

Technology Law Analysis

August 12, 2020

E-COMMERCE LAWS AND MARKETPLACE CONUNDRUM

In the context of recent controversy about depicting *country of origin* on e-commerce platforms and discussion about imminent e-commerce policy and related laws, it is important to re-assess various marketplace models and which legal compliances can be reasonably expected from them.

"*ease of doing business*" and "*Start up India*" narratives should act as a backdrop for this assessment. The policies adopted by India are getting traction in other countries. Hence, Indian start-ups when expanding in those countries may eventually face laws similar to Indian laws made applicable for foreign entities. Therefore, we cannot see things in isolation in global markets.

One other aspect is consumer interest. In the context of e-commerce, information transparency should act as a precursor to *buyer beware* principle.

During last 2-3 years, to regulate e-commerce, various general and industry specific laws have been amended or draft amendments proposed. E.g. legal metrology law, food laws, e-pharmacy, tourism laws, intermediary guidelines and now consumer protection law. Unfortunately, the framers have not premised these laws on clear understanding of business models and role of each stakeholder in each model. Even the court orders dealing with market places are somewhat confusing. I will deal with the court orders in next article. In this article I have illustrated some of the issues, in present laws.

Localization: In the proposed Intermediary Guidelines under Information Technology Act (IT Act) and new Consumer Protection E-commerce Rules (CP Rules), foreign marketplaces are required to have entity localization. In a global eco-system, this requirement does not seem reasonable. With blocking of 59 apps, India has demonstrated, you don't need to have a local entity to enforce Indian laws! Other legal and technical solutions are available for enforcement.

Different Marketplace models: Buyers can discover products and services offered by several sellers in a systematic manner on digital platforms. Some platforms provide only listing / directory services. On some in addition to listing, buyers and sellers can consummate the transaction. Some marketplaces may render additional services such as logistics, payment and the like. Logically, the legal obligation and liability of each type of platform should vary. However, laws don't make that distinction. There are three issues, first, various laws defines similar terms differently and that too in a convoluted manner. Second, ignoring differences in marketplaces, laws have painted all of them with the same brush. Third, laws are confusingly drafted in that the expectations from various stakeholders are not clear. E.g. Food laws enlist several obligations which may not be relevant for certain types of marketplaces.

Transparency of information: Typically, sellers themselves list their products and services on marketplaces and not marketplace employees or agents. Various laws require sellers to disclose details of products and service but in addition some laws require marketplaces to ensure discourse. The marketplaces do not have the wherewithal to ascertain whether such information is complete or accurate. Some laws require marketplaces to enter into contracts with sellers to impose this obligation. E.g. food law says it has to be 'signed' contract. Technically, it means digital signature as per IT Act. This is quite burdensome.

To summarize, the responsibility of marketplace should be (i) to have place where seller can themselves insert product information; (ii) to make such information available at appropriate place in readable manner to the buyer. Sellers should be responsible to insert such disclosures. Marketplaces need not verify whether or not the information is complete or accurate. Liability for incomplete and/or inaccurate information should be solely of the seller. While some laws are clear in this regard, some are vague.

An exception can be made where marketplaces choose to verify certain information and make representations to consumers. E.g. if marketplace make a specific representation "*only genuine products available*", then marketplace could be liable for breach of the representation in case counterfeit product is sold. But only to that extent and not for a genuine but defective product.

Rule 5 of new CP Rules, is vague at places. E.g. what would one understand by "*any other information necessary for enabling consumers to make informed decisions at the pre-purchase stage*"? Law has to be certain and not subjective.

Take down: Food law says "*The e-commerce entities shall immediately delist any food products listed on their platform, which are not in compliance with the FSS Act or Rules or Regulations, made thereunder*". In relation to social media intermediaries, in *Shreya Singhal* case, the Hon'ble Supreme Court clarified that the obligation to take down content arises only in case of court or government orders. Similar approach should be adopted under marketplace related laws.

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Grievance redressal: Do we expect mall owners to ensure that our complaints about one particular shop is resolved in timely manner or that they should disclose refunds and refunds policy of each shop to us? No, because we recognize that the shop owner is responsible for that. However, under CPA Rules, marketplaces are required to ensure that the complaints are resolved in one month and disclosure about refunds policies are made. Each seller may have a different refunds and exchange policy. How can marketplace have identical policy for all sellers? From consumer experience perspective, marketplaces may choose to have certain common policy in place, but let that be determined by market forces and should not be made a mandatory requirement.

I can go on with more examples. In short, when it comes to digital world, law and policy makers think that things have to be handled differently. In doing that, they often go overboard and violate the basic principle of intelligible differentia under Article 14 of the Constitution. One should always revisit how the situation is handled in real world and either change the rules for real world as well or create laws for digital world only to the extent required to address change in medium. One such example is bias. We are not doing much to address actions arising out of bias in real world, but AI bias is considered problematic !

Intention of the lawmakers seems to be to protect consumers in the digital world, where the seller is not distinctly and physically present. For this purpose, government should consider co-regulatory model, where basic principles are laid down by law and self-regulatory bodies create SOPs for each type of business model that evolves. An e-commerce ombudsman could also be created in such regime.

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