



Social Media and Copyright: An Indian Perspective

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Social media is one such digital technology that has several benefits, such as, it helps in building relationships by improving communication, eases the process of establishing private businesses/enterprises by providing a platform where the business can reach a larger population and also remote talent by giving a chance to artists to showcase their art and gather appreciation from across the world but it does have an adverse effect on copyright owners of such posts or content as there are chances of their work being misused or infringed. However, sometimes the infringement might be unintentional and without any malicious intent. This paper shall discuss the authorship/ownership of the content posted on social media platforms, how copyright infringement takes place on such platforms and how the Indian legislations regulate such infringement. The author shall suggest certain steps the Indian government can take to curb copyright infringement cases on social media.

Keywords: Social Media, Copyright Infringement, Copyright Act, 1957, Information and Technology Act, 2000

The internet has not just made the life of people easier by creating a broad canvas of knowledge and information but it has also provided them with a virtual identity, through the introduction and expansion of social media which is a platform for sharing content generated by users. Today, maintaining and building social media accounts has become an obligation from merely an interest of a person. Your social media account helps you to interact and connect with your peer group or a long-lost friend or the public at large and sometimes it also determines your selection for a job. High paying companies also while recruiting an employee look into their social media account to determine the person's interests, qualities, and at times, character as well. Social media platforms like Whatsapp have aided in increasing the efficiency in communication in today's day and age by replacing old-dated applications like SMS in mobile phones. The benefits of Whatsapp include that user can send messages without any cap on word limit along with photos and videos, and the user gets the real time information whether their messages have been read or received or a message is being typed by the receiver. According to the Global Digital 2021 Report by We Are Social and Hootsuite, in a total population of 7.83 billion there was 53.6% penetration of Active Social Media Users.¹ An increase of 13.2% from January 2020 to

January 2021 has been observed in Active Social Media Users¹ and with each passing year this percentage of increase is also shooting up.

To agglomerate a large number of followers or friends, social media users are encouraged to post eye-pleasing content and as the followers increase, the users are pushed to 'step-up their social media game' by increasing the speed of posting the content.² Hence, in order to achieve this target, users remain under a false impression that anything available on social media is for free and they are allowed to repost other users' content without their permission. However, this belief of users is wrong, and using or reposting the work of any person without their permission is not permissible and amounts to copyright infringement. The question which needs to be looked into here is from whom such permission is required to be taken? This opens the gateway for various questions touching upon different aspects of social media and IP rights. To mention a few it leads us to think about issues such as the authorship and ownership of the work posted on various social media platforms and the plausible threat to the infringement it possesses. This paper will attempt to discuss and answer these questions with a relevant comparison with the physical copyrightable work. The paper will further discuss about the Indian legal aspect covering the concerned issues of copyright infringement on social media and the measures which can be undertaken to curb it.

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Authorship and Ownership

There are two distinct terms ‘authorship’ and ‘ownership’ under copyright law, however, the thread of ownership passes through the needle of authorship. Both of them hold importance in order to decide the beneficiary and exploiter of the work to claim copyright protection. In social media platforms, it becomes a challenge to identify who the first author is because to check whether the person who has posted the content has posted their original work or whether they were under any course of employment and has infringed such contract by posting the content without the permission of the employer, is a tricky task.

Authorship

The author is the creator or the originator of the work and copyright protection is available to the author of the literary work or dramatic work, the composer of the musical work, the artist of the artistic work (except, in the case of photographs), producer of the cinematograph film or sound recording.³ The Copyright Act, 1957 of India states that ‘*the author of a work shall be the first owner of the copyright*’.⁴ The copyright law of other countries provides for similar provisions for determining the author of the work and are based on similar rules and principles.

Historically speaking, before 1710, the publisher who printed the book had ownership over the content of such a book, and the same was entered in a register, which maintained a record of such owners.⁵ Thereafter, ‘Statute of Anne’, the first statute that talked about the regulation of copyright by the government and courts, was passed and it gave authors recognition by declaring them as the first owners of the literary work they created. The same principle was adopted and included in the legislation governing the copyright of various countries such as the US, UK, and India. The universal rule that copyright vests with the author of the copyrighted work is subjected to some exceptions, such as when the work is created under the course of employment or at the instance of another person.⁴

On social media platforms, for determining and protecting copyright the first thing that needs to be looked upon is whether social media users can claim authorship. The social media sites allow their users to post their original work on the sites and the work posted, generally, includes pictures and videos, which are the subject matter of copyright. It clarifies the fact that if an original work of the user is posted online by

them, then they can claim copyright over that content, hence, can claim authorship over it.

Be it the work on a physical or digital platform, it would not be wrong to state that authors are inspired by the works of other people.⁵ Therefore, if a user gets inspired by some other person’s work available on the social media platform and creates something new out of the same work and posts it on the platform, it would not be considered as an infringement and the said user would be considered as the author of the transformed work.

Ownership

The copyright law of most of the countries provides that, primarily, ownership over the work is with the author and all the exclusive rights with respect to the said work vests with such author. However, under certain circumstances, the author doesn’t remain the owner of the copyrighted work, i.e., in the course of employment, the ownership over the work vests with the employer and not the author who creates such work (i.e., the employee) or; at the instance of another person. Take an example, if a portfolio shoot is done by a photography agency for a model in exchange of valuable consideration, the model would have ownership over the photographs and not the agency, however, in case, the photographer is a freelancer and is not under a contract with any agency and if the agency post the photographs on their social networking account without the photographer’s permission, they can sue the agency for copyright infringement. Recently, in the US, a Haitian photographer filed a copyright infringement suit against Agence France-Presse and Getty Images, for using the photographs clicked by him, without any license/permission.⁶ The court pronounced the decision in favour of the photographer and observed that it doesn’t matter whether the Terms of Service of a social media site allow its users to freely use the content available on the site, an agency before using or distributing any copyrighted content must seek permission from the copyright holder/owner of such copyright.⁶

Copyright Infringement

Social media provides opportunities to the users to present or explore their views or talent and seek the response of the people on the same but on the other hand, it poses some difficult challenges in various aspects, one of which being copyright infringement. Whether the content or post is free for anyone to copy

without seeking consent or authorisation from the author/ copyright holder of such content? The answer to the same would be 'NO'. Anything posted online in the form of a text, image, video, or music, assuming it to be an original creation, would be protected under the Copyright Act. If the content includes, for example, someone's view on a particular topic it would be protected under the literary work, if it is an image it would be protected under the artistic work, if it includes a dance choreography it would be protected under dramatic work, if it includes an original tune played on piano it would be protected under the musical work and if it is a video which includes dance, music, etc. the video as a whole would be protected as cinematographic work. The work need not be original or creative in any novel sense, it should simply involve some minimal amount of effort and should not be an exact imitation of someone's work.⁷ The same concept is also explained by the Supreme Court of US observing that a work is considered as original when the '*work is independently created by the author (as opposed to copied from other works), and when it possesses at least some minimal degree of creativity.*'⁸

Many creators don't mind their work being shared on social media platforms because they believe that their creativity would reach more people which will amount to an increase in their popularity, but the issue arises when the users misuse this liberty and while reposting or sharing the content of the original creator or copyright holder, do not provide credits to the deserving person and in turn, monetize or gain recognition from it in their name.

Copying copyrighted content posted by the copyright holder on any social media platform includes, downloading or retrieving into the computer system which constitutes reproducing or copying (in case of cinematograph films) the work in any material form in contravention to right of reproduction which is an exclusive right provided to the copyright holder under the Berne Convention, 1886⁹ and it is also stated in the Diplomatic Conference that:

*'The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.'*¹⁰

Thus, downloading a copy of an original copyrighted work into a computer or a computer storage media fall within the meaning of reproduction and copying provided as an exclusive right under the copyright law of various countries.⁹

The copyright law of the countries protects the exclusive rights of the author over the copyrighted work, by providing that no person without the permission of the owner of the work has the right to copy, publish, communicate it to the public, distribute, etc. However, the reservation for such protection is that the person who posts the content should be well aware of the terms of service provided by these social media platforms on which such content is posted. If the person agrees to the condition of the platform that any content posted on the platform would vest ownership on the platform, then the author of the content cannot object or report for infringement if the content is being used by the platform. In the case of copyright infringement on social media, it is necessary to issue a takedown notice to the owner of the platform and to the person who has posted the content before initiating an infringement action and this step of takedown notice has been adopted by the laws of most of the countries being the member state of WIPO Copyright Treaty, 1996 and WIPO Performances and Phonograms Treaty, 1996.

Some of the exclusive rights which are granted to a copyright owner and are often violated on social media include: 1) the right '*to reproduce the copyrighted work in copies or phonorecords*'¹¹, for instance, when a user named 'Common White Girl' reposted content created by others and portrayed it to be her work by not giving attribution to the original creators of the content or by not taking permission from them, she violated the right of reproduction of the copyright owner;¹² 2) the right '*to prepare derivative works based upon the copyrighted work*',¹³ it can be often seen being violated when users copy the work of the original creator on their computer system, makes trivial changes to it and use it for a commercial purpose;¹² 3) the right '*to perform the copyrighted work publicly*';¹⁴ and 4) the right to '*display the copyrighted work publicly*'.¹⁵

Indian Laws Regulating Copyright Infringement on Social Media

The legislation which governs copyright in India is the Copyright Act, 1957 and it protects the following

works: literary, dramatic, musical, and artistic works along with cinematograph films and sound recording.¹⁶ The Copyright Act, 1957 has been amended several times, however, the most noteworthy is the 2012 amendment, which was brought in to comply with the WIPO Internet Treaties i.e., WIPO Copyright Treaty (WCT) and WIPO Performance and Phonogram Treaty (WPPT). The WCT and WPPT grant the authors the following rights: (i) right of distribution; ii) right to authorize commercial rental to the public; iii) right of communication or making available to the public; and iv) right of reproduction.¹⁷ The Internet Treaties obliges the Contracting Parties to provide legal remedies in their national laws against circumvention of technological measures¹⁸ (such as, encryption, electronic signature, digital watermarking, etc.¹⁹) and protection of the information which is essential for the management of the rights of the authors²⁰ (such as, the name of the author/performer, type of the work²¹).

However, the Copyright Act, 1957 does not provide, explicitly, any provision that deals with social media sites or intermediaries. It only provides for remedies against general copyright infringement. From the attitude of the judiciary, in recent years, it is observed that the provisions of the Copyright Act, 1957 could be and has been applied to the works posted on social media or online platforms. However, the Information Technology Act, 2000 provides for the 'safe harbour' provision for the intermediaries. Presently the IT Act, 2000 is accompanied by the recently notified Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (2021 Rules) which superseded The Information Technology (Intermediaries Guidelines) Rules, 2011 (2011 Rules).

All the above mentioned legislative frameworks of India are discussed below, in reference to infringement of copyright taking place on social media platforms.

The Copyright Act, 1957

This Act was enacted and enforced in India post-independence in 1947. According to the Copyright Act, 1957, the copyright is the exclusive right to perform acts of economic rights with respect to a copyrightable work or to authorize someone else to perform such acts.²² The term of copyright in India is, generally, for the lifetime of the author plus sixty years after the author dies.²³ The Copyright Act of

India provides certain cases in which the copyright is deemed to be considered infringed for example, without obtaining the license from that of the owner wherein he either performs any exclusive right to perform or for it being the profit for the communication of the work which has been infringed except being aware of the reasonable grounds.²⁴

Section 30A of the Copyright Act, 1957 provides that the principles of 'Modes of Assignment' provided under Section 19 of the Act, shall also apply to license provisions. Therefore, according to Section 19, the validity of an assignment depends on the fulfilment of the following conditions, i.e., it should be in writing, it should be signed, and it should mention duration and territoriality. Most of these conditions are fulfilled by the 'Terms of Service' agreement of the social media sites, except the sign. Thus, due to the absence of such a condition, it raises questions on the validity of the Terms of Service of social media sites in India.

Also, the Copyright Act not only protects the work which is available in physical form but following the decisions given by the Indian courts in various cases, it can be understood that the said provisions are applicable even if the work is available online, such as, photographs which seeks protection as the artistic work²⁵ under the Copyright Act of India. In *Fairmount Hotels Pvt. Ltd. v Bhupender Singh*²⁶, the Delhi High Court recognized that copyright exists on the photos posted by the users on Facebook. The plaintiff alleged that the defendant was their ex-employee and after leaving the said employment, the defendant started using and uploading photographs that belonged to the plaintiff for promotion of his new hotel on Facebook, hence, the plaintiff filed a suit of copyright infringement against the defendant. The Hon'ble High Court pronounced the judgment in favour of the plaintiff and the defendant was held liable for infringing the copyright of the plaintiff.²⁷

In *M/s Shree Krishna International and Ors. v Google India Pvt. Ltd. and Ors.*²⁸, the plaintiff filed a copyright infringement suit against the defendants, alleging that the defendants had displayed the copyrighted content of the plaintiff, which includes sound recording, cinematograph films, and audio-visual songs, on their platform without seeking permission from the plaintiff. It was also contended by the plaintiff that the defendants were producing financial benefits from the said infringement. The

District Court of Gurgaon gave the decision in favour of the plaintiff and did not consider the plea of defendants that they did not have any knowledge of the said infringement taking place on its platform.²⁹

Section 57 of the Copyright Act, 1957 provides for the author's special rights, i.e., 'right to attribution/paternity' and 'right of integrity'.³⁰ The moral rights of the performers were inserted in the Copyright Act, 1957 through the 2012 amendment, and similar rights as that of authors are provided to the performers.³¹ Section 65B of the Act makes any person criminally liable if he knowingly alters the copyrighted work and/or distributes the copyrighted work without attribution. Although, the Indian Copyright Act does not expressly prohibit the waiver of moral rights, however, as per section 57 and the observation given by the Delhi High Court in *Smt. Mannu Bhandari v Kala Vikash Pictures Pvt. Ltd. and Anr.*³², the moral rights remain vested with the author, even after he has assigned the copyrighted work to someone else. Therefore, this implies that the waiver of moral rights is not permitted in India.

Therefore, the works on which the moral rights of authors or performers are protected in India could include the work posted on social media platforms and if any such right is violated on the platform the Copyright Act, 1957 is strong enough to extend protection to such affected authors or performers.

Before 2012, the Copyright Act, 1957 did not have any provision which dealt with the ISPs or intermediaries, however, the 2012 amendment of the said Act introduced two new provisions under the 'fair-dealing provision' which excludes the '*transient or incidental storage of a work*'³³ to be considered as copyright infringement, unless, '*the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy*'.³⁴ Although, the Copyright Act doesn't specifically provide for the term 'ISP' or 'intermediaries', however, the Standing Committee Report provided that the said provisions were introduced with a view to deal with ISPs liability.³⁵ The proviso of section 52(1)(c) lays down a procedure similar to that of the Digital Millennium Copyright Act (DMCA) notice and takedown procedure, wherein, if any person receives the written complaint of infringement from the copyright owner, the person '*shall refrain from facilitating such access for a period of 21 days or till he receives an order from the competent court*'³⁴.

Following provisions of Copyright Act, 1957, also talks about 'fair dealing' doctrine: i) section 39,

provides that certain acts could be performed without seeking the consent of the copyright holder, with respect to only broadcasting and performance and; ii) section 52, provides an exhaustive list of exempted acts with respect to every other copyrightable work. The list of exempted acts provided under both the provisions comprises of the purposes for which using the copyrighted work without the permission of the owner of such work is allowed, such as for the purpose of research, criticism, reporting a current event, reading or recitation in public, etc.³⁶ However, the list does not expressly provide that the said provision applies to the work posted on social media networks, but the court in the case of *ESPN Star Sports v Global Broadcast News*³⁷ observed that there are no rigid standards which are to be followed in every case, the cases have to be decided upon their facts and circumstances, hence, what is considered to be right in a particular case might not be right for some other case.

The court in *Blackwood & Sons Ltd. v A.N. Parasuraman*³⁸ held that in cases of 'fair dealing', the infringer should not have any intention to have a competition with the copyright holder of the work and to generate profits out of such competition, however, the motive of the infringer of using the work of the copyright holder should be bonafide.³⁹

The Hon'ble Supreme Court of India in *R.G. Anand v Deluxe Films*⁴⁰ introduced a proposition similar to that developed by the US courts for transformative works, i.e., when subsequent work is created on the same theme of an existing work but it is presented differently, then the existing work transforms to a new work and the creator of such new work cannot be held liable for copyright infringement.⁴¹ Therefore, if any work is posted by the alleged infringer on a social media platform and he can prove to the court that the work posted is different from that of the copyrighted work, he could be exempted and seek the benefit of fair dealing doctrine.

Hence, in India, the law on the fair dealing doctrine with respect to social media is not settled and depends on the facts and circumstances of cases, however, from the abovementioned judgements it could be observed that Indian courts have tried to lay down principles similar to that of 'four-factor test' observed under the US copyright law.

The 2012 amendment brought in changes in consonance with WCT and WPPT, i.e., the addition of Sections 65A and 65B. Both these provisions help

the user to protect copyright on its content posted online. Section 65A protects the circumvention of technological measures and section 65B protects the rights management information.

Amongst others, blocking orders has proved to be the most beneficial remedy in cases of copyright right infringement on the virtual sphere in India. Unlike UK, the copyright legislation of India does not have any provision which deals with blocking orders against the online websites which are knowingly publishing or displaying or hosting infringing content (copyrighted content), however, the Indian judiciary has exercised its discretion in issuing such orders. The Indian High courts have been issuing 'John Doe' orders under the inherent power granted to the courts by the Code of Civil Procedure, 1908, i.e., to resolve imperative issues the court can evolve a fair and reasonable procedure.⁴² 'John Doe' order is an ex parte directive issued against unidentified people and restrains them from continuing infringing activities and the courts have passed such order mostly in cases where several websites are leaking and displaying movies, without seeking permission from the movie makers or the copyright holders.⁴³ In *Eros International v BSNL*⁴⁴, the Bombay High Court issued the following guidelines to deal with the unidentified infringers: (i) the copyright holder must adequately confirm that the alleged content is infringing their copyright before sending a request of blocking the content, (ii) while issuing a 'John Doe' order, the courts or a delegated third party should scrutinize the list of infringing sites, to establish its authenticity, (iii) a message including the information of the case and the reasons of blocking the site, should be displayed on the blocked site by the ISPs, and (iv) the blocking of the websites should last for only 21 days, and the plaintiff would have to seek an extension by approaching the Court.⁴⁵

Recently, in 2019, Delhi High Court in *UTV Software Communication Ltd. & ors. v 1337x.to & ors.*⁴⁶, dealt with the question that whether an infringer of copyright on the internet is to be treated differently from an infringer in the physical world? The court answered in affirmative and observed, '*that there is no logical reason why a crime in the physical world is not a crime in the digital world especially when the Copyright Act does not make any such distinction.*'⁴⁷ Also, in this case the Delhi High court has created a new type of remedy, i.e., 'dynamic injunction', in order to implead the

mirror/redirect/alphanumeric websites. Through dynamic injunction, the aggrieved party is not required to come before the court to seek an order against the URLs which are already ascertained as infringers by the court and this new type of injunction was adopted by the Delhi High Court from a decision given by the Singapore High Court.⁴⁸

Therefore, the Indian judiciary is taking efficient steps to curb copyright infringement on the online platform, including, social media and is providing efficient remedies to the aggrieved party, by following and accepting various international decisions. However, there are still certain loopholes in the remedy of 'blocking order', such as, whether the infringed content should be blocked or the entire website hosting such content needs to be blocked and such in order to protect themselves from such order it places an unreasonable burden on the intermediaries to increasingly monitor and regulate content hosted by them.⁴³

Information Technology Act, 2000 (IT Act)

The IT Act was passed to give legal recognition to electronic commerce and it defines 'Intermediary' with respect to any particular electronic message as

*'any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.'*⁴⁹

As social media platforms are restricted to receiving, storing, and transmitting information about individuals to their friends, subscribers, and followers, they come under the definition of 'Intermediary'.⁵⁰ The same was recently acknowledged by the Minister of Electronics and Information Technology of India, Mr. Ravi Shankar Prasad.⁵¹

Section 79 of the IT Act deals with '*Intermediaries not to be liable in certain cases*', hence, provides for 'safe harbour' provision which exempts intermediaries from liability '*for any third party information, data, or communication link made available or hosted by him*'.⁵² However, '*upon receiving actual knowledge, or on being notified by the appropriate Government or its agency*'⁵³ that any unlawful act has been committed, '*the intermediary fails to expeditiously remove or disable access to that*

*material*⁵⁴, in the said circumstances, they cannot escape their liability by seeking the defence of the 'safe harbour' provision. However, before the *Shreya Singhal v Union of India*⁵⁵ judgment was delivered in 2015, the situation was different. Section 79(3)(b) of the IT Act and the Information Technology (Intermediaries Guidelines) Rules, 2011 gave the discretion in the hands of the intermediaries to either remove or block access to the content which they considered as unlawful. This undue power with the intermediaries led to an increase in frivolous complaints and which resulted in, takedown of the content of bona fide users. Therefore, the Supreme Court of India in *Shreya Singhal's case*, read down Section 79(3)(b) of the IT Act and some provisions of the Intermediary Rules 2011 and also, narrowed down the interpretation of the said provisions. Therefore, post the judgment the intermediary can only take action once notified by governmental authority. Hence, if any user is aggrieved by content posted on Facebook or any other social media site, he must complain about the same to the government or the courts and not to the intermediary.⁵⁶

Therefore, looking at the above case and the statutory provision, it is clear that the intermediaries in India can seek protection under the 'safe harbor' provision provided under the IT Act, 2000, however, there are some restrictions attached to the said protection.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (2021 Rules) was notified by the Ministry of Electronics and Information Technology (MeitY), in order to amend 2011 Rules and the rationale behind such amendment is that the over-exploitation of social media platforms in an unlawful manner has increased the incidents of violence and in order to curb such incidents and to deal with emerging challenges the 2021 Rules has been brought into force.

2011 Rules provided standard guidelines which were to be followed by the intermediaries to seek the benefit of the 'safe-harbour' provision⁵⁷ and provided reasonable steps which the intermediaries were required to follow while discharging their duties. Although, the Government of India tried to regulate the roles and duties of intermediaries in India, however, certain loopholes were required to be

addressed by the government for better enforcement of IT Rules as a result of which 2021 Rules were drafted.

2021 Rules are notified for monitoring social media and digital media platforms and these rules, *inter alia*, aim to serve a dual-purpose: (1) increasing the accountability of the social media platforms; and (2) empowering the ordinary users of social media by establishing a three-tier redressal mechanism for efficient grievance resolution. These rules also require the social media platforms to adhere to these set of rules within three months⁵⁸, which ended on May 25. While the new rules were challenged by many on grounds of violation of free speech, the government has clarified that these rules permit social media platforms to operate in India freely but with due accordance to the law. Though, these rules provide due diligence and grievance redressal mechanism and also a separate Code of Ethics for OTT platforms, however, ambiguities are observed with respect to these rules, few of which are discussed hereunder.

The 2021 Rules have imposed additional requirements and widened the ambit of the IT Act, 2000. For instance, Section 79(2) read with Section 89(2)(zg) of the IT Act, 2000 makes it clear that the power of the Central Government is limited to prescribing guidelines related to the due diligence to be observed by the intermediaries while discharging its duties under the IT Act. However, 2021 Rules have also prescribed a new set of requirements in the form of 'Code of Ethics' for digital media which lies outside the scope of the parent Act. Secondly, the Act also does not prescribe for any classification of intermediaries, however, the 2021 Rules have defined new categories of intermediaries, namely (i) Social Media Intermediary;⁵⁹ and (ii) Significant Social Media Intermediary.⁶⁰ Thirdly, Part III of the 2021 Rules regulate 'digital media' which is defined as digitized content transmitted, processed, edited etc. by intermediaries and 'publishers'.⁶¹ However, sections 69A and 79 of the IT Act, 2000 both very clearly states that the rules issued would apply to intermediaries and no mention of 'publishers' is made in the parent Act.

Conflict between Copyright Act and IT Act

As already mentioned above, Information Technology Act 2000 protects intermediaries from third-party activities, however, this protection is limited by section 81 of the Act, which provides that

IT Act shall not 'restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970)'⁶².

This conflict between the IT Act and Copyright Act was addressed by the Delhi High Court in *Super Cassettes Industries Ltd. v Myspace Inc. and Anr.*⁶³ In this case, the defendant operates a social networking and entertainment website which allows the sharing of music and videos. The plaintiff claimed that they own the copyright on the content available on the said website, so, the defendant is liable for copyright infringement.

There were certain issues before the Single Bench of the Delhi High Court, such as:

i) As per Section 51(a)(ii) of the Copyright Act, 1957, any person who allows any place to be used for communicating the copyrighted work to the public and gains any profit from the same⁶⁴, could be held liable for copyright infringement, so the question arose whether the term 'any place' includes virtual space? The court answered in affirmative;⁶⁵ and

ii) The Court dealt with conflict that arises between IT Act, 2000 and the Copyright Act, 1957 and observed that when Section 81 of the IT Act, 2000 and its proviso are read together, it clarifies that the IT Act, 2000 is not applicable in the copyright infringement cases which are dealt by the Copyright Act, 1957.

iii) Hence, the Court held that Myspace allowed the sharing of the content on its platform over which the copyright ownership was with the Super Cassettes, therefore, is liable for infringing the copyright of the owners.

However, after the 2012 amendment of the Copyright Act, 1957, Myspace filed an appeal before the Division Bench of the Delhi High Court and the Bench observed that Section 79 and section 81 of the IT Act, 2000, should be read harmoniously with Section 51 of the Copyright Act, 1957.⁶⁶ The Division Bench also suggested the adoption of a 'four-step' mechanism to deal with such issues that are cropping up because of day-to-day evolving technology. The 'four-step' mechanism includes:-(i) Notice and Takedown: the content owner issues an infringement notice to the intermediary, and thereafter, the intermediary takes down the content of the infringer; (ii) Notice and Notice: after receiving notice from the content owner, the intermediary sends the same to the infringing user; (iii) Notice and Disconnection: the intermediary has the right to discontinue its service

for such user who has uploaded infringing content more than 3 times and; (iv) Filtering: use the automated tools to remove and identify the infringing content.⁶⁶

Conclusion

The social media platforms have provided a space for people to connect with each other from every corner of the world and this connection is not limited to personal chats but also includes posting and sharing of pictures, videos, current locations, etc. However, the content available on these platforms raises certain copyright issues. In India, the legislation which governs such issues is the Copyright Act, 1957 (as amended till 2012), and the intermediary liability is dealt with under the Information Technology Act, 2000 along with IT Rules, 2021. Though the efforts made by the Indian government for keeping the copyright legislations up-to-date with emerging technologies and other various conventions and global legislations is laudable, however, there are various loopholes in the said Indian legislations that should be fixed to meet the needs of the changing society and they also lack in balancing the interests of the copyright holders, the intermediaries (such as social media platforms) and bonafide users of such intermediaries.

The two available options that can curb copyright infringement immediately, is either, the creators stop posting their work online but that would hamper the development of creativity in the country, or the users should be given a right to enjoy and exploit the content available on the social media sites freely but it would affect the work of the creators commercially⁶⁷ and also lack of recognition could prevent creators from generating new and original works. Therefore, both these options will negatively impact either of the two parties, i.e., copyright holder and users, and would also hinder the true essence of copyright law itself. Consequently, the Indian legislature should step up and try to harmonize the interests of the creators, the users, and the service providers, i.e., social media platforms, and this could be achieved by not just amending the laws or introducing new regulations but by each party taking certain steps, at their level, to prevent and mend copyright infringement. The author suggests certain measures which the Indian legislature can take to prevent the increasing cases of copyright infringement on social media.

Amendment in Indian Law

The Copyright Act, 1976 of US clearly excludes non-exclusive license from the provision of transfer of copyright ownership⁶⁸ and implies that no transfer of the ownership of copyright takes place in favour of social media platforms, because they have a non-exclusive license with the users, therefore, on social media the ownership remains with the copyright owner on the work posted by them and not with the social media platforms. Such provision should also be included in the Copyright Act 1957 of India, to avoid any confusion with respect to the ownership of the content posted on social media sites. Another provision that should be amended is the fair-dealing provision under the Indian Copyright Act which should provide for a similar exception of ‘caricature, parody or pastiche’ against copyright infringement, as provided in the UK Copyright Act 1988. Such inclusion would extend protection to memes or GIFs used or posted on social media sites. Also, the Copyright Law of US and UK provides for punitive punishments for copyright infringers, in India the maximum punishment is imprisonment till three years and the maximum fine imposed is of two lakh rupees⁶⁹ (in the case of second or subsequent infringement), which is quite less, especially for people in music and entertainment industry, as the infringers using their work could make money and if any work is altered in a wrong way it could affect their reputation as well, therefore according to the author extending the maximum punishment to seven years of imprisonment and fine to ten lakhs rupees, would be reasonable and would secure justice to the copyright holder. Also, in India the courts have recognized the ‘four factor test’ in cases of fair dealing as provided under the US Copyright Act 1976, therefore, such factors should be incorporated under Section 52 of the Copyright Act 1957, in order to check whether any act which is not exclusively provided under the list of protected acts in the said provision should be exempted or not. Though the Indian courts are performing an applaudable job by granting various types of injunctions against the infringing websites, however, the Copyright Act should include a provision which expressly provides that the High Courts have the power to grant blocking injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright, as provided under the UK Copyright Act 1988.⁷⁰

Also, to protect the bonafide users who use intentionally/unintentionally a small amount of copyrighted work of the copyright holder for non-commercial and entertainment purposes, ‘de minimis’ principle should be made applicable and should be included in the fair-dealing provision. The maxim ‘de minimis non curatlex’ means that the law does not concern itself with trifles.³⁶ Following factors which the courts observed in *India TV Independent News Service (P) Ltd. v Yashraj Films (P) Ltd.*⁷¹ should be considered while dealing with the ‘de minimis’ principle, i.e., (i) the size and type of the harm, (ii) the cost of adjudication, (iii) the purpose of the violated legal obligation, (iv) the effect on the legal rights of third parties, and (v) the intent of the wrongdoer.

There is a need to re-look into the recently notified Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 as there are certain provisions that are weak and lack clarity. Also, one of the major loopholes of the said rules is that the ambit of IT Act, 2000 has been expanded without any legislative support, therefore, it is recommended that first amendments need to be brought into the IT Act, and then the rules would hold a legal stand.

Regulatory Guidelines by Government

Apart from amending copyright law, people must be made aware of the laws which are provided for their protection. In comparison to other powerful countries, the suits filed in India with respect to copyright infringement on social media are much less and one of the reasons for the same is lack of awareness amongst the public with respect to their rights. The government and individuals should come together and raise awareness and educate the public about copyright infringement and the safety measures available to the users. Not just public, there is a need to train and educate judiciary and police officials also about the intensity of such infringement, so that laws could be effectively and adequately enforced.

The author proposes that as the Department of Electronics and Information Technology (DEIT), Government of India released ‘Framework & Guidelines for Use of Social Media for Government Organisations’ in 2012⁷², similar guidelines should be framed for the citizens of India or the users of social media in India. The said regulation should include the rights, duties & responsibilities of the copyright holders, social media platforms, and users. The

regulation should not override any legislation of India, on the contrary it should make harmony with the existing laws which are presently governing the various issues of social media in India. On social media platforms, along with copyright infringement numerous other offences take place, such as, hate speech, defamation, impersonation by creating fake accounts, terrorism, etc. The regulation should provide in brief every legislation that governs and regulates such offences, so that it becomes easier for people to understand and appreciate the laws of India regulating offences on social media. Also, it should constitute a designated body that is completely devoted to regulating the functioning of social media. Such a designated body shall look into the offences committed by the users on social media and shall maintain a record of the same and shall help the aggrieved party with taking action against the committed offence.

Along with such regulation, since litigation is so expensive, time-consuming, and uncertain, new court procedures to deal with the offences taking place on the Internet should be adopted. This would be beneficial for individuals and small businesses to protect their rights since every person whose rights are violated online are not broadcasting companies, or studio owners, etc. who could afford the expenses of litigation. For instance, in China, three special internet courts have been established to deal with copyright disputes as well as other actions that arise from the use of the internet and the entire trial process takes place online, with more flexible procedures and rules of evidence.⁷³

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