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on the topic

Intermediary Liability in Copyright Infringement

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Declaration

I, **R V Vachanamrutha**, do hereby declare that this dissertation titled '**Intermediary Liability in Copyright Infringement**' is the outcome of bona fide research undertaken by me in partial fulfilment of the Degree of Master of Laws (LL.M.) for the academic year 2023-24, at National Law School of India University, Bengaluru, under the guidance and supervision of Dr Arul George Scaria.

I declare that this dissertation is my own original work and all sources used have been properly acknowledged and cited. I further declare that I have not used any AI technologies in the process. I also declare that this work has not been submitted either in part or in whole for any Degree or Diploma at any other University.

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Certificate

This is to certify that this dissertation titled '**Intermediary Liability in Copyright Infringement**', submitted by **R V Vachanamrutha (M23065)** at National Law School of India University, Bengaluru, in partial fulfilment of the Degree of Master of Laws (LL.M.) for the academic year 2023-24, was undertaken under my supervision.

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R V Vachanamrutha

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Information Technology (Intermediaries Guidelines) Rules, 2011

Copyright (Amendment) Act 2012

Copyright Rules, 2013

Directive on Copyright in the Digital Single Market 2019

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

Cases:

A&M Records Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

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MC Mehta v Union of India (1987) 1 SCC 395.

MySpace Inc. v. Super Cassettes Industries Ltd. 2016 SCC ONLINE DEL 6382

Neetu Singh v. Telegram Fz LLC 2022 SCC ONLINE DEL 2637

Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007)

Rahul Mittra vs Chief Executive Office, YouTube & Ors CS(COMM)No.150/2020

Rakesh Kumar Mehta v. Dushyant Kumar 2018 SCC ONLINE DEL 7817

Religious Technology Center v. Netcom On-Line Communication Services, Inc. 907 F. Supp. 1361

Rylands v Fletcher (1868) L. R. 3 H. L. 330.

Shapiro, Bernstein & Co. v. HL Green Co., 316 F.2d, 304 (2d Cir. 1963)

Triumphant Institute Of Management Pvt. Ltd. vs Mega Limited & Ors

Utv Software Communication Ltd. And Ors vs 1337X.To And Ors 2019 SCC ONLINE DEL 8002

Viacom International Inc. v. YouTube, Inc. 253 F.R.D. 256

Vasundhara Prakash v. Half Baked Beans Literature Pvt. Ltd ORS CM(M)-223/2019

PART I: INTRODUCTION

Background

The rise of the internet has changed how we make, share, and find information. This flood of online content has let more people share their ideas and create new things, which is good for innovation, but the anonymity afforded by the internet seems to have encouraged activities that are infringing upon the rights of the copyright holders of content that is made available online by the original creators.¹ Owing to this, there is an increased difficulty in assessing on whom the liability is accrued upon in the event of copyright infringement of online content.²

Consequently, adapting to technological advancements, even the legal landscape has had to evolve, and it now recognises the positions of the intermediaries that facilitate the availability of content on the internet and the infringement of copyrighted content that happens on the internet.³ However, their position places them in the midst of an intersection of innovation and intellectual property rights enforcement. And striking the right balance between protecting the rights of copyright holders and ensuring a vibrant online environment that fosters free expression and innovation, that lets people freely share and create online, is a working project.⁴

The Indian judiciary has played a pivotal role in shaping the position of intermediaries and their liability. The court quoted, in the recent case, *Amway India Enterprises Pvt Ltd v IMG Technologies Pvt Ltd*, that "with great power comes great responsibility", and therefore intermediaries are required to comply with the IT Act in order to avail protections.⁵ This means if the intermediaries fail to comply, they can be held accountable for infringing acts, and this would include copyright infringements as well. While copyright enforcement for content on the internet has been a challenge in India, some legal and policy changes have been proposed and are in progress to address the issue of copyright infringement. A study on the same is undertaken.

¹ Ronald J. Mann and Seth R. Belzley, "The Promise of Internet Intermediary Liability" (2005) 47 *William & Mary Law Review* 239 <<https://scholarship.law.wm.edu/wmlr/vol47/iss1/5>>

² Juhi Saraswat and Rekha Chaturvedi, "Copyright Protection in the Digital Environment: Indian Perspective and International Obligations," vol Vol 22 (DIPP IPR Chair, Cluster Innovation Centre, University of Delhi, Cluster Innovation Centre, University of Delhi 2017) <<https://nopr.niscpr.res.in/bitstream/123456789/44436/1/JIPR%2022%286%29%20303-310.pdf>>.

³ IT Act (Amendment) Act 2008, Section 79

⁴ MK Sinha & Vandana Mahalwar (eds) *Copyright Law in the Digital World: Challenges and Opportunities* (2017)

⁵ 2019 SCC ONLINE DEL 9089, para 1

Research Objectives

1. To understand the concept and scope of intermediary liability under Copyright Law
2. To analyse the approach of the Indian courts in interpreting and applying intermediary liability in cases of copyright infringement
3. To evaluate the effectiveness of legal and policy measures with regard to intermediary liability

Research Questions

1. What forms the basis for intermediary liability under Copyright Law?
2. How have Indian courts dealt with secondary liability in copyright infringement cases?
3. Whether the legal and policy measures taken to provide protection to copyright holders are effective?

Hypotheses

1. Intermediary liability under copyright law is secondary liability.
2. Indian Courts show an inconsistency in applying secondary liability principles in cases of copyright infringement.
3. Certain provisions of the Copyright Act, Information Technology Act, and Intermediary Guidelines, are relevant.

Research Methodology:

The methodology employed in this research is Doctrinal. it is analytical and descriptive in nature, and follows a qualitative research design. The primary sources include statutes, rules and judicial decisions, and the secondary sources will include scholarly articles, journals, reports and commentaries. Additionally, an analysis of the relevant legal framework of USA, EU and UK and subsequent judicial developments will be done at various junctures to provide insights into best practices.

Literature Review:

There have been significant scholarly studies on the concepts of 'copyright infringement' and the 'liabilities of intermediaries'. Literature on the topic of 'intermediary liability in copyright infringement' is relatively scant. To pursue this research, the concepts and their interconnection is studied to develop an understanding of the topic.

To begin with, Upendra Baxi, elaborates on some of the features of the Act, and notes, in light of the basis of liability for copyright infringement, barring exceptions, the Indian copyright law at the time, gave no distinction between direct and indirect infringement. In 1986, championing for better protection of the rights of the copyright owners for social interest and cultural progress, Baxi argued that there was no need to amend the law to provide for computer software protection when the rights of intellectual and cultural labourers were yet to be effectively addressed.⁶ In her book, Alka Chawla does an in-depth analysis of Copyright Law with comparative perspectives, and in light of copyright infringement, she outlines three theories of liability that would be applicable.⁷ Discussing the development of the law, she touches upon the impact of the technological advancements on copyright law, raises the issue of difficulties of protection of rights of the copyright owners in the digital world, and comments on how the Information Technology Act, although deals with several challenges due to technological developments, it does not directly touch upon issues that arise under the copyright law due to it.

Sudhir Ravindran discusses the UK based distinction of primary and secondary infringement of copyright.⁸ He elaborates on the forms of primary infringement of copyright, and briefly discusses the counts where secondary infringement accrues. For liability for secondary infringement, he notes that it is not explicitly recognized under the Indian Copyright Act, 1957. Chris Reed in his book provides more clarity on how secondary infringement occurs according to the UK Copyright law.⁹ He lays special emphasis on copyright infringement via the internet, or infringement of copyright by transmission, a form of secondary infringement and the resultant liability accrued on the network operators, and refers to the approach of the US for

⁶ Upendra Baxi, "Copyright law and justice in India" (1986) 28(4) Journal of the Indian Law Institute 497. (Gives a brief historical view of the Copyright Law in India, including the colonial influence and the subsequent amendments)

⁷ Alka Chawla, *Law of Copyright: Comparative Perspectives* (2013).

⁸ Sudhir Ravindran, *Intellectual Property Risk Management* (2015).

⁹ Chris Reed and John Angel, *Computer Law: The Law and Regulation of Information Technology* (6th edn, 2007).

cases of this subject matter. Simon Stokes while writing a UK View on the popular cases of copyright infringement in the US, he touches on the concepts of vicarious liability and doctrine of contributory infringement.¹⁰ He sheds light on the attempts of States to clarify when liability arises, the US DMCA, 1998 being the international precedent, which contains safe harbour provisions for parties that are only storing and transmitting material on the internet.

In the Indian context, P Narayan offers a basic understanding of the provisions pertaining to copyright infringement in the Copyright Act, 1957.¹¹ Taking it further, Ananth Padmanabhan examines, in his paper, the language of the Copyright Act, and finds in his enquiry of the Section 51, a bifurcation of the two types of infringement, primary and secondary.¹² Aakanksha Kumar discusses the 2012 amendment to the Copyright Act and identifies the provisions offering safe harbour to be structurally similar to that in the DMCA. She further highlights the IT (intermediary guidelines) Rules, 2011, which appear to have a very wide scope, thereby extending the safe harbour to copyright infringement.

Prashant Reddy in his book discusses the case and development of the DMCA, 1998 which has played a pioneering role in the debate on intermediary liability for copyright infringing content transmitted or hosted on their platforms. He notes the consequent development of the IT Act, 2000, which is the legislation concerning intermediary liability in India.¹³ Further, discussing the case laws in the realm of both, copyright and intermediary liability, he offers an insight into the interests of the competing forces that are the protection of intellectual property rights and digital freedoms.¹⁴ In her paper, Justice Pratibha Singh, sheds light on how in order to remedy these emerging issues, the Courts have innovatively approached the issues to ensure the protection of the rights that are vested in the copyright owners.¹⁵ Discussing the judicial developments, she highlights the fact that remedies in copyright infringement are being moulded to match the technological developments.¹⁶ Both the authors have discussed the

¹⁰ Simon Stokes, *Digital Copyright: Law and Practice* (3rd edn, 2011).

¹¹ P Narayanan, *Law of Copyright and Industrial Designs* (4th edn, EASTERN LAW HOUSE 2017).

¹² Ananth Padmanabhan, "GIVE ME MY SPACE AND TAKE DOWN HIS" (2013) 9 *Indian Journal of Law and Technology* <<https://doi.org/10.55496/egqu9801>>.

¹³ Aakanksha Kumar, "Internet Intermediary (ISP) Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as a Trade Barrier. | *Journal of Intellectual Property Rights | EBSCOHost*" (July 1, 2014) <<https://openurl.ebsco.com/EPDB%3Aagcd%3A10%3A9289578/detailv2?sid=ebsco%3Aplink%3Ascholar&id=ebsco%3Aagcd%3A97945568&crl=c>>.

¹⁴ Prashant Reddy T and Sumathi Chandrashekar, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (Oxford University Press, USA 2017).

¹⁵ Justice Prathiba M Singh, "Evolution of Copyright Law: The Indian Journey" (2020) 16 *Indian Journal of Law and Technology* 47 <<https://doi.org/10.55496/sqkh5138>>. (Paper highlights, that the growth of digital technology has led to new methods in infringement of copyright.)

¹⁶ *Ibid*, 52.

MySpace case in length which is the landmark judgement in the field of intermediary liability in copyright infringement.

A more recent development in this topic is the IT (Intermediary Guidelines and Digital Media Ethics) Rules, 2021. Shreya Matilal and Sumeet Guha offer an extensive overview of the Rules, and provide criticism over the confusion that arises out of these Rules for right holder in event of pursuing legal action.¹⁷ The Rules have been critiqued for being unconstitutional, arbitrary and vague. Rishab Bailey argues that this could pose a problem to the business of intermediaries.¹⁸ There have been several critiques of the high liability being placed on the intermediaries. The European counterpart has met with similar criticism. The 2019 EU Directive in a press release has championed to create a level playing field where creators and right holders will be able to negotiate good deals with large entities such as Google and Facebook.¹⁹ This has resulted in, as highlighted by Sandip Majumdar in his study, debate, controversy and lobbying by tech-giants.²⁰

Scope and Limitation:

The focus of this study is on the concept of secondary liability in context of copyright infringement under Indian law. Along with the statutes, the Copyright Act, 1957, the Information Technology Act, 2000 and the Information Technology (Intermediary Guidelines and Digital Media Ethics) Rules, 2021, an analysis of the judicial decisions and subsequent case law is done to identify the trends in the Indian Jurisdiction. Additionally, legal frameworks and judicial developments in USA, EU and UK are taken into consideration.

The research is confined to the legal frameworks and judicial approaches in India, and USA, EU and UK. The analysis of policy measures is also constrained by the availability of the sources. It is a doctrinal research, and practical challenges faced by intermediaries in the real

¹⁷ Sumeet Guha and Shreya Matilal, “INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021- A REASSESSMENT OF THE CONTOURS AND LIMITS” (2023) 32 NUJS Journal of Regulatory Studies <<https://www.nujs.edu/wp-content/uploads/2023/07/2-1.pdf>>.

¹⁸ Rishab Bailey and Knowledge Commons Collective, “Censoring the Internet: The New Intermediary Guidelines” (2012) xlvii Economic & Political Weekly 15 <<https://indianet.nl/pdf/epw120204.pdf>>.

¹⁹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

²⁰ Sandip Majumdar, “Directive (EU) 2019/790 of the European Parliament and of the Council: Overhaul of European Union’s Copyright Rules: A Study” (2020) 37 Library Hi Tech News.

world scenario are not a subject of this study. Despite these limitations, this research aims to contribute to the understanding of intermediary liability in Indian Copyright Law.

Chapterization:

This research is divided into five parts. This part sets the stage for the research by providing an overview of the topic, outlining research objectives, questions and hypotheses. It also outlines the structure of the research and briefly describes the methodology adopted. The second part engages with the theoretical underpinnings of secondary liability. It explores the foundational concepts of copyright, infringement, liability and builds an understanding of intermediary liability under copyright law. In the third part, an exhaustive analysis is done on the Indian Courts' interpretation and application of the principles of secondary liability in the cases of copyright infringement. A detailed examination of the landmark MySpace case is done to establish the standard, and the holdings of subsequent cases is done to highlight the trends in the reasoning adopted by the courts. The fourth part of the paper is a discussion on the legal as well as policy reforms that have been brought about, which have had an impact on the rights of copyright holders. In the last part, the research concludes by revisiting the research questions and hypotheses, and trying to answer them from the findings of the research. It will shed light on the strengths and weaknesses of the position taken in India.

PART II: SECONDARY LIABILITY UNDER COPYRIGHT LAW

This part of the paper engages with the foundational concepts of copyright law, tort law and theories of liability that are pertinent to build an understanding of what secondary liability would mean under copyright law. Further a brief discussion on the application of these doctrines on copyright infringement in the digital context follows.

Copyright Infringement:

Copyright is a legal mechanism that is designed to protect the intellectual property rights of creators.²¹ The concept of copyright can be traced back to the 15th century, when the invention of the printing press raised concerns about unauthorized reproduction of books.²² As the printing press became more widespread, authors and publishers sought legal protection to control the reproduction and distribution of their works.²³ Over time, copyright protection expanded to cover various forms of creative expression, including literature, art, music, films, and computer programs.²⁴

Based on the principle that creators have the exclusive right to control how their works are used, copyright infringement occurs when an original work owned by the creator or copyright holder is copied, reproduced, distributed or displayed to a significant extent that there is substantial similarity.²⁵ As discussed by the Court in *Bobbs-Merrill Company v. Isidor Straws and Nathan Straws*, “Infringement of a copyright is a trespass on a private domain owned and occupied by the owner and protected by law”²⁶. The first occurrence of copyright infringement can be traced back to the early 16th century with the advent of printing presses.²⁷ At that time, unauthorized copies of books would be printed and sold without the permission of the original authors or publishers, leading to financial losses and disputes over intellectual property rights.²⁸

²¹ Shyamkrishna Balganes and University of Pennsylvania Carey Law School, “Foreseeability and Copyright Incentives” (2009) 122–122 All Faculty Scholarship 1569
<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1704&context=faculty_scholarship>.

²² Paul Edward Geller Jr, “COPYRIGHT HISTORY AND THE FUTURE: WHAT’S CULTURE GOT TO DO WITH IT?,” vol 47 (2000) <https://pgeller.com/Paul_Geller-Copyright_History-Future.pdf>.

²³ Ibid.

²⁴ Andrew Beckerman-Rodau and Suffolk University Law School, “THE PROBLEM WITH INTELLECTUAL PROPERTY RIGHTS: SUBJECT MATTER EXPANSION,” vol 13 (2010) journal-article
<https://openyls.law.yale.edu/bitstream/handle/20.500.13051/7774/03_13YaleJL_Tech35_2010_2011_.pdf?sequence=2&isAllowed=y>.

²⁵ Copyright Act 1957, Section 51

²⁶ *Bobbs-Merrill Company v. Isidor Straws and Nathan Straws*, 210 US 339 (1908)

²⁷ RR Bowker, *Copyright: Its history and its law* (1912)

²⁸ Ibid.

Concerned and to address this matter, Charles II passed a Licensing of Press Act. The first copyright laws were introduced in countries like England and Germany, granting authors and publishers exclusive rights to reproduce and distribute their works.²⁹ Copyright infringement refers to the unauthorized use or reproduction of someone else's original work, without obtaining proper permission or giving due credit to the original creator or copyright holder.³⁰ It has been a concern for centuries, but it gained significant attention with the rise of digital technology and the internet.

The ease of copying and distributing digital content has made it more challenging to protect intellectual property rights.³¹ On that note of copying, the entire point about a copyright is that it serves as a prohibition against reproducing a work.³² Hence, copying would amount to a direct infringement. It is also known as primary infringement of copyright.³³ Some other forms of primary infringement are issuing of the copies of such copyrighted work, renting or lending of work, performance of a work in public by way of lecture, speeches or any presentation such as sound recording, film, broadcast, and even adaptation and translation of a copyrighted work.³⁴ These acts would amount to direct infringement. Whereas acts such as dealing with the importation of copyrighted works, providing aid for making infringing copies and facilitating infringement by transmission, add to secondary infringement.³⁵ It occurs indirectly when an individual facilitates, contributes to or benefits from the directly infringing acts of another, without themselves getting engaged in the act that infringes a copyright.³⁶

Liability:

Liability in tort law signifies the legal responsibility of an individual to compensate for any harm or injury that is caused to another due to the act or omission by that individual.³⁷ It is based on the principle that individuals owe a duty of care towards others, and the breach of the same, when results in an injury, thereby makes them liable to damages.³⁸ In tort law, liability

²⁹ VK Ahuja, *Law Relating to Intellectual Property Rights* (3rd edn, 2017)

³⁰ *Ibid.*

³¹ *Supra n, 7*

³² Hal R Varian, "Copying and Copyright," vols 19–19 (*Journal of Economic Perspectives*) <<https://pubs.aeaweb.org/doi/pdf/10.1257/0895330054048768>>.

³³ *Supra n, 7*

³⁴ *Supra n, 8*

³⁵ *Supra n, 9*

³⁶ *Ibid.*

³⁷ Ratanlal Dhirajlal, *The Law of Torts : Ratanlal and Dhirajlal* (26th edn, 2020).

³⁸ R K Bangia, *Law of Torts* (24th ed, 2017)

varies based on fault, cause and damages, and their extent.³⁹ Negligence being the most common type, occurs when an individual simply fails to take the reasonable amount of care needed and it results in injury or loss to another. Direct liability is accrued upon the individual for one's own deed.⁴⁰ In the case of intentional civil wrongs, where an individual acts with an intention to cause harm to another, direct liability is accrued on the individual. Indirect liability is accrued upon individuals in two ways: strict liability and vicarious liability. The doctrine of vicarious liability typically is centred around the relationship of master-servant.⁴¹ It is now in the current scenario extended to employer-employee relationship, where the employer is held responsible for the acts of negligence committed by the employee during the course of the employment.⁴²

The case of *Rylands v Fletcher*⁴³ laid down the strict liability rule making an individual answerable for all the damage that has been caused by the escape of anything likely to cause mischief that is kept in their possession. The Indian Supreme Court in *MC Mehta v Union of India*⁴⁴, laid down a more stringent rule of strict liability, barring all exceptions available, and called this duty to the community as absolute and non-delegable. In context of copyright infringement, scholars have found that it is a strict liability tort.⁴⁵ An individual may be found guilty of copyright infringement even without the intention to violate the law.⁴⁶ The focus is solely on use of work without authorisation, with no consideration for the intent of the infringing individual.⁴⁷ The common understanding has been that innocence is not a defence to the act of infringing a copyright.⁴⁸ However, there has been a shift in application of strict

³⁹ *Ibid.*

⁴⁰ Nadir Ali Kolachi (ed), "The 15th International RAIS Conference on Social Sciences and Humanities" (Johns Hopkins University) <https://www.researchgate.net/profile/Benabou-Djilali/publication/338680979_Emotional_Intelligence_and_Effective_Leadership_RAIS-Conference-Proceedings-November-2019/links/5e241014458515ba2092f1a4/Emotional-Intelligence-and-Effective-Leadership-RAIS-Conference-Proceedings-November-2019.pdf#page=282>.

⁴¹ Thanvi, S.C., *Law of Torts* (2015).

⁴² *Ibid.*

⁴³ (1868) L. R. 3 H. L. 330.

⁴⁴ (1987) 1 SCC 395.

⁴⁵ Patrick R Goold † and City, University of London, "Is Copyright Infringement a Strict Liability Tort?" (2015) <<https://openaccess.city.ac.uk/id/eprint/20413/1/Is%20Copyright%20Infringement%20a%20Strict%20Liability%20Tort.pdf>>.

⁴⁶ *Ibid.*

⁴⁷ Gideon Parchomovsky and others, "Restructuring Copyright Infringement" [2020] All Faculty Scholarship <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3104&context=faculty_scholarship>.

⁴⁸ Goldstein, P, *Goldstein on Copyright* (3rd edn, Thomson Reuters 2014)

liability rule in modern tort law itself and the view that copyright infringement ought to follow the rule of strict liability is considered orthodox.⁴⁹

Theories of Liability for Copyright Infringement:

Treatises have outlined three theories of liability in cases of copyright infringement - direct, contributory and vicarious.⁵⁰

In case of a direct infringement, the individual has had to have committed an infringing act, irrespective of the presence of intent to do so, and has directly infringed the copyright of a right-holder.⁵¹ When an individual illegally copies and distributes a copyrighted work without a permission or licence is a plain example. The infringer is directly liable as a consequence of their own actions.

Contributory infringement on the other hand involves the conduct by another individual, a contributory infringer, other than the direct infringer.⁵² An example of this would be that when an individual provides the direct infringer, with aid in the form of equipment or machine or apparatus, or any other facilitating support, for the purpose of the infringing act. The contributory infringer should have materially contributed to the direct infringer's act of infringement.⁵³ There is a causal relationship between the contributory infringer and the act of infringement, and is therefore liable as a consequence of the deeds of another.⁵⁴

For vicarious infringement, as the name suggests, there is a master-servant relationship between the infringer and the individual or entity. And the vicarious liability arises when the individual or entity financially benefit from the act of infringement done by the infringer, and the infringement could have been stopped from occurring in the first place.⁵⁵ Even in the absence of a master-servant or employer-employee relationship, vicarious liability arises when there is financial benefit coming in from an infringing act that an individual or entity has the power to

⁴⁹ Steven Hetcher, "The Immorality of Strict Liability in Copyright," vol 17 (2013)
<<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1197&context=iplr>>.

⁵⁰ Bird R and others, *Cyberlaw: Text and Cases* (2nd edn, 2004)

⁵¹ *Supra* n, 7

⁵² A Samuel Oddi, "Contributory Copyright Infringement: The Tort and Technological Tensions," vol 64 (1989)
<<https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2133&context=ndlr>>.

⁵³ Irina Atanasova, "Copyright infringement in digital environment." (2019) 1(1) *Economics & Law* 13
<https://www.researchgate.net/profile/Irina-Atanasova-3/publication/339077032_COPYRIGHT_INFRINGEMENT_IN_DIGITAL_ENVIRONMENT/links/5e3c1f89458515072d838a02/COPYRIGHT-INFRINGEMENT-IN-DIGITAL-ENVIRONMENT.pdf>.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

police.⁵⁶ For example, a club owner profits from live performances of copyrighted music, and if done so without obtaining a license, despite being unaware, becomes vicariously liable. The knowing and active participation is not of concern in this case, it is having the right and ability to supervise that makes them liable.⁵⁷

Secondary Liability under Copyright Law:

Secondary liability is imposed on individuals who did not directly partake in the infringement, but are held responsible regardless. This imposition has been justified on efficiency and moral grounds.⁵⁸ Unlike direct liability, which is imposed on individuals who are involved directly in infringing acts, the idea of secondary liability relates to instances where individual is liable for infringing acts committed by another.⁵⁹ There is an inconsistency in the legal concept of indirect infringement across different forms of intellectual property.⁶⁰ There is a possibility that this may be happening due the fact that patents, copyrights and trademarks operate differently and have different functions. There is an inconsistency and it can be seen in "peculiar specialized terminology of vicarious, contributory and inducing infringement"⁶¹ used to denote the different types infringement that are indirect and therefore accrue secondary liability. The inducement theory is plainly, another version of the contributory theory and falls within its ambit.⁶²

⁵⁶ Ke Steven Wan, "MONOPOLISTIC GATEKEEPERS' VICARIOUS LIABILITY FOR COPYRIGHT INFRINGEMENT," vol 23 (Regent University Law Review, 2010) <https://regentparents.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v23n1/02Wanvol.23.1.pdf>.

⁵⁷ Ibid.

⁵⁸ Lynda J Oswald, "International Issues in Secondary Liability for Intellectual Property Rights Infringement" (2008) 45 American Business Law Journal 247 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-1714.2008.00055.x>>.

⁵⁹ Miquel Peguera and Universitat Oberta de Catalunya, "Secondary Liability for Copyright Infringement in the Web 2.0 Environment: Some Reflections on Viacom v. YouTube," vol Vol. 6 (2011) <https://www.researchgate.net/profile/Miquel-Peguera-2/publication/49596639_Secondary_Liability_for_Copyright_Infringement_in_the_Web_20_Environment_Some_Reflections_on_Viacom_v_YouTube/links/54dc6eae0cf2a7769d961fe3/Secondary-Liability-for-Copyright-Infringement-in-the-Web-20-Environment-Some-Reflections-on-Viacom-v-YouTube.pdf>.

⁶⁰ Supra n, 58

⁶¹ Charles Adams W, "Indirect Infringement from a Tort Law Perspective" (2008) 42 University of Richmond Law Review 635 <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1334&context=fac_pub>.

⁶² Ibid.

Secondary liability is broadly of two forms: vicarious and contributory.⁶³ Vicarious liability operates on the relationship direct infringer and the individual's power to police in it, and contributory liability accrues simply owing to offering support in whatever form it may be. In the case of copyright infringement in the online medium, the liability that accrues appears to be a complex mix of both the forms of liability. This can be elaborated with an illustration:

The internet service provider provides a platform for users, where the users create, share and access content. There are not many measures to prevent them from acting in a way that infringes someone's copyright. It is relatively far easier to infringe upon someone's copyright and get away with it owing to the anonymity afforded by the internet. The liability of the ISP in this case is of two forms - there is contributory infringement as they have facilitated infringement by transmission, and vicarious liability as they are benefitted financially from the activities of the users. Content is stored and transmitted by packet switching.⁶⁴ It can be inferred that when an infringing act is committed, the internet service provider is facilitating the direct infringer's act and therefore contributing to the infringement. The technical operations of the internet service providers require copying and transmission, as merely part of the whole system.⁶⁵ Therefore, it can be said that by the very fact that they provide the platform to users, the internet service provider is vicariously liable.

The doctrine of vicarious copyright infringement has been developed over a series of cases that start with dance hall proprietors.⁶⁶ They've been held liable even in instances when the performers are not employees and they did not participate in choosing the infringing music.⁶⁷ The court held in *Shapiro, Bernstein & Co. v. HL Green Co.*, that vicarious liability in copyright infringement matters would be based on the individual or entity's right and ability to supervise, combined with the financial benefit from exploiting a copyrighted work.⁶⁸ The respondeat superior doctrine incentivises the principal to monitor.⁶⁹ By supervising and monitoring, due

⁶³Mark Bartholomew and John Tehranian, "The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law" [2006] Journal Articles Faculty Scholarship <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1053&context=journal_articles>.

⁶⁴ Rajamani, G.S. *Intellectual property rights in information technology: Vademecum* (2013)

⁶⁵ Ibid.

⁶⁶ Charles Adams W, "Indirect Infringement from a Tort Law Perspective" (2008) 42 University of Richmond Law Review 635 <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1334&context=fac_pub>.

⁶⁷ Charles Adams W, "Indirect Infringement from a Tort Law Perspective" (2008) 42 University of Richmond Law Review 635 <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1334&context=fac_pub>.

⁶⁸ 316 F.2d, 304 (2d Cir. 1963)

⁶⁹ Robert Luskin and others, "CARING ABOUT CORPORATE 'DUE CARE': WHY CRIMINAL RESPONDEAT SUPERIOR LIABILITY OUTREACHES ITS JUSTIFICATION"

<<https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/03/57-2-caring-about-corporate-due-care-why-criminal-respondeat-superior-liability-outreaches-its-justification.pdf>>.

care can be exercised. It can be a valid economic rationale in case of copyright enforcement too. Moreover, it is a far cheaper alternative for copyright owners to hold the one entity liable instead of the individual infringers, who are often unidentifiable.⁷⁰ Additionally, in case of bankrupt infringers, indirect liability helps to internalize the negative impact of the infringement.⁷¹ The dance hall proprietors have been held liable for copyright infringement by the performers, who often are not financially in a position to make good on the infringement. The vicarious liability established in dance hall cases is extended beyond its origin and applied to cases like Napster.⁷²

Owing to the difficulty in enforcing their right upon infringement by the unreachable and often unidentifiable infringer on the internet, copyright holders have begun to sue those who facilitate infringement by others, the intermediaries.⁷³ In the digital era, where the operations of intermediaries have exponentially risen, it can be now said that the basis for intermediary liability in copyright infringement is secondary liability.

In response to this emerging issue, the US introduced safe harbour provisions⁷⁴ to protect online service providers from being held liable for copyright infringement done by users of their service.⁷⁵ This inspired several other countries to do the same. In India, the first legislation governing intermediary liability can be traced back to the Information Technology Act, 2000. This Act provided a legal framework for regulating digital activities and addressed the liability of intermediaries in certain situations. Over the years several amendments, rules and judicial decisions further shaped the law relating to intermediary liability due to copyright infringement, i.e., secondary liability.

The Copyright Act, 1957 contains provisions relating to infringement⁷⁶ and the punishments⁷⁷ for the same. Although, there is no literal mention of primary and secondary infringement in the Act, Section 51(a)(i), Section 51(a)(ii) and Section 51(b) of the Act are conceivably related

⁷⁰ William M Landes, Douglas Gary Lichtman, and University of Chicago Law School, "Indirect Liability for Copyright Infringement: An Economic Perspective" (2003) 16 Harvard Journal of Law and Technology 395 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=9458&context=journal_articles>.

⁷¹ Ibid.

⁷² F.3d 1004 (9th Cir. 2001)

⁷³ Supra n, 70

⁷⁴ DMCA 17 U.S.C. § 512(c) (2000)

⁷⁵ Mark A Lemley and R Anthony Reese, "Reducing Digital Copyright Infringement without Restricting Innovation," vol 56 (2004) <<https://cyber.harvard.edu/people/tfisher/Lemley%20Reese%20Abridged.pdf>>.

⁷⁶ Copyright Act 1957, Section 51

⁷⁷ Copyright Act 1957, Section 63

to primary infringement and secondary infringement respectively.⁷⁸ The distinction can be drawn from the wordings of Section 51(a)(i) where an infringer "does anything" only a copyright owner has the right to, and in Section 51(a)(ii) and 51(b), there is no such emphasis. Additionally, there is lack of knowledge qualifier that exempts infringer from liability in Section 52(a)(ii) for copyright infringement that is facilitated by use of their place. This sets the stage for the discussions of the secondary liability of intermediaries for copyright infringements on their platforms.

⁷⁸ *Supra* n, 12

PART III: INDIAN JUDICIARY'S APPROACH

The Copyright Act does even contain the words internet, online or intermediary. Although the language of the subsequent amendment to the Act in 2012, does not directly mention intermediaries, it still pushes to introduce a new fair use model that protects intermediaries.⁷⁹ Intermediary liability in context of copyright infringement in India has been developed over the years through judicial decisions. The landmark case between Super Cassettes Industries Ltd., popularly known as T-Series, the music record label, and MySpace Inc., a social networking service, was a watershed moment for the internet industry and the music industry.⁸⁰ It pushed forward the conversation on the liability on intermediaries for copyright infringement. In light of the same this part of the paper delves into the details of the *Myspace Inc. v. Super Cassettes Industries Ltd*⁸¹ case, analysing the judgements of the single as well as the division bench. Further, the cases subsequent to the *MySpace judgment* are studied to make an analysis of the trends that have developed in online copyright infringement cases.

Super Cassettes Industries Ltd. vs Myspace Inc. & Another, 2011:

Facts: In 2011, the plaintiff, T-Series filed a suit for restraining infringement of copyright and damages against MySpace, the social networking service. T-Series claimed that it depends majorly on the exploitation of the copyright it holds for about 70000 songs in difference languages. The financial benefit from the exploitation of the copyrighted works funds it to carry out its business. It generally does so by granting licences to parties, and the infringement of these works causes a loss of royalty. MySpace, the defendant, being a social networking and entertainment website, describes to be a place for friends, where one can upload pictures and videos. Although, based out of USA, it provides country specific content, and hence, is one of the most popular social networking and content sharing websites for multimedia content which can be viewed and shared on the internet. Additionally, the website contained features and instructional videos to users on how to share videos.

The business model of the defendant was based on offering songs and videos, including that of the new movies, due to which the revenue of the plaintiff was getting deteriorated owing to illegal sharing of the songs and videos on the internet for free of charge for the end users. The

⁷⁹ Thomas, Z., 2012. Overview of changes to the Indian copyright law.

⁸⁰ Supra n, 14

⁸¹ 2016 SCC ONLINE DEL 6382

defendant also generates revenue by the advertisements that get displayed while offering copyrighted works illegally. The plaintiff and defendant have already been in a non-disclosure agreement in 2007, and the defendant was to take a licence from the plaintiff in order to continue displaying the works of the plaintiff. The defendant instead offered the plaintiff to opt for registration of rights management tool programme. The plaintiff communicated effectively, the rights, to the defendant in 2008, and the defendant responded acknowledging and assuring that all infringing content will be taken down and it will not repeat in the future. However, in late 2008, the plaintiff found the infringing content on the website, despite assurance by the defendant. Hence, filing a suit for injunction.

Issues: The case was heard before a Single Bench in 2011. There were two issues relevant to liability of the intermediary in copyright infringement. Firstly, whether the acts of MySpace were infringing and hence a violation of Article 51(a)(i). And secondly, whether MySpace can be held liable for that infringement.

Court's reasoning:

- For the first issue, the Judge read Section 52(a)(ii) with Section 14 of the Copyright Act and found that the acts of the defendant have indeed amounted to infringement.

MySpace was offering the space over the internet, that the users took advantage of to commit infringement of works. Additionally, the advertisements that are displayed on the website are sponsored, which added to the earnings of the defendant, MySpace. Therefore, the defendants were offering the place where infringement occurs, and making profits by doing so.

The defendant tried to claim for exception under Section 52(a)(ii) that they had no knowledge or reasonable belief of infringement, and was defeated by the Judge on 4 points:

1. They had the safeguards of take down of infringing works on the website, implying that they had a reasonable amount of knowledge about the infringing acts that are carried out on the website, the space they offered.
2. The plaintiff particularly notified the defendant about the infringement, thereby making the defendant aware of the knowledge.
3. Defendants are exposed to knowledge and reasonable belief when they are exposed to the content being shared by the user as they are taking a limited licence from the users to amend or delete or modify the works uploaded. Advertisements get added to the clips, which is significant modification.

4. The defendant claimed to offer India centric content, for which they even had an office dedicated to cater to Indian consumers. With this extent of indulgence and research, it is impossible for the defendant to not have knowledge or even reasonable belief of infringement.

The Judge concluded that copyright infringement under Section 52(a)(ii) was committed by MySpace.

- For the second issue on whether Myspace is liable for infringement. The defendants sought protection under Section 79 of the IT Act, 2000 coupled with Section 81 which gives an overriding effect to the Act, thereby giving full immunity to the defendant.

The single Judge defeated the argument on two points:

1. The proviso to Section 81 of the Act made an exception for rights conferred under Copyright Act and Patent Act.
2. The defendant may not qualify for the benefit of Section 79 of IT Act as it is subject to Section 79(2) and (3) of the Act, which lay down the requirements for the intermediary exceptions to be applicable.

Additionally, he emphasized that the defendant had a responsibility to carry out the duty of due diligence, which has not been done by the defendant.

Finally, an interim injunction and order for relief were passed directing MySpace to restrain from modifying and displaying works to the public, and to delete all existing works and take immediate remedial measures within one week in the future. They were also directed to utilise their resources owing to the India centric operations to remove infringing content and ensure such deletions with their own tools without making Supercassettes pay for that subscription.

Myspace Inc. v. Super Cassettes Industries Ltd, 2016:

Facts: Post the 2011 judgement, MySpace appealed and argued that a significant public interest issue emerges when holding intermediaries liable for every copyright infringement, as it sets a dangerous precedent that threatens the functioning of internet. Emphasizing on the difference in dissemination of information in the online medium, it urged to consider international treaties, foreign legislations and case laws.

Appellant, MySpace, claimed that the relief granted by the single judge is too general and not implementable. It is an impossible task to comb through millions of multimedia files in order to takedown the copyrighted contents of SuperCassettes, the respondent. Further, screening and taking pre-infringement measures is incapable to perform. It relied on the case of *Religious Technology Centre v. Netcom Online Communication Services*⁸², where the Court considered the impossibility in distinguishing between infringing and non-infringing content, and upheld protection of intermediary from liability.

MySpace claimed that there was no knowledge of or control on the infringing content on their part, and the exception under Section 51(a)(ii) would apply to them. It also relied on Section 52(1)(b) and 51(1)(c) of the Copyright (Amendment) Act, 2012 which extend certain immunity to intermediaries. The single judge found the use of safeguard tools by the appellant as implying presence of actual knowledge in red flag test, which is the test for secondary liability. Clarifying on the point of safeguard tools, it asserted were introduced out of general knowledge and were a requirement under Section 79(3) of the IT Act. The safeguard tools are a measure taken only to respond and protect copyright.

Issues: Three broad questions were outlined in the appeal: firstly, whether MySpace could have had knowledge of the infringements on its platform, thereby attracting Section 52(a)(ii) of Copyright Act; Secondly, whether the proviso to Section 81 of the IT Act, which gives priority to Copyright Act, in turn cancel the safe harbour provided by Section 79 of the IT Act; Thirdly, a possibility of harmonious interpretation of Sections 79 and 81 of the IT Act, and Section 51 of the Copyright Act.

Court's Reasoning: The Division Bench disagreed with the Single bench's application of the knowledge test. In the virtual space, it is nearly possible to identify the infringing content. They emphasized that knowledge means conscious awareness and not simply a suspicion of the likelihood of something. Especially in the case of internet intermediaries such as MySpace, to know, they would have to sift through a million multimedia files, which is impossible. Moreover, the modification of content on MySpace by some automated process with no human intervention, cannot be considered as actual knowledge.

⁸² 907 F. Supp. 1361

Relying on the red flag test outlined in the *Viacom Case*⁸³ in US, the Court considered "whether the defendant had a specific and identifiable knowledge or merely a general knowledge of the infringing activity on their website". It also relied on *Perfect10 v. CCBill*⁸⁴ where it was held that "mere storage of files with names suggestive of infringement by user would itself not be a red flag." The Division Bench also agreed with observations made in the *Netcom case*⁸⁵, where the court laid an objective test that in case of internet intermediaries, if a notice is sent and no action is taken, then intermediary is liable for secondary infringement.

The division bench held that there was no knowledge on part of MySpace for infringement of SuperCassettes' content. And that the onus is upon the copyright owners to provide specific information about their work, as general and vague notice can lead to takedown of content shared by genuinely licensed as well, thereby injuring their right to fair use.

Coming to the second issue, the Court held that MySpace is an intermediary under Section 2(1)(w) as it is a "conduit" for sharing user-generated content. It allows third-parties to enter into contract and freely share data, upon entering into an agreement with MySpace with respect to IP Rights. It also gives an option to content owner to notify for take-down of infringing content, following due diligence under Section 79, thereby qualifying for immunity.

There is the third question of the proviso to Section 81 which, overrides the safe harbour provided under Section 79, as claimed by Supercassettes. The Court interpreted the IT Act's intentions to address intermediaries. However, to avoid blanket immunity under section 79, it inserted proviso of section 81 so it enables copyright owners to pursue legal recourse against intermediaries. The Court attempted to present a harmonious interpretation of Sections 79 and 81 of IT Act, and Section 51 of Copyright Act, by reading them together. It held that the proviso does not preclude the defence safe harbour under Section 79. Otherwise, if intermediaries are held liable for being mere facilitators despite doing their due diligence. It could discourage investment, research and development, and harm the digital economy, bringing life as we know, to a standstill.

It laid emphasis on the fact that although MySpace is not liable for infringement, infringement has still occurred. "The remedy is not to target intermediaries but to ensure that infringing content is removed reasonably." Ruling in favour of MySpace, the Division Bench offered

⁸³ 253 F.R.D. 256

⁸⁴ 488 F.3d 1102 (9th Cir. 2007)

⁸⁵ 907 F. Supp. 1361

Supercassettes alternative techniques (such as notice-and-take-down, Rights Management Tool) to protect copyright, and directed them to provide MySpace an updated catalogue of specific works with URLs. And MySpace was directed to takedown such content on notice within 36 hours as per the IT Rules, 2011.

The case between MySpace and SuperCassettes has had a major impact on the internet industry as it clarifies the liability of internet intermediaries in cases of copyright infringement and provides a guidance on the applicability of the IT Act and the Copyright Act. The judgement since 2016, has been cited in several cases regarding intermediary liability in general. The cases pertaining to copyright infringement are discussed in brief hereunder.

I. Rakesh Kumar Mehta v. Dushyant Kumar⁸⁶

Facts: The plaintiff is the owner and author of literary works presented in the video recordings of CA Course lectures delivered by him on a platform, V-Sat. The defendant has claimed himself to be a CA and unauthorisedly posted the videos via his channel CA-ROCK on YouTube. The infringing content was found to be unauthorisedly posted on YouTube repeatedly through other channels, despite it being disabled by YouTube earlier.

Issues: The two questions raised in the case were: firstly, whether the defendant was liable for damages; secondly, on the responsibility on YouTube for hosting infringing content.

Ruling: The Court heard the submission of the defendant and granted permanent injunction against reposting the work. And as for YouTube, no costs or damages were claimed. However, it cited that "the remedy is not to target intermediaries but to ensure that infringing material is removed reasonably"⁸⁷, and as per the request of the plaintiff, and Rule 7 of the Intermediary Guidelines, directed YouTube to provide information of the identity of the individuals repeatedly posting the infringing content.

II. Vasundhara Prakash v. Half Baked Beans Literature Pvt. Ltd.⁸⁸

Facts: The plaintiff and defendant had a publishing agreement for plaintiff's book. Due to disputes between them regarding the content, the plaintiff revoked authorization to publish. Upon finding the book listed on Amazon, she notified them not to deal, and was assured that the infringing work would be removed. Despite the assurance the book was not removed and it was further converted and made available in the digital form. The plaintiff relied on the

⁸⁶ 2018 SCC ONLINE DEL 7817

⁸⁷ 2016 SCC ONLINE DEL 6382. p 62

⁸⁸ CM(M)-223/2019

MySpace case and filed a suit seeking an injunction against the defendants, publisher, printer and Amazon, to restrain the infringement of copyright and to take down the infringing book from Amazon. The case remains unsettled at the moment owing to Amazon's involvement.

III. *Utv Software Communication Ltd. And Ors vs 1337X.To And Ors*⁸⁹

Facts: The plaintiffs filed eight suits seeking injunction against several websites for copyright infringement on the internet, and sought website blocking orders. They also named ISPs, Department of Telecommunication, and the Ministry of Electronics & Information Technology to assist in notifying and implementing. The case primarily delivered a comprehensive note on law relating to website blocking in other jurisdictions and claimed that the websites were liable for copyright infringement. Several conceptual questions arose in the case regarding hydra headed rogue websites which facilitate music and film piracy, and how they can be dealt with.

Issue: Whether the websites infringed upon the copyright of the plaintiff?

Ruling: The court held the websites directly liable for infringement. The Court noted that a balancing act is required between intellectual property rights and freedom of speech⁹⁰, therefore, not passing orders for proactive monitoring of internet. The Court granted a permanent injunction against the websites restraining them from infringing the plaintiff's content, and directed the ISPs to block access to the websites.

IV. *Rahul Mitra vs Chief Executive Office, YouTube & Ors*⁹¹

Facts: The plaintiff in the case is a producer of a film that has been uploaded on YouTube, which has degraded his right to monetize on his copyrighted work.

Issue: Whether there is copyright infringement?

Ruling: The court accepted the defendant's submissions that it is an intermediary, and therefore, not liable for copyright infringement. The defendant also noted that the legal notice served by the plaintiff did not specify the exact works and their URLs. It clarified to the plaintiff that a response was sent inquiring the exact works and URL, which, had the plaintiff seen, the suit wouldn't have to be instituted. The Court directed the defendants to take down the movie.

⁸⁹ 2019 SCC ONLINE DEL 8002

⁹⁰ 2016 SCC ONLINE DEL 6382, para 62

⁹¹ CS(COMM)No.150/2020

V. *Triumphant Institute Of Management Pvt. Ltd. vs Mega Limited & Ors*⁹²

Facts: The plaintiff, TIME Coaching Centre has copyright in the study material prepared by it for entrance exams. The plaintiff claims violation of copyrighted material by defendant in the videos of the lectures.

Issue: Whether there is violation of copyright?

Ruling: The Court accepted the defendant's submissions that it is an intermediary and therefore, not liable for copyright infringement. However, for the two specific instances where the copyrighted work has been infringed, the Court directed for it to be taken down by the defendant upon being provided with the URLs.

VI. *Neetu Singh v. Telegram Fz LLC*⁹³

Facts: The plaintiff is a renowned author of books used in competitive exams preparation. Her copyrighted course material and lectures were unauthorisedly disseminated through hydro-headed channels on Telegram, despite being taken down. Hence, the suit seeking a permanent injunction restraining the infringement of her copyrighted work, and to disclose the identity of the infringing user.

Issue: Whether Telegram can be directed to disclose the information about the identity of the individuals who are repeatedly and unauthorisedly sharing the copyrighted works.

Ruling: The defendant is an intermediary and therefore, not liable for copyright infringement. However, the Court rejected the defendant's claim that the identity of the infringing user cannot be disclosed owing to the fact that Telegram's data centre is located in Singapore, which may not be permissible. Telegram has claimed to be an intermediary, and thus, as held in *MySpace*⁹⁴, "the intermediary is to be granted safe harbour, so long as it complies with the requirements of law". The Court, directed the plaintiff to provide the list of infringing channels to Telegram, and directed Telegram to disclose the data of the channels infringing upon the copyright of the plaintiff within two weeks.

⁹² CS(COMM)No.172/2020

⁹³ 2022 SCC ONLINE DEL 2637

⁹⁴ 2016 SCC ONLINE DEL 6382, para 47

The six cases discussed above, all took into consideration the case of *MySpace Inc. v. Super Cassettes Industries Ltd.*⁹⁵

The *MySpace case* revisited the red flag test and ascertained what kind of knowledge would accrue liability. An intermediary's regular and functional activities of hosting or storing of a gazillion files cannot practically mean having knowledge of their contents.

The case set a standard that can plainly be put in three points:

1. For copyright infringement by third party users, the intermediary is not liable.
2. The onus is upon the copyright owner to provide specific information about their work that is infringed on the space/platform offered by the intermediary.
3. And upon receiving specific information about the infringing content by the copyright owner, the intermediary is required to take the content down, failing which they may not avail immunity under the safe harbour provisions.

It can be found that, subsequently the standard has been followed by intermediaries for copyright infringement due to third party activities.

⁹⁵ 2016 SCC ONLINE DEL 6382

PART IV: LEGAL AND POLICY MEASURES TAKEN FOR COPYRIGHT PROTECTION IN INDIA

In order to keep up with the technological advancements, as well as to harmonize the national laws with international standards for ease of trade, the copyright protection regime has undergone several changes. The most of recent development of which are discussed hereunder in this part of the paper.

Copyright Law:

The Copyright Act has been amended several times making adjustments to suit the changing circumstances owing to technological developments. In light of the growth of the internet, the Copyright Act was amended in 2012.⁹⁶ The amendment was brought about to harmonize the Copyright Act with the WIPO Internet Treaties: WIPO Copyright Treaty and WIPO Performance and Phonograms Treaty.⁹⁷

According to Section 52(b) and 52(c) of the **Copyright (Amendment) Act, 2012**, transient and incidental storage of works, purely in the process of electronic communication, and providing such links or access, when not expressly prohibited by the owner, does not amount to infringement. Provided that the individual themselves has no awareness of reasonable grounds to believe that the work is infringing. And in case the person responsible receives a complaint about infringement from owner, the access to the content shall be refrained for 21 days and until a court order confirms the same. Additionally, the **Copyright Rules, 2013**, Rule 75 aids the application of the safe harbour offered by Section 52(1)(c) under the Copyright Act. Rule 75(2) provides the contents of a complaint, and 75(3) provides guidance for the steps to be taken upon receiving a complaint.

There's a broadening of the fair use doctrine in changes made to the Copyright Act. However, the Act does not even contain the terms internet, online or intermediary, even today. Whereas, Information Technology Act, 2000 already dealt with safe harbour for network service providers.⁹⁸

⁹⁶ Supra n, 2

⁹⁷ ibid

⁹⁸ Harshita Bhatnagar and Vinay Mishra, "ISP Liability for Third Party Copyright Infringement: A Comparative Analysis for Setting International Standard Norms" (2009) 50 Acta Juridica Hungarica 59 <<https://doi.org/10.1556/ajur.50.2009.1.3>>.

Technology Law:

The 2008 amendment to the **Information Technology Act, 2000**, defined the term intermediary⁹⁹ and amended Section 79 of the act which now holds that intermediary shall not be liable for third party information and is only a provider of access to communication system. It provides the conditions under which this safe harbour extends, failing which, the intermediary will be liable.¹⁰⁰ Under Section 79(2)(c) of the Act, the **IT (Intermediary Guidelines) Rules, 2011** were notified which contained the due diligence that is to be observed by the intermediary, failing which the exemption under Section 79 shall not be applicable. According to Rule 3(4) of the Guidelines, the intermediary is required to take down content within 36 hours of receiving a notice. Further, in **IT (Intermediary Guidelines and digital media ethics code) Rules, 2021**, a dedicated grievance redressal mechanism, positions of grievance redressal officer and chief compliance officer have been created, that are to be complied with by intermediaries. It imposes tight deadlines for takedown of content.¹⁰¹ Provisions from both laws, Section 52(1)(c) of Copyright Act and Section 79(2) and 79(3)(b), mandate a notice and takedown requirement for intermediaries to avail the protection of safe harbour.¹⁰²

The notice and takedown measure has been mandated by the laws in India and other jurisdictions. It is a more efficient method of enforcement for copyright infringement as compared to legal proceedings.¹⁰³ Even in the cases studied in part III of this paper, the notice and takedown has been the most efficient method to obtain relief in copyright infringement matters. The peculiar case of Vasundhara Prakash stands out, barring other factors, as the one where the notice and takedown method has not been followed, leading to tedious litigation.

⁹⁹ IT (Amendment) Act 2008, Section 2(w)

¹⁰⁰ Karnika Seth and Seth Associates, "IT Act 2000 vs 2008- Implementation, Challenges, and the Role of Adjudicating Officers" [2010] National Seminar on Enforcement of Cyberlaw <<https://www.sethassociates.com/wp-content/uploads/2010/05/IT-Act-2000-vs-2008-3.pdf>>.

¹⁰¹ Anna Pokrovskaya, 'Intermediaries liability for copyright infringement: application of the "safe harbor" model' 2023 Vol. 420 E3S Web of Conferences EDP Sciences.

¹⁰² Althaf Marsoof and Indranath Gupta, 'Shielding internet intermediaries from copyright liability: A comparative discourse on safe harbours in Singapore and India' (2019) 22 (3-4) Journal of World Intellectual Property 234

¹⁰³ Jennifer M Urban, Joe Karaganis and Brianna Schofield, "Notice and Takedown in Everyday Practice" [2016] UC Berkeley Public Law Research Paper UC Berkeley Public Law Research Paper SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628>.

PART V: CONCLUSION

The MySpace case has settled the question on what the intermediary liability is in case of copyright infringement cases in India. A three-point standard for the same has been discussed in Part III of the paper. Thereby, revisiting the questions and hypotheses that were framed at the beginning of this research as under:

- The first hypothesis has been proved. The basis for intermediary liability in copyright infringement is secondary liability.
- The second hypotheses has been disproved. The Indian judiciary's approach in the case of MySpace Inc. v Supercassettes Industries Ltd. first took a regressive approach, and then corrected course to harmoniously interpret it and balance the rights of creators and the internet industry. The standard set in this case, particularly regarding safe harbour and the post-infringement notice and take down remedy, has been followed in the subsequent matters as well.
- The third hypothesis is also proved. The legal and policy reforms for copyright protection in the digital era point to establish a notice and takedown mechanism. The effectiveness of the same is widely accepted and can be seen in practice.

Currently, the notice and takedown regime is the prevalent remedy. However, in two of the six cases discussed in Part III of the paper, the necessity to approach the Court would have not arrived had the Plaintiff sent a Notice for Takedown to the intermediary, containing the information of the exact works owned by the plaintiff and the specific information, the URL, of the infringing work.

SUGGESTIONS

In light of the above discussed hiccup, the following suggestions can be taken to enhance the existing Notice and Takedown mechanism:

- A guide can be added on the platform, depicting clearly with suitable graphics, the requirements for the filing of a notice for a takedown of infringing content on the intermediary's platform.

- Adopting of a standard format of notice, and displaying the timeline for the response, for the satisfaction and knowledge of the user can be of great aid and assistance in this process.
- Moreover, albeit an added expense, but intermediaries can consider using chatbots for filing of complaints on their platform. It has been used for filing of consumer complaints.¹⁰⁴
- Lastly, user awareness contributes significantly to effective mechanisms. Awareness campaigns can be launched to educate the masses about intellectual property and rights.

¹⁰⁴ By BL Bengaluru Bureau, “Ministry of Consumer Affairs Launches Chatbot for Filing Consumer Complaints” (*BusinessLine*, March 17, 2023) <<https://www.thehindubusinessline.com/news/ministry-of-consumer-affairs-launches-chatbot-for-filing-consumer-complaints/article66630572.ece>>

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