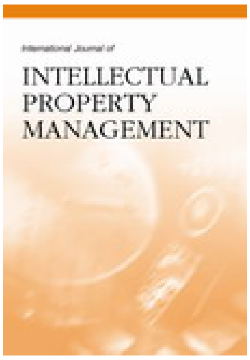

International Journal of Intellectual Property Management

ISSN online: 1478-9655 - ISSN print: 1478-9647
https://www.inderscience.com/ijipm

Intermediary liability for online copyright infringement in India: a trans-judicial dialogue

Sunidhi Setia, Samanvi Narang, Suhaib Salman

DOI: 10.1504/IJIPM.2022.10048348

Article History:

Received:	08 January 2022
Accepted:	30 April 2022
Published online:	17 January 2024

Intermediary liability for online copyright infringement in India: a trans-judicial dialogue

Sunidhi Setia* and Samanvi Narang

OP Jindal Global Law School,
Narela Road, Near Jagdishpur Village Sonipat,
Haryana-131001, NCR of Delhi, India
Email: sunidhisetia7@gmail.com
Email: samanvinarang@gmail.com
*Corresponding author

Suhaib Salman

Lawctopus,
Sco 224, Level 1, Cabin 14, Sector 37C,
Chandigarh 160036, India
Email: suhaibsalman.nalsar@gmail.com

Abstract: With the internet becoming a vital part of our day-to-day life and the enormous opportunities that it creates, its use and abuse also bring new challenges every day. The development of the internet not only enables access to quality information and data in seconds but also leads to economic issues due to mammoth intellectual property infringements. The authors in this work focus on the burgeoning intermediary liability for copyright infringement in the USA, and European Union with a brief discussion on laws in BRICS countries and Japan. Subsequently, the authors make a clear contrast in the approach of the judiciary to deal with such issues in India. Advocating a balanced mechanism to deal with copyright infringement on the internet, the authors suggest a harmonised international framework like the 'notice and take down'/'safe harbour' mechanism to limit the liability based on intermediaries' knowledge/awareness of the unauthorised communication and reproduction.

Keywords: intermediary liability; safe harbour; infringement; intellectual property; internet; copyright; actual knowledge; notice and take down; India.

Reference to this paper should be made as follows: Setia, S., Narang, S. and Salman, S. (2024) 'Intermediary liability for online copyright infringement in India: a trans-judicial dialogue', *Int. J. Intellectual Property Management*, Vol. 14, No. 1, pp.17–32.

Biographical notes: Sunidhi Setia is currently working as a TRIP Fellow and Academic Tutor at the OP Jindal Global Law School. She has completed her Post-graduation from NALSAR, University of Law, Hyderabad India, and graduated from the Institute of Law, Nirma University, Ahemdabad. Her specialisation in both her masters and under graduation was intellectual property laws.

Samanvi Narang is associated with Jindal Global Law School as a TRIP Fellow and Academic Tutor. She completed her BA, LLB (Hons.) with a specialisation in Energy Laws from the School of Law, University of Petroleum and Energy

Studies, Dehradun. Thereon, she completed her Master's in Corporate and Commercial Law from the NALSAR University of Law, Hyderabad. She is presently pursuing her PhD (part-time) from NALSAR University of Law, Hyderabad.

Suhaib Salman is currently working as the Creative Head of Legal-Ed Organisation, Lawctopus. He has completed his Masters from the Nalsar University of Law, Hyderabad with Intellectual Property Laws specialisation.

1 Introduction

From 1 million users in the late 1990s, internet users have increased to 4.9 billion in 2021, and the issue of liability of intermediaries becomes even more relevant. One-sixth of a person's day is spent on various internet platforms like Facebook, Instagram, Netflix, Amazon Prime, Alt Balaji Voot, etc. With this boom in the online streaming platform industry both nationally and internationally, it has become easy for consumers to have access to media digital content. The internet allows the artists, educators, researchers, musicians, and entertainment industry to communicate their work at a faster pace, also harbours pirates and anonymous people to copy and publicise the work without authorisation leading to potential and actual intellectual property infringements.

It is important to note that to make work available online to the end-user, there are various kinds and chains of intermediaries involved in the transactions. According to the definition of Intermediary as provided under Section 2(1)(w) of the Information Technology Act, 2000 (hereinafter 'IT Act'), the intermediary is a person who connects the individuals to the internet and provides services like hosting, web-building, receives, or transmit information on behalf of someone. This definition includes almost all the e-platforms that connect people to the internet and the one that provides services on behalf of someone. From the bare reading of Section 2(1)(w) of the IT Act, every 'stream-ripping' will fall within the definition of intermediary.

Before understanding intermediary liability for IP infringement on Social Media platforms, it is important to first understand what is protected as IP under copyright law in general. Copyright protects the original expression of work and not ideas. It requires originality and gives copyright holders exclusive rights to distribute, prepare, perform, display and derive work(s). A test of originality and deceptive similarity that varies in form is based on general substantive fundamental requirements. Copyright infringement includes unauthorised posting-reposting, communicating, and distributing of someone else's work (photo, music video) on social media. Fake social media accounts and scamming through these accounts have led the consumers into a labyrinth and require the urgent attention of policymakers and the decision-makers to uphold the interest of innocent consumers, IP rights holders, and the platform owners.

According to Kumar (2014), the careful study of a variety of provisions including 'notice and take down' and 'harbour' provisions shows a steady growth of intermediary liability laws in India and the USA. A plethora of literature uses the judicial pronouncements under statutory provisions to understand a country's stand on intermediary's liability. While the comparative methodology is the most popular methodology preferred and used by the IP rights scholars, Asensio (2012) focuses on the significant jurisdictional differences in dealing with secondary liability and safe harbour provisions at a substantive law level; points out the conflict of law aspects relating to online intermediary liability. Considering unpredictability, multinational scope, and disintegrity in substantive laws, the author concludes by suggesting international harmonisation of some basic principles to deal with issues realising the impracticality of the unrealistic aim of total unification of principles of private international law. Acknowledging the adverse effect of imposing liability on intermediaries for actions of their customers on internet service providers and the internet itself, Kahandawaarachchi (2007) limits the scope of the discussion and examination of ISP liability for the copyright infringement by third parties, i.e., their subscribers. The discussion around the Intermediary's liability is multi-nodal and intersects with different subject areas within the IP law itself. However, the aim throughout has been to homogenise the system of intermediary liability principles, at the same time seeking to fit it within the needs and circumstances of a particular country. Frosio (2017) highlighted the need and importance of Intermediary policing to deal with over-censoring or lack of creativity on platforms to fulfil the legal obligations imposed by governments across the globe. Bagal (2019) focuses on the disruptive technological advancements and development of music consumption gadgets and analyses the liability of the intermediaries involved in Copyright infringement in the music industry in absence of relevant judicial pronouncements.

The advent of the internet has not only catalysed the innovative development of music consumption from compact disc to iTunes but has also exposed the music industry globally to fast-evolving techniques of piracy. 'Stream ripping' is one such issue that needs the attention of policymakers and lawmakers around the world. According to Mokyr (2005), it is an illegitimate or unauthorised process of turning a streaming file into a downloadable file for local access. Considering the streaming of a sound or video recording is a public performance and makes the right holders entitled to the royalties, according to the number of times the recording is streamed. When these files are converted into a downloadable file, they are made available to the public at large without any cost hampering the rights holders and societies collecting such royalties on their behalf commercially. In absence of any determination of such an act by courts and the inefficiency of current legislative frameworks dealing with advanced technology, the question of copyright infringement still stands in limbo.

2 Understanding the Intermediary liability principles

The claims against intermediaries for online Intellectual Property infringement by a third party on their platform have been debatable for a long time now. De Ruyck (2020) noted that legal approaches and trends of liability doctrines vary with jurisdiction as we move from the common law countries to civil law countries. The intermediary liability doctrines while debuting from principles like vicarious liability and contributory infringement holding one liable for a third party's fault, have reached to recently developed inducement doctrine of secondary liability. Before dwelling on each liability doctrine, there is a need to focus on the greater question of imposing liability on intermediaries for a third party's wrongful act. According to Seth (2006) and Mann (2004), Deviation of liability reasoning from the 'you break it you pay for it strategy' to the ‘gatekeeper strategy ‘in the case of intermediary liability can largely be attributed to factors like intermediaries being/having:

a the weakest link to trace

b cost-effective monitoring

c financial efficiency to pay compensation as against the individual

d ability and position to block, remove and locate the source of the infringing content

e cost-efficient approach to seeking the relief.

However, Prakash and Pallavi (2020) noted that imposing third-party liability on intermediaries owing to stated reasons has led to new juro-logistic problems for the judiciary to negotiate the rights of various stakeholders and pronounce the extent of regulations to maintain pragmatic persuasiveness. This section will briefly discuss various models and reasoning to deduce intermediary liability along with highlighting their drawbacks or adverse effect on some or other stakeholders.

1 Strict liability or ‘no-fault liability’ principle under tort law makes the owner of the premises strictly liable for the wrong caused on its premises even if the owner is not the one committing the wrongful act. Similarly, the intermediary being the owner of the platform or the service provider which provided the access to the infringing content is made unconditionally liable for communication or publication of any unauthorised content. However, with the rise in the number of users and increased use of these platforms’ compliance and monitoring of the content by intermediaries for self-regulation seem to be a practically impossible option. Further, there is apprehension that to avoid any liability these platforms may involve in the practice of over censoring the online content leading to a chilling effect on free speech.

2 Contributory liability principle is secondary liability based on the knowledge of the intermediary of the infringing content, like abetment principles in criminal law, wherein the person inducing, materially contributing, or causing infringing activity is held liable. Alfred (2006) pointed out that there are no statutory guidelines to decide what can be considered a material contribution, but judicial pronouncements hint it to be ‘specific knowledge or direct assistance’. This position was reiterated in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), wherein the court opined that mere knowledge of potential infringement is not enough to make an intermediary liable for contributory infringement unless there is specific knowledge of the identity of the unauthorised work and the infringer.

3 Vicarious liability principle is based on the law of agency and the principle of ‘respondent superior’. Generally, this principle makes the superior or person in control vicariously liable for the act done by the person under control. Thus, while deciding on intermediary liability, the deciding factors include the ability to supervise or control the unauthorised conduct on its platform and the financial interest in the infringement. However, how to determine sufficient control and financial interest has been the subject of judicial interpretation. Judicial pronouncements in cases like *Fonovisa v. Cherry Auction*, 76 F.3d 259 (9th Cir. 1996) and *Shapiro, Bernstein and Co*. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963) over the time have included the mere ability to terminate vendor ship contracts

and the inclusion of the *direct interest test*. With every case, secondary liability kept on extending leading to the development of the principle of inducement.

4 Inducement liability principle is derived from carefully interpreting the judicial approach to dealing with IP infringement cases relating to intermediary liability. Thereby, dividing them into good faith and bad faith intermediaries, based on their intention. An intermediary is said to be an inducer when its business model thrives and is based on the promotion of infringement. Dogan (2011) highlighted that a variety of decisions by the Courts end up providing a safe place for the intermediaries qualifying as good actors and no protection for those classified as bad actors. While deciding the inducement liability the court has given relevance to the intention to infringe and considered an express encouragement for infringement as an irrelevant factor. Thus, the definition of inducement does not require a provoking act but merely an unlawful objective.

Let's now discuss the efficiency of International Treaty Provisions in light of the theoretical understanding of the quintessential intermediary liability principles discussed hereinabove.

3 Do we have efficient international treaty provisions to deal with intermediary liability for IP infringement?

With the galore global access to borderless internet, the question of online IP infringement and its international implication becomes even more significant. For international obligations of IP rights, WTO Agreement on Trade-Related Intellectual Property Rights (hereinafter 'TRIPS') is a minimum standard agreement for protecting intellectual property rights that bind the member countries. With the major objective of providing effective means of IP rights enforcement, TRIPS provisions vis. avoiding trade barriers, abuse of safeguards available, are silent on the issue of liability of intermediaries in online IP infringement. WIPO Copyright Treaty (1996) (hereinafter 'WCT') and WIPO Performance and Phonogram Treaty (1996) (hereinafter 'WPPT') are the two internet treaties adopted by the WIPO in 1996. The issue of rapid unauthorised communication and digital reproduction over the internet was debated at the Diplomatic Conference. The ultimate result left the issue of determining liability in such cases to be decided by national legislation, making the treaties neutral to online infringement. Article 8 of WCT and Articles 8 and 15 of WPPT provide for exclusive rights of 'distribution' and 'communication' of the work to the owner of the work. However, one of the article's agreed statements provides that within the meaning of internet treaties and the Berne Convention specifically, the mere provision of physical facilitation to make or enable communication does not amount to the communication of the author's work.

The combined reading of these provisions and the statements provide that the liability will arise when communication is made via wireless means only. However, Kaminski (2011) suggests that the statement provides us a limited understanding of its implication and applications as it excludes the number of activities that a service provider indulges in and excludes the contributory infringements. This leaves various issues like harbouring unauthorised data, routing, re-routing infringing information, and connection access for online communication and transmission at the mercy of national laws, without being discussed or touched upon under WCT and WPPT. With an aim of substantive harmonisation of intermediary liability provisions, the negotiations concluded with the formation of the Anti-Counterfeiting Trade Agreement, 2010. This agreement based on EU Directives and DMCA provided provisions to protect the digital environment but failed to provide liability exemptions for intermediary liability. Article 3:604 of the CLIP principle is another international provision that roots curbing the burden of identification and compliance with intermediary regulations of different jurisdictions, to provide a uniform, secure, and stable legal framework to the intermediaries providing neutral services to everyone. On one hand, Article 3:604(1) provides for the liability based on the general rule of knowledge and inducing infringing conduct same as that of the original infringer, on the other hand, sub-clause (2) and (3) provisions that in order to have single law, requires minimum substantive standards for the infringement. It provides only an exception to the liability of those service providers who have no control over the infringing activity.

Civil societies around the world have formulated and endorsed another set of practices to ensure balance between various human rights and the actions of curbing content taken by the intermediary under the Manila Principles on intermediary liability (Viswanath 2020). The principles primarily provide for protection of intermediaries against third party content, promotion of judicial restriction of the online content by following due process in line with doctrine of necessity and proportionality and advocate the unambiguous, accountable and transparent content restriction policies and practices.

With an evident lack of progress made by international organisations like WIPO, WTO, UNCITRAL, and ACTA to deal with the issue, due to interaction of intellectual property, e-commerce and internet media, there is obvious need for international harmonisation and unification of basic principles by using conflict of law rules to attain legal certainty and predictability.

It is pertinent to now discuss how intermediary liability rules are codified and effectuated in different jurisdictions around the globe. In the following section, we shall highlight the growth of intermediary liability for copyright infringement in the USA, EU, and other third-world countries.

4 The USA and the rise of intermediary liability for copyright infringement

4.1 Pre-digital millennium copyright act (hereinafter 'DMCA')

Prior to DMCA the issues of intermediary liabilities were dealt with under the broad ambit of direct and secondary infringement with further bifurcation of vicarious copyright infringement and contributory infringement. Under principles of direct infringement, to make intermediary liable, the plaintiff largely was required to prove the ownership of alleged infringed work and an act on part of intermediary to prove the violation of exclusive rights granted to the copyright holder. The courts have held the intermediaries liable under this principle for providing internet services to subscribers or for the act of reproducing or distributing the copyrighted materials at request of subscribers. The first case involving internet and Intellectual Property was *Playboy Enterprises Inc. v Frena* (1993) F. Supp. 839, wherein the plaintiff, Playboy Magazine sued both the uploader and the bulletin board service providers for publishing their photographs without any authorisation. The court while holding the BBS liable for copyright infringement for distributing and publicly displaying images, opined that intent or knowledge is not the factor considered while applying direct infringement principles. However, considering the excessive and unreasonable liability imposed via this principle the courts in later judgements like *Religious Technology Centre v Netcom* (1995) F.Supp 1361, understanding the strict liability nature of copyright laws stressed the need for some elements of causation or volition to refrain the imposition of liability on countless parties for merely setting up a system for internet access.

Unlike direct infringement, secondary liability principles are based on contributory and vicarious copyright infringement. Even in absence of an unequivocal recognition of vicarious liability, the courts can be seen imposing these principles when there is direct financial interest involved or ability to supervise the unauthorised use of copyrighted material. Judiciary can be seen divided on the application of these principles while deciding the ISP liability as where some courts find ISPs having little control over abundant data or direct linkage to profitability, while others find the close affiliation to subscribers and ownership of transmitting systems enough to satisfy the requirements to hold ISPs liable for vicarious copyright infringement. In *Gershwin Publishing Corp v Columbia Artists* (1970) 443 F.2d 1159 and *Sega Enterprises Ltd v MAPHIA* (1994) 839 F. Supp. 1556, the Court re-emphasised the fact that while deciding copyright infringement liability, the role of 'intent' and 'knowledge' is not significant and it is not obligatory to impose liability. However, with time, the courts seem to have diverged from the approach and considered the lack of resources, finances, ability, and direct linkage of profitability to flat-fee and brought in the application of principles of contributory infringement.

Contrary to vicarious liability, the contributory copyright liability does not make intermediary liable for merely providing services or goods and needs elements of participation, material contribution, or concrete knowledge of infringing activity.

4.2 Post digital millennium copyright act

Considering the vigorous nature of judicial decisions deciding ISP liability and limiting their liability, the USA 1998 amended its copyright law to enact DMCA. Section 512 of the DMCA does not provide for the liability of intermediaries but encompasses the guidelines when it is not under the safe harbour principle, which focuses on the transmission of data by the third party via an intermediary. Further, the exemption applies to the intermediaries acting merely as passive conduits and expedited removal of the infringing content under four categories namely 'transit digital network communicator, system caching, information location tools and storage of information on network or system'. The provisions further provide for strong 'notice and takedown' measures for taking down the infringing material in good faith on being notified by the right holder. This clear categorisation and provisions for dealing with fraudulent and misrepresented notifications and counter-notices help in facilitating judicial deliberation.

The first case in respect of contributory copyright infringement dealt by the US judiciary was *Sony Corp. of America v. Universal City Studios, Inc.* (1984) 464 US 417. In this case, Sony had recently introduced new technology known as VTR (Video Tape Recorder) which lets the user record the copyrighted material which was broadcasted on television, for users to view later. There were instances where the user with the help of technology recorded the copyrighted material and circulated it. All these circumstances led Universal City Studio to file suit against Sony alleging that VTR technology allowed the user to copy the program being televised and skip the commercials which were infringing provisions of copyright law. To support the above allegation, Universal made the argument that studio production was paid through the revenue being generated by advertisements. The decision came in favour of Sony in District Court but was overruled by the Ninth Circuit court. Sony appealed to the Supreme Court, the court gave the decision in favour of Sony propounding the principle of 'substantial non-infringing rules'. The court while dismissing the claim observed that Sony could not be held liable based on the generalised knowledge that the product in question might be misused for purposes that entail infringement. In other words, for an allegation to be legitimate, the person must show the actual knowledge of the infringing act. The extent of liability is further decided based on the action taken by the intermediaries after having actual knowledge of infringing activity leading to ISPs becoming risk hesitant and over-censoring the data.

For nearly two decades, the test laid down in the Sony case was followed in case of contributory copyright infringement but the court in the case of *MGM Studios Inc v. Grokster Ltd.* (2005) 545 US 913, took a different view. In this case, a copyright infringement suit was instituted by MGM against Grokster over decentralised peer-to-peer sharing of files over which the user could transfer the file to each other. The US Supreme Court in the present case denied the argument put forth by the Grokster that its platform has many lawful uses. But a report submitted before the court showed that 90% of the file on the platform which was being shared was copyrighted files and other evidence suggesting that active steps were taken by Grokster to encourage infringement. The court to tackle this issue developed the 'inducement theory'. According to the theory, if the device, service, or technology is in question by virtue of its fundamental character persuades the user to infringe someone else's copyright the service provider or the person who developed the technology can claim copyright infringement.

5 Intermediary liability for copyright infringement in European Union

5.1 Liability under E-Commerce Directives, 2000

Smallen (2016) noted that the European Union under its E-Commerce Directives, 2000, in absence of actual knowledge of infringing content, provides for the limited legislative immunity to intermediaries against the third-party infringement on their platform. While providing limited immunity for merely catching, conduit, and hosting activities, Article 12, Council Directives 2000/31/EC of the European Parliament further limits the liability, if the intermediary has not selected the transmitter, receiver or initiated or modified the transmitted information. Article 14 provides the exemption from liability for copyright infringement only to those intermediaries who on actual knowledge of infringing content remove it or block the access expeditiously. Further, through InfoSec Directives exemption to intermediary liability is provided for the unauthorised reproduction, which is transient, temporary, incidental, or integral to technical process. Thus, the actual knowledge of the infringing activity is integral to deciding the intermediary liability under EU law. Court of Justice of EU in *Google France and Google Inc. v. Louis Vuitton Malletier and Others* (2010) E.C.R I-02417, while deciding the issue relating to

AdWords services focused on whether Google acted merely as a passive conduit or was an active participant. Receiving remuneration for advertisement and matching of data by the system was considered insufficient by the Court to not grant an exemption under Article 14.

5.2 Liability under amended Article 17 of European directives on copyright

With newly adopted Directive on Copyright in the Digital Single Market, the European Commission has put an indirect obligation of filtering and monitoring online platforms while uploading content. Article 17 further requires intermediaries to take authorisation from the right holders before uploading content and making it available for public access, failing the same will lead to liability for copyright infringement, irrespective of who uploaded the content. Furthermore, the directive sets out different liabilities on the basis of the number of unique visitors, size, type, etc. With adversely affecting US tech giants like YouTube, and Meta, the new directives with no clarity on what consists of 'Best Efforts' rides on a see-saw with potential drawbacks and benefits waiting to be analysed.

6 Intermediary liability in BRICS and Japan

Brazil introduced the Marco Civil, basically a legislative effort to regulate intermediary liability by preserving the end-to-end nature of the internet. The landscape in Brazil around the complexity of the internet application providers is quite pertinent to understanding the importance of an intermediary liability model that not only provides the flexibility for providers to adopt their own policies but also safeguards the freedom of expression for internet users. Brazil opted for a balanced approach wherein there is minimal interference from the state and the judiciary acts as a legitimate arbiter for content disputes.

Contrastingly, Russia took a stringent stance on the protection of IP and introduced Federal Law No. 187-FZ (so-called the 'Anti-Piracy Law/Law') which came into force on August 1, 2013. Under this law, third parties will have to take down everything, if there is a notice issued by the IP holder except for the 'photographs' which are not added to the list even after the amendments in 2015.

On the other side, the Chinese policy for intermediary liabilities is ambiguous and in limbo. While in the EU, intermediaries can enjoy civil immunity, if they follow the notice and take-down mechanism (Friedman, 2017). But in China, intermediaries would be liable under Chinese consumer law, even if they follow the notice and take-down mechanism.

Interestingly, in South Africa, intermediaries are not liable as long as they are part of Internet Service Providers Association (ISPA) and they respond to valid takedown requests. There is little incentive for the intermediaries to contest the take-down notices as the burden of proof falls on them if they think that it is not valid or done in bad faith.

Japan follows the same common approach towards intermediary liability as India. Intermediaries would be accountable only for the content they are aware of or have 'actual knowledge' of. Article 3 of Japan's Provider Liability Limitation Act, enacted in 2001, contains a liability shield that does not apply, if a provider is aware that third-party content causes 'the infringement of the rights of others', or if 'there is a reasonable ground to find' that they know this.

7 Rise of intermediary liability for copyright infringement in India

7.1 Legislative development through copyright laws

Given the integral role played by the intermediaries like internet service providers ('ISPs'), search engines, web hosts, etc. in enabling this virtual reality, it is pivotal to channel and regulate their conduct through legislation. In India, the major laws that govern and regulate the issue of intermediary liability are the Information Technology Act, 2000 (hereinafter 'IT Act'), Section 52(c) of Copyright Act 1957, and IT Rules of 2011. Unlike the USA, Indian copyright law did not specifically or expressly provide for the provisions to deal with liability of intermediary for copyright infringement until 2012. The legal provision related to the same in India can be understood under the two broad heads of pre and post Copyright (Amendment) Act, 2012.

Being drafted in the age before internet development, the Copyright Act of 1957 along with amendments made in 1994 and 1999 had no express provisions dealing with intermediary liability for copyright infringement. However, Section 51(a)(ii), Copyright Act 1957 which provides for 'deemed infringement' can be read to provide an indirect provision to deal with the kind of liability arising for copyright infringement on the internet. This provision constitutes an act of infringement if a person permits to use any place for the purpose of infringement having actual knowledge or awareness of such unauthorised communication. As ISPs provide their platforms either ways for storing or transmitting the content for a nominal charge or through advertisement earning profit can be seen as satisfying the requirements of deemed infringement under Section 51. Considering the provision of 'having no knowledge or awareness of infringement' provisions under copyright laws, the Indian regime is found tilted towards the principles of Secondary liability, though no express demarcation is drawn under any law. However, in absence of a 'safe harbour' provision like that of DMCA under Indian laws, the courts could be seen holding intermediaries liable even in absence of actual knowledge or awareness rejecting the defence of post infringement measures.

As the data on the internet is sent by means of 'packet switching', the routers make various copying in transit affecting the reproducing, distributing, and public performance rights of the copyright holders. In order to fulfil its compliance under WIPO 'internet treaties', Copyright Act was amended in May 2012 to add Section 52(1)(b) and (c), fair use exemption and a chance to take down the infringing content on due notice of the same. The amended provision further provided the exemption for temporary or incidental storage bringing a paradigm shift. However, in absence of statutory clarity on what is 'transient or incidental storage', the issue has been left open for judicial interpretation. Proviso to Section 52 after amendment provided the much-awaited counterpart to DMCA's notice and takedown provisions providing a window period of 21 days to right holders to get the Court's order for continuous takedown of the alleged infringing content, in absence of which, intermediary can continue providing access of the alleged taken down content.

7.2 Legislative development under Information Technology Act, 2000 and intermediary guidelines

Unlike provisions under copyright laws, IT Act, 2000 provides for a 'safe harbour' mechanism specifically under Section 79. However, this exception under Section 79, IT Act is not unconditional. The intermediary must exercise due diligence apart from the general condition, specific conditions that had been laid down under IT (intermediary guidelines) Rules, 2011. Rule 3(3) provides that if a user has a specific knowledge that indicates infringement of copyright, the person whose copyright is being infringed can send a notice to the intermediary, which under rules must compulsorily publish the contact details of a specifically appointed grievance officer under Rule 11. But this is a tedious process for a person having rights over the intellectual property, to send separate notices for each case of infringement. Moreover, companies generally escape liability by contending that they do not have actual knowledge of each instance of infringement. It raises an important question that needs to be examined; can stream-ripping services avail the safe harbour provision under the IT Act? Albeit, specific cases cannot be found in Indian jurisdiction at this point.

Both IT Act and copyright law give a window of 21 days to the intermediaries to continue access to the alleged infringing work in absence of court's order. The interplay between IT Act and Copyright Act, and the court's view on this, could be better understood with the help of the Delhi High Court Judgement in case of *Super Cassette Industries Ltd. v MySpace* (2011) 48 PTC 49 Del, wherein Hon'ble court opined that the provisions of IT law can override other laws but held that Section 79 for saving the liability of defendant cannot restrict the rights of copyright or patent holder.

However, with the precedent set in the USA involving such issues, it has been seen that companies facilitate the infringement of copyright and try to justify their action by saying they have only general awareness of the issue. The court in India has not addressed or considered the inducement theory yet. Hence, we must wait and see how the court deals with this issue.

7.3 Judicial intervention, development, and suggestions

While dealing with various cases on intermediary liability for IP infringement on digital media and music industry, the courts can be seen adopting measures like issuing various kinds of injunctions to protect the rights of IP holders while not going over the board to adversely affect technological developments. Where, on one hand, the decision of the court in *MySpace Inc vs. Super Cassettes Industries* (2011) *FAO(OS) 540*, provided the intermediaries to take action against the infringing content on the basis of 'actual knowledge' and gave IP holders a relief of making intermediaries take down the infringing content by providing exact location in absence of any court's order. The increasing cases of digital piracies made the copyright holders impatient to wait for the infringing content to appear on the intermediary websites. Considering the anonymity of the infringer on the internet, the IP holders under the 'qui timet' injunctions started filing the infringing suits against the unknown infringer citing the imminent danger and substantive loss. Nadkarni et al. (2020) noted in order to curb the rising digital piracy cases, the judiciary in India started with new remedy of passing *ex-parte* 'john-doe' or 'Ashok Kumar' orders against the anonymous defendant who could be hosting the infringing content online on their platforms, resulting in the apprehended substantive loss to the IP holders. However, with a surge in the number of orders being passed, it increases the burden to balance the interests of both intermediaries and the IP holders to not discourage investments and not harm the digital economy.

One such question of balancing rights came before the Bombay High Court in *Eros International Media Limited* and Ors vs. Bharat Sanchar Nigam Limited and Ors. (2016) CS 620 wherein the court while deciding the application for passing John doe order and broad blocking of websites, held a prerequisite of a comprehensive audit for justifying the necessity and urgency of such broad blocking orders to prevent the interest of honest and genuine intermediaries. However, with technological development, the habitual offenders developed innovative ideas finding loopholes in legal statutes and started communicating the infringing work to the public with the help of mirror websites. To prevent multiplication of suits against different websites for the same content, the right holders started seeking 'Dynamic injunction' which will extend the existing order of injunction against every mirror website detected with the infringing content to provide immediate remedy to right holders and reduce judicial burden. Such a Dynamic injunction order was passed by Delhi High Court in *UTV Software Communication Ltd. and Ors vs.* 1337X To and (2017) Ors CS(COMM) 724, in favour of UTV to extend the injunctions against all the defendants as and when they detected infringing content.

In *Channel 2 Group Corporation v. http://live.mycricketlive.net and Ors* (2019) CS(COMM) 326, to protect the broadcasting rights of ICC Women's Cricket World Cup, 2019, the Court extended such dynamic injunction to the live audio streaming and broadcasting by passing an ex-parte restraining order against 100 audio streaming platforms and directed the search engines to take down the links and listing of the infringing content on their web pages or search history. Furthermore, the proactive roles that courts are playing while dealing with unprecedented abuse of these platforms can be seen in the judgement of the Delhi High Court in *Swami Ramdev & ors. v Facebook Inc & Ors*, (2019) CS (OS) 27. The court here passed an order for geo-blocking of the defamatory content unlike the usual order of passing ordinary injunction to block the access only in India. Geo-blocking allows access to infringing content across the world provided the content was uploaded from the network located in India. While such orders of geo-blocking can be seen securing interest and providing relief to IP holders in near future, the question as to how to deal with the threats from the network outside India can still be seen in limbo.

In India, courts have not come across the stream-ripping disputes, unlike the USA. But one may consider some of the landmark judgements which are proximate to the issue at hand. Section 51(a)(ii) of the Copyright Act which talks about contributory infringement does not expressly cover the modern technology used for piracy including the stream ripping software. The role that an intermediary can play has not been deliberated just yet, due to which several challenges arise. Although the court in the case of *Myspace* observed that where provisions have been applied on secondary liability, it seems difficult to extend its applicability to the issue which we are dealing with. The court till date has adopted a very liberal interpretation of Section 51 and observed that due to the volume of content being uploaded on the internet via intermediary, their liability would arise only in cases where they have actual knowledge of infringement instead of general awareness.

One of the possible solutions to the above-mentioned issue can be found under Section 65B which criminalises the act of making changes to the right management information of protected work. Metadata is essential for any work in which copyright subsists as it helps in identifying the owner or licensee of the copyrighted work and other information pertinent to the copyrighted work. Section 2(xa) considers it as 'risk management information'. Further, Section 65B provides that if there is any alteration or removal of risk management information which is not authorised is punishable under the Copyright Act. Moreover, sub-clause (ii) provides for the circumstances under which such information is being manipulated, distributed, broadcasted, or communicated to the public. By nature, stream ripping software manipulates right management information of protected work under Section 2(xa)(i) and conditions associated with the legitimate use under Section 2(xa)(iv). Hence, if the courts in India apply the principle of harmonious construction as propounded in the Myspace case, Section 65B can act as a possible solution to the piracy caused by stream ripping software. At present, it is very easy for the stream ripping software to change the metadata of the protected work and distribute it; thereby, infringing the copyrighted work.

Another possible solution can be blockchain wherein all the metadata of recorded music will be stored, and any update or modification of metadata would be notified to the right holder of the work in real-time, so that they can be fairly compensated for infringement of their work. Further, many challenges arise as there is no standard format for the documentation of metadata and different persons have their own database.

8 Lack of harmonisation: trade barriers and adverse economic effects

With a different understanding of 'legitimate trade' and TRIPS minimum enforcement requirements, international trade involving IP has flourished over time. However, in absence of a similar international minimum standard mechanism for disputes involving online IP infringement is affecting the trade in the concerned industries adversely. Differential treatment of ISPs for secondary liability around the world and relatively strong immunity for infringement under DMCA acts as the obvious trade barriers for countries like India having pro-right holders' regimes. This not only creates an economic downfall but also makes India an inconvenient forum to resolve disputes. Further, Khan (2011) noted that with the strong lobby of ISPs like Google, Amazon, E-bay the stringent liability provisions are non-tariff barriers when compared to the laws of their counterparts. Considering situations like these and the ever-growing internet reach, the authors strongly suggest that having an international mechanism to protect against online IP infringement and to provide minimum standards like that of TRIPS to have a harmonised mechanism.

It is important to understand here that the development of technology with its interaction with various other IPs affecting streams like E-commerce platforms, the music/entertainment industry, and social media largely depends on the equal and proportional evolvement of corresponding legislations. The stagnant laws can not only pull back the innovative minds but can also put an adverse effect on a country's economy. The authors suggest building the much-discussed value gap through a harmonised mechanism that not only promotes the principle of 'fair remuneration' for IP rights holders by providing them much deserved royalties, but the one which also promotes the principles of 'fair use' for free and open internet, to ensure that the non-commercial and good faith communications are not considered as IP infringement.

The major issue, however, here arises is the practical application of such a harmonised mechanism across the globe considering the variety of substantive provisions followed across jurisdictions. Taking the EU as a case study, the authors stress the need for critical analysis of judicial decisions on IP infringement in Europe despite the legislative differences. With decisions like *Media BV v. Sanoma Media Neth. BV,* 2016 E.C.R. 644, *Filmspeler [Stichting Brein v. Wullems*, 2017 E.C.R. 300, 3 C.M.L.R. 30 (2017)] and *The PirateBay*, CJEU has decided the liability of these platforms by paying specific attention to two cumulative elements vis. infringing conduct and actual knowledge of infringement. Now, if the judicial approach to deciding secondary liability for IP infringement in the EU is carefully compared to the judicial trend followed around the world, the commonality of the two discussed elements would not be surprising.

9 Conclusions and way forward

Having understood the mechanisms to deal with intermediary liability for copyright infringement in India and different jurisdictions across the world, the new laws seem to be pro-right holders imposing strict liability obligations on intermediaries. According to Reynold (2019), the far-reaching effects of newly amended Article 17 to European Union Directives on Copyright law-making intermediaries liable for copyrighted content posted by their users is leading to widespread protest known as 'meme ban'. Furthermore, the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, in India while providing for various regulations for social media intermediaries and digital media is silent on procedures in case of infringing IP rights. The rules provide for obliging intermediaries to deploy automated tools to identify and remove the infringing content along with tracing of preparator. These laws make it even more urgent to balance the rights and build the value gap. These newly formed or to be enacted laws are not only detrimental for the small operators but also are not in consonance with existing laws like provision of injunction against the intermediary for knowledge of infringement in UK or judicial decision like Supreme Court judgement in *Shreya Singhal v. Union of India* AIR (2015) SCC 1523, of burdening the intermediaries with unnecessary expectation of judging the legitimacy of huge flowing data on their platforms.

Considering the nature of copyright infringement and the border-less world of internet, we can conclude that to promote a balanced society for both right holders and internet development, there is need to have a harmonised international framework like 'notice and take down'/'safe harbour' mechanism to not grant immunity but to limit the liability based on intermediaries' knowledge/awareness of the unauthorised communication and reproduction.

Thus, the authors suggest having a harmonised mechanism that provides minimum standards like any other international IP provisions to bring unity and remove trade barriers due to differential laws. The authors suggest having a regime where the 'safe harbour principle' based on secondary liability goes hand in hand with fair remuneration and fair use principles. This will not only promote the digital single market or positive economic effects, but will also stimulate creativity, investments, innovation, production, and development of digital platforms. The furthered harmonised legal framework will lead to less dispute and hence lesser legal suits.

References

Alfred, Y. (2006) 'Third-party copyright liability after Grokster', *Minnesota Law Review*, Vol. 91, No. 184, p.195.

Asensio, P. (2012) 'Internet intermediaries and the law applicable to intellectual property infringements', *Journal of Intellectual Property Information Technology and E-Commerce Law*, Vol. 3, No. 3, p.350.

Bagal, Y. (2019) 'Contributory copyright infringement in music industry: technological implications', *Journal of Intellectual Property Rights*, Vol. 24, Nos. 1–2, p.28.

Channel 2 Group Corporation vs. http://live.mycricketlive.net and Ors (2019) 326, (CS(COMM)), p.10.

Copyright Act 1957 (India).

De Ruyck, J. (2020) *Comparative Study of National Approaches to Internet Intermediary Liability, IP Watch* [online] https://www.ip-watch.org/2014/05/09/comparative-study-of-national-approaches-to-internet-intermediary-liability/ (accessed 27 March 2022).

Dogan, S. (2011) 'We know it when we see it: intermediary trademark liability and the internet', *Stanford Technology Law Review*, Vol. 7, No. 1, pp.6–7.

Eros International Media Limited and Ors. vs. Bharat Sanchar Nigam Limited and Ors. (2016) 620, (CS), p.3.

Filmspeler [Stichting Brein v. Wullems] (2017) 300, (ECR), p.7.

Fonovisa v. Cherry Auction (1996) 259 (F.3d), p.76 (9th Circuit).

Friedmann, D. (2017) 'Oscillating from safe harbor to liability: China's IP regulation and omniscient intermediaries', in Frosio, G. (Ed.): *The Oxford Handbook of Online Intermediary Liability*, pp.277–294, 2020, OUP, Oxford.

Frosio, G. (2017) 'Internet intermediary liability: WILMap, theory and trends', *Indian J.L. & Tech.*, Vol. 13, No. 1, p.16.

Gershwin Publishing Corp v Columbia Artists (1970) 312, (F. Supp.), p.581.

Google France and Google Inc. v. Louis Vuitton Malletier and Others (2010) C-236/08.

Kahandawaarachchi, T. (2007) 'Liability of internet service provider for third party online copyright infringement: a study of US and Indian laws', *Journal of Intellectual Property Rights*, Vol. 12, No. 6, p.553.

Kaminski, M. (2011) 'An overview and the evolution of the anti-counterfeiting trade agreement', *Albany Law Journal Science & Technology*, Vol. 21, No. 3, pp.385–444.

Khan, R. (2011) 'IP protection and enforcement – a barrier to legitimate trade?', *ATRIP Congress: IP Law at Crossroads of Trade*, Vol. 30, pp.25–27.

Kumar, A. (2014) 'Internet intermediary (ISP) liability for contributory copyright infringement USA and India: lack of uniformity as a trade barrier', *Journal of Intellectual Property Rights*, Vol. 19, No. 4, p.272.

Mann, J.R. (2004) 'Regulating internet payment intermediaries', *Texas Law Review*, Vol. 681, No. 84, p.708.

Media BV v. Sanoma Media Neth. BV (2016) 644, (ECR), p.15.

MGM Studios Inc v. Grokster Ltd (2005) 545, (US), p.913.

Mokyr, J. (2005) 'The intellectual origin of modern economic growth', *Journal of Economics History*, Vol. 35, No. 2, p.285.

MySpace Inc vs. Super Cassettes Industries (2011) FAO(OS) 540.

Nadkarni, N., Dan, S. and Kanwar, U. (2020) *India: The Conundrum Of Intermediary Liability In The Last Decade*', Mondaq, 23 April [online] https://www.mondaq.com/india/trademark/921920/the-conundrum-of-intermediary-liability-in-the-last-decade (accessed 20 September 2020).

Playboy Enterprises Inc. v Frena (1993) 1552, (F.Supp.), p.839.

Prakash, A. and Pallavi, P. (2020) 'No end of trouble? Intermediary liability after perfect 10 v visa international', *IJIPL* [online] https://www.nalsar.ac.in/IJIPL/Files/Archives/Volume%201/6.pdf (accessed 21 January 2022).

Religious Technology Centre v Netcom (1995) 907, (F.Supp), p.1361.

Reynold, M. (2019) 'What is Article 13? The EU's divisive new copyright plan explained', *WIRED* 24 May [online] https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban (accessed 24 October 2021).

Seth, K. (2006) 'Censorship by proxy: the first amendment, internet intermediaries and the problem of the weakest link', *University of Pennsylvania Law Review*, Vol. 155, No. 11, pp.12–101.

Shapiro, Bernstein & Co. v. H.L. Green Co. (1963) 316, (F.2d), p.304.

Shreya Singhal vs. Union of India (2015) AIR (2015) 5, (SCC), p.1.

Smallen, M. (2016) 'Copyright owners take on the world (wide web): a proposal to amend the DMCA notice and takedown procedures', *Southwest Law Review*, Vol. 49, No. 1, pp.169–170.

Sony Corp. of America v. Universal City Studios Inc. (1984) 464, (US), p.417.

Super Cassette Industries Ltd v MySpace (2011) 48, (PTC) p.49.

Swami Ramdev & ors. v Facebook Inc & Ors (2019) 27 (CS (OS)), p.15.

UTV Software Communication Ltd. & Ors vs. 1337X To and Ors, (2017) CS(COMM) 724.

Viswanath, A. (2020) *Intermediary Liability for Intellectual Property Infringement*', Singh Associates [online] https://singhassociates.in/wp-content/uploads/2020/01/SA-IP-Tech-Jan-2020.pdf (accessed 21 August 2021).

WIPO Copyright Treaty (1996).

WIPO Performance and Phonogram Treaty (1996).