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Counterfeit Fashion Sales on E-Commerce Platforms: Re-examining Marketplace Liability under Indian Law

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The growth of online fashion retail in India has been accompanied by a parallel and largely unregulated growth in the sale of counterfeit goods through the very same platforms that host genuine brands. Amazon, Myntra and Flipkart, among others, have built business models that depend on third-party sellers, yet these platforms routinely disclaim responsibility for what those sellers list by invoking the safe harbour available to intermediaries under Section 79 of the Information Technology Act, 2000. This paper argues that the safe harbour defence, as currently interpreted, sits uneasily with the degree of control that marketplaces actually exercise over listings, logistics and consumer trust. Drawing on the Delhi High Court's reasoning in Christian Louboutin v Nakul Bajaj and comparing it with the more permissive standard adopted by American and European courts, the paper contends that Indian law has quietly moved towards an active role test without ever codifying one. It concludes that the absence of a statutory definition distinguishing a passive host from an active commercial participant leaves brand owners, sellers and consumers to litigate the same question afresh in every dispute, and proposes a tiered liability framework as a way out of that cycle.

Keywords: *intermediary liability, safe harbour, counterfeit goods, e-commerce, trade mark infringement.*

INTRODUCTION

Buying clothes and accessories online has stopped being unusual and has become, for a large share of Indian consumers, the default way of shopping. That shift has brought real convenience, but it has also created a problem that the law was not quite built to handle: what happens when the platform through which a fake handbag or a counterfeit pair of shoes is sold is neither the manufacturer nor, on its own account, the seller?

The easy answer offered by most marketplaces is that they are mere conduits. Under Section 79 of the Information Technology Act, 2000, an intermediary that only hosts, stores or transmits information on behalf of others is shielded from liability for that information, provided it meets certain conditions of neutrality and due diligence.

The difficulty is that fashion marketplaces rarely behave like neutral conduits. They rank listings, offer fulfilment and warehousing services, run promotional campaigns for specific sellers, and in some cases physically inspect and repackage goods before dispatch.[1] Each of these functions' chips away at the claim to neutrality, and Indian courts have started to notice.

This paper examines that tension. It sets out the statutory scheme governing intermediary liability and consumer protection in e-commerce, analyses the leading case law on the safe harbour versus active role distinction, places the Indian position alongside the American and European approaches, and argues that the current framework leaves too much to judicial improvisation. The central claim is a modest one: the law needs a clearer, codified standard for when a marketplace stops being a host and starts being a seller in substance, particularly in a sector like fashion where counterfeiting is both easy to execute and hard to detect at scale.

THE STATUTORY FRAMEWORK

Three separate legal regimes bear on this question, and part of the confusion in this area comes from the fact that they do not speak to each other very well.

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[1] *Christian Louboutin SAS v Nakul Bajaj & Ors* AIROLINE (2018) Del 1962

The first is the safe harbour under Section 79 of the Information Technology Act, 2000. Sub-section (1) exempts an intermediary from liability for third-party information made available through its platform. That exemption is not unconditional. Sub-section (2) requires that the intermediary's function be limited to providing access to a communication system, that it must not initiate the transmission, select the receiver, or modify the information, and that it must observe due diligence and any guidelines the Central Government prescribes. Sub-section (3) withdraws the protection where the intermediary has conspired in, or abetted, or induced the unlawful act, or where it fails to expeditiously remove or disable access to unlawful content upon receiving actual knowledge or a government or court order.[2]

The due diligence obligations referred to in Section 79(2) are fleshed out by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Rule 3 requires intermediaries to publish terms of service, appoint a grievance officer, and act on complaints and lawful takedown requests within specified timelines. The rules, however, are drafted in largely reactive terms. A marketplace is expected to respond once informed of infringing content; it is not made to affirmatively screen for counterfeit fashion listings before they go live.[3]

The second regime is consumer protection law. The Consumer Protection (E-Commerce) Rules, 2020 impose duties directly on marketplace e-commerce entities, including a requirement to maintain a record of sellers' identities, addresses and other contact details, and to display this information against every listing. Rule 5 also prohibits a marketplace entity from manipulating search results in a manner that favours its own related sellers or from falsely representing itself as the manufacturer of goods it merely lists.[4] These provisions address transparency towards the consumer, but they are not, strictly speaking, an intellectual property enforcement mechanism, and a brand owner cannot invoke them directly to force a platform to take down a counterfeit listing.

The third regime, and the one a fashion brand actually relies on, is trade mark law. Sections 29 and 30 of the Trade Marks Act, 1999 define infringement and its exceptions, while Sections 101 to 104 create criminal liability for the sale of goods with a false trade mark. These

[2] Information Technology Act 2000, s 79
[3] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 3
[4] Consumer Protection (E-Commerce) Rules 2020, r 5

provisions were written with a seller or a manufacturer in mind, not a digital intermediary, so applying them to a marketplace requires either treating the platform itself as an infringer, which demands proof that it is doing more than hosting, or proceeding only against the underlying seller, who is often untraceable, judgment-proof, or based outside the jurisdiction.[5]

The result is a framework with three separate doors and no single key. A brand owner frustrated by counterfeit listings has to decide whether to sue the seller under trade mark law, complain to the platform under the IT Rules, or report a violation of the E-Commerce Rules to the consumer protection authority, and each route leads to a different forum with a different standard of proof.

SAFE HARBOUR VERSUS ACTIVE ROLE: WHAT THE CASE LAW ACTUALLY SHOWS

The most significant judicial intervention on this question remains the Delhi High Court's decision in Christian Louboutin v Nakul Bajaj. The plaintiff, a luxury shoe and accessories brand, sued the operator of Darveys.com for selling products bearing its marks without authorisation. The platform argued that it was a passive intermediary entitled to the Section 79 safe harbour. The Court disagreed.[6] It examined what the platform actually did: it charged a membership fee, provided delivery and logistics support, offered a replica or authenticity guarantee, and allowed sellers to use the marketplace's own quality assurance processes. On these facts, the Court held that the platform's involvement went well beyond passive hosting, and that an entity performing such functions could not simultaneously claim the shelter meant for a neutral conduit.

What makes this decision analytically important is not just its outcome but the method it uses. Rather than asking whether the platform intended to infringe, the Court asked a structural question: does the platform's business model depend on activities that a genuine intermediary would not perform? That question, once asked, tends to answer itself for most fashion marketplaces, because logistics, fulfilment and curated recommendations are precisely the features that let a platform compete on customer experience. The very things

[5] Trade Marks Act 1999, ss 29, 30, 101, 102, 103 and 104

[6] *Christian Louboutin SAS v Nakul Bajaj & Ors* AIROLINE (2018) Del 1962

that make Myntra or Amazon commercially attractive to a buyer are the things that, on the Louboutin logic, make it harder for them to claim neutrality.

It is worth pausing on how narrow the earlier judicial trend had been. In My Space Inc v Super Cassettes Industries Ltd, the Delhi High Court, applying the stricter actual knowledge standard set out by the Supreme Court in Shreya Singhal v Union of India, had held that an intermediary could only be expected to act on specific, identified instances of infringement, not on a general or constructive awareness that infringing content exists somewhere on the platform.[7] Louboutin does not overrule that standard, but it narrows its practical reach for marketplaces by holding that a platform with an active business role forfeits the safe harbour altogether, so the actual knowledge threshold never even becomes relevant to it. The two decisions can be read together as creating a two-track system: passive hosts get the benefit of the actual knowledge standard; active participants do not get the safe harbour at all.

The trouble is that Indian courts have not since built on this distinction with any consistency. Subsequent disputes involving fashion counterfeits have tended to settle at the interim injunction stage, with platforms agreeing to take down listings without a final adjudication on whether they were acting as active participants. That leaves Louboutin as an important precedent that is, in practice, under-tested, and marketplaces have had little judicial pressure to redesign their due diligence processes around it.

A COMPARATIVE LOOK: THE UNITED STATES AND THE EUROPEAN UNION

The United States takes a considerably more protective view of platforms. In Tiffany (NJ) Inc v eBay Inc, the Second Circuit held that eBay's general knowledge that counterfeit Tiffany goods were being sold somewhere on its platform did not amount to the kind of specific knowledge required to impose contributory trade mark infringement liability. eBay was not obliged to pre-emptively remove listings merely because it knew, as a statistical matter, that some proportion of them were fake; the burden remained substantially on Tiffany to identify individual infringing listings.[8] This is, in effect, the same actual knowledge principle that the

[7] *MySpace Inc v Super Cassettes Industries Ltd* (2016) SCC OnLine Del 6382; *Shreya Singhal v Union of India* (2015) 5 SCC 1

[8] *Tiffany (NJ) Inc v eBay Inc* [2010] 600 F 3d 93 (2d Cir)

Delhi High Court applied in My Space, but the American courts have been far less willing to depart from it even where the platform provides significant logistical support.

The European Union sits somewhere between the two. In L'Oréal SA v eBay International AG, the Court of Justice held that a marketplace loses the benefit of the hosting exemption where it plays an active role of such a kind as to give it knowledge of, or control over, the data relating to the offers for sale, for instance by optimising the presentation of listings or promoting them.[9] This active role test is strikingly close to the reasoning later adopted in Louboutin, which suggests that Indian courts, whether consciously or not, have gravitated towards the European rather than the American standard.

More recently, the European Union has gone further than case law and legislated the point directly through the Digital Services Act, which imposes traceability obligations on online marketplaces, requiring them to collect and verify basic identification information from third-party traders before allowing them to list products, and to design their interfaces so that consumers can identify the trader responsible for a given listing.[10] This is the kind of codification that Indian law currently lacks. The Consumer Protection (E-Commerce) Rules, 2020 require seller information to be displayed, but they do not require the platform to verify that information before a listing goes live, which is a meaningfully lower standard than the one now operating in the European Union.

WHERE THE FRAMEWORK FALLS SHORT

Bringing the statutory and judicial threads together exposes a few recurring problems that are worth stating plainly rather than glossing over.

First, Indian law has no statutory definition of what an active role actually consists of. Louboutin lists the facts that mattered on its own record, but a list of facts is not a test, and the next marketplace sued for a different set of facts, say, one that only offers logistics but not authenticity guarantees, has no way of predicting which side of the line it falls on.

Second, the burden of detection remains almost entirely on the brand owner. Neither the IT Rules nor the E-Commerce Rules require a marketplace to run any form of proactive image

[9] *L'Oréal SA v eBay International AG* [2011] C-324/09
[10] Digital Services Act 2022

or listing matching to catch counterfeit fashion goods before they are published. A takedown regime that only responds to a specific, identified complaint will always lag behind a determined counterfeiter who can relist a product under a slightly different name within hours of removal.

Third, the distinction that Indian foreign investment policy draws between a marketplace model and an inventory-led model, which determines how much operational control a platform is permitted to exercise over sellers, has no equivalent in the liability framework. A platform can structure itself to stay within the marketplace model for FDI purposes while still exercising, in substance, exactly the kind of control over listings and logistics that Louboutin treats as disqualifying for the safe harbour. The two regimes are not talking to each other, and a platform can comply with one while failing the other.

RECOMMENDATIONS

A few relatively targeted reforms would close much of this gap without requiring a wholesale rewrite of the intermediary liability scheme.

The IT Rules could be amended to require verified seller identification before a listing goes live, along the lines of the traceability obligations now in force under the EU Digital Services Act, rather than only after a complaint is received.

A statutory tiering of intermediaries, similar in spirit to the distinction the Digital Services Act draws between hosting providers and online platforms, would let a marketplace that offers fulfilment, authenticity checks or promotional placement be classified separately from one that is genuinely a passive listing service, with correspondingly different due diligence duties attached to each tier.

Finally, a shortened, sector-specific takedown timeline for counterfeit fashion and luxury goods, paired with a requirement that a platform maintain a repeat infringer policy analogous to the one used in copyright law, would reduce the current pattern where a delisted counterfeit seller simply reappears under a new account within days.

CONCLUSION

The safe harbour under Section 79 was written for a different kind of internet, one in which an intermediary genuinely did little more than carry information from one person to another. Fashion e-commerce marketplaces do not fit that description particularly well, and Christian Louboutin v Nakul Bajaj is best read as an acknowledgement of that mismatch rather than as an aberration. What Indian law has not yet done is turn that judicial acknowledgement into a workable statutory standard. Until it does, brand owners will keep having to relitigate, case by case, a question that European law has already chosen to answer through legislation: at what point does hosting a seller's goods become something closer to selling them?