

ONLINE INTERMEDIARY LIABILITY AND COPYRIGHT
INFRINGEMENT: A COMPARATIVE STUDY OF THE FRAMEWORK IN
INDIA AND USA

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ABSTRACT

In the age of the Internet, the commission of copyright infringement by innumerable anonymous users through internet intermediaries, has become rampant. Owing to the technical difficulties of tracking down each individual infringer, copyright holders have held the intermediaries who are facilitating the access and use of the Internet, responsible. An argument in support of holding the intermediaries responsible is that the intermediaries are also profiting of such infringing content indirectly. However, the nature of the Internet is such that the normal framework of redressal accorded to copyright infringement in the tangible medium, cannot be applied on the Internet. Imposing a very strict standard of liability on intermediaries will adversely affect the dynamic nature of the Internet and curb economic development in the digital age. Due to these reasons, the development of an intermediary liability and copyright infringement framework which balances conflicting interests, has become essential. In this paper, the author has made comparisons to the frameworks that exist in India and USA under the Digital Millennium Copyright Act (DMCA); as the US framework has given rise to a number of successful internet-based businesses. By this, a robust framework has been proposed to be implemented in India. In pursuant to this objective, this paper has been divided into three parts. Part I provides an outline of the legal framework of intermediary liability and copyright infringement that exists in India and USA. Part II makes a comparative study between the legal framework in India and USA, in order to identify the lacunae and deviations that exist. Part III makes certain recommendations to be implemented for having a more conducive and

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effective intermediary liability and copyright infringement framework in India, and subsequently concludes.

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INTRODUCTION

The development of copyright law has kept abreast of the development of technology. With every new technological advance that has been made, questions as to how this would affect the rights of copyright holders have been raised. The economic value of a copyright is derived from the holder's control over how the copyrighted work is reproduced or distributed. Without such control, a copyright would be of little value and would not act as an effective incentive to the creator.¹ Intermediaries facilitate such reproduction or distribution. This is not a new development as it has been so from the time of the invention of the printing press; printers became the very first intermediaries between the author and the reader in the fifteenth-century. In the modern day, the internet has emerged as a new and indisputably integral intermediary, enabling global transfer of creative works. While this has greatly benefited and encouraged the creation of new works, it has also posed grave threats to the rights of copyright holders, both because of the way the internet works and the nature of copyright itself. The internet has changed the way in which content is created and distributed and this of increased relevance to copyright law which concerns itself with protection of such content.

COPYRIGHT INFRINGEMENT AND THE INTERNET

The internet acts as global network by facilitating devices across the world to communicate with each other through the transfer of material from one device to another. In this process, the devices are essentially making 'copies'. Thus, it can be said that the internet works on 'copying'. Due to this, the regulation of activities that infringe copyright protection for works on the internet is radically different than for those works that are fixed in a tangible medium. For example, the purchaser of a hardcopy of a book is not held liable of copyright infringement for acts such as reading, gifting and re-selling the book. However, these acts constitute violations on the internet as it involves the making of 'copies'. Another definitive factor for liability is that the internet enables an individual user to make an unauthorised copy of the work and circulate it to large number of people almost instantaneously and at low cost, compared to infringing in the tangible medium. Access to such infringing works is also

¹ DAVID BAINBRIDGE, *INTELLECTUAL PROPERTY* (10th ed. 2018).

facilitated by search engines or links to work. Copyright infringement by such individual violators is often harder to detect, but they eat away the rights of the copyright holder.²

This kind of infringement perpetrated by individuals is due to the presence of online intermediaries. The term ‘intermediary’ covers a wide range of parties such as Internet Service Providers (ISPs), web hosting service providers, search engines, transitory communication systems, telecom service providers, online market places and cyber cafes among others.³ These intermediaries connect users to the internet, allow them to interact with each other and also to share and receive content. They facilitate both communication and trade online. Due to the significant role that intermediaries play on the internet, they are often embroiled in intellectual property disputes.⁴ The liability of intermediaries arise because they host or facilitate the transfer of infringing content uploaded by their users. In the past, many intermediaries have sometimes been able to avoid liability by claiming that they are simply facilitating transfer or are hosting, and do not have any direct control over the selection of the content and are unaware of the specific details of the content. In many jurisdictions, intermediaries have taken advantage of the immunity accorded to them by ‘safe harbour’ provisions. ‘Safe harbour’ provisions are those provisions that provide immunity to online intermediaries from the infringement of intellectual property rights such as copyrights and trademarks. However, with the growth of the internet and at the increased threat of unjust enrichment, a different global regime has emerged, one where there is an increasing pressure on online intermediaries to prevent copyright infringement and to take effective action and responsibility where such infringement has already occurred.⁵

The law imposes liability for copyright infringement on intermediary by imposing upon them a duty to actively monitor the content being uploaded by their users. Although intermediaries’ resort to defences such as their capacity or working *only* as a host and not having made any modifications in the content, there is a very strong justification for holding them liable. The

² Precious A Adeyemi, *International Developments in Licensing and Rights Management for Copyright Protected Works on the Internet: Implications for Copyright Exceptions and Limitations*, ACADEMIA, https://www.academia.edu/37877320/International_Developments_in_Licensing_and_Rights_Mangement_for_Copyright_Protected_Works_on_the_Internet_Imlications_for_Copyright_Exceptions_and_Limitations (last visited Dec. 21, 2019).

³ Karthik Chawla, *Intermediary Liability-An Explanation*, NALSAR TECH LAW BLOG (Oct. 7, 2014) <https://techlawforum.wordpress.com/2014/10/07/intermediary-liability-an-explanation/>.

⁴ 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 307-308 (Peter Yu ed., 2009).

⁵ Jeremy Beer and Christopher Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS J. 375, 375–409 (2009).

justification is that online intermediaries earn advertising revenue from the content that is shared or allowed to be accessed by the. Further, the costs that the copyright holder will have to incur for identifying the individual infringer is an unreasonable one. Therefore, it makes sense to hold the intermediaries liable as they are profiting from such infringing material. The question of intermediary liability is not about whether there should be complete immunity for copyright infringement online. Copyright liability cannot be absolutely eliminated, whether online or offline. However, there is a need to keep in mind the restrictions faced by the intermediaries as well due to the fact that it is not feasible to examine all the content that is uploaded online due to the sheer amount of data that is being exchanged simultaneously. This would make the business of intermediaries expensive and would eventually increase the cost of accessing the internet to individual users.⁶ Further, the intermediary cannot be held solely liable for all the infringing content where the individual user is let-off scot free. Online intermediaries and copyright holders are mostly the stakeholders whose rights have been discussed in debates around the world. However, there is a third important stakeholder who is the user of the internet who is entitled to the right of fair dealing. When the content that has been uploaded by a user is taken down by the intermediary on the basis of a claim by the copyright holder, it is necessary that a counter claim mechanism is provided to the user to make his defence. Otherwise the rights of fair dealing or fair use, assured by many copyright legislations, will be violated. Keeping in mind the interests of these stakeholders, there is an impetus for determining the level of liability to be apportioned to online intermediaries in the process of protecting the rights of copyright holders and internet users.

It is apparent that the evolution of intermediary liability, especially with respect to copyright law, has been a contentious one with recommendations of “blanket immunity”, recommendations for the removal of the due diligence requirement and a limited approach to defining intermediaries being taken.⁷ Therefore, there is a lack of clarity with regard to the same. Having an ambiguous and unclear safe harbour provision is detrimental both to the copyright holders as well as to the intermediaries. This has been the case in India where the statutes are unclear. Further, the situation has become more complex due to the varied

⁶ COPYRIGHT ENFORCEMENT AND THE INTERNET 121-122 (Irina Stamatoudi ed., 2010).

⁷ The Information Technology Bill, No. 135 of 1999 §78, Gazette of India (1999), pt. II sec. 2, <http://egazette.nic.in>.

approaches taken by different courts in India. All this has had an adverse impact on the growth of internet-based start-ups and businesses in India.⁸ At this juncture, this author is of the opinion that there is a need to bring about sweeping reforms in the law concerning intermediary liability. Therefore, this paper makes a comparative study between India and the United States of America, a country which has several successful internet-based businesses and has emerged as a pioneer in safe harbour laws on the global level. Even South Asian countries like Singapore have heavily borrowed from the US framework and benefited from the same.

PART I

LEGAL FRAMEWORK REGARDING INTERMEDIARY LIABILITY VIS-À-VIS COPYRIGHTS IN INDIA AND USA

While talking about the liability of online intermediaries and copyright infringement in the Indian context, there are two important legislations which come into play – the Information Technology Act, 2000 (hereinafter referred to as “ITA 2000”) and the Copyright Act, 1957 (hereinafter referred to as “CA 1957”). Both of these statutes contain provisions which deal with intermediary liability extensively and these provisions have been amended several times since its inception.

In order to make an effective and useful comparative analysis of the frameworks in India and the United States, it is pertinent that one understands the evolution and current position of the American laws regarding the same. In the US, the issue of intermediary liability and copyright infringement is dealt with in the Digital Millennium Copyright Act which was enacted in 1998 (hereinafter referred to as “DMCA”). The DMCA is a collection of different laws enacted by the US Congress in order to curb the issue of copyright infringement in the internet age. This Act discussed the providing of safe harbour to online intermediaries, shielding them from copyright infringement liabilities upon the fulfilment of certain conditions. Before the enactment of the DMCA, the US courts had an extremely aggressive approach towards intermediary liability whereby they found the intermediaries to be “directly

⁸ PRASHANT REDDY & SUMATHI CHANDRASHEKARAN, CREATE, COPY AND DISRUPT 223-224 (2017).

liable” in the case of copyright infringements. Such an approach can be seen in prominent cases like *Playboy v. Frena*⁹ and *Sega v. Maphia*¹⁰ (in the preliminary hearing).

A drastic and radical shift in the approach of the US Courts can be seen in *Religious Technology Center v. Netcom Online Communication Services Inc.*¹¹ (hereinafter referred to as “*Netcom*”). The defendants in this case were a bulletin board service (BBS) and an Internet Service Provider (ISP) who were being accused of liability for copyright infringement. The infringing materials were uploaded on the BBS by Dennis Erlich using the services of Netcom, the ISP. In the judgment, it was held that since the infringing user was already being held directly liable, it was not logical to hold various other parties liable for merely setting up a system that made the Internet accessible and functional. It was not feasible for the intermediary to monitor the billions of bits of data flowing through the Internet. However, the judge also held that it would be reasonable for the ISP to implement measures such as removing the infringing content once they are notified as the same, in order to prevent further violations of the rights of the copyright holder.¹²

The judgment in *Netcom* is important as it became the basis for the safe harbour provisions in the Section 512 of the US Copyright Act. This provision was incorporated in the DMCA under Title II which emerged as a result of the Online Copyright Infringement Liability Limitation Act (OCILLA). The safe harbour provisions in the DMCA have succeeded in striking a balance between various conflicting interests and this has been proven through the test of time.

⁹ *Playboy Enterprises, Inc. v. Frena*, 839 F Supp. 1552 (1993).

¹⁰ *Sega Enterprises Ltd. v. Maphia et al.*, 857 N.D. Cal. 679 (1994).

¹¹ *Religious Technology Center v. Netcom*, 907 N.D. Cal. 1361 (1995).

¹² REDDY, CHANDRASHEKARAN, *supra* note 8, at 231.

PART II

COMPARATIVE ANALYSIS BETWEEN INDIA AND THE UNITED STATES OF AMERICA

The analysis can be understood under three main headings. They are - Meaning and Definition, Notice and Takedown Mechanism, and Counter Notice and Restoration Mechanism.

I. MEANING AND DEFINITION

Under the Information Technology Act, 2000

Section 79 Before the 2008 Amendment

As can be understood from the evolution of the intermediary liability framework in India which has been in this paper previously, it can be understood that the Information Technology Act, in its original form in 2000, took a rather narrow approach. Under the ITA 2000, Section 79 which provided 'safe harbour' for intermediaries was titled "network service providers not liable in certain cases". Section 79 reads thus -

"...it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention."¹³

In the explanation to Section 79, "third party information" has been explained as "information dealt with by a network service provider in his capacity as an intermediary". Here, the term intermediary is merely constituted by network service providers. Further, the term "intermediary" is emphasized to be the provider of "connectivity" and "transmission". These two functions are in connection to an "electronic message" which has not been defined in the ITA 2000. Further, the definition makes it clear that only transient or incidental storage is considered here and not permanent storage of data. All this leads to the inevitable

¹³ The Information Technology Act, No. 21 of 2000 §79, Gazette of India (1999), pt. II sec. 1, <http://egazette.nic.in>.

conclusion that only Internet Service Providers (ISPs) are considered to be intermediaries for the purposes of this provision.

Section 79(3)(b) contains certain references such as “residing”, “controlled by the intermediary” and “remove or disable access” which seem to imply that it applies to hosts that engage in permanent storage of third-party content. Since this has not been explicitly stated, the conditions set out are unclear on whether or not it is applicable to temporary storage. This is unlike the DMCA 512.¹⁴ The aforementioned references have been borrowed from Section 512(c)(1) of the DMCA which is in reference to hosts only. Further, the words “temporarily stored” have been used in certain places in Section 79. Therefore, one can argue that the takedown procedure mentioned in these provisions are applicable only to permanent storage and not to temporary which is contradictory in nature.

Section 79 also limited the liability of an intermediary only to “under this Act, rules or regulations made thereunder”. The ITA 2000 did not actually impose any liability on intermediaries. At this juncture, the safe harbour provision was wholly in favour of the intermediaries and accorded no importance to the protection of copyright holders as it excluded the application of any other statute including the Copyright Act, 1957.

Section 79 after the 2008 Amendment

Following the 2008 Amendment, Section 2 defines an “intermediary” as any person who on behalf of another person receives, stores or transmits an electronic record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.

Further, Section 2(1)(t) defines “electronic record” as -

“data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated microfiche.”¹⁵

Thereby the IT Act (following the amendment) now was not merely restricted to ISPs but also included a wide range of online intermediaries in its ambit including hosts, search

¹⁴ ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 699-703 (6th ed. 2012).

¹⁵ The Information Technology Act, No. 21 of 2000 §2(1)(t), Gazette of India (1999), pt. II sec. 1, <http://egazette.nic.in>.

engines, online payment sites, online marketplaces, cyber cafes etc. The only essential criterion was that these intermediaries had to be dealing with third party content. This new definition of an “intermediary” can be compared with the definition in the DMCA.

In the DMCA, Section 512(k)(1) mentions four categories of activities - transitory digital network communications, system caching, hosting and information location. These have been explained from Section 512(a) to (d). The ‘safe harbour’ extends to any “service provider” who is engaged in one or more of these activities. A two-pronged approach has been taken to define a “service provider”. For the activity of transitory digital network communications under Section 512(a), Section 512(k)(1)(A) defines a “service provider” as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”¹⁶ This definition extends to ISPs. For the activities of system caching, hosting and information location from Section 512(b) to (d), Section 512(k)(1)(B) defines a “service provider” as “a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).”¹⁷ This definition has a broader scope and includes the providers of other online services as well.

In correspondence to the changes made in the definition of an intermediary, Section 79 has also been amended to have a broader scope. Firstly, the term “network service provider” has been replaced with “intermediary”. Secondly, the intermediary is not liable for any “third party information, data or communication links”. The term “communication links” has not been defined in the ITA but it has been defined in the Information Technology (Intermediaries Guidelines) Rules 2011 and has been accorded a broad coverage of content.¹⁸

¹⁶ 17 U.S.C. § 512(k)(1)(A) (1998).

¹⁷ 17 U.S.C. § 512(k)(1)(B) (1998).

¹⁸ Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet*, CENTRE FOR INTERNET & SOCIETY-BANGALORE (Apr. 27, 2012), <https://cis-india.org/internet-governance/chilling-effects-on-free-expression-on-internet>.

Under the Copyright Act, 1957

The Copyright Act, 1957 was amended in 2012 and two provisions dealing with the liability of online intermediaries were added under Section 52. Section 52 is a general provision that deals with the exceptions to copyright. Section 52(1)(b) states that the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public does not constitute copyright infringement. Section 52(1)(b) states that the transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, which has not been expressly prohibited by the right holder will not constitute copyright infringement, unless the person responsible has knowledge, or reasonable grounds to believe that the work or performance is an infringing copy.

Further, the proviso states that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work then such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.¹⁹

Both Section 52(1)(b) and (c) are speaking about “transient” or “incidental” storage of a work. It is apparent that these two provisions are referring to caching activities. As we know, caching is a separate category of activity identified under the DMCA safe harbour. In the judgment in the case *MySpace v. SCIL*, activities like hosting that constitute permanent storage of data do not qualify for protection under Section 52.²⁰

Further, the Court also made an important distinction between Section 52(1)(b) and (c) by stating that Section 52(1)(b) provides absolute immunity to those intermediaries that it considers to be the “backbone” of the internet such as ISPs, and Section 52(1)(c) provides limited immunity to other intermediaries such as hosts and search engines, provided that they implement a notice and takedown procedure. However, the Court has not provided any justification for making such a distinction. This is a problematic classification as the ambit of Section 52(1)(c) may extend to ISPs as well as ISPs also fall within the category of access

¹⁹ Copyright Act, No. 14 of 1957 §52, Gazette of India (1957), pt. II sec. 1, <http://egazette.nic.in>.

²⁰ Myspace Inc. v. Super Cassettes Industries Ltd., MIPR 2017 (1) 274.

providers mentioned in this provision.²¹ Complete immunity is provided to ISPs in the performance of its technical functions but Section 52(1)(c) would only give immunity based upon the condition of a notice and takedown mechanism with respect to the temporary reproductions of copyrighted works that may occur in the course of the technical functions.

Therefore, it is pertinent that the positions of Sections 52(1)(b) and (c) with regard to the granting of immunity must be clarified.

II. NOTICE AND TAKEDOWN MECHANISM

Notice and takedown mechanisms have been established both under the IT Act 2000 and the Copyright Act, 1957.

Notice and Takedown Mechanism under the IT Act 2000

Section 79(3)(b) of the Act and Rule 3(4) of the Intermediaries Guidelines form the basis of the notice and takedown mechanism under the IT Act. Section 79(3)(b) stipulates that the safe harbour will not be applicable if the intermediary fails to remove or disable access to the infringing material upon receiving actual knowledge.²² Rule 3(4) of the Intermediaries Guidelines stipulates that the intermediary who has received “*actual knowledge by itself or by a notification in writing*” by the aggrieved copyright holder regarding any information prohibited under Rule 3(2)(a) to (i) should “act within 36 hours and where applicable, work with user or owner of such information, to disable such information”.²³ It has been clarified in 2013 that the intermediary has to acknowledge the receipt of the complaint within 36 hours and initiate action. Moreover, redressal can be made within 1 month as per Rule 3(11). However, specific categories of activities carried out by intermediaries have not been made and therefore, specific procedures to be followed by different types of intermediaries have also not been stipulated. This has been implemented in the DMCA.²⁴

²¹ Mridula Dalvi, *India: Intermediary Liability and Copyright*, KHURANA & KHURANA (July 26, 2018), <http://www.mondaq.com/india/x/829986/Copyright/Intermediary+Liability+And+Copyright>.

²² The Information Technology Act, No. 21 of 2000 §79(3)(b), Gazette of India (1999), pt. II sec. 1, <http://egazette.nic.in>.

²³ Information Technology (Intermediaries Guidelines) Rules, 2011 Rule 3(4), Gazette of India, pt. II sec. 3(i) (Apr. 11, 2011).

²⁴ Adam Holland et al., *Intermediary Liability in the United States*, BERKMAN CTR. INTERNET & SOC’Y HARV. UNIV. (FEB. 18, 2015), https://publixphere.net/i/noc/page/OI_Case_Study_Intermediary_Liability_in_the_United_States.

Under the DMCA, as mentioned earlier, different categories of activities carried out by the service providers have been identified. Section 512(b), (c) and (d) are referring to caching activities, hosting activities and information location providing activities respectively.²⁵ In the case of caching activities, the service provider is obligated to remove the infringing content in order to receive safe harbour protection only if the content has been removed at its source or a court has ordered the removal of such material. In the case of hosting and information location activities, the service provider is obligated to remove the infringing content –

- a) upon receiving actual or *red flag knowledge* of an infringement, or
- b) upon receiving a notice of infringement *in the prescribed format*.

Unlike the Indian safe harbour framework, the DMCA also requires the service provider to remove the infringing content upon the receipt of constructive or red-flag knowledge. The red-flag requirement in the US has actually been the recipient of criticism due to its lack of certainty. This is because it is difficult for the intermediaries to determine whether they have the knowledge of the required amount of facts and circumstances upon which they can reach the conclusion that the content is infringing. This approach has not been followed in India and it is one of the aspects in which the Indian framework is better than its American counterpart. However, the advantage of arriving at more certain outcomes in the Indian framework has been adversely affected due to the fact that there has been no prescribed format given to be followed in the submission of notices of claimed infringement under the IT Act. Unlike the Indian safe harbour, the DMCA requires that the notice of claimed infringement be made in a prescribed format.

Notice and Takedown Mechanism under the Copyright Act, 1957

Section 52(1)(c) of the Copyright Act, 1957 requires that the intermediary who has “reasonable grounds” to believe that the transient or incidental storage of data which has taken place is of an infringing nature will have to takedown such data in order to be eligible for the protection granted by the safe harbour.²⁶ This requirement of having to act on the basis of “reasonable grounds of belief” is nothing but the constructive knowledge standard or red-flag knowledge followed under the DMCA. As explained earlier, this requirement of red-flag

²⁵ 17 U.S.C. § 512 (1998).

²⁶ Copyright Act, No. 14 of 1957 §52(1)(c), Gazette of India (1957), pt. II sec. 1, <http://egazette.nic.in>.

knowledge is absent in the safe harbour provisions of the IT Act. This is a serious discrepancy between the two legislations.

Section 52(1)(c) provides a notice and takedown mechanism to be followed by intermediaries.²⁷ However, the approach taken is vastly different from the approach taken under the DMCA. In the case of intermediary which is involved in caching activities, it has to expeditiously remove or disable access to the alleged infringing material upon receiving a notice of claimed infringement.²⁸ Therefore, under the DMCA, would only lose the immunity granted if the notice and takedown mechanism was not implemented after the receipt of actual knowledge through a notice. Further, in the case of caching activities, the cached content only has to be removed when the source material has been removed or there exists a court order requiring that the source material be removed. These two mechanisms have been instrumental in preventing abusive takedown practices and they are absent in the Indian framework.²⁹

Section 52(1)(c) requires the intermediary to restore access to the cached content after 21 days if the complainant has not produced an order from a competent court. There is no such requirement under the DMCA as the cached content is only required to be removed after the content at the source has been removed. This is because the removal of the source content has rendered the cached content to be immaterial. The requirement of restoring access to the cached content after 21 days is not supported by logic as the source material itself may not exist after the 21-day period.

It has already been stated that the IT Act 2000 does not provide any prescribed format to be adhered to in the notice that is submitted. However, Rule 75(2) of the Copyright Rules, 2013 lays down the requirements to be fulfilled by a valid notice. They are -

- a) “a description of the work with sufficient information to identify the work in which copyright subsists
- b) details establishing that the complainant is the owner or licensee of copyright in the identified work

²⁷ *Id.*

²⁸ Althaf Marsoof & Indranath Gupta, *Shielding internet intermediaries from copyright liability—A comparative discourse on safe harbours in Singapore and India*, J. WORLD. INTELL. PROP. (July 2, 2019), <https://onlinelibrary.wiley.com/doi/abs/10.1111/jwip.12126>.

²⁹ *Id.*

- c) details establishing that the transient or incidental copy of the work is an infringing copy and that none of the exceptions to copyright protection apply
- d) details of the location where the temporary storage of the work is taking place
- e) the identity of the person, if known, who is responsible for uploading the material infringing the copyright in the work of the complainant
- f) an undertaking that the complainant shall file an infringement suit in the competent court against the person responsible for uploading the infringing material and produce the orders of the competent court having jurisdiction within a period of 21 days from the date of the notice/complaint.”³⁰

The DMCA requires the complainant to furnish information necessary for the intermediary to contact the infringing party, a physical or electronic signature of the complainant and a statement that the complaint made and the information provided is legitimate under penalty of perjury. These requirements are necessary for ensuring that the notice and takedown mechanism is not abused. Such important requirements are absent in the Copyright Rules, 2013.

III. COUNTER NOTICE AND RESTORATION MECHANISM

Both the ITA 2000 and the CA 1957 do not contain any provisions that provide for a counter notice and restoration mechanism. Such a counter claim mechanism is present in the DMCA. The absence of a counter claim mechanism has a deeply adverse impact on copyright law, specifically the fair dealing rights (known as ‘fair use’ in USA), and the free speech rights of third parties or users.

In order for a service provider (hosts in this case) to continue to be eligible for immunity under the DMCA, the service provider has to perform a counter notice and restoration mechanism. This mechanism provides an opportunity for the aggrieved user whose content has been removed to challenge the validity of the notice given by the copyright holder. The mechanism consists of -

- a) takes reasonable steps to notify the subscriber that it has removed the material,
- b) upon receiving the receipt of a counter notification from the person responsible for the material that was removed, the person who served the notice of claimed

³⁰ Copyright Rules, 2013 Rule 75(3), Gazette of India, pt. II sec. 3(i) (Mar. 14, 2013).

infringement with a copy of the counter notification should inform that person that it will replace the removed material

- c) replaces the removed material in not less than 10, and no more than 14, business days following receipt of the counter notice, unless the person who served the notice of claimed infringement informs that an action has been filed seeking a court order to restrain the person responsible for the alleged infringement of the owner's content.³¹

If the service provider fails to restore legitimate content which was wrongfully taken down, it will lose its immunity. However, this requirement is only applicable in cases where the service provider has received actual knowledge through a notice of claimed infringement only, and not acquired by itself or through red-flag knowledge.

The only restoration process provided through the CA 1957 is with respect to the restoration of cached content after a period of 21 days if no court order has been issued pursuant to the same. This is not a counter notice mechanism and such a restoration process is not needed. There is a need for a restoration process to be established so that aggrieved users have formal channel through which they challenge the takedown.

HARMONIOUS READING OF THE IT ACT 2000 AND THE COPYRIGHT ACT 1957

In *MySpace v. SCIL*³², the question arose before the Divisional Bench as to whether the IT Act 2000 and the CA 1957 were to be read harmoniously. This arose as a result of the parties relying on different statutes with regard to the provisions of the safe harbour which were Section 51(a)(ii) of the CA 1957 and Section 79(1) of the ITA 2000 (as amended). After a reading of both the aforementioned provisions a conclusion was drawn that the intermediary would become disentitled to the safe harbour provisions only in the case where even after acquiring actual knowledge, the intermediary fails to remove the infringing content. However, under Section 51(a)(ii) of the CA 1957, a reasonable belief of infringement was a sufficient condition for the liability of a host, whereas under the ITA 2000 actual knowledge of an infringement was required to be held liable. This difference in the standard of knowledge

³¹ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

³² Dalvi, *supra* note 21.

requirement in both the provisions questioned as to which law would be applicable over the other. In this context, the court considered the implications of Section 81 of the ITA 2000 which reads - “the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force”. However, this provision was subsequently amended and a proviso was added to Section 81, which stated that “provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970)”. Following the addition of the proviso, some clarity regarding the Parliament’s intent of protecting the rights of the copyright and the patent holders was brought about. Following this the Court held that Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously.

It has become increasingly clear that there is an urgent need to remove the discrepancies that arise in determining which statute is to be applied. This is seen in the recent case of *M/s Shri Krishna and Ors. v. Google India Pvt. Ltd. and Ors.*³³ The Plaintiff in this case is a film production company which is involved in the making of cinematograph films, audio visual songs, etc. The contention of the Plaintiff was that the Defendants 1, 2 and 3 namely Google India Pvt. Ltd., YouTube LLC and Google Inc., were infringing upon the copyrights of the Plaintiff. The Defendants contented that they were merely providing a platform for exhibition of information available worldwide and that they were not aware of the content being of an infringing nature. However, the district court ruled in favour of the Plaintiff as they had suffered monetary loss. An appeal was filed by the Defendants. The issues raised in the appeal were that firstly the Defendants were not provided notice according to the Section 51(a)(ii) of the Copyright Act, and secondly no URL was provided by the Plaintiff to locate the infringing content in furtherance of the judgment provided in *MySpace*. Only a mere notice stating that infringing content was being held was stated. This brought about the question as to whether a notice which is not compliance with the Rules of the IT Act can be considered as the defendants having sufficient knowledge. Another question that arose was whether the defendants would be disqualified from safe harbour protection, if they had not removed the infringing content upon receiving such an incomplete notice, or not taking action with respect

³³ *M/s Shree Krishna International & Ors. v. Google India Pvt. Ltd. & Ors.*, CS/1358/2014.

to the same. These questions are yet to be answered, as the case is pending before the High Court.

SUGGESTIONS

On the basis of the comparison that has been made, the deviations between the Indian framework and the American framework can be clearly identified. For the most part, these deviations exist because the Indian framework does not take into consideration the interests of all the stakeholders and strike an effective balance. In the interest of achieving the same, the lacunae that is present in the Indian framework can be remedied by adapting certain mechanisms practiced in the DMCA in the US. Pursuant to the same, this author makes certain suggestions which can be incorporated into the Indian law. They are -

1. **Categorization of intermediaries on the basis of their activities** - The DMCA identifies 4 distinct categories of service providers on the basis of the activities undertaken by them, such as transitory digital network communications, caching, hosting and information location. Different knowledge standards are to be followed by each category of service providers which is most suited to their nature. In India, no categories are made and there is only a blanket requirement that action must be initiated within 36 hours of the receipt of the complaint for all intermediaries. It would increase the effectiveness and ease of the redressal mechanism if India also makes such categories of intermediaries.
2. **Expeditious redressal of complaint notice** - The ITA 2000 and the Intermediaries Guidelines provide to the intermediaries a 36-hour timeframe within which the intermediary has to initiate action. However, a clarification issued by the Indian Government in 2013 stipulates that the intermediary merely has to respond/acknowledge the notice within 36 hours. Further, the Intermediary Guidelines 2011 allows for the intermediary to take a period of up to one month for redressal of complaint. This kind of mechanism is not well-suited for the dynamic nature of the Internet where large-scale changes can be brought about in a minuscule period of time. A more expeditious redressal procedure is required.
3. **Clarity in immunity granted under Section 52(1)(b) and Section 52(1)(c)** - In *MySpace v. SCIL*, the Court made a distinction by stating that Section 52(1)(b) provides absolute immunity to intermediaries that act as the backbone of the internet such as ISPs.

Section 52(1)(c) provides limited immunity to other intermediaries. However, Section 52(1)(c) can be applicable to ISPs as well. It is also problematic because of the technical functions that may take place during temporary reproductions of copyrighted works. No justification has been provided for making such a distinction. This position taken in the Indian framework must be clarified.

4. **Uniform format to be prescribed in notices of claimed infringement** - The DMCA prescribes a clear format to be followed in a notice of claimed infringement submitted by an aggrieved copyright holder. This prescribed format contains certain requisite information which has to be furnished by the copyright holder. Such a format is conspicuously absent in the IT Act, 2000. The only requirement is that the notice must contain an electronic signature. However, a prescribed format is present under the Copyright Rules 2013. There is a need for a uniform approach to be taken by both the legislations.
5. **Inclusion of certain important requirements in the prescribed format** - Even though the prescribed format of a notice is given in the Copyright Rules 2013, certain important requirements such as the contact information of the infringing party, physical or electronic signature of the copyright holder and a statement by the copyright holder that the information provided in the complaint is legitimate under the penalty of perjury. These requirements are from the DMCA and they been instrumental in ensuring that the notice and takedown mechanism is not abused.
6. **Removal of red-flag knowledge requirement in the CA 1957** - Under the CA 1957, there is a requirement for the intermediary to act on “reasonable grounds of belief”. This is nothing but the constructive knowledge or red-flag requirement which is present in the DMCA. The DMCA has been criticised for having this requirement as it leads to uncertain outcomes. The IT Act does not contain this red-flag knowledge standard and has been lauded for the same. Therefore, it is nonsensical to have it in the CA 1957 and it needs to be altered.
7. **Removal of requirement to restore cached content** - The CA 1957 requires the intermediary to restore access to the cached content after 21 days if a judicial order has not been produced. This requirement is absent in the DMCA as the cached content becomes redundant once the content at source has been removed. Therefore,

the restoration required after 21 days is unnecessary as the source content may not exist after that period.

8. **Establishment of a counter notice and restoration mechanism** - There is no counter claim and restoration mechanism provided for in the Indian framework under both legislations. This is absolutely essential for protecting the fair dealing rights of users. Therefore, the Indian framework should adopt the robust counter notice procedure laid down in the DMCA.

CONCLUSION

The liability of intermediaries and copyrights framework in India is unique compared to other jurisdictions, because of its two-pronged approach under the IT Act, 2000 and the Copyright Act, 1957. While it is commendable that the law in India has developed by leaps and bounds in recent years, in order to keep pace with the technological developments and the demands of the changing global requirements, many sweeping changes are required to be adopted. The comparative analysis and suggestions made in this paper are aimed at achieving a workable and profitable balance between the rights and interests of the internet intermediaries, copyright holders and users of the internet.

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