respect of infringement. *Fifth*, it fails to account for the practical working of e-commerce marketplaces, where the sellers themselves create listings of products, and it is thus not feasible to have the intermediary take permission from brand owners before listing products, as such an arrangement would be nearly impossible to implement, as discussed above. *Sixth*, it discriminates between physical retail hypermarkets and e-commerce marketplaces, since the former is not required to seek any authorisation from the brand owner or take products off its shelves on the basis of a single customer complaint as to counterfeiting.

If the Draft Policy comes into effect, it will severely choke the rising success of e-commerce in India. The capital-intensive regulatory compliances required to pro-actively police counterfeiting, coupled with the shrinking list of products that e-commerce marketplaces are actually allowed to sell due to interference from brand owners, will ensure the decline of this otherwise thriving industry. Further, it will lead to a situation where e-commerce

⁶⁹ Asheeta Regidi, 'Draft E-Commerce Policy: A Problematic Revision Of Intermediary Rules For Trademark And Copyright Liability' *FirstPost* (Mumbai, 28 February 2019) <<https://www.firstpost.com/tech/news-analysis/draft-e-commerce-policy-a-problematic-revision-of-intermediary-rules-for-trademark-and-copyright-liability-6168921.html>> accessed 13 November 2019.

⁷⁰ *Samsung Electronics Co Ltd v G Choudhary* 2006 SCC OnLine Del 1038 : (2006) 33 PTC 425; *Kapil Wadhwa* (n 48).

marketplaces ‘over-comply’ with takedown requests so as to eliminate the risk of falling short of their due diligence obligations, as discussed above.

The Draft Policy is also facing severe resistance from sellers. In response to the draft, the All India Online Vendors Association claimed that levying fines against sellers for counterfeiting was a one-sided affair and demanded a dispute redressal mechanism for these allegations. It also demanded the opportunity for sellers to prove their innocence in a court of law, instead of making the marketplace the jury and executioner.⁷¹ Several aspects of the Draft Policy will require reconsideration in line with the recent decision of the Division Bench in *Amazon Seller Services*⁷² which expressly upholds the principle of exhaustion even for nutraceuticals and cosmetic products, and states that the balance of convenience must be maintained without adversely impacting e-commerce.

C. E-Commerce Guidelines for Consumer Protection, 2019⁷³

In August 2019, the Department of Consumer Affairs published a draft advisory to states on guiding principles for e-commerce businesses to prevent fraud and unfair trade practices, and protect the legitimate rights and interests of consumers in the business-to-consumer space. Under this draft framework, ‘e-commerce entities’ is defined to include inventory or marketplace models or both.⁷⁴ An inventory based model of e-commerce is defined as “*an e-Commerce activity where inventory of goods and services is owned by e-Commerce entity and is sold to the consumers directly*” whereas marketplace based model is defined as “*providing of an information technology platform by an e-Commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.*”⁷⁵ While both these models are defined in the draft, all obligations therein are applicable to ‘e-commerce entities’. No distinction is made between the roles of players following different models.

⁷¹ Asmita Dey, ‘E-commerce policy: Vendors want changes in anti-counterfeiting measures’ *Financial Express* (Uttar Pradesh, 28 February 2017) <<https://www.financialexpress.com/industry/e-commerce-policy-vendors-body-wants-changes-in-anti-counterfeiting-measures/1500787/>> accessed 13 November 2019.

⁷² *Amazon Seller Services* (n 47).

⁷³ See, Model Framework for Guidelines on e-Commerce for Consumer Protection 2019 <<https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Guidelines%20on%20e-Commerce.pdf>> accessed 13 November 2019 (E-Commerce Guidelines for Consumer Protection).

⁷⁴ E-Commerce Guidelines for Consumer Protection, guideline 2(c).

⁷⁵ E-Commerce Guidelines for Consumer Protection, guidelines 2(g) and (i).

As per these guidelines, an e-commerce entity must provide details about the sellers on its website, including their name, address, email address, and how they can be contacted by customers.⁷⁶ E-commerce entities are not permitted to directly or indirectly influence the price of goods and must maintain a level playing field.⁷⁷ Further, they may not falsely represent themselves as consumers and post fake reviews or exaggerate the quality or features of the products.⁷⁸ An e-commerce entity must also ensure that advertisements are consistent with the actual characteristics of goods and services, and should mention safety and healthcare information relating to the goods and services advertised for sale.⁷⁹ This too, raises pragmatic concerns, since most e-commerce platforms do not list products themselves, and all related acts are undertaken by the seller.

Pertinently, if an e-commerce entity is informed by a consumer or comes to know by itself or through another source about any counterfeit being sold on its platform, and is satisfied after exercising due diligence, it shall notify the seller, and if the seller is unable to provide any evidence that the product is genuine, it shall takedown the said listing.⁸⁰ These directions seem rather vague, as it is not clear how an e-commerce marketplace would come to know about counterfeiting 'by itself', what 'due diligence' means in this context, and whether a mere customer review would burden the e-commerce marketplace with initiating a probe into the actual quality of goods.

The draft also proposes to hold an e-commerce entity guilty of contributory or secondary liability if it makes assurances about the authenticity of the goods sold on its marketplace or guarantees that the goods are authentic.⁸¹ In this regard, it is important that a clarification be issued distinguishing between a seller making assurances about the authenticity of its product on the product display page, and the e-commerce marketplace itself making these claims in its policies. Further, the terminology used misses out a critical distinction between the legal definition of 'guarantee' and 'warranty'. A guarantee is a tripartite contract where the guarantor is by definition not the principal. It only amounts to a promise that in case the product eventually turns out to not be genuine, the guarantor will ensure that the customer is provided with a genuine product. On the other hand, a warranty means that the person providing the warranty, i.e. the seller, specifically vouches for

⁷⁶ E-Commerce Guidelines for Consumer Protection, guideline 3(vi).

⁷⁷ E-Commerce Guidelines for Consumer Protection, guideline 4(i).

⁷⁸ E-Commerce Guidelines for Consumer Protection, guideline 4(iii).

⁷⁹ E-Commerce Guidelines for Consumer Protection, guideline 4.

⁸⁰ E-Commerce Guidelines for Consumer Protection, guideline 4(ix).

⁸¹ E-Commerce Guidelines for Consumer Protection, guideline 4(x).

the authentic nature of that particular product. Accordingly, authentication guarantees are provided by parties that are not the principal and as such, cannot take an e-commerce marketplace outside the ambit of an intermediary. Finally, this clause proposes imposing ‘contributory or secondary liability’ upon e-commerce marketplaces, whereas the Trade Marks Act, 1999 (unlike the Copyright Act, 1957) does not contain any provisions for secondary or contributory liability.

V. CONCLUSION AND STEPS AHEAD

It is a tumultuous time for the Indian e-commerce industry. Although e-commerce platforms can breathe a sigh of relief after the clarifications issued in *Amazon Seller Services*,⁸² there are still several ambiguities in the regime for intermediary liability in e-commerce that require more consideration. In this judgement as well, the court held that the intermediary status of an e-commerce marketplace will be determined after its role is ascertained at trial. This appears inconsistent with the IT Act, wherein an e-commerce marketplace is deemed to be an intermediary by definition. The purpose of a trial therefore should be to establish whether the said intermediary is entitled to safe harbour or not. It may be adjudicated, after trial, that the intermediary was conspiring, aiding or abetting a crime, or that it failed to perform takedowns upon receiving actual knowledge of infringement in terms of Section 79(3), and accordingly, that it cannot avail safe harbour as provided in Section 79(1). Further, as discussed above, full-fledged trials in such cases are yet to be carried out and thus, there exists a lack of clarity as to the factual thresholds that a court may use to determine the intermediary status of an e-commerce marketplace.

While the crusade against counterfeiting is noble in origin, any law or policy drafted with respect to the same should be proportionate and must not come at the cost of choking a free market or the rights of small businessmen and entrepreneurs to carry on with their business. In light of this, the author proposes the following self-regulatory mechanism to effectively tackle counterfeiting on e-commerce marketplaces:

- i. In the interests of a free market, no prior concurrence with brand owners should be required and e-commerce marketplaces as well as their sellers must be free to sell genuine products bearing any trademarks in line with the decision in *Amazon Seller Services*.⁸³

⁸² *Amazon Seller Services* (n 47).

⁸³ *Amazon Seller Services* (n 47).

- ii. In order to retain the sanctity of the intermediary status of e-commerce marketplaces, they should not be mandated to pro-actively police their platforms for counterfeits, as the said due diligence must be carried out by brand owners. At the very least, compulsory deployment of technology-based automated tools to track counterfeits should be limited only to e-commerce companies above a certain net worth and size in a phased manner, so as to not act as an entry barrier for homegrown e-commerce companies. Further, the efficiency and accuracy of these automated tools must be ascertained in order to prevent a chilling effect on free trade.
- iii. E-commerce marketplaces should obtain warranties and guarantees from their sellers that the products offered for sale are authentic.
- iv. Since brand owners cannot reasonably be expected to go to court to procure orders for the takedown of each counterfeit product, e-commerce marketplaces should accept takedown notices from brand owners.
- v. E-commerce marketplaces must takedown listings pointed out by brand owners without any evidentiary requirements in case of identical trademarks and copyright related matters, within 36 hours of intimation as prescribed under the Intermediaries Guidelines, provided that the brand owner undertakes that the takedown requests are bona fide and correct. This will ensure the expeditious takedowns of infringing listings without unduly expecting the brand owner to prove infringement at every instance in a tedious and time-consuming manner.
- vi. Subsequent to takedowns, e-commerce marketplaces must intimate the seller that the listing has been taken down. After temporarily disabling access to the allegedly infringing product, notice must be given to the seller, along with a deadline to respond, so that the seller has an opportunity to prove its innocence. If the marketplace is satisfied with the explanation of the seller, the product may be reinstated with notice to the brand owner, providing reasons. An in-house appeal mechanism may also be instituted. This will ensure that the implementation of takedowns is balanced, and substantially reduce the probability of a takedown overdrive by intermediaries in order to avoid legal proceedings, the dangers of which have been discussed above.
- vii. In case a brandowner is found to be repeatedly demanding takedowns of genuine products/parallel imports with the intent to create a trade

channel monopoly, the burden of proof may be shifted to the brand owner to prove that the listings pointed out are in fact, counterfeit. This will ensure that brand owners do not attempt to create a market monopoly by stopping lawful trade and maintain a free market in line with the principle of exhaustion as laid down in *Kapil Wadhwa*.⁸⁴

- viii. With respect to sellers, repeat offenders must be delisted or blocked from the platform entirely. In such cases, a ‘three-strike policy’ (for sellers who have been found guilty of selling counterfeits thrice) or similar mechanism may be instituted. By doing so, marketplaces will disincentivise the sale of counterfeit products on their platform and also ensure that infringing products are not repeatedly re-listed by the seller upon takedown.
- ix. In case the allegations made by a brand owner are inconclusive and the intermediary is of the opinion that it is not a prima facie case of counterfeiting, it should be allowed to ask the brand owner to obtain an order from a court of law before delisting the product. In such cases which are not instances of blatant counterfeiting on bare comparison (as in the case of copyright concerning alleged fair use, design infringement, patent infringement, trade dress violations, refurbished goods, deceptively similar trademarks etc.), the marketplace should not be held liable for its failure to delist the product, even if the court subsequently determines that there is infringement. This will ensure that the marketplace does not assume an adjudicatory role in determining what constitutes infringement, in line with the dictum in *Shreya Singhal*.⁸⁵
- x. Consumer rights groups and government bodies should be encouraged to actively engage with e-commerce marketplaces to report counterfeit goods. In doing so, consumer interests will be protected even in cases where the brand owner fails to enforce its trademark or take steps to remove infringing products from the e-commerce marketplace.

⁸⁴ *Kapil Wadhwa* (n 48).

⁸⁵ *Shreya Singhal* (n 19).