NAVIGATING ISP LIABILITY ANALYSING THE INTERPLAY BETWEEN THE INDIAN COPYRIGHT REGIME AND THE INFORMATION TECHNOLOGY ACT

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Abstract

The modern digital landscape has brought forth complex legal challenges concerning the protection of Intellectual Property Rights. A focal point of this discourse revolves around the liability of Internet Service Providers (ISPs) for third-party copyright infringement online. The fundamental question pertains to the allocation of liability, prompting an examination of ISPs' responsibilities and liabilities concerning copyright infringement committed by their users. This study aims to delve into the theoretical foundations, judicial evolution, and contemporary applications of ISP liability under India's copyright and technology law regime. ISPs, serving as conduits for information exchange, raise critical questions about their accountability and the applicable principles of copyright infringement. By examining the Indian legal systems, landmark cases, and legislative responses, this research seeks to illuminate the approaches taken by the Indian jurisdiction in addressing the challenges posed by ISP liability. The study seeks to understand the dynamics of online copyright infringement and the role ISPs play in facilitating third-party infringement, concluding with the understanding that a harmonized international framework for ISP liability is essential to foster a global digital ecosystem that respects creators' rights, fosters innovation, and protects Intellectual Property without creating online trade barriers. In conclusion, this research offers important perspectives into the complex issues surrounding ISP liability for online copyright infringement in India, offering practical recommendations to strengthen the legal framework and foster a more balanced digital

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environment that respects Intellectual Property Rights while promoting innovation and accessibility.

Keywords: Intellectual Property Rights, Internet Service Providers (ISP) Liability, Copyright, Third-party Infringement

1. Introduction

In today's modern digital landscape, the intricate relationship between technological progress and safeguarding intellectual property rights has presented complex legal challenges. A focal point of this legal discourse and policy debate revolves around the liability of Internet Service Providers (ISPs) for third-party copyright infringement in the online realm, especially given the proliferation of online platforms and content creation, challenging traditional copyright frameworks.

The fundamental question in this context pertains to the allocation of liability. There is a longstanding debate on whether accountability should rest solely on the direct infringer or extend to entities, like ISPs, that play a contributory role by facilitating internet access. This necessitates a thorough examination of ISPs' responsibilities and liabilities concerning copyright infringement committed by their users.

The potential role of ISPs as intermediaries in copyright infringement has raised critical questions about their accountability, immunity scope, and the applicable principles of copyright infringement. By examining the Indian legal systems, this research aims to shed light on the approaches taken by the Indian jurisdiction in addressing the intricate challenges posed by ISP liability.

Most copyright laws, whether in India or elsewhere, all have certain basic principles and aims, of which the most central is enhancing innovation by balancing the protection of creators of work with access to public knowledge. This goal has been considered of such high importance, that the United States has embodied the essentiality of intellectual property rights within the American Constitution, wherein Article I, Section 8, Clause 8 states, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

Writings and Discoveries".[1] While not explicitly mentioned in India, the provisions of the Copyright Act, 1957 embody these fundamental principles as well.

2. Copyright Laws and ISP Liability in India

In India, 'Internet Service Provider' has not been interpreted or defined in the Copyright Act of 1957. The term has also not been explicitly defined under the Information Technology Act, of 2000 either. ISPs fall under the category of 'intermediary,' which has been outlined under Section 2(w) of the IT Act. The provision states that, concerning any electronic record, an intermediary refers to any person who receives, stores, and/or transmits records on behalf of another, and also includes internet, network, and web-hosting service providers.[2] Therefore, internet service providers come under the ambit of intermediaries under the IT Act and otherwise, and their liability is determined accordingly.

India's Copyright Act of 1957 has not explicitly made a mention of online infringement of copyrighted works. Most provisions are generic and can be interpreted to mean all forms of copyright works and all forms of their infringement thereof through any media, including the Internet. The Act is also silent on the question of internet service provider's liability for third-party copyright infringement online. Unlike the Digital Millenium Copyright Act of the United States, which specifically tackles the legislative aspects of copyright, infringement, and cyberspace, in India, the understanding of these aspects can be drawn from a combined reading of the Copyright Act of 1957, the Information Technology Act of 2000 and the supplementary rules.

The crux of what constitutes copyright infringement lies in firstly understanding Section 14 of the Act, which prescribes certain economic rights to the creators of copyrighted works; Section 51, which explains when copyright is infringed; and Section 52, which provides for the exceptions to infringement. According to Section 14, copyright grants an exclusive right to do or authorise to do certain actions in respect of the work as substantiated under the provision. This includes the rights of – reproduction, distribution, performance, public display, translation, and more.[3] Further, Section 51 of the Act

1 Constitution of the United States, 1789. Art. I, s. 8, cl. 8.
2 The Information Technology Act, 2000 (Act 21 of 2000), s. 2(w).
3 The Copyright Act, 1957 (Act 14 of 1957), s.14.

provides what exactly constitutes copyright infringement, according to which copyright is said to be infringed when any person who does not have the exclusive right (this refers to the exclusive rights as provided under Section 14) does anything the exclusive right to do which lies with the owner of the copyright, or allows for profit any place to be used for infringement, or sells, distributes exhibits or imports infringing copies of a copyrighted work.[4] Lastly, Section 52 of the Act encompasses a set of exceptions called the fair dealing provisions, wherein if any of the uses of a copyrighted work come under the provisions of Section 52, the act or use will not constitute infringement.[5]

Therefore, when any person not being the creator of the copyrighted work or the authorised person does any such act as mentioned in Section 14, or performs any act which falls within the ambit of Section 51, then such person shall be liable for copyright infringement unless the act falls within the fair dealing provisions under Section 52. This basic understanding of what constitutes copyright infringement and what does not can accordingly be applied when determining cases of online infringement and the liability of ISPs for the same.

The liability of an ISP for copyright infringement can arise in various forms, including direct or primary, secondary, or indirect, or secondary, vicarious or contributory[6]. First and foremost, the aspect of tortious liability or common law liability comes to mind. According to Section 16 of the Copyright Act, copyright shall only exist as specified within the Act. In other words, no individual shall be entitled to copyright in any form except in accordance with the provisions of the Act, or any applicable law in force.[7] However, this does not include breach of trust or confidence cases. According to Section 16, the question of internet service provider's liability can thus only be considered as per the statutory provisions. Thus, accordingly, the question of ISP liability can be considered only concerning the existing statutory provisions, and liability under tort law or common law principles is barred by Section 16. Any claim of infringement cannot be entertained unless it is made as per the provisions of the Act.

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4 *Supra* note 3, s.51.
5 *Id.*, s.52.
6 Thilini Kahandawaarachchi, "Liability of Internet Service Providers for Third Party Online Copyright Infringement: A Study of the US and Indian Laws," 12 *Journal of Intellectual Property Rights* 553 (2007).
7 *Supra* note 3, s.16.

The next form of liability is direct or primary liability, where an infringer directly perpetrates the act of infringement. As mentioned above, Section 14, read with Sections 51 and 52, helps ascertain infringement of copyright. Particularly, Section 51(a)(i) stipulates that copyright in a work is considered as infringed when any person, without a licence granted by the copyright owner or the Registrar of Copyrights under this Act or in violation of the terms of a granted licence or any condition imposed by a competent authority under this Act, engages in actions that are exclusively reserved for the copyright owner .[8] These exclusive rights are outlined in Section 14, which grant the exclusive right to perform or authorize certain acts related to the copyrighted work.

A word of relevance in this regard is 'authorise.' In the case of Falcon vs. Famous Players Film Co., the Court of England emphasized the usage of the word 'authorise' in Copyright law, holding it to be a word of wider meaning that enlarges the protection granted to authors.[9]

The copyright laws provide that only the copyright owner can exercise the exclusive bundle of rights as provided for by the Act, or may authorise another to exercise them. ISPs overtake this role of authorising others to carry out certain actions which are, by law, the exclusive rights of the owner, and thus by this unlawful authorisation is, equally liable for direct infringement of copyright as the person they authorise is. Therefore, they play a facilitatory role by wrongfully authorising infringement or providing the means by which infringement is committed online. The understanding is simple – without the networks and internet access provided by ISPs, infringement online would be impossible. By the very nature of the role of an ISP, it is a copyright infringer. Holding ISPs liable as such is unrealistic and would lead to a lack of internet access, and thus, an ISP's liability should ideally arise only when it plays the role of an unlawful authoriser with knowledge of infringement. What constitutes knowledge on the part of an ISP has been well-expounded in the landmark judgement in Super Cassette's case. However, the question of determining what constitutes 'authorisation' remains unanswered.

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8 *Supra* note 3, s.51(a)(ii).
9 [1926] 2 KB 474, CA.

In the United States, Canada, and the US, a common determination of what constitutes authorisation is as per the Betamax doctrine, where the Patent law's staple article of commerce was adopted by the Courts in Sony Corp. of America v. Universal City Studios Inc.[10] According to the Betamax doctrine, if a product has the potential for both infringing and non-infringing uses, the producers cannot be held liable for any resulting infringement. The Courts affirmed that 'unauthorised uses of a copyrighted work are not automatically infringing'. An unlicensed use of copyright does not always constitute infringement unless it directly conflicts with any of the specific exclusive rights as granted by the statute.[11] The Courts passed the judgement considering the negative impact on the production and distribution of VCRs if every such product was held liable for copyright infringement merely due to its capability to be used for infringement. This introduction of this doctrine by the judiciary helped ascertain the question of what constitutes authorisation and determining liability for infringement with ease. If this doctrine is applied in ascertaining ISP liability, the answer would simply be that ISPs will not be liable for 'authorisation' of infringement as they possess non-infringing and lawful uses as well. Holding them liable for infringement would lead to a negative impact on the growth of the internet and access to networks.[12] However, the Indian legislation or judiciary has not implemented this doctrine concerning any purview of copyright law, let alone ISP liability, and thus, answering the question of ISP liability in India is not as easy.

The next type of liability for infringement is secondary or indirect liability. According to Section 51(a)(ii), when a person allows any placed to be utilized for profit for the communication of a work to the public where such communication amounts to infringement of the copyright in the said work, without being authorised to do so, it constitutes secondary copyright infringement.[13] With respect to ISPs, the question of liability arises given that they provide a place on the internet for communication of works to the public through its network access. The words 'permits for profit' are also applicable as ISPs require subscription fees from users to grant access to the Internet and also gain enormous proceeds from advertisements hosted by them. Here is where the considerations

[10] 464 U.S. 417 (1984).
[11] *Ibid*.
[12] Cheng Lim & Warren B, "Revisiting Authorisation Liability in Copyright Law", 24 *Singapore Academy of Law Journal* 698 (2012).
[13] *Supra* note 3, s.51(a)(ii).

of lack of intention and absence of reasonable awareness or knowledge that the provision of a place of communication would be used for infringement come into play. The notice and take-down, and safe harbour provisions come to the protection of ISPs in this regard. Both contributory and vicarious liability can arise as a subset of this and is also addressed on an individual basis.

It is pertinent to note that Section 52(a)(ii) also provides an exception to the infringement in the very provision itself. It reads as follows, '... unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright'.[14] Having active awareness and knowledge of the fact that the communication of the work to the public would result in infringement is necessary for secondary liability of copyright infringement. Accordingly, when it comes to intermediary and ISP liability, the service providers must have had actual awareness and knowledge of the fact that there is an act of infringement of copyright committed via their networks, without which liability for the said infringement cannot arise under Section 52(a)(ii). This provision when read in line with the safe harbour provisions under the IT Act helps understand the importance of knowledge of infringement for the ISP. Therefore, while the intention for copyright infringement for an ISP is out of the question, their knowledge is considered above and beyond all.

Lastly, in cases of criminal liability for the offence of copyright infringement which is provided for under Section 63 of the Copyright Act. It provides that any person who knowingly infringes, abets or aids in the infringement of copyright in any work or any other rights as granted under the Act will be criminally liable for such infringement and be subject to six months to three years of imprisonment and a fine of fifty thousand to two lakh rupees.[15] Section 45 of the Bharatiya Nyaya Sanhita (BNS), 2023 defines abetment as the instigation, engaging in conspiracy, and intentional aiding in an offence.[16] Instigation refers to actively suggesting or stimulating another to commit an offence. Engaging in conspiracy has been elucidated within Section 120A of the Indian Penal Code, and is an unlawful agreement between persons to commit a crime. An internet service provider, by providing access to the internet, in no way can be said to actively

[14] *Supra* note 3, s.52(a)(ii).
[15] *Id*., s.63.
[16] The Bharatiya Nyaya Sanhita, 2023 (No. 45 of 2023), s.45.

suggest its users to infringe copyright online; nor does the service provider conspire with its users for the same. However, when it comes to aiding an offence, a service provider's liability for abetment may arise as by providing internet access or failing to control infringement online through their network, they intentionally or unintentionally aid a third-party infringer in the infringing act. An essential consideration in this regard, given that criminal liability involves *mens rea*, is the lack of intention on the part of an ISP. Merely engaging in the provision of Internet networks to users does not entail the intention to aid users in infringing copyright online.

Furthermore, merely failing to prevent the commission of an offence does not by itself constitute abetment. This is a preliminary understanding of criminal law, and it has been held that without some level of direct involvement, conviction for abetment is unsustainable.[17] Therefore, this leaves us to the position that as per Section 63 of the Copyright Act, ISP liability is uncertain given the lack of intention to commit or abet infringement and the fact that only because they fail to prevent the commission of an offence, they cannot be held as an abettor. However, while this understanding holds good for any cases in the tangible form when it comes to online infringement, the position differs. Considering the role an ISP plays in enabling and disabling access over the internet, they cannot be held in the same extreme position as a direct infringer, nor do they fall under the lesser position where they escape liability based on lack of intention or otherwise. To tackle this paradoxical position of ISP liability, the legal provisions of safe harbour have been established.

3. Safe Harbour in India

To effectively determine liability for ISPs and ensure that they are neither able to escape liability, when necessary, nor be wrongfully liable when without fault, the provision of 'Safe Harbour' has been established. Safe harbour is a legal provision within a legislation that grants certain protections from liability upon certain conditions being met.[18] With respect to ISPs, safe harbour provisions restrict the liability of the service providers in certain conditions such that they are not held unjustifiably liable for third-

[17] Kulwant Singh @ Kulbansh Singh v. State 2007 Criminal Appeal No. 834 OF 2007 (Arising out of SLP (Crl.) NO. 5104 of 2006).

[18] Winston & Strawn, "What is a Safe Harbor?", Winston & Strawn Legal Glossary, *available at*: https://www.winston.com/en/legal-glossary/safe-harbor (last visited March 13, 2024).

party infringement of copyright online.[19] These provisions signify the legislative intent to ensure a balanced and reasonable approach in holding all intermediaries, including ISPs liable for actions within their control but not perpetrated by them. When a service provider meets the particular conditions mentioned in the safe harbour provision, they receive protection from being held liable for infringement.

Sections 79 and 81 of the IT Act deal with the safe harbour provisions for intermediaries and ISPs in India. Section 79 deals with the exemptions from liability of intermediaries. It is pertinent to note that Section 79(1) begins with a non-obstante clause, which provides, 'Notwithstanding anything contained in any law for the time being in force.'[20] Accordingly, an ISP can be granted immunity under the safe harbour provision 'notwithstanding' any other applicable laws in force. Contrary to this, Section 81 of the IT Act provides a paradoxical provision, which states that nothing in the IT Act restricts anyone from exercising the rights conferred under the Copyright Act.[21] This contrary provision raised questions as to whether the rights conferred under the Copyright Act are in a superior position, and accordingly, ISPs cannot claim safe harbour in respect of liability for copyright infringement.[22]

However, this position was overridden in the landmark judgement in ***My Space Inc v. Super Cassettes***, where the Delhi High Court concluded that the juxtaposition between the two provisions implies that when determining liability for ISPs, a harmonious interpretation of the provisions of the Copyright Act and Sections 79, 81 of the IT Act must be made, which together assign the infringement liability and also limit it accordingly. The Court affirmed this necessity to interpret the provisions of the IT Act and the Copyright Act harmoniously to ensure rightful safe harbour immunity to ISPs and intermediaries in case of copyright infringement cases. Quoting an important point of the judgement in this regard, '... Proviso to Section 81 does not preclude the defence of safe harbour for an intermediary in case of copyright actions. Accordingly, it is held that

[19] "Safe harbors for online service providers under Copyright Law", Justia (2023), *available at*: https://www.justia.com/intellectual-property/copyright/copyright-safe-harbor/ (last visited March 13, 2024).
[20] *Supra* note 2, s.79(1).
[21] *Id*., s. 81.
[22] Aditya Gupta, "The Scope of Online Service Providers' Liability for Copyright Infringing Third Party Content under Indian Laws", 15 *Journal of Intellectual Property Rights* 35 (2010).

Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously.[23]

In this regard, it can be understood that Section 79 has granted a narrow immunity to intermediaries and it cannot be understood to be an unrestricted, blanket immunity to completely avoid liability. The very purpose of section 79 was to regulate and limit this liability. When interpreted together, the final understanding is that the safe harbour provisions enable ISPs to limit their liability while at the same time allowing copyright holders to raise claims of infringement in cyberspace when the same is warranted by the Copyright Act and falls outside the protection under Section 79.

The legal provisions for ISP liability fall within the scope of the horizontal approach, that is, liability is determined in all areas where ISP responsibility arises, not limited to copyright infringement. Accordingly, safe harbour for the ISP is also determined according to horizontal immunity, not limited to copyright infringement.[24]

Coming to the safe harbour provision itself, Section 79 provides three conditions when an intermediary or ISP will be exempt from liability for third-party infringement online through a network hosted by him. Firstly, the intermediary's role must be restricted to merely providing access to communication systems through which information is made available, stored, or transmitted by third parties. Secondly, the intermediary should not itself initiate transmission, choose the receiver of the transmission, or alter the information contained therein. The use of the term 'or' signifies that an intermediary claiming safe harbour under this section must fulfil either clause (a) or (b) along with clause (c). This delineation has probably been made with the legislative intent of ensuring all different forms of intermediaries, whether they be network providers or internet service providers, fall within the ambit of the safe harbour as per the prescribed functions itself. An ISP can fall within the purview of clause (a), given that it engages in providing access to users to network systems. However, as the role of an ISP involves initiating transmission of the access to a specific user,[25] they do violate clause (b). However, as the

[23] FAO(OS) 540/2011, C.M. APPL.20174/2011, 13919 & 17996/2015.

[24] Seng, Daniel., Comparative Analysis of National Approaches of the Liability of the Internet Intermediaries - Part I., 1 WIPO Knowledge Repository (2010).

[25] Jeff Tyson and Chris Polette, "How Internet Infrastructure Works", *available at*: https://computer.howstuffworks.com/internet/basics/internet-infrastructure.htm (last visited on March 13, 2024).

clauses offer an alternative condition, this does not deter ISPs from claiming safe harbour. It is probably for this very reason the section has been worded as such.

In the case of ***Flipkart Internet Private Limited v. State of U.P. and 3 Others***, the Allahabad High Court settled this interpretation of Section 79(2). It has been held that the exemption from liability under Section 79(1) of the Act applies when intermediaries, including ISPs meet the criteria specified under Section 79(2)(a) or Section 79(2)(b), and Section 79(2)(c). If the intermediary only provides access, it must comply with Section 79(2)(a). However, if it offers services beyond mere access, it must adhere to the requirements outlined in Section 79(2)(b).[26]

The last condition under Section 79(2) provides that an intermediary can claim safe harbour only if the intermediary observes necessary 'due diligence'.[27] This condition is of utmost importance as it determines whether the ISP can claim an exemption from liability in the first place. What constitutes due diligence has not been defined within the IT Act, but has been provided for in the accompanying IT Intermediary Guidelines. The provision of due diligence is also important considering that irrespective of the type of the intermediary and whether it fulfils either clause (a) or (b), all intermediaries must practice due diligence under clause (c) for protection, as is evident through the lack of the use of the word 'or' following clause (a), which has been used in the preceding clause.

This condition is also in line with the case of ***Avnish Bajaj v. State***; the Courts considered the aspect of due diligence with respect to Section 85 of the IT Act, where a website was held liable for failure to exercise due diligence by not filtering content displayed therein.[28]

The Karnataka High Court, in ***Flipkart Internet Private Limited v. M/S. Indusviva Health Sciences Pvt. Ltd.*** highlighted the importance of the aspect of due diligence, holding that, 'an intermediary should observe due diligence while discharging its duties'.[29]

[26] CRIMINAL MISC. WRIT PETITION No. - 3487 of 2019.
[27] *Supra* note 2, s.79(2)(c).
[28] (2008) DLT 279 (Delhi High Ct.).
[29] M.F.A. No. 1693 of 2021.

Lastly, Section 79(3) deals with cases when the safe harbour provisions will not be applicable and cannot be used by an intermediary to escape liability. This provision provides a two-fold condition wherein a safe harbour will not come to the rescue of an ISP. Firstly, if the intermediary has conspired, abetted, aided, or induced by threat or promise, the act of infringement. Secondly, in case the ISP has 'knowledge' or has been alerted by the Government of such infringement, despite which the ISP does not take down or disable access to the infringing material. When the intermediary's actions fall within either of these clauses (a) or (b), it cannot claim safe harbour and avoid liability for infringement facilitated through its network.

The two-fold nature of the provision has been interpreted in the case of ***Christian Louboutin Sas v. Nakul Bajaj & Ors.***, where the Delhi High Court held that the exemption under Section 79(1) does not apply if a platform actively participates or contributes to the commission of the unlawful or infringing act. Section 79(3) consists of two parts: Section 79(3)(a) and 79(3)(b). The former is a key component to the exception criteria provider under Section 79(1). It restricts the exemption to those intermediaries who do not aid, abet or induce the unlawful act. Any active involvement immediately negates the protection of the exemption that intermediaries are granted under Section 79(1). The latter, Section 79(3)(b) addresses the obligation of having a policy to remove information, data or links upon receiving relevant notice.[30]

Further, in the landmark judgement of the Supreme Court of India in ***Shreya Singhal v. U.O.I*** (2015), a rather narrow interpretation of the IT Act with respect to Section 79 and the condition of 'knowledge' was made. The Court uplifted the validity of Section 79(3)(b), holding that Section 79(3)(b) must be interpreted to mean that when an intermediary receives actual knowledge of a court order instructing it to promptly remove or disable access to certain material, the intermediary fails to do so within a specified time frame.[31]

The Court further mentioned that if no specificity with respect to disabling access to material is laid down, then intermediaries who receive millions of requests would be in a challenging position to determine which requests are genuine and which are not.

[30] 2018 AIRONLINE 2018 DEL 1962.
[31] AIR 2015 SC 1523.

Thus, only a competent Court order or Government notification in line with Article 19(2) of the Indian Constitution, which allows the imposition of reasonable restrictions,[32] shall constitute 'knowledge' on the part of the intermediary for which they will be then responsible to disable access for infringement. The Court considered that this position for intermediary liability has been accepted and used worldwide. The Supreme Court stated that any unlawful acts beyond what is encapsulated within Article 19(2) will not form part of Section 79. With this understanding, liability for ISPs is relatively narrow, as only in case the service provider receives a governmental notification or order to disable access to certain infringing content online will the ISP be liable to do the same. This leaves no place for the grievances of content creators and copyright owners themselves unless they can back their claims with judicial intervention and proof. Thus, the position when it came to copyright infringement online was not appreciative of the needs of the very persons whose rights the copyright regime seeks to protect.

This discourse on copyright infringement online, intermediary liability, and the requirement of 'knowledge' was further clarified the very next year by the Delhi High Court in the case of ***My Space Inc v. Super Cassettes*** (2016).[33] One of the main issues in this case was whether the Appellant My Space had 'knowledge' of the infringement of the copyright of Super Cassettes through its network. Here, the Single Judge Bench of the High Court primarily held that according to Sections 51 and 79, general awareness is sufficient, and specific knowledge is not required to determine infringement. However, on Appeal, the Delhi High Court disagrees with this understanding of 'knowledge; drawing a distinction between infringement in the tangible and intangible space. Similar to the observation made by the Supreme Court in Shreya Singhal, the Court found that in the virtual space, there is an unlimited amount of content being uploaded each day, and given the current standards of technology, it would neither be realistic nor possible to identify from the millions, which content is infringing. Keeping this in mind and given the different challenges posed by the online realm in comparison to the physical world, the criteria of 'knowledge' must have a definitive understanding as meaning a conscious awareness, not just a mere possibility that infringement is likely.

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[32] The Constitution of India, art. 19(2).
[33] *Supra* note 23.

Merely considering the ambit of 'knowledge' as per Section 51(a)(ii) of the Copyright Act, would require the intermediary to be aware of every possible work online or have a constructive understanding of the same. Even if the intermediary is notified of infringement via its networks, it cannot be expected to go through millions of contents online to identify which content is an infringing one. Accordingly, when an intermediary receives knowledge of infringement of a vague or generic nature, the same is insufficient to identify infringement in its actuality, and the intermediary is left with no choice but to either ignore such a notice of infringement or make random guesses as to which content to be disabled. In some instances, if the intermediary does not have specific knowledge, it may make a generic search and accidentally remove the content uploaded by the copyright owner himself or his rightful licensee. Considerable, this approach can lead to several legal disputes. Therefore, in this regard, the Court laid down that the claimant of copyright infringement online must provide a detailed and specific description of the works being infringed to the ISP to enable them to identify and remove access to such infringing material accordingly.

The Courts held that the meaning of the term 'knowledge' is as per the judgement in ***R.K. Mohammed Ubaidullah v Hajee C. Abdul Wahab***, wherein it was held that, a person is considered to have 'notice' of a fact when he is aware of that fact, or when, due to wilful avoidance of an inquiry he should have conducted, or due to gross negligence, he would have known it. Therefore, knowledge requires a pragmatic awareness.[34]

All in all, the judgement emphasized how an ISP must possess extremely specific knowledge of a work being infringed by its network. Only when the service provider has such specific 'knowledge' or has 'reasonable belief, and it still neglects to expeditiously remove such infringing content despite having knowledge, then the ISP will also be liable for infringement.

Coming to the interpretation of the IT Act, the High Court noted that Section 79(3)(b) encompassed either actual knowledge of the intermediary of a notification by a Government or other appropriate authority. When the intermediary encompasses this knowledge, he must remove the violative content or disable access to the same to come under the safe harbour immunity. The Court clarified the interpretation of this section

[34] 2000 (6) SCC.

specifically for copyright infringement as well. While considering that the Shreya Singhal case read down Section 79, given that without specific knowledge via a government order, intermediaries would be unable to deal with takedown claims. However, in the case of an ISP, it is not just a government order, but even specific knowledge on part of the ISP by way of a detailed claim from the copyright owner or otherwise will suffice. Here, a government order is not mandatory for copyright infringement, as it is for other violations under the section. This shows a harmonious understanding of copyright and technology laws, and also highlights the importance of right holders in being able to claim their rights as granted to them by the Copyright Act.

The Court further went on to explain why this unique position for ISPs is held in cases of copyright infringement itself. Given that the amount of content and users online are magnanimous and constantly increasing, withholding ISP liability on account of knowledge would, in the Court's words, lead to the intermediary industry shutting down. The Court also noted that when balancing these copyright claims with intermediary liability and safe harbour, the approach must be reasonable to be able to protect the copyrights while also giving them a just opportunity to the intermediary to protect themselves from trivial claims. It was held greater harm will occur when a private organisation, without authorization, is compelled to view, monitor and remove content based on its own assessment of potential liability, which would lead to a severe violation of the fundamental right to privacy.[35]

Therefore, it can be seen that when the IT Act and the Copyright Act are read congruously, it leads to the ideal and intended result, wherein valid copyright claims, when specifically notified to an intermediary, ensure takedown without which the intermediary loses safe harbour protection.

The Judgement concluded with the following final position on intermediary liability and copyright infringement online – Sections 79 and 81 of the IT Act must be interpreted in complete harmony with Section 51(a)(ii) of the Copyright Act. As such, the proviso to Section 81 does not negate the safe harbour protection available to intermediaries in copyright related disputes. For internet intermediaries online, Section 51(a)(ii) requires evidence of actual knowledge rather than mere general awareness of

[35] *Supra* note 23.

infringement. Furthermore, any imposition of liability on intermediaries must satisfy the conditions outlined in Section 79 of the IT Act. After this landmark judgement, several other cases have also uplifted the interpretation made both individually with respect to intermediary liability, and also concerning copyright infringement online.

In the case of ***UTV Software Communication Ltd. and Ors. v. 1337x to and Ors.***, the Court cited the My Space case holding that, the principles of proportionality mandate achieving a fair balance between conflicting fundamental rights, such as the right to intellectual property and freedom of trade and expression.[36] Accordingly, the ISP liability, safe harbour and online infringement regime in India has ensured this balance of rights; regulating liability while also granting control rights to the creators of copyright.

The Karnataka High Court also placed reliance on the judgement while dealing with a copyright infringement case online in ***Amazon Seller Services Pvt. Ltd. v. M/S Indusviva Health Sciences Pvt. Ltd***. It was held that, as per the My Space case, if the ISP or host has 'specific knowledge' of infringement, then safe harbour cannot be claimed.[37]

In ***Amazon Seller Services Pvt Ltd v. Modicare Ltd & Ors.*** (2020), the Delhi High Court considered that Section 79 does not make any demarcation between an active and a passive intermediary.[38] The provision applies the same to both. Therefore, accordingly, even an Internet Service Provider's liability will not depend on its active or passive nature and role. As long as Section 79 is complied with, they can claim safe harbour, and if not, they will be liable for copyright infringement online, irrespective of whether they are active or passive in nature.

Based on the comprehensive assessment above, it can be concluded that secondary liability has been accorded to internet service providers in India for online copyright infringement, and for the same, the safe harbour provisions have been laid down, which ensure a balanced approach between rights of the ISPs and copyright holders.

However, one form of liability remains unascertained, that is, criminal liability for intermediaries in a case of online copyright infringement. The theoretical and legislative basis of copyright infringement as a criminal offence have been discussed before.

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[36] AIRONLINE 2019 DEL 773.
[37] AIR 2020 KARNATAKA 5, AIRONLINE 2019 KAR 1754, 2019 (4) AKR 766, (2020) 1 ICC 725.
[38] AIRONLINE 2020 DEL 169.

Nonetheless, we must also understand whether such criminal liability has been decided for intermediaries or ISPs by the judiciary, or whether its possibility has been ascertained. It is firstly important to identify the varying provisions under the IT Act and the Copyright Act. Section 63 of the Copyright Act, 1957 provides that copyright infringement is a criminal offence.[39] On the other hand, Section 79 of the IT Act provides that if an intermediary, which includes, internet service providers, fails to comply with the conditions of safe harbour provisions therein, they lose the said defence and will face liability. However, the IT Act nor any supplemental rules provide that non-compliance with the rules or the section will also attract criminal liability. When all these provisions are considered together, the question arises whether criminal liability for an intermediary, particularly for copyright infringement, can arise.

In the case of ***Flipkart Internet (P) Ltd. v. State (NCT of Delhi)***, the Court observed that all the cases so far, including those cited, pertained to civil suits where interim or permanent injunctions against infringers have been claimed. The question considered by the Delhi High Court was whether compliance with the safe harbour and due diligence provisions also renders the intermediary eligible for an exemption from criminal liability as well.

The Court emphasized that the threshold for establishing criminal liability is significantly higher than that for civil cases, requiring proof beyond reasonable doubt rather than a mere balance of probabilities. It was further observed that this higher standard should apply when determining intermediary liability under criminal law. Moreover, the Court stated that the safe harbour protection extended to intermediaries against civil liability should mutatis mutandis apply in cases of criminal prosecution. Thus, when, an intermediary has observed the conditions for safe harbour, and due diligence under the IT Act, the exclusion of liability for infringement will arise for criminal prosecution as well.[40]

Therefore, this affirms the position that if an internet service provider complies with the necessary conditions under Section 79 of the IT Act and has taken the steps of 'due diligence' under the IT Rules, then the ISP can claim safe harbour exemption from

[39] Andrew Bernstein and Rima Ramchandani, "Don't Shoot the Messenger! A Discussion of ISP Liability", 1(2) *Canadian Journal of Law and Technology* 77 (2019).
[40] *Flipkart Internet (P) Ltd. v. State (NCT of Delhi)*, (2022) 5 HCC (Del) 226.

liability for not only civil but criminal liability for copyright infringement provided as per Section 63 as well. This reflects the wide scope of protection given by the law to ISPs for copyright infringement, as long as they follow the required necessities to claim such protection.

4. Fair Dealing and ISP Liability

Apart from the safe harbour provisions outlined under the IT Act, another exemption provision to internet service providers is the fair dealing provisions under the Copyright Act, 1957 itself. Though these provisions do not provide a specific exemption only to intermediaries as the IT Act does, it nonetheless allows certain conditions under which the actions of the ISP will constitute a fair use not amounting to copyright infringement. Section 52(1)(b) and 52(1)(c) of the Act, inserted vide the 2012 Amendment to the Copyright Act provide two digital-specific fair dealing clauses which can aid internet service providers from infringement liability.

Section 52(1)(b) provides that any transitory or incidental storage of any work in which copyright subsists purely under the technical processes of electronic transmission will not amount to infringements of that work.[41] Accordingly, when an internet service provider makes a transitory storage of any copyrighted work solely for the technological processes involved in transmission, their liability for infringement does not arise as per this provision. The provision is of utmost importance to ISPs given their role which involves such transitory storages which are merely incidental in nature and not intentionally infringing.

In the landmark case of ***Tips Industries Ltd v. Wynk Ltd. and Anr.*** on April 23, 2019, the Bombay High Court clarified that only when the electronic storage, if of a transient or incidental nature can it be considered within the purview of fair dealing. Further, the Courts held that the provisions of Section 21(1)(b) would evidently apply in cases of internet service providers.[42]

This goes to show the judicial upliftment of the legislative intent to protect ISPs from infringement liability in such cases of transitory and incidental storage of works. However, the fair use exemption can be granted to ISPs only to the extent of the

[41] *Supra* note 3, s.52(1)(b).
[42] AIRONLINE 2019 BOM 1452.

interpretation of this section and not beyond. It is pertinent to keep in mind that in India, unlike the fair use provision in the USA, fair dealing works on a pigeon-hole basis wherein no exemption exists beyond the scope of exactly what is defined under the provision of Section 52.

In the case of ***Super Cassettes Industries Limited v. Mr Chintamani Rao & Ors.***, the Delhi High Court clarified the extent and applicability of Section 52 holding that, cinematograph films and sound recordings will not garner the exemptions under Sections 21(1)(a) and (b).[43] Accordingly, the fair dealing provision will not come to the rescue of ISPs concerning infringement of sound recordings and films, irrespective of whether it is a transitory or incidental storage or otherwise.

Section 52(1)(c) states that any transitory or incidental storage of copyrighted works to provide electronic links, access, or integration where the same has not been expressly prohibited by the right-holder, then the same does not amount to copyright infringement provided there are reasonable grounds to believe that the stored material is of an infringing copy.[44] Section 52(1)(c) also comes with a proviso according to which, when the person who makes such storage receives a written complaint from the copyright owner stating that the same amounts to infringement, then such a person must suspend access to the work for 21 days or till he receives a Court order refraining such access.[45] However, on the lapse of the 21 days, if no such court order is received, then he may continue to facilitate such access. Accordingly, an internet service provider can claim exemption from liability as per Section 52(1)(c) as well.

In the case of ***UTV Software Communication Ltd. and Ors. v. 1337X.To and Ors.*** on April 10, 2019, the Delhi High Court interpreted Section 52(1)(c) holding that ISPs are exempt from liability for copyright infringement for any transient or incidental storage subject to the proviso to the section.[46]

The provision under Section 52(1)(c) is commonly referred to as the 'Notice and takedown' procedure, wherein upon being given a notice of infringement, service providers have the responsibility to take down the infringing content and disable access

[43] I.A. No. 13741/2006 in CS(OS) 2282/2006.
[44] *Supra* note 3, s.52(1)(c.).
[45] *Id*., s. 52(1)(c).
[46] *Supra* note 36.

to the same. This is structurally and conceptually similar to the notice and takedown procedure of the DMCA, which also requires removal of allegedly infringing material on receiving a complaint, however, the Indian provision provides a shorter timeframe for the takedown of infringing content in contrast to the US laws.[47]

Another challenge under this provision is that of re-uploads. The proviso explicitly states that in case after the lapse of 21 days, no court order to disable the content has been made, the content can continue to be facilitated thereafter. This leads to limiting the rights of the copyright holder given that it is not feasible or possible for every right holder to obtain a court order for every infringed work and against every infringer to protect the rights. Thus, this provision gives broad protection to ISPs and otherwise to continue enabling infringement of a copyrighted work without consequences.

From the above analysis, it is evident that India has taken a nuanced approach and has sought to balance the two clashing interests of the protection and fostering of intellectual property rights and at the same time, furthering digital growth and innovation. However, without considering the impact of the Intermediary Guidelines, which now stand struck down,[48] a sound conclusion cannot be made. As of now, it can be said that with a dynamic approach, the ISP liability regime constantly evolves in India, with new developments and advancements continually coming up. While a collaborative framework has been put into place, implementational challenges do exist, and there is scope for improvement on various grounds.

5. Conclusion

This analysis has provided a significant contribution to the understanding of the intricacies involved in determining an internet service provider's liability for third-party copyright infringement online. By examining perspectives from the Indian jurisdiction and conducting an in-depth assessment of the fundamental principles of copyright law, infringement of copyright online, the legal framework for ISP liability and safe harbour in India, judicial decisions, and scholarly discourse, this study has uncovered several insights that are crucial for the regulation of copyright infringement in the digital world.

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47 *Supra* note 6.
48 *Kunal Kamra v. Union of India*, WRIT PETITION (L) NO. 9792 OF 2023.

There are inherent imbalances between the interests of ISPs, copyright holders, internet users and other stakeholders in the digital realm. While ISPs are crucial intermediaries enabling internet access and content dissemination, they also bear the responsibility of combating resulting copyright infringement. Striking a balance among these competing interests is crucial and necessitates careful consideration of the legal positions and responsibilities of all parties involved. In light of the same, it is the need of the hour to develop the legal framework for ISP liability to strike a balance between promoting online safety, innovation, and copyright protection.

As technology advances and the importance of the internet reaches new limits, ensuring engaging in positive and healthy content dissemination online will be unavoidable to ensure that the rights of copyright holders are not curtailed, and ISPs are not misdirected into liability issues. International cooperation in this respect shall ensure balancing the competing interests of ISPs, users, and copyright holders, thereby uplifting the fundamental notion of intellectual property rights laws and, at the same time, promoting internet accessibility and advancements.

5.1. Suggestions

This analysis has delved deep into the intricate Indian legal framework dealing with internet service providers' liability for third-party copyright infringement online. From the provisions of the Copyright Act and the Information Technology Act, it is evident that India has a robust system in this regard. However, this study has also unearthed certain complex issues and challenges posed by the legal framework for intermediary liability in India. The following suggestions are crucial steps that the Indian framework can take to navigate this complexity and ensure international integration.

Unlike the United States, where the **Digital Millenium Copyright Act** exclusively deals with the aspects of intermediary and ISP liability for online infringement, India currently lacks separate legislation to address copyright claims over the internet and the resultant ISP liability. Given India's significant technological advancements, dedicated copyright-specific legislation must be developed to address digital copyright issues, ISP liabilities, and the responsibilities of the involved parties. The unique nature of copyright issues on the Internet and ISP liabilities necessitates a specific provision, as a generic one for all forms of wrongful acts over the Internet, and

the same liability provisions and exemptions for all such acts are ineffective. By establishing a separate legal framework focused on online copyright protection, the unique challenges posed over the internet and to the internet intermediaries can be addressed more comprehensively.

Further, while copyright-specific legislation is long overdue, such a large legislative intervention requires a significant amount of time, study, and resources. Accordingly, another feasible solution would be to amend the Information Technology Act and reintroduce amended IT Intermediary Guideline Rules to include specific provisions addressing liability concerns for online copyright infringement, or any intellectual property violation over the internet, for that matter. This is a reasonable and quicker solution to provide legislative specificity on this issue and ensure that the existing legal framework be expanded to encompass the specific issues of copyright infringement online, and ISP liability thereof.

To improve the effectiveness of the regulations dealing with ISP liability and online infringement, it is imperative to demarcate the roles and responsibilities of ISPs and determine what exactly constitutes infringement online. Therefore, the framework should provide comprehensive definitions for the terms 'Internet Service Providers' and 'Online Infringement' within the legal framework. The definitions should encompass all forms of online infringement, with a specific focus on the unique challenges posed by the internet. Further, the definition of ISPs should also demarcate which kind of intermediaries come under this category, so that specific responsibilities can be established for the effective enforcement of the law.

Given the unique role ISPs play in accessibility to copyrighted works online, and their ability to control user access and disable infringement, ISPs can also be made into a separate category of intermediaries. This will enable demarcating certain specific responsibilities to ISPs, including additional due diligence criteria specific to copyright issues online. This sub-categorization can ensure better accountability for ISPs and prevent generic roles from being forced on them beyond what is necessary to protect copyright.

The current legal framework in India has also failed to address repeat infringement cases on the Internet. Both the IT Rules and Section 52 of the Copyright Act have dealt

with transitory information storage as an exemption to infringement, along with certain disabling requirements for infringing content. However, specific periods for disabling the content have been provided, after which users are free to re-upload infringing content. Further, even in cases where user access has been revoked for infringement, the same individual has the liberty to make separate accounts and use different intermediaries to regain access to the internet and continue infringement of copyright. Therefore, the current framework needs to address this issue of repeat infringement online and provide effective provisions to prevent the same.

Determining liability for ISPs should also consider the financial aspects between the ISP and the alleged infringer, such as the profit derived by the ISP from the acts of infringement. This ensures that the element of intention to facilitate infringement can be better understood and prevents smaller ISP businesses from being held liable the same as larger ISPs who freeride on the benefits derived from infringement.

While the above-mentioned changes are slowly being enforced within the framework, other measures to protect copyright online and reduce unjustified liability upon ISPs must be encouraged. Increasing the awareness and benefits of using anti-circumvention measures and Digital Rights Management procedures such as licensing agreements, use of encryption technologies, copy restrictions, anti-tampering protocols, and more can help protect the interests of copyright users and also ensure that ISPs are not held liable for acts beyond their intent and control.

In conclusion, the suggestions put forth aim to refine and strengthen the Indian framework governing intermediaries and ISPs with specific measures towards the protection of copyright online. By incorporating these changes, the standard of protection for copyright online and the demarcation for intermediaries' liabilities will be well ascertained. Specific frameworks tailored for the unique challenges faced on the internet, both by the right holders and ISPs, can ensure strengthening the framework further. All in all, the balance that is so keenly sought between users, service providers, and copyright holders can be maintained by the Indian legal framework.

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