

The Role of Intermediaries in protecting IP Rights

One cannot deny that this is the age of social media. It is a powerful and easy to access platform for anyone to publish their intellectual content. Individual content creators as well as corporations have pivoted to the social media platform which has escalated the consumer reach for brands. A social media presence is considered to be of tremendous importance in any business' marketing strategy. As for individuals, the platform is a forum to share their creative skills. We are just one click away from sharing our original content with millions around the world. There's content created by someone everywhere around us. That catch phrase on the back of your cereal box, the slogan on your T-shirt, the Facebook post you scrolled past, the TikTok's you viewed, the video you watched on Instagram, the tweet you're reading? It's all content.

Businesses are becoming more and more aware of the advantages of collaborating with content creators. They observe that high-quality content motivates consumers to take action and can cultivate community and loyalty through engagement with the brand, its community, or both. The global spread of Covid-19 prompted a rise of individuals as well as small business owners who used social media platforms to grow their businesses and build their brands. A media buying company named Groupm projected that by the end of 2021, the market for social media content development has grown to a leaping INR 900 Crores. Additionally, this business is anticipated to expand at a rate of 25% annually, growing to a total market value of more than INR 2,200 crores by the end of 2025. India had 400 million users of social media before the pandemic, but this figure increased dramatically by 18% as a result of the Covid-19 outbreak. The ease in decimating one's original work through such platforms also heightens the risk of IP infringement and misuse. It is paramount for any individual, entrepreneur or a company to be informed and aware about their Intellectual Property Rights and the ways in which one can protect them on platforms with a global reach.

In the social media world the nature of IP infringement is far different compared to infringement as characterized in the traditional sense by the law. Digital infringement has put the intermediary platforms into limelight by holding them liable for showcasing infringing content on their platform.

Social media platforms such as YouTube, Facebook, Instagram, TikTok etc. act as intermediaries between the provider being the content creator and the users being the viewers of such content. Such intermediaries host and transmit content, products or services of third parties.

As per Rule 2 (1) (w) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, a **Social Media Intermediary** is an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.

Rule 2(1)(v) defines **Significant Social Media Intermediaries** as a social media intermediary having number of registered users in India above such threshold as notified by the Central Government. Platforms such as Facebook, Twitter, Instagram, YouTube, Snapchat, LinkedIn, WhatsApp etc.

Instagram, for instance, has included clauses in its terms of use that prohibit content that is "unlawful, misleading, or fraudulent or for an illegal or unauthorized purpose" and gives

Instagram the right to remove or terminate an account that displays such content in an effort to manage and prevent intellectual property infringement on its platform. Both Twitter and Facebook's terms of service contain similar clauses.

Under Section 79 of the Information Technology Act, 2000, intermediaries are safeguarded from legal liabilities arising from infringing content being posted on their platform by the providers or users however such protection is available subject to due diligence exercised by the intermediaries. Rule 3 (d) of the Information Technology (Intermediaries guidelines) Rules, 2011 states that the intermediaries hold the responsibility to notify the user about the infringing nature of the content posted by them on such a platform and shall refrain from allowing such infringing content to be posted. Moreover such intermediaries hold the right to terminate user access when the infringing content is posted on their platform despite being notified regarding the same.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, mandates social media platforms to take down flagged content within 36 hours as well as trace specific messages back to the originator. Facebook, Instagram, Twitter, YouTube have intellectual Property Right Policies under the platforms reserve the right to take down any content that infringes another's intellectual property rights upon receiving a complaint or report regarding the same.

Some of the landmark judgements pertaining to the subject have been briefly mentioned below:

In *Sinclair v. Ziff Davis LLC*, the Southern District of New York dismissed a case filed by Stephanie Sinclair against Mashable Inc. and its parent company Ziff Davis, LLC for infringing her copyright in the photograph posted to her public Instagram Account by embedding a copy of the same in an article on its website. It was held that the said action did not constitute copyright infringement as Sinclair agreed to Instagram's Terms of Use which was interpreted as allowing Instagram to sublicense public content to third parties. The District Court granted the Plaintiff's motion to reconsider the dismissal finding that while the plaintiff granted Instagram the right to use her public Instagram Content, the platforms Terms of Use were susceptible to different interpretations regarding sublicensing. The court acknowledged the requirement that a license must convey the licensor's explicit consent to use a copyrighted work.

In *Suneel Darshan vs YouTube LLC*, The Plaintiff sued Google India and YouTube LLC alleging copyright infringement by the Defendants as various sound recordings, cinematographic films and audio-visual songs were displayed and reproduced on the Defendants platform in the absence of any authorization or license for the same. The defense taken by Google and YouTube was that them being an intermediary platform were unaware of the infringing nature of such content and were incapable of such evaluation of the uploaded content on their own. The District Court of Gurgaon restrained the Defendants from displaying the Plaintiff's content on its platform and awarded Rs. 50,000 in damages to the Plaintiff. The court held that as per the Information Technology Act and Rules thereunder, the Defendants were to take down such infringing content upon being notified by the Plaintiff in order to avoid secondary liability.

In the landmark judgement of *Shreya Singhal v. Union of India* the Supreme Court of India constrained the interpretation of the legal provision pertaining to the protection of online

intermediaries like Twitter, Facebook, WhatsApp, and other social media platforms from liability as provided for under Section 79 of the Information Technology Act, 2000. The Court ruled that intermediaries must remove or restrict content after being notified; however, the Court underlined that this need only applies when an intermediary receives a court or government order, not at the intermediary's discretion or in response to a request by an affected individual.

In *Super Cassettes Industries Ltd. v. My Space Inc. (2017)* [6], the Delhi High Court's division bench made a distinction between copyright matters and found that if intermediaries were given the duty of identifying illegal content, it may have a chilling effect on free speech and result in private censorship. The Court also introduced the idea of "actual or particular knowledge" and held that intermediaries can be held accountable if they have actual or specific knowledge from content owners that there is illegal content on their website, and in spite of receiving warning, they fail to remove it. In these situations, a court order is not required.

The laws governing the use of IP have significantly evolved since social media platforms have provided a wide space for content creation as well as increased the scope of IP theft. Any social media site would rather not be used for illegal activity or for encouragement of violence. They are concerned with safeguarding user privacy and want to provide a forum for unrestricted expression of creative ideas and skills. It is crucial to explain and be explicit about the rules and regulations in order to prevent restricting someone's independence and discouraging the usage of social media. It can also be difficult technically to provide traceability without endangering end-to-end encryption. To develop a solution that respects the needs of customers and intermediaries while assuring the suppression of illegal behavior, all parties involved should work together.

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