

Striking a Balance between Liability of Internet Service Providers and Protection of Copyright over the Internet: A Need of the Hour

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With the advent of 'World Wide Web', the Cyberspace has spread its tentacles throughout the globe bringing in its wake highly controversial issues. Despite advantages of this matrix of immense utility, the Internet poses potential threat to the Internet Service Providers (ISPs) of incurring liability for no fault of theirs. The quantum of liability of ISPs has become an important issue for the legislators of all countries. This paper limits its scope to the legal issues integrated to the much debated problem of the 'scope of liability of ISPs for copyright infringement by third parties or subscribers'. The object of the paper is to provide a comprehensive analysis of the prevailing legislative approaches towards this issue in India and bring out loopholes in the present legal framework. The paper also suggests establishing a clear and specific 'safe harbour protection' for the ISPs in India by incorporating notice takedown procedures, implementing standard technical measures and by appropriate categorization of ISPs. While doing so, it analyses the laws of countries like US and Japan where legal regime is far more developed to tackle the issue in question.

The lacuna in the Indian laws must be cured so as to develop a legal system in consonance with the international order, which can combat the unforeseen anomaly of the Internet era. Furthermore, specific laws and procedures should be framed, to clear the suffocating air of critical issues, striking a balance between ISPs liability and interest of the copyright holders.

Keywords: Internet Service Providers (ISPs), copyright, infringement, Copyright Act, Information Technology Act, Digital Millennium Copyright Act (DMCA), safe harbour protection

One of the biggest inventions of the 20th century, Internet, spread its tentacles far and wide spanning five continents and helping humans reach out to each other in a matter of seconds. It provided easy access to the countries across the globe to latest technologies, such as, e-mail, file transfer, file sharing, online chat, in their quest for knowledge. The Internet is often said to be the network of networks, which is a collection of packet computer networks, glued together by a set of software protocols called Transmission Control Protocol/ Internet Protocol (TCP/IP). These protocols allow computers on various networks to find and communicate to other computers connected to the Internet.¹ The Internet has revolutionized information dissemination by digitalizing the form of information. While Internet provides its users with instant access and distribution of their work, it has its own drawbacks. Besides the real world threat of IPR violation from acts of book piracy which takes place when a book is printed by someone other than the real publisher without authorization, and sold in the market, or cassette/CD piracy, Internet poses a

geometrically increased risk to intellectual property owners over the virtual world. The risk of IPR violation in the form of plagiarism, unauthorized publication and distribution of copyrighted materials and unaccredited hyperlinking is higher over the virtual world due to global reach of Internet, the ease and low marginal cost of replication and transmission of digital data, and relative anonymity of users.² Internet makes it extremely easy to acquire digital copies of copyrighted works. The pirated works are distributed globally, filtering down to peer-to-peer and file sharing networks accessible to anyone with net access.⁴⁶ The advent of Internet has benefited the copyright owners by providing a wider market for their works, however, the flipside of the same coin makes the property vulnerable to illegal access and distribution, thus posing a threat to owner's control over such property.³ The legal regimes of most of the countries are inadequately prepared to handle intellectual property infringements taking place over the virtual world that knows no territorial boundaries.

The web of Internet is spreading fast in India resulting in increased 'cyber enslavement' of people. The increased social and commercial dependence give

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rise to various legal issues concerning intellectual property. The Indian Copyright Act enacted in 1957 and comprehensively amended in 1994 is the relevant legislation which acts as an instrument for tackling IPR issues on Internet. It is widely accepted that the amended Act has adapted itself to the digital era enabling itself to face copyright challenges of digital technologies including those of Internet.⁴ This paper addresses highly debated issue of the scope of liability of ISPs for copyright infringement by a third party in Indian law while drawing analogies from laws of foreign countries. It also suggests certain amendments to the Indian laws so as to establish a more definite safe harbour protection for ISPs.

Internet Service Provider

The access providers play a major role in the working of Internet by providing various services, ranging from dial-up account for the home user, to a permanent leased-line connection for commercial use. Nowadays, a typical access provider is a commercial organization making profits out of selling Internet access to home and commercial users. These commercial access providers are commonly known as ISPs.¹ In order to connect to the Internet, a user requires an ISP and a medium for communication to allow passage of information to and from the computer.⁵ ISP, provides the user with services like World Wide Web, e-mail, listservs, newsgroups and other additional services like web site hosting and design, rendering its role even more prominent for the working of the technical web.^{1, 6, 7}

In US, the Digital Millennium Copyright Act, 1998 (DMCA)⁸ defines 'service provider' in a twofold manner by incorporating it in two different subsections, as:

- (i) Section 512(k)(1)(a) an 'entity offering transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of the material of user's choice, without modification to the content of material as sent or received'
- (ii) Section 512(k)(1)(b) a 'service provider' is a 'provider of online services or network access or the operator of facilities therefore'.

The DMCA defines a service provider in a broad sense so as to include universities and other institutions providing Internet access to their students, professionals, researchers, etc. Further, definition

under Section 512(k)(1)(a) and Section 512(k)(1)(b) is broad enough not only to include all current ISPs but also to encompass technically new providers in the future.⁹

The UK law defines a 'service provider' as 'any person providing an information society service'.¹⁰ Information society service means 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service'. For the purpose of this definition, service must be provided without parties being simultaneously present and it must be sent and received by means of electronic equipment only on individual request.¹¹

In India, the copyright law does not deal with online service providers in express terms. However, provisions relating to ISPs are specifically legislated in the Information Technology Act, 2000 (IT Act) where an ISP is referred to as a 'network service provider' meaning an intermediary.¹² Further, it defines the term 'intermediary' as 'any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message'.¹³ The definition of 'intermediary' is intended to include both professional and non-professional intermediaries and the words 'or provides any service with respect to that message' further enlarges the scope of the word 'intermediary'.¹⁴ The IT Act refrains from creating any classification of ISPs while subsuming all existing categories of ISPs under Section 79 irrespective of their functions as an intermediary.¹⁵

Need for ISPs Liability

Every wrongful act involves a perpetrator and a victim. Same is the case in a wrong committed over Internet. However, transmission of an online communication can only be made possible by the interference of third parties, namely, the service providers. Therefore, commission of a wrong over the Internet cannot occur without intentional or unintentional involvement of service providers who facilitate the communication to take place.¹⁶ This awakened the widespread debate about ISPs' liability for copyright infringement committed by third parties and the extent of such liability. While the copyright holders demand that liability should be imposed on ISPs as a right to receive compensation for the use and reproduction of their material,¹⁷ the ISPs on the

other hand have been vehemently lobbying for limiting their liability.² ISPs are of the opinion that they are being scapegoats through no fault of their own'.¹⁸

Arguments for Holding ISPs Liable for Copyright Infringement Perpetrated by Third Parties

- (i) It is difficult to find the real culprit as the Internet allows users to remain anonymous making it impossible to trace the actual perpetrators. The ISP is identifiable and locatable and most often situated in the same jurisdiction,¹⁹ and thus it is easier to hold them liable in terms of locating the culprits.²⁰
- (ii) The ISPs are more lucrative targets for litigation than the originator of the offending information content.¹¹ The offender may not have adequate resources to pay heavy damages whereas the ISP can pay with his share of profits.¹⁹ Hence it is economically more viable to hold ISP liable.
- (iii) ISPs who are suitably positioned for policing the Internet can better supervise the activities over the net.⁴ ISPs can close down the home page or remove an e-mail and can stop further infringement by closing the site.²¹ Thus, to prevent further access to the offending information by complete or partial blocking of all potential originators and to create a deterrent effect on further infringement, action needs to be taken against the ISPs.²²
- (iv) If the offender and the copyright holder are in different jurisdictions, it is easier to hold the claim against ISP in the claimant's home jurisdiction or in a jurisdiction that has given favourable decisions in similar claims. However, in reality success of a cross-border claim by and large depends on how effectively and coherently the claim has been articulated before proper forum. For example, DMCA 'notice and take down' notwithstanding, there is very little chance of relief to a cross-border claimant unless the notice itself carries the information that it can be enforced in US.

Arguments for Limiting the Liability of ISPs

- (i) ISPs argue that they are only 'passive carriers',³ and 'mere conduits of information' and they play the role of a messenger and not a publisher.²¹ In the case of *Fonovisa v Cherry Auctions*,⁴⁹ the Court said that

supplying the 'site and facilities' for direct infringement is 'materially contributing' to the infringing conduct of another and must attract liability. However in *Sony v Universal Studios*,⁴⁹ the Court rejected the proposition and held that 'merely providing the means to accomplish an infringing activity' was not sufficient without constructive knowledge of the infringing activity. Further, in the case of *Costar v Loopnet*,⁴⁸ the majority held that an ISP should not be held liable for direct infringement when its facilities are used to infringe a copyright with no intervention made by the ISP.

- (ii) It is highly impracticable to expect ISPs to screen all the content passing through their systems given the large number of transactions taking place. Even after constant screening, 100% accuracy cannot be achieved so as to prevent every single instance of copyright infringement. In *Religious Technology Service Centre v Netcom*,²³ the Court held that information providers only offer an opportunity to publish and are unable to exercise any influence on, or what people say on Internet.
- (iii) Moreover holding ISPs liable would hinder the growth of Internet in a nascent stage particularly in India.²⁴

With the backdrop of above arguments the issue that arises is with regard to the extent of liability that has to be ascribed to ISPs and also the legal framework required to deal with the complex issue of ISP liability so as to develop an IPR regime paying heed to the interest of both, ISPs and copyright owners. In the light of these issues an analysis of the existing Indian legislations is indispensable.

Indian Scenario

Many countries impose ISPs liability in relation to various legal fields, like information technology law, criminal law or copyright law. The approach of covering ISPs liability arising out of all potential disciplines of law including copyright law is known as the horizontal approach.²⁵ However, in India the approach adopted by the legislators is non-horizontal²⁶, wherein the liability of an ISP arising in a legal field is fixed under the same field of law.³

The Copyright Act, 1957

The law related to ISP liability is vague and ambiguous in India. The Indian Copyright Act of

1957 does not touch upon the issue of liability or position of ISPs with regard to copyright infringement of third party content uploaded by its subscribers.²⁷ Perhaps the primary reason for this is that the Act was enacted without prior knowledge of the advent of Internet. Despite the fact that the said Act was amended twice in 1994 and once again in 1999 there is still no mention of the liability of ISPs. The following paragraphs amply reveal the assertion that the robustness of the Act has stemmed from the careful choice of the language which allowed it to remain almost technology neutral. In the absence of any express provision, certain provisions of the Copyright Act are wide enough to include the issue of ISP liability in their ambit.¹⁵

According to Section 51(a)(ii) of the Copyright Act if any person without an express license given by the Registrar of Copyrights or Copyright holder, allows the work to be exposed to the public with a view to making gains, it amounts to an infringement of the said copyright. Under this Section, a person becomes liable only when he permits 'any place' to be used for infringement of copyright. The ISP incurs liability since the computer servers and other devices storing infringed materials are located at their business place thereby qualifying an ISP under the expression 'any place' used in the provision. The crux of the ISP liability is whether the ISP is making any profit, meaning thereby benefiting out of the infringement. In the usual course the users always pay the ISP for providing services. In addition ISPs also earn from advertisements by tying them up with the material infringed. The only exception to liability is to prove that they did not know that their activities were causing harm to the copyright owner.

Moreover any person who knowingly infringes or abets the infringement of copyright will be criminally liable under Section 63 of Copyright Act, 1957. Whether an ISP can be said to have abetted the infringement of copyright is a question of fact. But granting a wilful permission to the users brings liability on ISP's under Section 63 of the Copyright Act. Aiding and abetting the infringement is to be strictly proved in the court of law, as it is a penal provision.⁴⁵

The Information Technology Act, 2000

This issue has also been dealt by the IT Act, 2000 in Section 79. Chapter XII of the Act deals with the liability of network service providers. However these provisions only lay down statutory protection

exempting the service providers of their liability.²⁸ The IT Act, 2000 refers to an ISP as 'network service provider' and defines the same in Explanation (a) to Section 79 as an intermediary and further defines the term 'intermediary' under Section 2(w). Furthermore, the Act in some cases added the responsibility of the service providers by mandating them to establish their innocence to escape their liability.²⁹ Section 79 states:

'network service providers not to be liable in certain cases. For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention'.

Explanation- For the purposes of this Section:

(a) 'network service provider' means an intermediary;
(b) 'third party information' means any information dealt with by a network service provider in his capacity as an intermediary.

Section 79 absolves the liability of the ISPs if it can establish that they had no knowledge about the infringement or that they had taken due diligence to prevent such acts.¹⁸ In other words, if the service provider can prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence then he cannot be held liable for such acts.⁴ In order to avail the protection under Section 79, one has to qualify as a 'network service provider', which is defined in the Act as an 'intermediary'. However, it has to be noted that all intermediaries are not network service providers. Moreover, Explanation (b) to Section 79 deals with 'third party information'. 'Third party information' would mean any information which has been generated by a third person not involved in the primary process of generating that information and received, stored or transmitted by ISP from an independent person.¹⁴

It can be well construed from a comprehensive reading of Section 79 that the intention of the legislature behind incorporating the provision in the Act is to provide immunity to ISPs. It is also amply clear that this immunity is absolute in nature only if ISP is able to prove any of the following two circumstances provided in the Section.

Lack of Knowledge

In this regard it is important to note that 'knowledge' is one of the essential preconditions required to be satisfied in order to prove liability of the ISP. It is possible for an ISP to evade liability if he can establish to the contrary. Knowledge could be either actual knowledge or constructive knowledge.³⁰ If the ISP has notice of the fact that the material passed through its servers or stored in it is likely to infringe the copyright of another he is deemed to have 'knowledge' about it and is under the obligation to employ appropriate measures to prevent the same.¹⁵

Due Diligence

Section 79 imposes a statutory duty on ISPs to take measures to prevent transmission or publication of the unlawful content once it has been proved that the ISP had knowledge about the same. It is not a very practical idea to expect ISP to keep a check on every single transaction that takes place through its networks. Further allowing the role of pre-censorship to the ISP is also not desirable. On the other hand, not imposing any statutory duty of care would allow ISP to be reckless and this would lead to innumerable copyright infringement cases over Internet.

Thus, degree of care to be taken by the ISP would be judged by reasonable standards of care expected to be adopted by a person to prevent an act of infringement in a situation where he is aware of any illegal activity taking place or likely to take place.

Therefore it has been affirmed that ISPs are neither responsible nor answerable for a third party's wrongful activities if ISP can prove innocence or even if ISP comes to know about the misdeed and exercised 'due diligence' to prevent any infringement. This in turn means that unless the case at hand falls under these two exemptions the ISPs are liable for copyright infringement as well as any other violations that take place through their websites, even if the act is done by the subscribers.

Limitations of Indian Law

- (i) The vague provisions of Section 79 limiting the liability of ISPs leave enough scope for the authorities to use the Section as a tool for harassing ISPs.³¹
- (ii) The Section exempts ISPs from liability for copyright infringement if the ISP has exercised all due diligence. Ironically, the term 'due diligence', which plays a pivotal role in determining the liability of ISPs has not been

defined anywhere in the Act. Therefore, this creates ambiguity allowing different ISPs to interpret meaning of the term differently and hence work accordingly.

- (iii) The explanation to Section 79 is also open to broad interpretation bringing almost all intermediary in the ambit of 'network service provider'.
- (iv) While Section 79 limits the liability of ISPs, it does not specify who bears the liability under such circumstances in infringement of copyright.³²
- (v) Neither the IT Act nor the Copyright Act classifies ISPs. ISP liability greatly depends upon what kind of function they are performing. Thus in absence of any categorization, the liability is erroneously same for one who acts as a mere communication carrier and the one who makes inputs and has control over the infringed material.

The Google and T-Series Case

The Indian IPR regime has not witnessed any case on this issue but recently in the year 2007, T-Series brought a case against YouTube.com and its parent company Google Inc for earning profits at the expense of a rightful copyright owner by allowing its subscribers to upload T-Series copyrighted materials without obtaining any license or permission from T-Series. T-Series with its rapid expansion had a forward looking approach to the copyright law and was the plaintiff in this case. Google which is renowned for such litigation in this regard with its search engine and allied searches being the target of attacks alleging copyright infringement. Being prudent enough, Google adopts the policy of settling these disputes.

The facts giving rise to the action brought by T-Series is that the users of YouTube posted certain materials on their website www.youtube.com, which were under copyright of T-Series. In the ordinary course of events, T-Series should have proceeded against the user who posted such content. Under Section 51 of the Indian Copyright Act 1957 this could be taken as infringing the Copyright by the user. However, Section 63 also includes within its scope abetment of infringement. Thus, as is the usual trend in such cases, instead of suing the user, which would prove to be fruitless in terms of the ability to pay compensation, T-Series under its parent company, Super Cassettes Industries Limited (SCIL) brought an

action against YouTube and its parent company Google Inc at the Delhi High Court.

The Delhi Court passed an interim order of injunction restraining YouTube from reproducing, adapting, distributing, communicating, transmitting, disseminating or displaying on their websites or otherwise infringing in any manner any audio visual works in which the SCIL owns exclusive, valid and subsisting copyright.³³ The injunction was passed on the grounds that YouTube and Google incurred pecuniary benefits by making the copyrighted songs of T-Series available for free of cost on their website, which contained advertisements, without obtaining any license or permission from SCIL who earned profits from selling of these copyrighted songs in the market in the form of DVDs, CDs etc.

The arguments that YouTube resorted to was that the content uploaded on the website is not done by YouTube themselves but by millions of users across the world and it is practically not feasible for Google to filter all such material that is being uploaded. In addition to this, they also agreed to remove all those titles from their website over which T-Series have copyright, if T-Series provides them with those copyrighted titles. However, after all the arguments and interim orders passed it is highly anticipated that the matter would conclude in weighty negotiations taking place between the parties keeping in mind the past record and achievements of Google in ably resolving such issues.

Conclusion

The law relating to ISP liability in India is vague which is facilitating an unjust shift in the liability of wrongful users upon ISPs, making them the scapegoat of inadequate legal framework. The growth of Internet is largely dependant on the functional role of ISPs in enabling transactions and communications between end users. In the absence of specific legislative provisions defining the scope of liability of ISPs, the intermediaries are confronted with the constant risk of incurring liability for any or all of their actions and inactions, thus hindering the growth of Internet. With a view to better equip Indian laws dealing with ISP liability for copyright violation by third party, the IT Act requires attention to some very fine issues without which the ISPs and their role could be disastrous to Internet. To address the issues, following suggestions are presented:

Extent of Liability of ISP

The Indian laws with regard to liability of ISPs are still unclear on the issue of the extent of liability of the ISPs and what should be the yardstick for

determining the liability. Drawing reference from the DMCA it is suggested that the real test for ascertaining the liability of ISP should be based on the degree of involvement of ISP in the alleged infringement. The DMCA under Section 512 of the Act classifies ISPs into four different categories on the basis of their respective functions.³⁴

The objective behind making such a classification is to create limitations on the liability of ISPs. While it should be ensured that ISPs do not escape liability by giving frivolous reasons, it should also be the endeavour of the legislature not to hold ISPs liable for no fault of theirs in cases where they act as a mere conduit facilitating transfer of content. In order to achieve ends of this aim it becomes indispensable for the Indian laws to provide a proper classification of ISPs on the basis of the role played by them in different networking systems in order to clarify the extent of liability attributed to them.

Furthermore, the Indian legal system should distinguish liability of ISPs relying on concepts of direct, contributory and vicarious infringement as has been incorporated in various statutes pertaining to copyright infringement across the world.³⁵ Contributory infringement is when 'one who with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.'³⁶ Contributory infringement,³⁷ which is an American concept could further be incorporated into the IT Act whereby any person with prior knowledge helps and abets in the commission of an infringement would also be held liable.³⁸ In addition to this distinction it is required that the Statute lays down expressly the tests that would assess such liability.

Notice and Take-Down Regime

The Indian law must establish a notice and take down regime as has been established by the DMCA in US. The DMCA provides a legal procedure by which the copyright owners can request any ISP to remove or otherwise disable access to a website where his copyrighted work(s) are appearing without his permission.³⁹ Although DMCA tries to balance the interests of all stakeholders, the 'notice and takedown regime' is still problematic in some areas. The regime under DMCA increases the risk of 'wrongful takedown' as it often leaves no chance for the subscribers to explain, before their materials are taken down.⁴¹ In *Online Policy Group v Diebold*, it was argued that greater checks should be introduced into the notice and takedown provisions of DMCA and the

parties misusing DMCA procedures should be held liable for damages incurred by those they target.⁴⁷ Under the notice and takedown regime which is required to be established in India, first the ISP must designate an agent to handle infringement claims who will receive notification of copyright infringement. The facility of online notification must also be provided by ISPs over their web site. Secondly, the copyright holder shall submit a formal notice to ISP's agent, which must be a written communication comprising of specific identifying elements.⁴⁰ Finally, the ISP must provide its subscribers with an opportunity to respond to the copyright holder's allegations prior to removal of the material.⁴¹

Uniform Set of Rules Applicable Throughout the World

Internet being a global system and its network spread all across the world, the issues regarding copyright infringement might be of a nature where the three role players, i.e. ISP, copyright holder and the user are in different countries. The moot question that arises here is with regard to the applicable law to decide the case as in such situations the domestic laws of the three countries would vary. Further, confusion also crops up as to which is the appropriate forum for filing of the case for infringement. In order to avoid jurisdictional difficulties that stem from conflict of laws, it is recommended that the best way to solve this problem is by providing a Uniform Code or Rules that would govern every such case arising out of the functioning of Internet.

Term 'Due Diligence' Needs to be Exemplified

Section 79 of the IT Act refers to 'due diligence' as one of the conditions, which the ISP needs to fulfil. On having satisfied that the ISP has exercised due diligence in the matter, the ISP can be exempted of its liability. However, the extent to which the ISP is required to take care is not mentioned or explained anywhere in the Act. The term 'due diligence' needs to be substantiated by adding a further qualification of 'due care'. The latter having a wider meaning than the former which is essentially an investigative procedure to establish credentials and value, would succor in creating better preventive measures. Incorporating 'due care' will ensure development of sound safeguards while 'due diligence' requirement will make sure that the duty to maintain such safeguards are fulfilled. Further, both these terms need to be explained with reference to the Section in order to determine the degree of care that is expected to be taken by ISPs. If these terms are left open to

interpretation it can lead to severe uncertainty. On one hand, it has to be accepted that innumerable content transmission signals are sent across the network in the matter of a few seconds and thus it is unreasonable to impose a duty on ISP to scrutinize every such transmission. On the other hand, it is highly debatable whether it is prudent to allow the ISPs some kind of exemption from the duty of care. In the absence of any standard of care mentioned in the statute, it is also not very practical to refer to the 'reasonable man' concept, as relied upon by the courts in torts and other cases. The reason for the same being that the world of cyberspace is utterly complex and involves technical nitty-gritty. What is required here to decide such issues is a high level of technical knowledge and specialized skills.

Therefore, the need of the hour is to define the term 'due diligence' and 'due care' to strike a balance between the interests of the copyright holders and at the same not to create unachievable responsibilities for ISPs in terms of policing the Internet.

Clear and Specific Procedure to Avail the Safe Harbour

Incorporating specific provisions dealing with the procedure to avail benefits of limitations on liability, will establish a proper standard of liability of ISPs. In US, the DMCA lays down a comprehensive procedure for ISPs to obtain the benefits of safe harbour protection.⁴² Section 512 of the DMCA not only specifically defines the scope of the safe harbour but also sets out specific conditions and exemptions for its application. In India, the two defences available to ISPs are 'lack of knowledge' and 'due diligence' both of which are vaguely defined. Moreover, there is a lack of clear and specific procedure to take the benefits of safe harbour provision in India. Thus, the Indian law must be redrafted to include provisions, which establish a distinct scope of safe harbour protection with proper procedure to avail the benefit.

Implementing Policy and Standard Technical Measure

The IT Act must make it mandatory for ISPs to adopt, implement and inform the users of a policy of termination of subscription on repeated infringement by the user. The DMCA makes it compulsory for ISPs to implement such policy to receive the benefit of safe harbour protection.⁴³ Moreover, the Indian legislation must impose a mandatory direction on ISPs to accommodate 'standard technical measures' which must be consensually developed by the copyright owners and the service providers.⁴⁴ By virtue of Section 512(i)(2) of the DMCA, 'standard technical

measures' mean technical measures that copyright owners use to identify or protect copyrighted works, that have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, are available to anyone on reasonable non-discriminatory terms, and do not impose substantial costs or burdens on service providers.

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- 25 Wei W, The liability of Internet Service Provider for copyright infringement and defamation in the United Kingdom and China: A comparative study, *European Intellectual Property Review*, 28 (10) (2006) 528.
- 26 Countries like Germany, Sweden, Japan, etc. approach the issue from a horizontal perspective.
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- 28 Mukherjee S, Liability of Internet service providers for copyright Infringement on the Internet: US vis-a-vis Indian position, [http:// www.legalservicesindia.com/ articles/](http://www.legalservicesindia.com/articles/) (15 February 2009).
- 29 Explanation- Construction of a building or other structure which infringes or which, if completed, would infringe the

- copyright in some other work shall not be an offence under this Section.
- 30 Kumari T Vidya, *Copyright Protection – Current Indian & International Perspective* (Asia Law House, Hyderabad), 2004, 320-335.
- 31 Under Chapter XII Section 79 of the Act prescribes that network service providers not to be liable in certain cases.
- 32 ‘A person is deemed to have constructive knowledge of the contents of material, which would put a reasonable and prudent person on notice as to the suspect of the nature of the material. That is, the network service provider knows, or has reason to believe that, that the information content it is transmitting is unlawful’; Sharma Vakul, *Information Technology Law and Practice*, 2nd edn (Universal Law Publishing Co Pvt Ltd, New Delhi), 2007, 18-19.
- 33 Duggal P, Unsured liability of ISPs under the proposed amended IT Bill 99, [http:// cyberlaws.net/cyberindialiability.htm](http://cyberlaws.net/cyberindialiability.htm) (15 February 2009).
- 34 Shah A, The Information Technology Act, 2000: A legal framework for e-governance, [http:// www. sudhirlaw.com/cyberlaw-itact](http://www.sudhirlaw.com/cyberlaw-itact) (18 February 2009).
- 35 Mukherjee Priyanka & Punani Shachi, A rear view of the YouTube case, 6 December 2007, [http:// www.legalserviceindia.com/ article/ 1124-YouTube-case.html](http://www.legalserviceindia.com/article/1124-YouTube-case.html) (18 February 2009).
- 36 (i) Transitory communications; (ii) System caching; (iii) Storage of information on systems or networks at direction of users; and (iv) Information location tools.
- 37 Vicarious liability occurs only when an online content provider has the right and ability to control the user and obtains a financial benefit from the infringing action of the user. The difference between vicarious and contributory liability is the degree of ‘control’ over the primary infringer, Reddy Prashant, Google’s militant approach to copyright law, 23 November 2007, [http:// spicyindia.blogspot.com/ 2007/ 11/ googles-militant-approach-to-copyright.html](http://spicyindia.blogspot.com/2007/11/googles-militant-approach-to-copyright.html) (15 December 2008).
- 38 *Gershwin Publishing Corporation v Columbia Artists Management Inc*, 443F 2d 159, 1162 (2d Cir 1971).
- 39 This is the concept that recognizes that although a person or entity such as a library or school may not itself be misusing the copyrighted work, it should nonetheless be legally held responsible when one with knowledge of the infringing activity induces or causes or materially contributes to the infringement of another.
- 40 In *Metro-Goldwyn Mayer Studio Inc v Grokster Ltd.* 259 F Supp 2d 1029 (C D Cal 2003), Grokster distributed free software for exchange of files between users but its servers did not store files of users. The Court held that Grokster was neither liable for vicarious or contributory infringement as he had no prior knowledge of such infringement and further he did not have the ability to control such conduct.
- 41 Section 512(g)(1)-(3) of the DMCA.
- 42 Section 512(c)(1) of the DMCA that provides for the procedure for notice and take-down.
- 43 TIAN Yi Jun, WIPO Treaties, Free Trade Agreement and Implications for ISP Safe Harbour Provisions (The Role of ISP in Australian Copyright Law), *Bond Law Review*, 16 (2004) 198 & 204, The ‘expeditiously taking down’ provisions in the DMCA provides no chance for the subscribers to counter or explain the allegation thereby greatly increasing the risk of wrongful takedown. Unlike DMCA, the Japan’s seven day’s notice takedown regime provides more protection to the subscribers by giving them an opportunity to respond to the allegations notified by the copyright holder.
- 44 Band J and Schruers M, Safe harbours against the liability hurricane: The Communications Decency Act and the Digital Millennium Copyright Act, *Cardozo Arts and Entertainment Law Journal*, 20 (2002) 304, Section 512(i)(1) of the DMCA.
- 45 Lisa N Takeyama *et al*, *Developments in the Economics of Copyright Research and Analysis* (Edward Elgar Publishing, UK), 2005, 37-42, 60.
- 46 76 F 3d 259, 262-263 (9th Cir 1996); In *Religious Technology Center v Netcom*, 907 F Supp 1361, 1368-1370 (N D Ca 1995) it was held that the ‘failure to cancel a user’s infringing message and thereby stop the infringing copy from being distributed worldwide constitute substantial participation.
- 47 464 US 417, 434-435 (1984) at 436, 439.
- 48 373 F 3D 544 (4th CIR 2004).
- 49 http://www.eff.org/Legal/ISP_liability/OPG_v_Diebold/ (2 May 2009).