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**ONLINE MARKETPLACE LIABILITY: Safe Harbour and Fallback Liability in India**

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# ONLINE MARKETPLACE LIABILITY: Safe Harbour and Fallback Liability in India

Ashreet Acharya\*

[Abstract: This study employs a doctrinal research technique, that entails a thorough examination of current Indian rules, laws and court decisions about online marketplace liability. It focuses on the fallback liability clause. The paper examines the Consumer Protection Act, 2019 and the Consumer Protection Rules 2020. Furthermore, a comparative study is carried out to investigate the legislative structure and strategies dealing with fallback liability in the US and the EU. This research attempts to offer suggestions for establishing a balance between fostering innovation and defending consumer rights in the context of e-commerce platforms based on the conclusions from the legal analysis and comparative study.]

## I

### Introduction

E-commerce has advanced tremendously in India and has brought forth more options for consumers. However, such options also bring along risk of unfair business practices and unethical processes.<sup>1</sup> The introduction of the Consumer Protection Act, 2019 was meant to strengthen the interests of consumers in online markets.<sup>2</sup> However, as the act promoted technological development and innovation, it could not anticipate the new problems accompanying such advancements such as the online marketplaces being sued by major corporations such as Louboutin, L'Oréal and Skullcandy for allegedly enabling third-party merchants to sell counterfeit items to their customers using their brand.<sup>3</sup>

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<sup>1</sup> Mukesh Kumar & Pooja Sharma, *Globalization, Indian Market and the Consumers* 4 SAJMMR 31 (2014).

<sup>2</sup> Shubham Nigam, *From Caveat Emptor to Caveat Venditor: The Consumer Protection Act 2019 and the Consumer Rights*, in FROM CAVEAT EMPTOR TO CAVEAT VENDITOR: THE CONSUMER PROTECTION ACT (2020).

<sup>3</sup> Vaibhav Majithia, *The Changing Landscape of Intermediary Liability for E-Commerce Platforms: Emergence of a New Regime* 15 IJLT 470 (2019).

However, except for platforms nobody else has been legally liable for faulty goods and products. This research intends to examine the Indian legislation and judiciary's stance on marketplace liability. It emphasizes the fallback liability provision that is within the Consumer Protection (E-commerce) Rules, 2020 (CP Rules). This provision is intended to hold e-commerce companies liable for seller negligence and mistakes which cause loss to consumers. The paper also analyses the importance of a balance between advancing innovation and consumer protection which is further strained by the digital revolution and ease of internet accessibility in India. This has not only propelled online platforms towards daily usage by attracting a lot of interest.<sup>4</sup> The CP Rules have included a fallback responsibility clause to improve consumer protection by ensuring the e-commerce platforms can be held liable for mistakes and negligence of third-party vendors operating on their platforms.<sup>5</sup> By this provision, the e-commerce marketplace company is still liable if the seller's negligence causes them to fail to deliver goods/services and causes a loss to the consumer.

This is a departure from the norm, in which the e-commerce platforms were viewed as slightly more than middlemen who connected buyers to sellers like brokers and aided incomplete transactions.<sup>6</sup> The fallback liability clause is important as it makes online marketplaces more accountable for the deeds of third-party sellers, putting them at risk of legal action and financial damage. It provides the customers an alternate solution when importers or manufacturers, aren't held responsible.

This study employs a doctrinal research technique, that entails a thorough examination of current Indian rules, laws and court decisions about online marketplace liability. It focuses on the fallback liability clause. The paper examines the CP Act, 2019 and the CP Rules 2020. Furthermore, a comparative study is carried out to investigate the legislative structure and strategies dealing with fallback liability in the US and the EU. This research attempts to offer suggestions for establishing a balance between fostering innovation and defending a balance between fostering innovation and defending consumer rights in the context of e-commerce platforms based on the conclusions from the legal analysis and comparative study.

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<sup>4</sup> Neha Chawla & Bijay Kumar, *E-Commerce and Consumer Protection in India: The Emerging Trend* 180 JBE 581 (2022).

<sup>5</sup> Suman Sadhukhan & Joydeep Pakira, *The Legal Position of E-Commerce in India and the Significance of Competition Law for Its Improvement* 4 IJLLR 1 (2022).

<sup>6</sup> Anol Bhattacharjee, *Acceptance of E-Commerce Services: The Case of Electronic Brokerages* 30 IEEE TSMC-A 411 (2000).

## II

### Legal Framework and Judicial Precedents in India

Online marketplaces have historically benefited from liability exemption or "safe harbour" clauses that absolve them of any responsibility for goods or content posted by third parties on their platforms.<sup>7</sup> However, as their business models change and they have more control over transactions and product listings, there's a growing trend of holding these platforms responsible. Courts all across the world are actively scrutinising aspects such as the presentation of product listings, services offered beyond just hosting, the degree of control over the sales process and the capacity to look for goods that infringe rights.<sup>8</sup> There is an increase in online marketplace can be potentially exposed to liability with the degree it blurs the distinction between its activity and that of third-party vendors.<sup>9 10</sup>

India also witnessed the explosive expansion of online marketplaces with the advent of newer technology and reach. It witnessed how such marketplaces completely changed how consumers purchase by providing previously unheard-of levels of ease and product selection.<sup>11</sup> However, this change has brought up serious issues with consumer protection specifically in connection to third-party sellers who are trying to sell faulty or counterfeit goods. The idea of extending vicarious liability to online marketplaces is becoming more contentious as established frameworks are not up to the task. Vicarious liability armed with consumer protection laws may encourage serious vetting and risk-mitigating procedures for such platforms to implement.<sup>12 13</sup>

Accordingly, as part of its authority under the Consumer Protection Act, 2019 the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India notified and made the provisions of the Consumer Protection (E-commerce) Rules, 2020 effective as of July 24, 2020, to prioritise and protect the interests of consumers against potential exploitation by e-commerce entities.<sup>14</sup> The "e-commerce entity" subject of these

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<sup>7</sup> Christoph Busch, *Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective*, 58 SAN DIEGO L. REV. 269 (2021).

<sup>8</sup> Christine Riefa, *Coronavirus as a Catalyst to Transform Consumer Policy and Enforcement*, 43 JCP 451 (2020).

<sup>9</sup> Christoph Busch et al., *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?* 10 JECML 1 (2021).

<sup>10</sup> Andrea Bertolini, *Extension of Strict Liability to E-Retailers*, 14 JETL 1 (2023).

<sup>11</sup> Nishant Tailor, *Enhancing Customer Experience Management Through Servitisation Models in E-COMMERCE INDUSTRY OF INDIA* (2023).

<sup>12</sup> Bertolini (n 10) at 3.

<sup>13</sup> James Riordan, *THE LIABILITY OF INTERNET INTERMEDIARIES* (2016).

<sup>14</sup> Ministry of Consumer Affairs, Food and Public Distribution, *Consumer Protection (E-Commerce) Rules, 2020* (2020).

Rules is generally defined as anyone who owns maintains or operates a digital or electronic facility or platform for e-commerce. These Rules further define an "inventory-based e-commerce firm" as an organisation that maintains an inventory of goods or services for direct customer sales.<sup>15 16</sup>

Additionally, the Government of India suggested several changes to the E-commerce Rules on June 21, 2021, and invited feedback or suggestions on those changes from the industry's stakeholders.<sup>17</sup> When the proposed changes are made known, they will affect all parties involved in fulfilling orders placed by customers on mobile applications and electronic portals, including sellers, distributors, and logistics partners, as well as e-commerce operators (including marketplace and inventory-based model entities). All online businesses that deal in products or services must abide by the E-commerce Rules. This includes online businesses not based in India but routinely selling goods or services to Indian customers. The E-commerce Rules further include obligations for sellers on marketplace platforms, liabilities for inventory e-commerce firms, and obligations for marketplace e-commerce organisations.<sup>18 19</sup>

It is essential to comprehend the idea of vicarious liability before delving into India's stance on e-commerce and online marketplace liability. Vicarious liability is a legal theory which states that even in cases where the first party directly did not cause any harm, they are nonetheless accountable for the deeds of the second party. It has been argued that online marketplaces are required to adhere to their vicarious responsibilities when the question of accountability arises. The argument states that such platforms are to be held accountable for defective goods supplied by independent merchants on their websites for enabling and making money from these kinds of transactions. Specifically, if they have a substantial amount of influence over both the transactions and consumers,<sup>20 21</sup>

This concept was recognised and put into practice by Indian courts in the *Kashmiri Lal v. Shri Ramprasad* case. When an employee is performing tasks as needed by their employer while acting in the course of their employment at the time of the negligence act, they may be held vicariously liable. The employee's compliance with instructions,

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<sup>15</sup> Vikas Kathuria & Jure Globocnik, *Exclusionary Conduct in Data-Driven Markets: Limitations of Data Sharing Remedy* 8 JAE 511 (2020).

<sup>16</sup> Abhay Srivastava, *E-Commerce in India: Legal and Regulatory Challenges* 4 IJLMH 2456 (2021).

<sup>17</sup> Pranav Mukul, *Amid Criticism, Government Relook at Draft Rules for E-Commerce*, THE INDIAN EXPRESS (Aug. 31 2021) available at: <https://indianexpress.com/article/india/shopping-online-amid-criticism-govt-relook-at-draft-rules-for-e-commerce-7479163/>.

<sup>18</sup> Kathuria and Globocnik (n 15) at 3.

<sup>19</sup> Srivastava (n 16) at 3.

<sup>20</sup> Busch (n 7) at 3.

<sup>21</sup> Riordan (n 13) at 3.

whether the action was performed in the course of their work or for the employer's advantage, and other considerations are considered by the court dealing with the matter.<sup>22</sup>

Crucially, the courts have ruled that an employer may be held vicariously accountable for deliberate acts of torts like assault or battery committed by an employee while the employee is doing tasks for the employer. Furthermore, non-delegated tasks or actions that were performed as part of an employee's employment but were not expressly assigned to them may subject employers to liability as well. The National Consumer Dispute Redressal Commission's decision in the matter of *Amazon Seller Services Pvt. Ltd. V. Gopal Krishnan* has brought clarity to the e-commerce industry. The commission determined that it was Amazon's responsibility as a facilitator to guarantee the calibre of the products sold by individual vendors. The Commission stated:

*"An agent, who sells a product, is duty-bound to ensure its quality. If the product is found defective, the agent shall be vicariously liable for the loss caused to the purchaser and the manufacturer of the product."*

The verdict establishes that e-commerce platforms can be held vicariously liable for defective products sold by third-party vendors on their platforms because such platforms are regarded as agents in transactions.<sup>23</sup>

### III

#### Section 79 of The IT Act, 2000

This verdict has important ramifications for the online retail store sector since it established a legal precedent regarding vicarious liability.<sup>24</sup> This raises questions about how India's safe harbour rules and intermediary liability regimes interact as they include vicarious liability as well. Coming to intermediary liabilities in India, The Information Technology Act, 2000 (IT Act) is an important piece of legislation administering the idea.<sup>25</sup> Section 79 of the Act grants a "safe harbour" provision that releases intermediaries from any liability for third-party content or data transmitted or hosted on their platforms, under certain conditions. Nevertheless, the terms and circumstances are mentioned in Sections 79(2) and 79(3). Section 79(2) applies to this exemption.<sup>26</sup>

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<sup>22</sup> Abhishek Kaushal, *Revisiting the Doctrine of Vicarious Liability: A Study of Indian Tort Law* 11 NUJS LR 37 (2018).

<sup>23</sup> Kathuria and Globocnik (n 15) at 3.

<sup>24</sup> Srivastava (n 16) at 3.

<sup>25</sup> Bhaskar Acharya, *Mastering the Cybersecurity Landscape in India* 6 JNLUD 49 (2019).

<sup>26</sup> Arindrajit Basu & Elonnai Hickok, *Artificial Intelligence in the Governance Sector in*

According to the aforementioned, the intermediary is not allowed to start the transmission, choose the receiver, or change the information being transmitted. In addition, the intermediary is required to adhere to due diligence while carrying out its duty under the Act. A list of exclusions from the safe harbour provision is provided in Section 79(3). These include situations in which the intermediary fails to remove or block the address to the illegal content after being made aware of it or obtaining a court order, or in situations where they colluded abetted, assisted or instigated the criminal behaviour.<sup>27</sup>

## IV

### Key Cases and Interpretation of Safe Harbour

The landmark judgment in *Christian Louboutin v. Nakul Bajaj* (2018) shed light on the workings of safe harbour and how it should be applied and interpreted by intermediaries. The Delhi High Court held that under Section 79 of the IT Act-E-commerce sites such as the defendant, Darveys.com, could not be regarded just as a middleman.<sup>28</sup> The court noted that Darveys.com actively advertised and promoted counterfeit goods using the plaintiff's trademark after it inspected the products, created invoices and provided packaging and promotions services. Because of such actions, the platform could not be eligible to claim safe harbour protection under Section 79, as it went beyond a merely passive position.

The court highlighted that interpretations of the phrases "conspired," "abetted," "assisted," or "induced" in Section 79(3) must consider the platform's commercial practices rather than merely its statements. As Darveys.com was proven to be promoting and allowing the selling of counterfeit goods, it was now eligible for the safe harbour exemption.<sup>29</sup> The Delhi High Court dismissed the use of the distinction between "Active" and "passive" intermediaries in evaluating the eligibility for safe harbour in the Amazon Case in 2020.<sup>30</sup>

This decision established a standard for a more thorough analysis of the workings of e-commerce platforms. The Delhi High Court, however, rejected the application of the "active" and "passive" intermediate distinction in determining safe harbour eligibility in

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*India* (Centre for Internet and Society, 2018).

<sup>27</sup> *Id.*

<sup>28</sup> Tarun Jain & Srishti Tripathi, *Intermediary Liability in India: Shifting Paradigms* 12 NUJS LR 211 (2019).

<sup>29</sup> *Id.*

<sup>30</sup> Vikas Kathuria, *Platform Competition and Data Sharing: A Case Study of the Indian E-Commerce Industry* (Competition Policy International, 2021).



the 2020 Amazon case. The court focused on the role of the middleman during transmission and traction. Due to the lack of thorough legal tests for the determination of eligibility for safe harbour, court interpretations have left e-commerce platforms confused because courts will have to deal with the interpretation on a case-by-case basis.

The safe harbour protection may be lost when an intermediary is considered to be controlling the information transmission or transaction. Due to the lack of a conclusive test or set of guidelines offered by the courts for determining the eligibility criteria for safe harbour protection, judicial precedents will have huge implications on the liability landscape for online marketplaces. The self-described intermediary status of e-commerce platforms is no longer sufficient to continue their operation legally.<sup>31</sup> Courts will carefully review their business procedures, degree of transactional activities, and services rendered to evaluate whether they are eligible for safe harbour protection.

The Application of Section 79 to e-commerce platforms has also been hampered by the absence of a comprehensive and legal test or set criteria for establishing when an intermediary loses safe harbour status. Online marketplaces could actively encourage or assist illegal activity and jeopardise their eligibility for safe harbour unless such marketplaces impose more stringent monitoring and vetting procedures.<sup>32</sup> E-commerce platforms are more vulnerable to liability for products or material from third parties that are posted on their sites, especially when there are allegations of intellectual property theft, counterfeit goods, or defective products.<sup>33</sup> Furthermore, the court rulings have led the regulatory bodies have proposed rules and revisions to strengthen the oversight of e-commerce marketplaces. These include requiring the disclosure of seller details, establishing screening procedures, and possibly removing safe harbour practices for specific situations.<sup>34</sup>

In conclusion, the legal framework governing online marketplaces in India has been greatly impacted by the court interpretations of intermediary responsibility and safe harbour provisions under Section 79 of the IT Act. These judicial precedents have created uncertainty and compliance issues for e-commerce platforms, even though the original intention of such precepts was to strike a balance between consumer protection and continuing innovation. Hence, a more comprehensive and coordinated approach is needed to keep up with the quickly changing digital landscape.

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<sup>31</sup> Arindrajit Basu, *The Challenge of Local Platforms: Ridesharing Policy in India*, in *Oxford Handbook of AI Governance* (2019).

<sup>32</sup> *Id.*

<sup>33</sup> Busch et al. (n 9) at 3.

<sup>34</sup> Abhay Srivastava & Deepika Sharma, *Consumer Protection in the Digital Age: The Way Forward for India* 43 JCP 513 (2020).

## V

### Proposed Regulatory Changes

The Indian government has recommended possible changes such as a draft e-commerce policy to strengthen the regulation of e-commerce marketplaces. Requirements such as seller details disclosures, vetting mechanisms, consumer protection rules, mechanisms to identify and remove counterfeit products, and potential removal of the safe harbour for specific marketplace practices are all welcome. This indicates a shift towards greater accountability and due diligence obligations for online marketplaces to avoid being considered active participants liable for third-party listings. In summary, while online marketplaces currently enjoy safe harbour, the legal landscape is evolving with courts and regulators examining their roles more stringently.<sup>35</sup> <sup>36</sup> Increased due diligence, monitoring and transparency requirements may be imposed to prevent liability for unlawful third-party sales.<sup>37</sup>

The proposed regulatory changes, specifically the amendments to the CP Rules, 2020, are intended to improve online marketplace accountability and consumer protection. Important recommendations include requiring sellers to disclose information, implementing strict screening procedures and improving the detection of counterfeit items. The aforementioned changes signify an increase in the level of liability for e-commerce platforms to conduct due diligence and limit their capacity to assert safe harbour immunity under Section 79 of the IT Act. The proposed strategy also aims to eliminate safe harbour immunity for platforms that are notorious for negligence, delayed action, and persistent infringement of intellectual property.

These proposed amendments interplay with existing case law, such as the *Christian Louboutin v. Nakul Bajaj* case, where the Delhi High Court rejected safe harbour protection for platforms that are actively involved in transactions. The regulatory reforms are consistent with this judicial trend, focusing on the necessity for platforms to take more aggressive steps in monitoring and governing content by any third party. In summary, these regulations intend to advance consumer protection, however, they also validate concerns about governmental overreach which can hinder innovation and development. Currently, the legislation needs to strike a balance that combines stakeholder feedback and flexible compliance requirements to ensure the regulations will be impactful without unfairly increasing the burden on the e-commerce sector by going completely consumer-focused. After analyzing the laws and court rulings in the context of marketplace liability, it is important to focus on the fallback liability clause, that has impacted the Indian E-Commerce landscape recently. The clause departs from

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<sup>35</sup> Ministry of Consumer Affairs, Food and Public Distribution (n 14) at 3.

<sup>36</sup> Kathuria and Globocnik (n 15) at 3.

<sup>37</sup> Acharya (n 25) at 5.

the traditional way of holding online marketplaces responsible for third-party transactions. This clause reflects the conflict between consumer protection and practical issues faced by e-commerce platforms. This research must cover this specific clause to understand the contemporary literature on the overall subject as well as the future roadway for online marketplace legislation in India.

## VI

### The Fall-back Liability Clause

#### *Overview*

The Consumer Protection (E-commerce) Rules, 2020 includes a fallback responsibility clause to better consumer protection available to Indian citizens. This clause holds the platforms responsible for mistakes and carelessness of the third-party sellers if such issues cause losses to the customers.<sup>38</sup> Stakeholders, especially smaller e-commerce companies and trade associations, are concerned regarding its executions.<sup>39</sup> This clause transfers responsibility for breaches by sellers to online retailers if the seller defaults and causes losses for customers. Increased legal risks, operational difficulties, regulatory requirements, and possible obstacles for MSMEs and new entrants in the e-commerce industry could be impacted by this by advancing liability exposure.<sup>40</sup> Critics contend, that by holding e-commerce platforms accountable for actions beyond their direct control, this clause unfairly treats them as more than just a middleman or intermediary.<sup>41</sup>

Concerns have also been raised over regulatory overreach, the clause's unclear application, and the possible chilling impact on innovation.<sup>42</sup> Potential solutions to these problems include the introduction of differentiable compliance mechanisms according to the size and type of the e-commerce marketplaces, encouraging stakeholder collaboration, offering precise guidelines and explanations, supporting strong self-regulatory mechanisms, and routinely evaluating and improving the regulations in light of feedback from the industry and changing market conditions. Improving consumer protection is important, but finding the ideal balance between protecting

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<sup>38</sup> Srivastava (n 16) at 3.

<sup>39</sup> Priyanka Sahay, *Draft E-Commerce Rules: Companies Express Concern About Proposed Fallback Liabilities Clause*, MONEY CONTROL (Jun. 29, 2021) available at: <https://www.moneycontrol.com/news/business/startup/draft-e-commerce-rules-companies-express-concern-on-proposed-fallback-liabilities-clause-7100011.html>.

<sup>40</sup> Kathuria and Globocnik (n 15) at 3.

<sup>41</sup> Jain and Tripathi (n 28) at 6.

<sup>42</sup> Kathuria (n 30) at 6.

consumer interests and creating an atmosphere to encourage the expansion of the e-commerce sector is still a tough task.<sup>43 44</sup> There is a need for flexibility and coordination across the e-commerce industry for healthy and ethical advancements as well as to resolve the fallback liability clauses concerns.

The fallback liability clause in the Consumer Protection (E-commerce) Rules, 2020 marks a dramatic change in India's marketplace regulations. This clause holds E-commerce platforms accountable for the conduct of independent vendors and sellers on their marketplaces, even in situations in which they have no direct influence over the vendors' business practices. Accordingly, e-commerce platforms are also accountable for losses incurred by the consumer due to any negligence. As a result, E-commerce platforms are held accountable to a much higher standard than before and this has possibly impacted the operating expenses of such platforms. Platforms may be required to strengthen their consumer grievance redressal systems, bolster their product quality control systems and implement stringent vetting and screening procedures to meet liability standards.<sup>45</sup>

The operating models of E-commerce companies, specifically the smaller ones with limited resources may be negatively impacted by such regulations.<sup>46</sup> This clause also raises the question of governance of the platform's need to have over independent vendors which in turn also conflicts with the idea of the free market.<sup>47</sup> More regulations could improve consumer protection and quality control but it will also make it harder to differentiate between marketplace and inventory models which could impact the diversified online retail environment in India.<sup>48</sup> This clause also impacts the pricing methods of online platforms as well. Platforms may need to adjust their pricing structures for sellers to account for potential compensation costs for sellers.<sup>49</sup> This would reduce the increased risk of liability but it also led the consumer to pay more thereby negating some advantages of online shopping.<sup>50</sup> The CP Rules, with the inclusion of a fallback liability clause, have generated discussion regarding the heightened accountability and culpability of online marketplace operators in India. The introduction of this clause created several obstacles for the e-commerce business, particularly for smaller firms and MSMEs.

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<sup>43</sup> Busch and others (n 9) at 3.

<sup>44</sup> Majithia (n 3) at 1.

<sup>45</sup> Khaitan & Co., *Consumer Protection (E-Commerce) Rules, 2020: Key Highlights* (2020).

<sup>46</sup> Deloitte & Retailers Association of India, *Unravelling the Indian Consumer* (2020).

<sup>47</sup> Rupa Basu & Tarak Nath Chaudhuri, *Impact of E-Commerce on the Indian Economy: A Stakeholder Perspective* 12 JIE 56 (2021).

<sup>48</sup> PWC India, *Decoding the E-Commerce Regulatory Landscape in India* (2021).

<sup>49</sup> Acharya (n 25) at 5.

<sup>50</sup> Ernst & Young, *E-Commerce and Consumer Internet Sector - India Trend Book* (2021).

### ***Concerns Raised on Draft E-Commerce Rules***

According to critics of the fallback liability clause, it improperly elevates e-commerce platforms above the status of a simple broker or middleman and imposes obligations on them for events outside of their direct control. This deviates from the IT Act, which provides for intermediary liability protection guidelines. Concerns about this clause's potential to treat e-commerce marketplaces unfairly have been voiced by industry bodies such as NASSCOM which see these platforms as just technological intermediaries primarily used to facilitate transactions between consumers and sellers.<sup>51</sup> Additionally, e-commerce platforms would be needed to ensure strong grievance redressal processes, due diligence protocols and thorough records of all transactions and seller activity to comply with the fallback liability clause. Smaller companies with limited resources might find it difficult to keep up with the pace of increased compliance workload which could impede their ability to expand and compete fairly in the market.<sup>52</sup>

Fallback liability's increased legal and financial risks may deter innovation and investment in the e-commerce industry, especially from smaller firms and start-ups with tight budgets. This provision can stifle the development and innovation of India's digital economy. Some features of the fallback liability clause, like the definition of "negligible conduct", the particular conditions under which liability would be triggered, and the amount of due diligence required, are deemed to be unclear and ambiguous.

### ***Concerns and Opinions of the Consumer Organisations***

The fallback liability clause, however, has been hailed by consumer organisations as a positive move in improving consumer protection within the e-commerce sector.<sup>53</sup> They contend that in situations when traditional economic actors, such as manufacturers or sellers, are not able to be held responsible, consumers have a clear path to compensation and redress through a fallback liability clause and tackling possible lack of accountability inside the supply chain of e-commerce. Additionally, the clause encourages e-commerce platforms to take more care in screening sellers, keeping an eye on product listings, and putting in place strong grievance redressal procedures by making these platforms liable. This is intended to promote the e-commerce sector to adopt accountability practices and emphasise on customer needs.<sup>54</sup>

Consumer advocacy groups contend that the fallback liability clause contributes to redressing the disparity of power that exists between customers and major e-commerce platforms, which frequently possess substantial resources and market dominance. It seeks to advance consumer interests and level the playing field by making these

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<sup>51</sup> Basu and Hickok (n 26) at 5.

<sup>52</sup> Bertolini (n 10) at 3.

<sup>53</sup> Riefa (n 8) at 3.

<sup>54</sup> Riordan (n 13) at 3.

platforms accountable. The planned EU product liability also adds conditional liability for online marketplaces under certain circumstances and other global trends and regulatory developments are consistent with the introduction of the fallback liability for online marketplaces.<sup>55</sup>

Creating a balance between favourable business conditions and adequate consumer protection in the fast-changing e-commerce landscape is important, this is the argument made by consumer organisations, despite the industry stakeholders' concerns about unfair treatment, compliance burdens, and possible suppression of innovation being legitimate.<sup>56</sup> Collaboration between e-commerce marketplaces, sellers, regulators, and consumer organisations is essential to addressing these issues and coming up with a fair solution. To mitigate potential hindrances and uphold consumer interests, it may be helpful to establish clear standards, implement various compliance processes based on the size and nature of e-commerce platforms, and periodically examine and update the legislation.

So far it can be said that the fallback liability clause has generated a great deal of legal discussion and interpretation by Indian courts. Cases such as the *Louboutin* (2018) case and the *Amazon* case (2020) show how Indian courts are interpreting intermediary liability differently and focusing on control and engagement of e-commerce platforms during the transmission of information and transactions. The current state of law makes it necessary to establish more precise rules and regulations to ensure that fallback liability is applied consistently.

After examining the fallback liability clause in the Indian context and its impact on e-commerce platforms and consumers, it would be helpful to broaden the perspective of this study by viewing different jurisdictions approaching online marketplace liability. A comparative analysis can shed light on different regulatory regimes and how well they perform to strike a balance between the expansion of E-commerce and consumer protection. Some best practices and lessons can be found by analysing the methods used by different legal systems. This could guide India in managing its changing position on marketplace liability by placing India's fallback liability clause in the perspective of international E-commerce regulations and specifying areas for improvement.

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<sup>55</sup> Busch (n 7) at 3.

<sup>56</sup> Kaushal (n 22) at 4.

## VII

### Brief Comparative Analysis of Marketplace Liability

The issue of online marketplace liability has been handled differently in different jurisdictions, with differing methodologies and legal frameworks.<sup>57</sup> A comparative examination with the United States and the European Union can provide useful insights and lessons for India as it navigates these changing conditions.

#### *The United States' Approach*

Section 230 of the Communications Decency Act (CDA) protects online platforms and internet service providers from responsibility for third-party or user-generated information published on their platforms.<sup>58</sup> This specific provision has been important in expanding the internet sector in the US as it has allowed platforms to be exempted from liability relating to any content that it did not create. There is an argument that this broad immunity has enabled the online platform to avoid acting responsible for damaging and unlawful content that appears on their websites. The immunity provided by the usage of Section 230 has been questioned in various cases in the recent past such as *Herrick v. Grindr* and *Lemmon v. Snap Inc.*, which dealt with defective goods and services promoted on internet platforms.<sup>59</sup>

In the case of *Herrick v. Grindr*, the plaintiff sued the company Grindr for negligence as the company took no actions regarding the removal of fake profiles which led to harassment of the plaintiff. The court cited Section 230 and ruled the decision in favour of Grindr. This highlights the problems in holding such platforms responsible for content appearing on their sites. Another notable case is *Lemmon v. Snap Inc.*, where the court ruled that Snap might be held liable for a speed filter that allegedly encouraged irresponsible driving, causing a fatal accident. This case raises the possibility that platforms could be held liable if certain aspects of their designs encourage harmful behaviour.<sup>60</sup>

#### *The European Union Approach*

Coming over to Europe, Subject to specific requirements, online intermediaries are exempted from liability for third-party content or information stored on their platforms under the terms of the EU's E-commerce Directive, or "safe harbour" clause.<sup>61</sup> Online

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<sup>57</sup> Busch (n 7) at 3.

<sup>58</sup> Eric Goldman, *Why Section 230 Is Better Than the First Amendment* 95 NOTRE DAME L. REV. ONLINE 33 (2017).

<sup>59</sup> Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 Fordham L Rev 401 (2017).

<sup>60</sup> *Id.*

<sup>61</sup> Riordan (n 13) at 3.

marketplaces will also be subject to fallback liability under the proposed EU Product Liability Directive if, upon request from an aggrieved customer, they are unable to provide the name of the product's maker, importer, or authorised representative within a month.<sup>62</sup> If traditional economic operators are not held accountable, this can empower customers to seek justice from the marketplace itself. The Directive seeks to update product liability laws for the digital era and ensure consumer welfare in e-commerce supply chains by conditionally assigning liability to online marketplaces and fulfilment providers when traditional actors are untraceable.<sup>63</sup>

The directive's safe harbour clause only works when the marketplaces act quickly to remove the content which can be categorised as malicious upon notification without any real knowledge of its illegality. It is applicable if the marketplace takes on an impartial, passive position with no editorial control. The Directive forbids requiring marketplaces to undertake broad surveillance duties. Although intended to promote internet expansion, there are disagreements about whether large platforms using complex algorithms can still be regarded as passive hosts, which may lead to modifications that better reflect their changing functions. The Directive's safe harbour is more limited than Section 30 as it mandates that online platforms have to take prompt action to delete or block access to illegal content once notified.<sup>64</sup> Furthermore, if the platform actively indulges in modifying and transmitting the content in question, then it is not protected under the clause. Recent events have concluded that online marketplaces can be held accountable for trademark infringement by third-party sellers if they promote or even assist in the sale of products that violate trademarks as demonstrated by the EU Court of Justice's decision in *Coty v. Amazon*. India can learn a few things from the comparative study of these jurisdictions as it works through the problem of online marketplace liability.<sup>65</sup>

In the case of *Coty v. Amazon*, the European Court of Justice stated that Amazon is liable for trademark infringement if it actively promoted and enabled the selling of counterfeit goods. The EU's reinforced its position that online platforms cannot be immune from liability if they participate in transactions. Furthermore, the proposed EU product liability directive intends to hold online marketplaces accountable by tightening the liability framework even more. The directive will hold the platforms responsible if they are not able to identify the manufacturer and importer of defective/counterfeit goods. The EU's stance showcases the growing trend towards accountability of online

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<sup>62</sup> Bertolini (n 10) at 3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Martin Senftleben, *Intermediary Liability and Trademark Infringement: Proliferation of Filter Obligations in Civil Law Jurisdictions?* in OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio ed., 2020).



marketplaces and emphasises the changes in the legal environment throughout the world.<sup>66</sup>

### *Lessons for India*

Indian legislation needs to balance out satisfactory consumer protection along with online marketplace liability without curbing innovation and growth in the e-commerce sector.<sup>67</sup> The Legislation needs to be careful regarding excessive blanket immunity which could generate unforeseeable issues. This can be avoided by establishing proper and thorough standards for when online marketplaces can invoke safe harbour protection and when they can be held liable for third-party related goods.<sup>68</sup> Businesses and consumers could potentially benefit from consistency and legal certainty as a result. There is a need to reassess all the obligations and liabilities of online marketplaces as they develop and assume active roles in product promotion, transaction facilitation, and auxiliary services.<sup>69</sup> India's exposure to liability should also consider the degree of control and involvement of online marketplaces in today's day.<sup>70</sup>

India can create a fair and useful strategy for handling online marketplace liability by interacting with stakeholders, such as consumer advocacy groups, industry associations, unions and online marketplaces. Collaborating can solve complicated problems and nurture an environment that is favourable to the expansion of the e-commerce industry without harming consumer welfare. India should also routinely review and improve its legal framework in light of the quickly changing e-commerce market and technical improvements.<sup>71</sup> This will help to guarantee that the framework is still applicable and efficient in dealing with new problems as they arise. Through this approach, along with the application of lessons from other jurisdictions, India can create a legal framework that is robust and balanced.

Having examined how the US and the EU approach online marketplace liability, India's regulatory issues can be addressed. The comparative analysis shows that striking a balance between platform accountability, consumer protection, and innovation in the digital economy is a problem other countries also face. By using these perspectives, sophisticated and practical suggestions customised for India's distinct E-commerce environment can be developed. To address the stakeholder concerns, these suggested remedies seek to create a regulatory climate that aids sector expansion as well as consumer welfare.

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<sup>66</sup> *Id.*

<sup>67</sup> Kathuria and Globocnik (n 15) at 3.

<sup>68</sup> Acharya (n 25) at 5.

<sup>69</sup> Basu (n 31) at 7.

<sup>70</sup> Ministry of Consumer Affairs, Food and Public Distribution (n 14) at 3.

<sup>71</sup> Basu (n 32) at 7.

## VIII

### Review and Recommendations

To find a middle ground that solves the issues discussed above, India needs to include the idea of a tiered compliance system. Such a system can be based on the size, structure and makeup of the e-commerce marketplace and could assist lessen the disproportionate burden on smaller companies while upholding consumer protection.<sup>72</sup> For example, larger e-commerce companies might be subject to stricter monitoring and vetting standards but smaller platforms or start-ups might be exempted from some of the compliance requirements if they have adequate self-regulatory processes in place.<sup>73</sup>

Stakeholder consultations, industry-wide discussions and cooperation all across the board to address concerns such as consumer protection, ease of doing business and the expansion of the ecosystem could be good strategies. This would help in nurturing collaboration between e-commerce marketplaces, sellers, regulators, and consumer organisations.<sup>74</sup> It might be possible to mitigate the ambiguity and uncertainties by offering precise instructions and explanations regarding the fallback liability clause's use, scope and requirements.<sup>75</sup> These policies are supposed to cover things like the amount of required due diligence, what constitutes negligent conduct and the precise conditions that would result in liability.<sup>76</sup>

E-commerce platforms would be better equipped to comprehend and abide by the rules if they had clear guidelines. While increasing consumer protection, encouraging strong self-regulation practices such as industry-wide codes of conduct, seller screening processes and grievance redressal systems is also required to improve the e-commerce ecosystem and reduce intrusive governmental micromanaging.<sup>77</sup> Platforms exhibiting sufficient self-regulation and adherence to best standards may be granted incentives, such as safe harbour privileges or "not as stringent" compliance obligations.<sup>78</sup>

To ensure the regulations are still applicable and useful, periodical evaluation and improvement of the fallback liability clause regarding industry comments, changing market conditions and technological development is critical.<sup>79</sup> Stakeholder discussions should be part of this assessment process that should also allow adjustments or amendments to address unexpected consequences or new challenges without curbing

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<sup>72</sup> *Id.*

<sup>73</sup> Basu and Hickok (n 26) at 5.

<sup>74</sup> Basu (n 31) at 7.

<sup>75</sup> Busch and others (n 9) at 3.

<sup>76</sup> Acharya (n 25) at 5.

<sup>77</sup> Bertolini (n 10) at 3.

<sup>78</sup> Riordan (n 13) at 3.

<sup>79</sup> Kathuria and Globocnik (n 15) at 3.

innovation or expansion of the e-commerce industry.<sup>80</sup> It is important to keep a balanced approach that considers the interests of all parties concerned while putting these solutions into practice.<sup>81</sup>

One way to look at it is that the rights of consumers to seek compensation if vendors are irresponsible or negligent, on the other hand, innovation and promotion and the establishment of an environment that supports the expansion of the e-commerce ecosystem, are equally important to the overall growth of India's digital economy.<sup>82</sup> India can effectively balance consumer protection and e-commerce industry growth by embracing a collaborative and adaptable approach, involving all stakeholders and implementing differentiated compliance mechanisms, clear guidelines, and incentives for self-regulatory practices. There is a need to develop a well-rounded strategy which not only protects consumer interest but also promotes investment, advances technological developments, fosters innovation and aids in the expansion of Micro, Small and Medium Enterprises (MSMEs) and start-ups in the e-commerce industry.

After exploring different recommendations and potential remedies to deal with the issues raised by the fallback liability clause and the evolving context of online marketplace liability in India, this study can synthesise findings and draw broad conclusions. Considering the various demands of stakeholders, the suggested solutions seek to achieve a balance between promoting e-commerce growth and protecting consumers. As we approach the end, it is critical to consider how these recommendations mix with India's larger plans concerning its digital economy while being considerate of current global trends in E-commerce legislation. The next section will outline the main conclusions and next steps towards forming a strong and fair legal framework for online marketplaces in India.

## IX

### Conclusion

The changing liability landscape for India's online marketplaces poses substantial obstacles and noteworthy opportunities. Key conclusions include the absence of clear guidelines for identification of eligibility for safe harbour under Section 79. This has caused judicial ambiguity and inconsistent application. The fallback clause intends to ensure consumer protection is prioritised by holding platforms responsible for third-party actions, but it also raises flags regarding constraints regarding compliance and curbing the development of such platforms. The paper compared the US and the EU to

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<sup>80</sup> Ministry of Consumer Affairs, Food and Public Distribution (n 14) at 3.

<sup>81</sup> Busch (n 7) at 2.

<sup>82</sup> Riefa (n 8) at 2.

showcase multiple approaches to online marketplace liability where the US provides extensive immunity to platforms under Section 230 of the Communications Decency Act, while the EU's E-Commerce Directive and Product Liability Directive sets a conditional liability on the platforms. This is a complicated issue and has witnessed different proposals such as tier compliance implementations, compliance frameworks depending on the platform's size and structure, regulations to prevent smaller businesses from getting unfairly taxed and plans to collaborate with stakeholders such as industries, consumer law advocates and regulators to generate best practices and uniform regulation. In India, setting out established rules for fallback liability clause usage can avoid legal confusion and ensure consistent enforcement. This would also be supported by constant reviews and regulations updates with advancing technology and market changes. It is important to create a flexible regulatory framework that balances out consumer protection and stimulation of innovation to ensure there is exploitation-free growth in the digital economy of India. The country can create a strong legal framework that promotes digital transformation and adapts global best practices while encouraging fair competition and innovation without risking consumer rights.