
ANALYSIS OF INTERMEDIARY LIABILITY

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I. INTRODUCTION

Today's digital era brings with it an expanding online world which needs special laws for the protection of its users from various forms of criminal acts. New challenges arise especially in the context of copyright infringement as now anyone and everyone has the tools to copy and distribute copyrighted content to the masses across the world with a mere click. Technology allows users to stay anonymous and commit such acts at no additional costs to them and at huge perils of the intellectual property rights holders. To overcome this problem and to offer substantial reliefs to the rights holders, the legal liability is placed upon the intermediaries who allow and at times facilitate such wrongs. This is known as intermediary liability.

An intermediary is any person, business or entity that provides the place where people can publish possibly infringing content.¹ It is an actor which provides numerous functions to its users such as uploading, storing and archiving data and providing access to the internet, physical or otherwise.² The Information and Technology Act of India defines intermediaries as the person who on behalf of someone else receives, stores or transmits information to others and such person may include internet service providers (hereafter "ISPs"), search engines, online marketplaces, cyber cafes and more.³ Social networking sites are also considered intermediaries.⁴

Around the world, governments are putting liability on intermediaries to take down and block the content of their users in case it infringes on protected material or is obscene or qualifies as hate speech.⁵ Most victims of online copyright infringement choose to take legal action against

¹ Vatsalya Vishal; Aditya Sharma, "Into the Crosshairs - The Liability of Online Intermediaries in Case of Copyright Infringement," *Nirma University Law Journal* 8, no. 1 (December 2018): 89-96. *HeinOnline*, <https://jguelibrary.informaticsglobal.com:2055/HOL/P?h=hein.journals/nulj8&i=99>.

² BAILEY, RISHAB. "Censoring the Internet: The New Intermediary Guidelines." *Economic and Political Weekly* 47, no. 5 (2012): 15-19. Accessed November 2, 2020. <http://www.jstor.org/stable/41419840>.

³ *Information Technology Act, 2000*, India Code, s 2(1)(w)

⁴ Jhunjhunwala, Garima, and Prashant Kumar. "Developments in India—Website Owner and Service Provider Liability for User-Generated Content and User Misconduct." *The Business Lawyer* 70, no. 1 (2014): 307-12. Accessed November 2, 2020. <http://www.jstor.org/stable/43665705>.

⁵ "Intermediary Liability." Center for Internet and Society, October 30, 1970. <http://cyberlaw.stanford.edu/focus-areas/intermediary-liability>.

the intermediaries, such as ISPs, in addition to the actual infringers for a multitude of reasons. It is easier to trace the ISPs used to publish illegal content than to trace the individual contributing user.⁶ ISPs are usually in a better position to pay the damages arising out of the liability as opposed to the private infringing party.⁷ Further ISPs may be in a position to control the content displayed on their platforms and will be able to remove infringing content from their servers at the least cost possible. Therefore, it is more reasonable and advantageous for the copyright owners to hold ISPs accountable for either direct or contributory infringement.

II. INTERMEDIARY LIABILITY- LEGISLATIONS AND CASE LAWS

Different jurisdictions have taken different approaches to what extent should the intermediaries be held liable. The two main approaches generally taken are the strict liability approach and notice and take down approach or the Safe Harbor approach. Under the strict liability approach countries hold the intermediaries unconditionally liable for any user generated content available on their platforms.⁸ The Safe Harbor approach, on the other hand, provides immunity to ISPs provided they fulfill certain conditions.⁹ Herein, if the intermediary is liable to take down particular content on being served a notice detailing it to be copyrighted content. If the intermediary fails to do so, then it will lose its immunity and will be vulnerable to legal action for infringement. The safe harbor approach is followed in the USA as well as in India which will be discussed further in detail.

A. United states of America

In 1998, US government added a new section, i.e. Section 512, to its Copyright Act by enacting the Digital Millennium Copyright Act (hereafter “DMCA”).¹⁰ Under the DMCA, ISPs were given protection from copyright infringement liability in certain circumstances such as engaging in activities of system caching, transitory digital network communications storing information at the direction of users and information location tools.¹¹ The DMCA would be

⁶ Mittal, Raman. "ONLINE COPYRIGHT INFRINGEMENT LIABILITY OF INTERNET SERVICE PROVIDERS." *Journal of the Indian Law Institute* 46, no. 2 (2004): 288-321. Accessed November 2, 2020. <http://www.jstor.org/stable/43951908>.

⁷ Ibid.

⁸ Viswanath, Anjana. "Intermediary Liability For Intellectual Property Infringement - Intellectual Property - India." Welcome to Mondaq. Singh & Associates, March 3, 2020. <https://www.mondaq.com/india/trademark/899230/intermediary-liability-for-intellectual-property-infringement>.

⁹ Ibid.

¹⁰ Mittal, Raman. "ONLINE COPYRIGHT INFRINGEMENT LIABILITY OF INTERNET SERVICE PROVIDERS." *Journal of the Indian Law Institute* 46, no. 2 (2004): 288-321. Accessed November 2, 2020. <http://www.jstor.org/stable/43951908>.

¹¹ Ibid.

further dependent on ISPs being mere passive actors in the distribution of information and thereby adhering to the notice and takedown system.¹² The provisions under the DMCA have been criticized on account of granting ISPs the right to easy censorship which often results in removal of content on the mere suspicion of being infringing without any due process.¹³ In the US, indirect copyright liability is also dealt with as vicarious and contributory liability. Vicarious liability applies in an event where direct infringement has occurred and the defendant has a right to guard against infringement and some financial interest in the infringement.¹⁴ Contributory liability applies when the defendant has the knowledge of direct infringement and induces or contributes in such infringement.¹⁵

The collaborative action of Copyright Act and secondary liability in the form of vicarious and contributory liability can be seen through the case of *Perfect 10 v. Amazon*¹⁶. Perfect 10, the plaintiff filed a copyright infringement action against Google, and sought a preliminary injunction to prevent Google from infringing Perfect 10's copyright in its images and linking to websites that provide full-size infringing versions of Perfect 10's photographs. The District Court and the Court of Appeals concluded that Google had not infringed Perfect 10's right of Display. They also held that Google's in-line linking and framing of Perfect 10's full-size images infringed neither Perfect 10's display rights nor its distribution rights. The question then arose whether Google's use of the Thumbnail images and their process of "in-line-linking" is infringing Perfect 10's copyrights on the images and if Google can use the 'Fair Use' defense against this claim?

The court then observed that although the original work is taken but it has been transformed by Google's search engine, particularly in light of its public benefit and thus the use is transformative in nature and there was no spotted evidence of market harm to the plaintiff's full-size images and any potential harm to Perfect 10's market remains hypothetical. Moreover, Perfect 10 had already exploited the right to first publication and had gained commercially, therefore it was not entitled to get protections that are available for unpublished works. The court said, Google's use of the entire photographic image was reasonable in light of the purpose

¹² Ibid.

¹³ BAILEY, RISHAB. "Censoring the Internet: The New Intermediary Guidelines." *Economic and Political Weekly* 47, no. 5 (2012): 15-19. Accessed November 2, 2020. <http://www.jstor.org/stable/41419840>.

¹⁴ Haskel, David. "A Good Value Chain Gone Bad: Indirect Copyright Liability in *Perfect 10 v. Visa*." *Berkeley Technology Law Journal* 23, no. 1 (2008): 405-36. Accessed November 2, 2020. <http://www.jstor.org/stable/24118311>.

¹⁵ Ibid.

¹⁶ *Perfect 10 v. Amazon case, Inc* 508 F.3d 1146 (9th Cir, 2007)

of a search engine and since using less than the entire image would defeat the purpose of the search engine to a computer user.¹⁷ Consequently, it was believed that this use by Google's search engine amounted to a fair use since it had put Perfect 10's thumbnail images to a use fundamentally different from the use intended by plaintiff and therefore provided significant benefit to the public.

As much as this case reinforces the role of the intermediaries like search engines as they play are vital to facilitate discharge of information to the public, it subsequently calls for a liability for infringing committed while using their technology.¹⁸ The line of reasoning reflects that the use by Google being for the social benefit and serving the interest of the public, it amounts to fair use. This demonstrates that the court is promoting a liberal standard for defining the transformative nature unlike the previous ideology. Nevertheless, the court doesn't completely try to evade responsibility but it does suggest that there's a way out to impose a minimum liability on the party who could have terminated the event of copyright infringement at the least cost via imposing a secondary and not a direct liability.¹⁹ Further, this case elucidates the issue and difficulty of protecting the rights of intellectual property holders against such intermediaries and role of secondary liability in consonance.²⁰

Therefore, it was propounded by the idea of "simple measure"²¹ which states that a lesser burden be imposed on the holders of generic tools like search engines and have a higher burden of liability on the specific functionality tools. This would serve both the purpose of providing information to the public as well as will protect the copyright infringement.

B. India

Section 79 of Information Technology Act, 2000 (hereafter "IT Act") provides an exemption from the liability of an intermediary which could emerge out of legal action initiated in lieu of the user generated content which is said to be illegal as per the IT act or any other legislation.

¹⁷ Ibid.

¹⁸ Ding, Meng. "Perfect 10 v. Amazon.com: A Step Toward Copyright's Tort Law Roots." *Berkeley Technology Law Journal* 23, no. 1 (2008): 373-403. Accessed November 2, 2020. <http://www.jstor.org/stable/24118310>.

¹⁹ William Landes & Richard Posner, *The Economic Structure of Intellectual Property Law* 119 (2003).

²⁰ Haskel, David. "A Good Value Chain Gone Bad: Indirect Copyright Liability in Perfect 10 v. Visa." *Berkeley Technology Law Journal* 23, no. 1 (2008): 405-36. Accessed November 2, 2020. <http://www.jstor.org/stable/24118311>.

²¹ Ibid at 16.

This amended provision gives Safe Harbor Protection to the intermediaries.²²

In 2008, it was observed in the case of *Avnish Bajaj v. State and the Amendment to IT Act (2008)*²³, that there's a need for expanding the scope of protections granted to the intermediaries and it was then that the safe harbor regime was included under Section 79 of the IT Act and the definition of intermediaries was amended. The exemption provision provided a safe harbor from all the unlawful acts as long as they comply with the provisions of the section. In addition to this, it required proper due diligence on their part to claim safe harbor.

Thereafter in 2011, in furtherance of the 2008 amendment to IT Act, the Information Technology (Intermediaries Guidelines) Rules, 2011 were issued and certain instructions were passed, and it was made mandatory for all the intermediaries to follow in order to claim the safe harbor protection which are to be read in consonance with IT Act. Although even after these amendments to IT Act and the new the Intermediary Guidelines, there were several issues like intermediary's autonomous decisions, dubious content prohibition and anyone could request for content to be taken down to the intermediaries. The *Shreya Singhal v Union of India*²⁴ case resolved all these issues in 2015 wherein the citizens right to free speech was recognized. It was held that the intermediary, only on the notification of inappropriate content either by court order or by the government or its agency, will be liable to take down the content.

In 2017, the court observed that in cases of copyright infringement, if intermediaries were given the sole right to identify and take down illegal content then it would lead to private censorship and would further have a chilling effect on the right to freedom of speech.²⁵ It was held that intermediaries will be liable if, despite the actual or specific knowledge of the illegal content on their website and the notification of the same, they do not takedown the content. It was ultimately held that there's no such requirement for a court order in such cases. Further, it was reiterated that holding intermediaries liable for having the vesting right to filter will interfere with their rights.²⁶

In 2018, law minister, Ravi Shankar Prasad suggested that the IT act should be revised and changes be made to the Section 79 in order to curb the growing violence and lynching via social

²² Software Freedom Law Centre, *Intermediaries, users and the law – Analysing intermediary liability and the IT Rules*, <https://sflc.in/sites/default/files/wp-content/uploads/2012/07/eBook-IT-Rules.pdf>

²³ *Avnish Bajaj v. State*, 29 May, 2008

²⁴ *Shreya Singhal v. Union of India*, MANU/SCOR/58393/2014

²⁵ *Myspace Inc. v..Super Cassettes Industries Ltd.*, MANU/DE/3411/2016

²⁶ *Kent Ro Systems Ltd & Anr v. Amit Kotak & Ors*, 2017

media platforms. This led to the advent of the Draft Information Technology Intermediary guidelines (Draft Rules), 2018. These rules imposed various obligations on the intermediaries, like enabling traceability to know the originator of such information, proactive monitoring of content via automated tools, takedown of infringing content within 24 hours.

Thereafter, the court held that any non-compliance of due diligence mandate for intermediary and in case of failure of abiding by their own policies, the intermediary or the e-commerce platform shall be held liable and would not be entitled to safe harbor protection.²⁷

India is advancing towards a strict liability of intermediaries, though the rights and protections along with the liabilities of such intermediaries is evolving. Till date, the Shreya Singhal case and Section 79 of IT Act are the authoritative law and therefore intermediaries cannot be held liable unless they fail to comply with the order from court of any competent authority or they have the knowledge of the illicit content. Although, they are expected to do proper due diligence in order to avoid any contempt.

III. ANALYSIS OF LAWS IN LIGHT OF THE RIGHT TO FREE SPEECH

The Draft Rules, 2018 proposed to tackle growing disinformation circulation of obscene content and dissemination of terrorist content on the internet in order to ensure that social media are not misused by those who want to harm the integrity of the nation as a whole and the harmony of the Indian society in general. The draft rule holds intermediaries responsible to proactively filter and take down content using artificial intelligence tools and enable traceability to figure out the origin of the messages.

While doing this, the government fails to inform the user of the social media platform that their expression is being censored by the platform on the nudge of the government. Rather than breaking the discretion and the authority of the intermediaries over the content and its censorship, these rules gave them further power to do so which resulted in a lack of transparency and accountability.²⁸ In order to resolve this issue, the government could have mandated that the intermediaries have to perform the censorship and filtering of content openly and on a fair and transparent basis and ensure that they will be held liable under the due process. The users or customers could be given a right to report any illicit content and thereafter the

²⁷ Amway India Enterprises Pvt Ltd v. 1Mg Technologies Pvt Ltd & Anr., 2019

²⁸ Joshi, Divij. "Accountability, Not Curbs on Free Speech, Is the Answer to Harmful Content Online." The Wire, December 26, 2018. <https://thewire.in/law/accountability-free-speech-online-content>.

necessary steps could be taken by the intermediary to review the complaint and take down the content. For example, social media handles like Instagram and Facebook give the right to users to report any abusive or illegal content or behavior to the service providers. Additionally, both the government and intermediaries should inform the affected user about content take down instances concerning them. If the content is of public interest, like an investigation report about corporate corruption, then the public at large should be informed about it. This would further ensure the transparency via intermediaries in their functioning.

Section 79 which tells us about the exception of Intermediary's liability is vague and cumbersome and it is difficult to practically apply this section. There are multiple issues arising out of the language of Section 79 namely, class of intermediaries include search engines, cyber-cafes and the internet service providers thereby providing a generality of applicability on all. Under Indian law, since all types of intermediaries are treated similarly, it becomes difficult to impose different guidelines for the preliminary examination of the content, depending upon the type of intermediary.²⁹ Therefore, a single watertight guideline should not be applied to all and there's a need to add certain measures which are adapted on the basis of the functional differences of intermediaries and the section should provide for specific clarification with regards to the same.

Furthermore, Intermediaries, in order to deflect liability on themselves and avail safe harbor protection, are required to remove any content which attracts an objection notice without giving the content creators an opportunity to be heard and defend their work.³⁰ This leads to excessive and unnecessary censorship as the accuracy of the complaints filed cannot be determined without proper judicial review. This subjective discerning of intermediaries has severely negative implications towards the right to free speech and there is an urgent need to replace this procedure with a more objective one.

The provisions under Section 79 use expressions such as "grossly harmful" and "disparaging" to describe the content that intermediaries are supposed to take down on account of being prohibited. However, such terminologies are vague and unclear which may lead to deletion of more content that is required as it would further minimize the liability risk of these

²⁹ ADVANI, PRITIKA RAI. "Intermediary Liability in India." *Economic and Political Weekly* 48, no. 50 (2013): 120-28. Accessed November 2, 2020. <http://www.jstor.org/stable/24479053>.

³⁰ Ibid.

intermediaries.³¹ This prohibition may also possibly exceed reasonable restriction to freedom of speech under Article 19 (2) of the Constitution of India.

Most jurisdictions following the notice and take down approach with intermediary liability, including India and USA, try to create a balance between safety and accountability of the consumers of ISPs and the right to exercise their freedom of speech. While it is necessary to hold ISPs and other intermediaries accountable for the transmission of objectionable content, it is also imperative to formulate a mechanism wherein the intermediaries are held answerable to the content creators following a due process of law in instances where non-objectionable and non-threatening content is taken down by them. The threat to freedom of speech is to be weighed against the realities of fake news and misinformation provided by ISPs who are the sole economic beneficiaries of all available information.³² In this regards we propose the following suggestions, in addition to the above submissions, that should be incorporated in the laws across the world;

Firstly, there should be a framework of checks and balances. There needs to be a clear established definition of what social media companies need to do in case the government wants to take down content. This should also include what rights the user has in case a takedown has been initiated.

Second, there should be a proper process which allows content take down for every flat instance where the government finds content problematic. They must approach and send requests to all social media platforms according to an established process. There should be a noble person who could act as an authorized representative of the intermediary to coordinate with law in enforcement agencies. There should be different take down timelines and procedures for different types of content depending on the severity.

Thirdly, the intermediary should have the right to protect the privacy of the user since take downs have a possibility of misuse by power hungry people, the intermediaries must act as a wall between the government and the user unless there is a legitimate case involving ill intentions the government should not be able to track the identity of an anonymous user.

³¹ Ibid.

³² Khetarpal, Sonal. "The Delicate Job of Protecting Online Free Speech." *Business Today*, January 20, 2020. <https://www.businesstoday.in/current/economy-politics/regulations-are-important-to-protect-free-speech-online-say-experts-at-sflc-panel-on-intermediary-liability-law/story/394161.html>.

Fourth, intermediaries should not be the arbitrator for deciding what content is good or bad social media platforms provide space for all sorts of content but if there is anything problematic that the users think should not be on the platform, they should have the power to decide the intermediaries. The law should not mandate social media companies to proactively decide what is acceptable or what is not.

IV. CONCLUSION

With the growing internet usage and technological advancement, the service providers and search engines avail enormous opportunity and authority to circulate information to the public. The struggle between accountability and free speech essentially boils down to the contradicting purposes of copyright to protect exclusive rights while also encouraging public's access to information. Using secondary liability to create a balance between the two could be effective however it brings with it a multitude of problems as seen through this paper. If these four basic solutions discussed above are put in place, this would ensure a balance between user's rights, social media platform, business operation and governance mandate to govern.