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MADRAS HIGH COURT DEALS WITH LIABILITIES OF AN INTERMEDIARY IN A COPYRIGHT INFRINGEMENT DISPUTE

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In *Fermat Education v Sorting Hat Technologies P. Ltd.* [CS(OS) 330 of 2018], the Madras High Court (Court) dealt with a copyright infringement dispute relating to educational materials uploaded on an intermediary platform.

Background

Fermat Education (Plaintiff) has been providing class-room coaching and online courses for competitive exams, since 2014. Amongst various coaching programs, the Plaintiff offers an online course called '2IIM-CAT' to help prepare for the Common Admission Test of the Indian Institute of Management. The course materials for the same include question banks in the form of literary works and videos, both of which have been created by/for the Plaintiff.

Sorting Hat Technologies (Defendant) operates an online platform for coaching called - 'Unacademy' (Platform), whereby third parties can upload study materials in both literary and video modes. The Plaintiff discovered that certain works comprising questions available/uploaded on the Platform were reproductions of the works belonging to the Plaintiff. Upon such discovery, the Plaintiff approached the Defendant to take down such infringing content. In response, the Defendant not only admitted to the infringement, but also proposed to resolve the issue. However, the infringing content remained on the Platform, and thus, the Plaintiff filed a suit seeking injunctive and other reliefs.

The Plaintiff also made third parties who uploaded the infringing content on the Platform parties to the suit. The Court was satisfied that a *prima facie* case for infringement was made out and granted an interim injunction against the Defendant and the third parties. Subsequently, the Defendant preferred an application for vacating the interim injunction contending that it is an intermediary (as per Section 79 of the Information Technology Act, 2000), who merely allows third parties to upload content on the Platform and accordingly sought exemption from any liability arising out of its actions. Additionally, the Defendant also sought refuge under the provision of Section 52(1)(i) of the Copyright Act, 1957 stating that the content was for educational purposes in the course of instruction and hence does not constitute infringement. Reliance was placed on the recent judgment of the Division Bench of the Delhi High Court in the case of *Chancellor, Masters & Scholars of the University of Oxford and others v Rameshwari Photocopy Services and another* [MIPR 2017 (1) 0039], wherein the Delhi High Court had held that reproduction by making photocopies of particular portions of books of various publishers and collating them into separate book for students, does not constitute infringement by virtue of Section 52(1)(i) of the Copyright

Act, 1957. Reliance was also placed on the judgment of the Delhi High Court in the case of *Myspace Inc. v Super Cassettes Industries Limited* (2016 SCC Online Del 6382), wherein the Delhi High Court had exempted an intermediary from liability due to copyright infringement, where third party content was uploaded.

The Plaintiff, in response relied upon the terms and conditions of the Platform to establish that the Defendant cannot be categorized as an intermediary and cannot claim protection under the Information Technology Act, 2000. Further, the Plaintiff contended that there was monetary consideration paid in respect of the content made available/uploaded on the Platform and thus the Defendant cannot seek the defense under section 52(1)(i) of the Copyright Act.

Decision

The Court concluded that the Defendant was not an intermediary, agreeing with the Plaintiff's contention that the terms and conditions of the Platform suggested that the Defendant exercised considerable control over and regulated the nature of the content uploaded on the Platform. Additionally, the fact that monetary consideration was being paid to third parties for uploading content on the Platform, the exclusivity provisions in the terms and conditions of which restricted educators from uploading / publishing the same content elsewhere once it had been uploaded on the Platform, also went against the Defendant in seeking exemption in light of being an intermediary.

On the availability of the fair use defense under Section 52(1)(i) of the Copyright Act, 1957, the Court held that the Defendant was involved in a commercial activity as it paid consideration to educators who uploaded content on the Platform and the exemption under Section 52(1)(i) of the Copyright Act, 1957 would therefore not be available.

On the basis of the above, the Court did not find any valid grounds to interfere with the injunction order granted earlier.

Comment

The online space continues to offer new/innovative solutions, most of which are on platforms hosted by intermediaries. The decision serves as a reminder to such platforms, that they may not always qualify as an intermediary and safe harbour provisions are not always available to them. The manner in which the business is carried on and the terms of use of the platforms are required to be carefully structured so as to qualify for the exemptions available to intermediaries. Furthermore, even if such entities and their platforms qualify as intermediaries, it does not mean that they would not be required to take down infringing material.

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