

INDIAN AD TECH INDUSTRY AT LOGGERHEADS WITH AD-BLOCKING: POTENTIAL COPYRIGHT VIOLATIONS AND NET NEUTRALITY ISSUES

Mohit Kar, Shreya Sahoo*

ABSTRACT

With the ever-rising amount of digital content and desire to garner more audience by delivering content free of cost, digital content creators are resorting to online advertisements to support their work. The ad tech industry, which is the brains behind such practice of ad monetization, has been facing scornful criticism for designing annoying and intrusive ads that are mostly built with tracking cookies embedded in them. Many advertisers, instead of self-regulating, are claiming that ad-blocking amounts to copyright infringement of a content creator's work and opposes the ethos of Net Neutrality. In this article, the authors contend that legitimate ad-blocking does not amount to copyright infringement and is, in fact, a reasonable traffic management practice on the internet. The article first seeks to shed a light on ad-blockers, their economic significance and relevance on the internet. The article then discusses the potential copyright infringement aspects of ad-blocking software. The article further discusses the tortious interference aspects of ad-blockers and proceeds to address the net neutrality concerns that could arise out of the use of ad-blockers. The last part of the article contains conclusory remarks.

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* Mohit Kar is a 5th Year law student at the Maharashtra National Law University, Aurangabad. The author may be reached at 17ballb44@mnlua.ac.in.

Shreya Sahoo is a 5th Year law student at the National Law University, Odisha. The author may be reached at shreya.sahoo.148@gmail.com.

INTRODUCTION

Over the last few years, banner ads or web banners have become a new form of advertisement on the internet, appearing on web pages that direct the user to the advertiser's website with a click. The advertisement is created using an image, animation, sound, JavaScript program or a multimedia object involving platforms like Shockwave Flash. The mechanism of the banner-website compilation, often termed as 'impression,' displays the ads unheralded when the particular webpage is loaded on a web browser.¹ Such a mechanism has been considered annoying by most web users as it distracts them from the actual content of the web page and also wastes bandwidth.

Ad-blocking software is a browser add-on extension that allows the users to determine the content made available to them when they enter a website.² Generally, the ad-blocking software runs a comparison between the loading content and the user's list, thereby restricting any coincident matches.³ The comparison mechanism of the software can use a self-curated list by the user or a pre-made index of unwanted website elements.⁴ A user, by enabling an ad block software, retains the autonomy to view what they want to view and restrict unnecessary advertisements.

According to a report published in 2019, it was found that 47% of users are resorting to ad-blockers to shut down irrelevant ads and 26% to prevent their online privacy from being compromised.⁵ According to another report, the number of people using mobile browsers with built-in ad-blocking mechanisms has shot up by 64% since 2016 and was recorded to be 527 million.⁶ Asian users make up a whopping 400 million of the aforementioned number of active users of UC browser.⁷ In 2016, major news publishing houses in India such as Times of India and Hindustan Times had urged their readers to disable ad-blocking software to access their

¹ Gordon Smith et. al, *Managing Intellectual property in the advertising Industry*, WIPO (2011), https://www.wipo.int/edocs/pubdocs/en/copyright/1021/wipo_pub_1021.pdf.

² Andrew Steele, *Is It Reasonable To Block Unreasonable Advertisements & As Examination Of The Legality Of Ad-Blockers*, 37(3) CARDOZO ARTS & ENT. L.J. 835 (2019).

³ *Id.* at 692.

⁴ *Id.*

⁵ Global Web Index, *Ad-blocking behaviors around the world*, <https://www.globalwebindex.com/reports/global-ad-blocking-behavior>, (last visited Aug. 10, 2021).

⁶ BLOCKTHROUGH REPORT, GROWTH OF THE BLOCKED WEB: 2020 PAGEFAIR ADBLOCK REPORT (2020), <https://f.hubspotusercontent10.net/hubfs/4682915/Adblock%20Reports/Blockthrough%20Report%202020.pdf>.

⁷ *Id.* at 7.

content.⁸ Readers cannot view the entire news report and may only view the homepage or few initial paragraphs of the content if they use an ad-blocker.⁹

In 2020, ad blockers could cost the publishers an estimated loss of \$78 billion and \$16 billion in case all the counter measures are taken by the publishers.¹⁰ Publishers, content creators, marketers and agencies face the detrimental effect of ad-blocking or filtering as they rely on the revenue generated by such ads.¹¹ The advertisers pay the website or host per one thousand ad views because the content is mostly free to access.¹² Ad-blocking provides the user access to the content without producing any ad revenue for the content provider, thereby depriving him of his due remuneration. Now, certain websites having taken cognizance of this impact have enabled a feature called ad-wall, which requires the users to disable ad-blocking software if they want to access the content of the website.¹³ This strategy has been found to be ineffective as either the users are abandoning sites which limit their access or overriding the working of ad walls completely.¹⁴

Internet users usually have to face the intrusive and annoying nature of advertisements that lead to a negative web experience.¹⁵ Threats caused by these “maladvertisements” tripled in 2014 and had even permeated popular websites like Yahoo¹⁶ and Forbes.¹⁷ The frequent display of retargeted and behavioural ads raises privacy concerns,¹⁸ consumes data costs and slows down the loading time.¹⁹ In order to tackle this issue, the users are using ad-blocking software

⁸ Anuj Srivas, *All Eyeballs on Reader Reaction as Ad-Blocking War Comes to India*, THE WIRE (Jun. 30, 2020), <https://thewire.in/economy/all-eyeballs-on-reader-reaction-as-ad-blocking-war-comes-to-india>.

⁹ *Id.*

¹⁰ Vishveshwar Jatain, *How to Tackle the Rising Cost of Ad Blocking*, FORTUNE (Aug. 8, 2020), <https://www.forbes.com/sites/forbescommunicationscouncil/2020/08/06/how-to-tackle-the-rising-cost-of-ad-blocking/?sh=4219c1f268d7>

¹¹ eMarketer Staff, *US Ad Blocking to Jump by Double Digits This Year*, EMARKETER (Jun. 21, 2016), <https://www.emarketer.com/Article/US-Ad-Blocking-Jump-by-Double-Digits-This-Year/1014111>.

¹² Ian C. Butler, *The Ethical and Legal Implications of Ad-Blocking Software*, 49 CONN. L. REV. 689 (2016).

¹³ Tyler Barbacovi, *Blocking Ad Blockers*, 16 J. MARSHALL. REV. INTELL. PROP. L. 272 (2017).

¹⁴ David Tromholt, *How to Bypass ad-blocker Detection on Websites*, TECHSTACKER (Nov. 24, 2019), <https://techstacker.com/how-to-bypass-website-ad-blocker-detection/>.

¹⁵ Ben Miroglio et. al, *The Effect of Ad Blocking on User Engagement with the Web*, WWW'18: PROCEEDINGS OF THE 2018 WORLD WIDE WEB CONFERENCE 813-821 (2018), <https://research.mozilla.org/files/2018/04/The-Effect-of-Ad-Blocking-on-User-Engagement-with-the-Web.pdf>.

¹⁶ Kif Leswing, *Yahoo Mail Tried to Block Ad blockers, And it Might have backfire*, FORTUNE (Nov. 23, 2015), <https://fortune.com/2015/11/23/yahoo-ad-block/>.

¹⁷ Violet Blue, *You Say Advertising, I Say Block That Malware*, ENGADGET (Jan. 8, 2016), <https://www.engadget.com/2016/01/08/you-say-advertising-i-say-block-that-malware/>.

¹⁸ Sophie C. Boerman, S. Kruikemeier et al., *‘Online Behavioural Advertising: a literature review and research agenda’*, 46(3) J. ADVERT. 363 (2017).

¹⁹ Farhad Manjoo, *Ad Blockers and the Nuisance at the Heart of the Modern Web*, THE NEW YORK TIMES (Aug. 19, 2015), <https://www.nytimes.com/2015/08/20/technology/personaltech/ad-blockers-and-the-nuisance-at-the-heart-of-the-modern-web.html>.

programs such as Adblock, Adblock Plus and μ Block Origin.²⁰ This action of skipping advertisements in order to avoid interruptions is known as ‘commercial skipping’.

Using an ad-blocking software may pose challenges of copyright infringement and tortious intervention to a contractual association.²¹ The basis of copyright infringement claim would be “that the ad-blocking service in question infringes publisher’s copyrights by impermissibly changing the publisher’s pages.”²² Essentially, it means that such software programs empower users to determine what website content they seek to display and ergo, ad blockers attract vicarious liability for the infringement caused by a user in relation to the copyright interest of a publisher.²³

In India, as far as commercial skipping in regards to a website is concerned, the specific page must meet all the prerequisites for copyrightability²⁴ as copyright cannot be extended to the website as a whole.²⁵ In this regard the authors contend that copyright infringement claims of the websites or content providers are weak as neither can the compilation of an ad with content be a copyrightable subject matter nor does the ad-blocking software constitute any sort of unauthorised derivative work.

I. DO AD-BLOCKERS INFRINGE COPYRIGHT?

Blocking advertisements through ad-blockers causes a huge loss of revenue to the advertisers. These advertisements are paid for and blocking them could be considered as unlawful. One aspect of its illegality lies in the infringement of copyright. In a suit for copyright infringement, one must deal with three different issues. Firstly, one must prove that the functionality behind ad-blockers infringes copyright. Secondly, the liability of infringement will have to be set upon the “author” or the one who is behind the ad-blocker. Thirdly, the defences to copyright have to be overcome.

The Test of Copyrightability

With regards to ad-blockers and copyright infringement, the first and foremost question would be to answer what the “work” at issue is. Secondly, one needs to figure out whether the work

²⁰ Tyler Baracovi, *supra* note 13, at 273.

²¹ Ian C. Butler, *supra* note 12.

²² Russell A. Miller, *The Legal Fate of Internet A-Blocking*, 24 B.U. J. SCI. & TECH. L. 299 (2018).

²³ *Gershwin Publ'g Corp. v Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1161-62 (2d Cir. 1971).

²⁴ The Copyright Act, 1957, § 13.

²⁵ *Frequently Asked Questions*, Copyright Office (GOI), <http://copyright.gov.in/frmFAQ.aspx>, (last visited Aug. 10, 2018).

at issue is “copyrightable.” The third fundamental question would be whether the work at issue was “original.”

The preliminary question with regards to a copyright infringement suit would be what the “work” constitutes. In the present context it may be the website as a whole or the individual components present on the website. Websites in general have many intellectual property rights instilled in them such as domain name rights,²⁶ copyrights over every original piece of work that is displayed, and trademark rights over any displayed trademark that has been registered by the parent company.²⁷ In India, an entire website is not entitled to copyright. In the case of *Rediff.com India Ltd. v. E-Eighteen.com Ltd.*,²⁸ the plaintiffs owned the copyright over “Dial”, a literary cum artistic work which served as an instrument on a financial website for users to make an assessment in relation to a stock or a mutual fund. The point of contention raised by them was whether the defendants, by merely effecting re-arrangement or alteration of “Dial,” have committed copyright violation. The Delhi High court dismissed the case and denied injunction. This is demonstrative of the fact that in India, unlike the U.S laws, individual elements of websites are copyrightable, and not the whole of the website.

Accessing a website without permission is normally acceptable by copyright laws due to an explicit or implicit license.²⁹ As a norm, majority of websites run on an implicit license providing open access to their content.³⁰ These websites are also indexed on search engines like Google, Microsoft Bing and others, thus inviting users to their website. However, certain websites have explicit licensing mechanisms thus restricting access and user permits.³¹ These websites also provide directions as to how users can use their website; thus, copying content could amount to copyright infringement. Websites such as Wall Street Journal, the Economist, Newslaundry, etc. are certain websites that require online subscriptions because they have adopted a subscription model and sustain on advertising revenue. These websites also promote the non-use of ad blockers by displaying messages like “*The best things in life aren’t free*” and

²⁶ Nitsimar Guliani, *Domain name and Trademark rights in India*, LEXOLOGY (Jul. 31, 2018), [https://www.lexology.com/library/detail.aspx?g=daafca2-6a68-4134-bd29-27aa941a1f03#:~:text=Protection%20of%20domain%20names%20in%20India&text=In%20India%2C%20domain%20names%20may,Act%20\(as%20enumerated%20above](https://www.lexology.com/library/detail.aspx?g=daafca2-6a68-4134-bd29-27aa941a1f03#:~:text=Protection%20of%20domain%20names%20in%20India&text=In%20India%2C%20domain%20names%20may,Act%20(as%20enumerated%20above).

²⁷ Akshara Bala, *How to copyright your website*, QUICKCOMPANY (Oct. 16, 2018), <https://www.quickcompany.in/articles/how-to-copyright-your-website>.

²⁸ *Rediff.com India Ltd v. E-Eighteen.com Ltd*, 2013 SCC OnLine Del 2747.

²⁹ S.V. JOGA RAO, *COMPUTER CONTRACTS & INFORMATION TECHNOLOGY LAW* 1226 (2003).

³⁰ Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 (2) SANTA CLARA HIGH TECH. L. J. 275 (2009).

³¹ Yi-Hsuan Lin, Tung-Mei Ko, Tyng-Ruey Chang et al., *Open Source Licenses and the Creative Commons Framework: License Selection and Comparison*, 22 J. INFO. SCI & ENG’G 1-17 (2006).

actively restrict it.³² If a website explicitly conditions that it does not permit the use of an ad-blocker, then the usage of one³³ by a user can cause termination of the license agreement as the license agreement clearly states that license is subject to non-usage of an ad blocker. There are “Anti-Adblock Detector” applications available which allow users to bypass the ad-blocking mechanism and allow browsing such websites without disabling the ad blocker. Bypass Adblock Detection and Anti Adblock Detector are some anti-ad blocking extensions available on Google Chrome that allow users to help disable the detection of an ad blocker. So, in cases where a contract which includes the copyright license has a clause (other than the copyright license clause) of not using an ad block, and the website/app user uses an ad block, then the license cannot be terminated. This is because the extension bypasses the circumvention created to control access to the content and the user is smoothly facilitated to view the website without having to come across the revenue raising channel of online advertisements. It may count as breach of contract but not lead to suspension of license.

A pertinent thing to note here would be that many big advertising companies make payments to popular ad-blocking apps to take their names out of their list.³⁴ This initiative is known as “Acceptable Ads” and was started by Adblock Plus.³⁵ All the ads that are to be added to the list must conform to the requirements set by the initiative. The details of the advertisers on the list are unclear but it can be estimated that many companies like Amazon, Facebook and Google would have to pay a hefty amount to be added to the list.³⁶ Such initiatives by ad blocker software may give it a pathway to legality and save it from infringement suits from advertising agencies.

With respect to copyright infringement, the petitioner has to primarily prove that the website at issue is “original” and he/she is “owner” of it.³⁷ In this regard it is worthwhile to note that the Supreme Court of India has put reliance on a standard which is not as simple as the “sweat of the brow” doctrine but concurrently is not as high a threshold envisaged by the “modicum

³² Robert Cookson, *News media move to ban ad blockers from websites*, FINANCIAL TIMES (Jul. 6, 2016), <https://www.ft.com/content/abf110aa-00b0-11e6-99cb-83242733f755>.

³³ David Tromholt, *supra* note 14.

³⁴ Adblock Support, *About the Acceptable Ads program and "non-intrusive" ads*, ADBLOCK HELP (Jan. 17, 2020), <https://help.getadblock.com/support/solutions/articles/6000092027-about-the-acceptable-ads-program-and-non-intrusive-ads>.

³⁵ Lara O'Reilly, *Google, Microsoft, and Amazon Are Paying AdblockPlus*, BUSINESS INSIDER (Feb. 3, 2015), <https://www.businessinsider.in/advertising/Google-Microsoft-and-Amazon-are-paying-Adblock-Plus-huge-fees-to-get-their-ads-unblocked/articleshow/46109705.cms>.

³⁶ *Id.*

³⁷ *Supra* note 24.

of creativity” test.³⁸ Therefore, the Indian judiciary has acknowledged the shift, and requires that not every industry or effort, or expending of skill will result in a subject matter worthy to be protected by copyright.³⁹ Only works that are instilled with distinct character, entailed intellectual efforts and were created with a certain level of creativity are copyrightable.⁴⁰ In the light of such imperatives, a simple compilation of commercial-plus-web content does not meet the threshold of originality. Thus, “originality” is an essential requirement in an infringement suit and the plaintiff must compulsorily prove it. A website is nothing but a webpage or a group of interlinked web pages, stored or hosted on a server, and is made accessible online to the public. The information, underlying work and other rudiments displayed on the website may be subject to copyright that falls within the purview of Section 13 of the Act. Section 13 of the Act deals with the classes of works which can be conferred with copyright and they are original literary, dramatic, musical, and artistic works. Further, works such as cinematograph films and sound recordings also qualify as copyrightable works. Indian copyright law does not confer copyright protection to websites as a whole and therefore a separate application must be submitted by an applicant claiming copyright for each component work or content displayed on a website. An important aspect to note is that common or unoriginal material like names, familiar symbols, icons, etc. are not copyrightable. But the copyrightability will depend on each website and there is no straitjacket answer for what website is original or what website is not original. It cannot be disputed that certain websites are not original at all like the ones that host pirated content; and therefore, the answer to the question of copyrightability will be quite straightforward in those instances. Some websites might be a host to licensed works such as movies, but ad blockers would not affect them insofar as a user just visits the website. However, none of these arguments would matter if the infringing work itself is not original or fixed. The potential infringing work also has to be a derivative work.

The Test of “Relatedness”

One of the arguments to uphold the notion that functioning of ad blocker software constitutes copyright infringement is that they result in the production of an unauthorised derivative work. According to this view, ad blocking leads to the production of an altered version of the original work. The issue regarding copyright infringement can be determined once the question, whether copyright is vested in such a work, is resolved.⁴¹ The definition of an “author” can be

³⁸ Eastern Book Company v. D. B. Modak, (2008) 1 SCC 1.

³⁹ *Id.*

⁴⁰ *Supra* note 38.

⁴¹ P. N. Krishna Murthy v. Co-operative for American Relief Everywhere, 2000 SCC OnLine Del 825.

found in Section 2 (d) of the Act⁴² which states that an author in relation to a literary, dramatic, musical, artistic work, cinematograph film and sound recording is the person who causes such works to be created. The pop-up advertisement in an entirely different webpage which may contain subject matter that is copyrightable however cannot be called a copyrightable subject when presented with online content.⁴³ The content creator may claim copyright in the content created by them and published on the webpage which they had chosen for such publication. However, a content creator cannot assert copyright protection for content associated with a different webpage, which is merely compiled with the original content of the content creator.

Furthermore, integration of an advertisement preceding a video or a movie does not result in the creation of an audio-visual work or a cinematograph film.⁴⁴ An explicit definition of “*audio-visual works*” has been provided in U.S copyright law, according to which the work should “*consist of a series of related images*”.⁴⁵ The interpretation of cinematograph or the art of cinematography used in the making of an audio-visual work is important in order to discern the fact that the integration of an advertisement with an audio-visual work does not entitle the combined work to copyright protection. The Indian copyright statute contains the definition of the term “*cinematograph film*” which is similar to the term “*audio-visual works*”. Section 2 (f) of the Copyright Act, 1957 (“the Copyright Act”) defines cinematograph film as “*any work of visual recording and includes a sound recording accompanying such visual recording.*”⁴⁶ The occurrence of determiner “such” in the definition indicates that the sound recording must be in relation to the visual recording.

Further, as mentioned above, advertisements may also precede video films. Thus, it is pertinent to note that video films are covered within the purview of cinematographic work by virtue of them being “*work produced by any process analogous to cinematography*”. To clearly understand the meaning of the term cinematograph, we shall take a look at the definition provided for it in Section 2 (c) of the Cinematograph Act, 1952 which says it is the “*apparatus for the representation of moving pictures or series of pictures.*” The expression “*series of pictures*” signifies that the pictures used for the creation of a cinematographic work must be related in order to compose a “series”. So, the requirement of ‘relatedness’ is attained if the

⁴² The Copyright Act, *supra* note 24, at § 2.

⁴³ *Pop-Up Ad*, TECHOPEDIA (Dec. 15, 2016), <https://www.techopedia.com/definition/15480/pop-up-ad>.

⁴⁴ Bingbin Lu, *The unique Chinese legal approach to online ad blocking: is it in the right direction?*, 33(6) COMP. LAW & SEC. REV. 786 (2017).

⁴⁵ 17 U.S.C. § 101 (2021).

⁴⁶ *Supra* note 42.

pictures are in succession, dealing with the same subject matter. However, the only similarity which can be drawn between an online ad and a video or a movie is their purpose of monetization and apart from that nothing on the basis of content is related. Therefore, there can be no situation of copyright infringement as there exists no cinematographic work in the first place to be violated.

The Fair Dealing Defence

The defence of fair dealing can be used by ad blockers if they are faced with an infringement suit. However, the success of such a reasoning might not be espoused in the eyes of law. The Copyright Act under Section 52(1) lists out various actions that would not count as copyright infringement in India.⁴⁷ It then proceeds to mention about “fair dealing” and states that acts done in private use for the purposes of research, criticism or review of other work, reporting of current events would be within its ambit.⁴⁸ In the case of *Civic Chandran v. Ammini Amma*, it was observed that Section 52(1)(a) and Section 52(1)(b) specifically deal with “fair dealing” or work, and not “reproduction of the work”. In accordance with this observation, re-production of substantial or whole of the original work would not be permitted and only extracts or quotations from the work will only be upheld as fair dealing.⁴⁹ The court further held that in such situations the following have to be taken in consideration – (1) quantum and value of the matter taken in relation to the comments or criticism; (2) the purpose for which it is taken; and (3) the likelihood of competition between the two works. In another case, the Delhi High Court held that the rights originating under Section 52 of the Act are to be construed in accordance to the same rules as the rights vested in the holder of copyright and therefore, such rights are not be interpreted in a narrow or strict or by limiting the ambit of Section 52. It clearly observed “Sections 14 and 51 on the one hand and Section 52 on the other hand are to be read as any two provisions of a statute.”⁵⁰

Thus, it can be said that fair dealing does not enable the violation or infringement of the exclusive right of a copyright holder. This provision cannot be used when there is blatant copying by an individual or a company from a copyrighted work. Copyright protection is conferred on such work wherein reasonable skill and addition has been administered in order to make it reach the threshold of originality; and therefore, cases wherein substantial part of

⁴⁷ The Copyright Act, *supra* note 24 at § 52 (1).

⁴⁸ *Id.*

⁴⁹ *Civic Chandran v. Ammini Amma*, 1996 PTC 670 (Ker HC) 675-677.

⁵⁰ *University of Oxford v. Sameshwari Photocopy Services*, (2016) 160 DRJ (SN) 678.

the work is emulated from an existing work will not be termed as “fair” and “legitimate”.⁵¹ Analysing this in the context of ad-blockers, it is unlikely that the work done by them is transformative in nature. Transformative works come into play only when there is something in addition to the original or when they add a different functionality. In the case of ad blockers, they merely remove the advertisements from a webpage. A web page which has advertisements in it if compared to a website which is visited with the help of an ad-blocker would look different but may not offer any added features or content for the user. So, ad-blockers may not succeed if they take use of the fair dealing provisions of the Copyright Act.

Contributory Infringement

The question of contributory infringement has not come before the courts in India as of now. Section 51(a)(ii) of the Copyright Act deals with the issue of contributory infringement but it has not yet been expanded for use in modern technology like ad blocking.⁵² Contributory infringement would be proper in the cases where one party assists the infringement of another party. The maker of an ad blocker contributorily infringes a website when he provides the software that creates the infringing work and advertises his product. The role of intermediaries in such cases of infringement has not been discussed due to the complications that arise with it. Even though the Delhi High Court applied this provision to internet intermediaries in the MySpace case, it would be difficult to apply that to ad blockers.⁵³ The court while taking a liberal interpretation of Section 51(a)(ii) stated that liabilities on internet intermediaries would arise only in certain scenarios where there is actual knowledge of infringement. Thus, the maker of an ad-blocker could be held liable under this provision. However, unlike direct infringement, contributory infringement focuses on the infringer’s knowledge or purpose. The individual must have a “specific” understanding of the infringing conduct. Because contributory responsibility requires that the secondary infringer to “know or have reason to know” of direct infringement, the phrase “particular or specific knowledge” is the key here.⁵⁴ Thus, if cases do come up against ad-blockers, the plaintiffs must show that the makers of such software had direct knowledge of potential infringement.

⁵¹ Ishan Sambhar, *Concept of fair Use and Fair dealing in copyright*, MONDAQ (May 13, 2020), <https://www.mondaq.com/india/copyright/930556/concept-of-fair-use-and-fair-dealing-in-copyright>.

⁵² The Copyright Act, *supra* note 24 at § 13.

⁵³ MySpace Inc. v. Super Cassettes Industries Ltd., 2011 (48) PTC 49 (Del).

⁵⁴ See Sneha Jha & Samar Jha, *An Analysis of the Theory of Contributory Infringement*, 11 J. INTELL. PROP. RTS. 318-325 (2006).

II. TORTIOUS INTERFERENCE

Another possible argument for advertisers and content providers would be of tortious interference by the ad block software with a contractual relationship subsisting between them. Such claims come into play when a third-party who is not a party to the contract intervenes with the said contract.⁵⁵ In the current situation, the contract between the advertiser and the website owner would comprise items such as rate per mille of ad views, guarantee of a stipulated number of views in consideration for a flat rate, higher per mille of ads once the ad views surpasses the stipulated number of views, etc.⁵⁶ It is needless to state that the functioning of ad-blockers do interfere with the contract extant between the website owners and advertiser. However, the point of contention is whether the claim of website owners that this interference qualifies as tortious interference is feasible or not.

The case of *Lindsay International Pvt. Ltd. and Ors. v. Laxmi Niwas Mittal*⁵⁷. was one of the first decisions in India which elucidated on tortious interference. The ingredients that may give rise to tortious interference are - existence of an identifiable contract, knowledge of the existence of the contract, application of unlawful means to cause the breach of contract and finally, damages resulted due to the breach.⁵⁸ There must exist an intentional invasion of contractual rights in order for tortious liability to arise.⁵⁹ Further, the principle elucidated in the Lindsay case was that interference to a subsisting contract may be caused by hindering or preventing the performance of the contract, even though the action may not qualify as breach of contract.⁶⁰

An identifiable contract between the advertiser and the website owners must exist for them to claim tortious interference. For the purpose of analysis, the authors assume that a contract subsists between the advertiser and the website owner because ordinarily a contractual relationship entails the operation of an ad on a website. The knowledge of this contract by the ad blocking entities may be deemed to exist after a reasonable inquiry. However, the element of intent is difficult to ascertain in this instance. In order to interpret the meaning of 'intention'

⁵⁵ LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES (4th ed. 2018).

⁵⁶ Alex Hem, *Adblock Plus: The Tiny Plugin Threatening the Internet's Business Model*, THE GUARDIAN (Oct. 14, 2013), <https://www.theguardian.com/technology/2013/oct/14/the-tiny-german-company-threatening-the-internets-business-model>.

⁵⁷ *Lindsay International Pvt Ltd and Ors v. Laxmi Niwas Mittal*, 2017 SCC OnLine Cal 270.

⁵⁸ *Inox Leisure Ltd v. PVR Ltd*, 2020 SCC OnLine Del 673.

⁵⁹ *Lumley v. Gye*, (1853) 2 E&B 216.

⁶⁰ *Lindsay*, *supra* note 58.

it is necessary to differentiate between conduct and consequences, because even when a tortious liability is based on the presence of intention of giving rise to particular consequences, liability of such a conduct may not rest in the intention of such conduct.⁶¹ The concept of intention with regards to conduct can be found on the edifice of ‘idea of choice’; and with regards to consequences, on the basis of aim, objective and purpose.⁶²

Basically, the intention driving the conduct of a person to produce a consequence lies in the ‘purpose’ for producing such consequence by their conduct.⁶³ In the functioning of an ad blocking software, the purpose is to let users experience hassle free internet services without disruptions caused by advertisements. Most importantly, the plaintiff has to prove that intervention caused to its contractual rights were intended and not merely a natural repercussion of the defendant’s conduct. It is imperative to show that the breach of contract was an “*end in itself or the means to an end.*”⁶⁴ The resultant harm suffered by the website owners and advertisers is incidental and unintended and therefore there exists no intention, whatsoever, to encroach upon a contractual obligation of the website owners.

In regards to the aspect of presence of intent in committing a tortious interference, courts have also had contrasting views that “*the defendant must have either desired to bring about the harm to the plaintiff or have known that this result was substantially certain to be produced by his conduct.*”⁶⁵ The same reasoning could be applied in order to discern the intention of operation of ad blocker. According to this view, although the intention of the ad blockers is not to divest the website owners of any of their contractual prerogatives, it is justifiable to infer that they are, by and large, certain of the outcome of the function of the ad blocker. However, in tort law, this view may be discredited by the concept of ‘justification’ of good motives.⁶⁶ It is well established that interference with contractual rights is reasonable when the impugned action is purported to protect or stimulate some social or moral principle of good conduct and if the means resorted to bring about such interference are not unlawful.⁶⁷ In this situation where the intention behind ad blockers may be seen as harmful because they give rise to a competitive market activity, the law mandates the presence of either unlawfulness or a predominantly bad

⁶¹ Peter Cane, *Mens Rea in Tort Law*, 20 (4) OXF. J. LEG. STUD. 533 (2000).

⁶² *Id.* at 534.

⁶³ *Id.*

⁶⁴ *OBG Ltd v. Allan*, [2005] QB 762.

⁶⁵ Restatement (Second) of Torts Ch. 37, at 5 (1977).

⁶⁶ Peter Cane, *supra* note 62.

⁶⁷ JOHN DYSON HEYDON, *ECONOMIC TORTS* (1978).

motive.⁶⁸ The authors believe that law which takes a pluralistic view may not take cognisance of each good motive because every good motive cannot justify a wrongful conduct. Yet, securing one's own contractual rights or advancing some public interest in the course of interfering with an existing contractual obligation should not qualify as tortious interference.

III. NET NEUTRALITY

Net neutrality as a concept has been much talked about in recent times. Before analysing the clashes between net neutrality and ad blockers, it is useful to get a brief background on the concept and its use in India. Net neutrality can be called as the "free speech" doctrine of the internet and it proposes that all Internet Service Providers ("ISPs") should strive to give equal and fair access to all content and services.⁶⁹ The main reason behind this is to ensure that access to internet services should be available to everyone and the internet should be an equal playing field. This would promote competition and make sure that smaller players are not held back by the money and power of the big technology companies. On the more civil side, this would also ensure that there is free speech and openness of thoughts on the internet and less of content moderation by the big players.

With the advancement of the internet and ubiquitous presence of telecom access across India, there is a need to protect and preserve the openness of the internet. This is why the demand for net neutrality increased and currently, India is said to have the strongest net neutrality rules in the world.⁷⁰ Net neutrality on the internet is attained when there is no discrimination with respect to the type of data being provided to the end users i.e., consumers.⁷¹ Ad-blocking, which is mainly an end user enabled service ensuring a blanket blockage or selective blockage⁷² of advertisements, must be compatible with net neutrality rules. This implies that ISPs must operate in consonance as net neutrality principles mandate the restriction of any form of interference or discrimination in the dealing of online content, including actions like degrading, blocking, according preferential treatment or speed to any content.⁷³ Moreover, the ad tech

⁶⁸ Peter Cane, *supra* note 62.

⁶⁹ *Id.*

⁷⁰ BBC Staff, *India adopts world's strongest net neutrality norms*, BBC NEWS (Jul. 12, 2018), <https://www.bbc.com/news/world-asia-india-44796436>.

⁷¹ Debarshi Mukherjee & Sonia Dhir, *Net Neutrality Issues and Different Cross Sections of Society – An Indian Perspective*, 6 (2) IPE J. MGMT. 80 (2016).

⁷² Jessica Davis, *Inside Axel Springer's war with AdBlock Plus*, DIGIDAY (Apr. 19, 2019), <https://digiday.com/media/inside-axel-springers-war-adblock-plus/>.

⁷³ Stan Adams, *Net Neutrality: India Gets It*, CDT (Jul. 13, 2018), <https://cdt.org/insights/net-neutrality-india-gets-it/>.

industry cannot be allowed to leverage the net neutrality framework to harbour their financial gains at the cost of the consumer's choice, privacy and safety.⁷⁴

In 2018, the Department of Telecommunication (DoT) had issued a letter in regards to 'Net Neutrality Regulatory Framework' which contains policy directives regarding net neutrality. According to it, the terms of the license agreements administering the ISPs were to be amended in order to include provisions of non-discriminatory dealing of online content along with apposite exceptions and exclusions.⁷⁵ One such provision is concerning the 'reasonable traffic management' measures used by the licensee.⁷⁶ Albeit, such measures ought to be proportionate, transparent and tentative in nature.⁷⁷ Measures concerning congestion management, network limitations and legal public policy necessities are certain acceptable traffic management approaches on the internet.⁷⁸

Many ads have been programmed such that they can "chat" with the user profile or its device and its settings.⁷⁹ Additionally, these ads frequently send signals across the network and all these activities result in an exacerbated congestion.⁸⁰ It is for this reason that the Body of European Regulators for Electronic Communications (BEREC), which is the regulating agency of the telecommunication market in the European Union, had noted ad-blocking as a "reasonable" practice for tackling network congestion. Furthermore, BEREC also conceded to "*allow network-internal blocking by the ISP if it is done at the request of the end-user and is under the control of the end-user, since they considered the most important principle was that the end-user could decide.*"⁸¹ Chapter 10 of the Net Neutrality report discusses the permissible traffic management approaches to preserve the integrity and security of a network in order to tackle the undesirable elements like spam, viruses, DOS (Denial of service) attack, worms, etc.⁸² Ad-blocking when done with a legitimate purpose of securing the health of the network

⁷⁴ UN IGF, NET NEUTRALITY RELOADED: ZERO RATING, SPECIALISED SERVICE, AD BLOCKING AND TRAFFIC MANAGEMENT (Luca Belli ed., 1st ed. 2016), https://internet-governance.fgv.br/sites/internet-governance.fgv.br/files/publicacoes/net_neutrality_reloaded.pdf#page=53 .

⁷⁵ DEPARTMENT OF TELECOMMUNICATIONS, REGULATORY FRAMEWORK ON NET NEUTRALITY (2018), https://dot.gov.in/sites/default/files/DoT%20Letter%20on%20Net%20Neutrality%20Regulatory%20Framework%20dated%2031%2007%202018_0.pdf?download=1.

⁷⁶ *Id.* at 2, 5.

⁷⁷ *Id.*

⁷⁸ Department of Telecommunication Committee, NET NEUTRALITY 15 (2015), https://dot.gov.in/sites/default/files/Net_Neutrality_Committee_report%20%281%29_0.pdf.

⁷⁹ Roslyn Layton, *User's rights, ad blocking and net neutrality*, in NET NEUTRALITY RELOADED: ZERO RATING, SPECIALISED SERVICE, AD BLOCKING AND TRAFFIC MANAGEMENT 187 (Luca Belli ed., 2016).

⁸⁰ *Id.* at 187.

⁸¹ Roslyn Layton, *supra* note 80, at 184.

⁸² Department of Telecommunication Committee, *supra* note 79, at 54.

by skipping unwanted advertisements cannot be said to be a contravention of the net neutrality framework.

Chapter 11 of the Net Neutrality report elucidates the amenability of communication networks to security and privacy concerns and thus highlights the need for regulatory action to be shouldered by communication service providers.⁸³ Any slack in relation to the security and integrity of communication networks could impact the data and information of the end user. Also, the ever-increasing competition is stimulating content creators to devise new tactics for improved user experience, some of which may lead to deleterious impact on the security of the user's network thereby having direct implications on net neutrality. For instance, a malware called 'Hummingbad' was responsible for a maladvertisement attack and unpermitted installation of fraudulent applications.⁸⁴ The malware surfaced from a seemingly licit platform Yingmob, which controlled it and infiltrated 85 million⁸⁵ Android devices, generating fraudulent ad revenue amounting to \$300, 000 per month.⁸⁶ The malware was designed to steal user data. This is the reason why users appreciate legitimate blocking mechanisms of ISPs to block ads filled with malware, spam, viruses, and other undesirable data at the network level.

The DoT committee report⁸⁷ which was published in 2015 has made numerous mentions of the terms 'data protection' and 'privacy' in the digital space and has briefly talked about the unregulated platform for online content providers. In India, the Personal Data Protection Bill which was passed in 2019 provides a statutory framework to implicate such offenders who in the garb of net neutrality are committing data theft. The Bill does not in entirety seek an absolute prohibition on processing of data. Operations such as "*collection, recording, organisation, structuring, storage, adaptation, alteration, retrieval, use, alignment or combination, indexing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction*" constitute processing of personal data of an individual.⁸⁸ The Bill mandates that the user be apprised with information of likelihood of such data collection and the purpose of its subsequent processing.⁸⁹ Therefore, Section 23 of the Bill

⁸³ *Id.* at 61.

⁸⁴ Gina Hall, *Android malware Hummingbad infected 85 million devices*, BIZ JOURNALS (Jul. 5, 2016) <https://www.bizjournals.com/sanjose/news/2016/07/05/android-malware-hummingbad-infected-85-million.html>.

⁸⁵ *Id.*

⁸⁶ *From HummingBad to Worse: New In-Depth Details and Analysis of the Hummingbad Android Malware Campaign*, CHECK POINT, <https://blog.checkpoint.com/2016/07/01/from-hummingbad-to-worse-new-in-depth-details-and-analysis-of-the-hummingbad-andriod-malware-campaign/>, (last visited Aug. 11, 2021).

⁸⁷ Department of Telecommunication Committee, *supra* note 82, at 25, 76, 78.

⁸⁸ Personal Data Protection Bill, 2019, 2019, § 3(31) [hereinafter Data Protection Bill].

⁸⁹ Data Protection Bill, § 23.

imposes an obligation on data fiduciary to maintain such transparency.⁹⁰ The data principal is at liberty to either grant or withdraw their consent to the data fiduciary for such processing.⁹¹ Now, data processors are such entities which process personal data on behalf of a data fiduciary.⁹² In order to understand this concept let us take the example of Facebook. In cases where data collected by Facebook is used by the advertisers to place ads, it plays a role of data fiduciary. In such capacity, Facebook has an obligation to give notice to its users about the categories of personal data to be collected,⁹³ the purpose for such collection,⁹⁴ basis of processing,⁹⁵ the data processors with whom such data has been shared,⁹⁶ etc. at the time of collection of data. Additionally, categories of personal data usually collected and purpose for which it is usually processed has to be made available by Facebook and the same can be consented to or not by the user.⁹⁷ Facebook on the other hand will be a data processor when it operates with businesses and other third parties. For instance, Facebook is a data processor when it processes data on behalf of an advertiser with a motive to assess the advertising campaign's performance and reach, and thereafter communicate insight about the individuals who interacted with the ad. A relevant example is Data File Custom Audiences.⁹⁸ In such a case Facebook has to rely on the data fiduciary, that it has provided a notice to the data principal in accordance with Section 7 of the Bill. Therefore, any implementation of online ads for processing of end user's personal data without receiving consent of data principal will fall afoul of Section 11 and Section 34 of the Bill.⁹⁹

The Telecom Regulatory Authority of India (TRAI) released a consultation paper entitled 'Traffic Management Practices and Multi-Stakeholder Body for Net Neutrality' in January 2020.¹⁰⁰ In the paper, TRAI has mentioned the legitimate grounds for deployment of a traffic management practice which includes traffic congestion and network integrity/security requirements.¹⁰¹ Further, it has suggested the premises upon which a TMP may be defined.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Data Protection Bill, § 3(15).

⁹³ Data Protection Bill, § 7(1)(b).

⁹⁴ Data Protection Bill, § 7(1)(a).

⁹⁵ Data Protection Bill, § 7(1)(e).

⁹⁶ Data Protection Bill, § 7(1)(g).

⁹⁷ *Id.*

⁹⁸ Gavin Llewellyn, *Custom audience and identity based targeting*, SMART INSIGHTS (Jun. 12, 2019) <https://www.smartinsights.com/internet-advertising/custom-audiences-and-identity-based-targeting/>.

⁹⁹ Data Protection Bill, § 34.

¹⁰⁰ TELECOM REGULATORY AUTHORITY OF INDIA, CONSULTATION PAPER ON TRAFFIC MANAGEMENT PRACTICES AND MULTI-STAKEHOLDER BODY FOR NET NEUTRALITY (2020), <https://traai.gov.in/consultation-paper-traffic-management-practices-tmps-and-multi-stakeholder-body-net-neutrality?page=1>.

¹⁰¹ *Id.* at 6.

One instance elaborated by TRAI is the practices which may have an impact on Quality of Services (QoS) of an application by resorting to prioritisation and/or throttling of certain applications. It is inevitable that the end-user experience on the internet enhances by deploying an ad blocker which tackles traffic congestion, thereby increasing the user's bandwidth; and concurrently, security of a device is preserved.

The authors do realise that ad blocking is not a real solution in the current 'arms race' and therefore, a balanced solution favouring the user, content creators and ad tech industry must be reached. Innovation will play a significant role in bringing a shift as to how online ads are created. Platforms such as Privacy Butler¹⁰² are already harnessing such opportunities and have created an example of privacy by design technology which can observe a person's presence and try to make rectifications to changes stated by the user. Users may resort to using ad management tools such as Ghostery which can expose tools embedded in a website for tracking, thereby empowering the user to decide whether to run the application or visit the content.

CONCLUSION

It can be concluded that ad blockers do not necessarily violate any laws. The owners of websites and the contents therein do not have a cause of action under copyright law and tortious interference. But there is a way out for them through the Acceptable Ads initiative by several ad blocking software. Ad blocking software is not bad in general; they do offer the public a chance to block several unnecessary ads. There is an undeniable public consensus on blocking certain types of advertisements, but this should not encroach onto meaningful advertisements. The forthcoming personal data protection law will definitely be able to ensure a suitable balance between the rights of the data principal and such individuals or entities who have an ad-based business model.

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¹⁰² Ryan Wishart et. al, *Privacy Butler: A personal privacy rights manager for online presence*, 8TH IEEE INTL. CNF PERVASIVE COMP. COMM. WORKSHOPS 672 (2010).