The Scope of Online Service Providers’ Liability for Copyright Infringing Third Party Content under the Indian Laws – The Road Ahead

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The issue of liability of online service providers (OSPs) for third party content is one of the most contentious issues in the realm of cyber law. Different jurisdictions around the world have dealt with the issue either through legislative provisions or judicial pronouncements. Until recently, the legal position in India was nebulous and vague especially with respect to liability for copyright infringing third party content. The Information Technology (Amendment) Act, 2008 has significantly clarified the scope of immunities available to intermediaries. Unlike the immunities under the old IT Act, these immunities are not only available with respect to offences under the IT Act, 2000 but even for the liabilities arising under any law. The object of this paper is to extensively examine applicability and scope of such immunities, by comparatively analysing them with similar provisions in the United States and the European Union.

This paper further examines the scope of OSPs liability under the Copyright Act, 1957 under three heads viz. direct liability, secondary liability and criminal liability. The potency of the argument that OSP authorize infringement has been examined by the courts in the UK, Canada and Australia. This paper examines accuracy of the argument and its applicability in the Indian context. The paper concludes with an overview of the position likely to emerge under the Indian law.

Keywords: Information Technology (Amendment) Act, 2008, intermediaries, Online Service Provider, copyright infringement, authorization of infringement

The advent of the Internet has resulted in the development of complex legal issues which has mandated a re-evaluation of traditional law and policy by courts and legislatures worldwide. Among these, the liability of OSPs is considered to be one of the most controversial issues to emerge from cyberspace. The main legal issue in this regard is to assess whether and under which circumstances an OSPs should be held liable for illegal activities initiated by its subscribers and facilitated by its systems. This issue has received considerable attention from both courts as well as the academic community in a number of jurisdictions around the world. Certain states, such as the United States and the European Union have opted to legislate in order to define the scope of liability of OSPs for third party content.¹ In others, such as Canada, the courts have sought to define the purview of their liability within existing legislative mechanism.²

The position under Indian law is likely to be determined by the IT (Amendment) Act, 2008, which came into force on 27 October 2009 and has introduced far reaching changes in the OSP liability regime in India. This article seeks to examine the Indian position on OSPs liability for copyright infringement, which is likely to emerge under the existing legislative framework including the IT Act, 2000 (as amended)[Act 21 of 2000] and the Copyright Act, 1957[Act 14 of 1957]. The object of this article is limited to analyzing the liability of OSPs for copyright infringing third party content, and it does not refer to their liability for defamatory or obscene third party material. Another limitation of the article is that it refers to the law in other jurisdictions only to the extent that they are relevant in examining the scope of the Indian law. An extensive analysis of the legal position in other jurisdictions has been avoided for the sake of brevity.

Why Online Service Provider Liability?

The wrongs committed over the Internet cannot occur without intentional or unintentional involvement of service providers who facilitate the communication of the information and provide a medium for the alleged wrong to take place.³ Consequently, the claimants aggrieved by third party information content transmitted or distributed by OSPs often pursue claims against OSPs rather than

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other third parties. The primary reason for this is that the OSPs are viewed as potentially more lucrative targets for litigation than the originators of the offending information content. This view is based on the ability of the OSPs to effectively compensate for the damage caused to the claimant (whereas a subscriber or a third party may not possess such ability) as well as on the challenges faced by claimants due to relative anonymity of Internet users (which makes the detection of those who violate copyright highly costly). Furthermore, the question of jurisdiction plays a vital role especially if the originator of information resides in a foreign jurisdiction or if the intermediary is in a jurisdiction where courts are reputed to provide favourable outcomes. Another significant consideration is that the outcome desired by the claimant may be more effectively obtained against the OSPs inasmuch as an action against the OSPs may ensure complete or partial blocking of all infringing material from potential originators.

The IT (Amendment) Act, 2008: Codifying the OSPs Liability Regime in India

Due to the reasons stated in the previous section, claims have been brought against OSP by copyright holders in many jurisdictions. The traditional law and policy were found insufficient to deal with the issue in an appropriate manner, and the emerging jurisprudence was being subject to judicial vagaries. Further, imposition of excessive liabilities was viewed as detrimental to the growth of the Internet. A balance was required to be achieved between the rights of authors and the larger public interest, particularly in education, research and access to information. In order to achieve this balance, different jurisdictions such as the United States and the European Union codified the law on the subject. India, recognizing the contentious nature of the issue, also amended the provisions of the Information Technology Act, 2000 through the IT (Amendment) Act, 2008, through which it has codified the law relating to the immunities available to OSPs for the transmission and hosting of third party material.

Immunity from Liability Under any Law in Force vis-à-vis Section 81

The Information Technology (Amendment) Act, 2008 is a significant advance in codifying the legal position relating to OSP liability in India. Section 79(1) of the IT Act, 2000 (as amended by the IT (Amendment) Act, 2008) provides immunity to intermediaries from liability for any data, or communication link made available or hosted by him. Section 79(1), as amended, significantly changes the law with respect to OSPs liability as compared to the old Section 79. Section 79, prior to amendment, provided immunity to service providers only with respect to liability under the IT Act, 2000 and the rules and regulations thereunder. Therefore, the service providers were not entitled to immunity with respect to liability arising under other statutes. In contrast, Section 79(1), as amended, contains a non – obstante clause to the effect ‘Notwithstanding anything contained in any law for the time being in force’, and, therefore, it affords protection to service providers with respect to liability arising under all statutes (for instance liability arising under the Copyright Act, 1957 discussed hereinafter), thereby significantly heightening the level of immunity available to service providers. That being said, it is pertinent to note that the proviso to Section 81 of the IT Act, 2000 (as amended) must be analysed while considering the question of intermediary liability in the copyright context. The proviso to Section 81 reads as ‘nothing contained in this Act shall restrict any person from exercising any right under the Copyright Act, 1957 or the Patents Act, 1970’. On a prima facie reading of the provision, it appears that the immunities under Section 79 are not available for copyright infringement. However, a finer reading is necessary for reaching an interpretation which is consistent with the object underlying Section 79. The amended Section 79 was introduced with the object of embracing horizontal approach to intermediary liability in India.

Section 79 was amended taking the European Union Directive on E-commerce 2000/31/EC as the guiding principle. The preamble to the Directive in Recital 50 explicitly states that the directive seeks to establish a clear framework of rules relevant to intermediary liability for copyright infringement. In fact, a perusal of the amended Section 79 reveals that it borrows heavily from the provisions of the Directive, especially Articles 12 – 15 and presumably intended the same to be applied in the copyright context also. The purpose of introducing the said amendment would, therefore, be defeated if Section 81 is read as having overriding effect over Section 79 to the extent that the immunity under Section 79 shall not be available in cases of liability for copyright infringement. The scope of the section is likely to become unduly narrow if the intermediaries are disinclined to avail the immunity for copyright infringing third party content. Further, it is noteworthy that amended Section 79 starts with
the phrase ‘notwithstanding anything contained in any law for the time being in force’.

The language used in corresponding provision the Information Technology (Amendment) Bill, 2006 was ‘notwithstanding anything contained in any other law for the time being in force’. This change is significant since it allows Section 79 to have overriding effect over other provisions of the IT Act itself and presumably the intention of the legislature was to this effect. Accordingly, Section 79 shall have overriding effect over proviso to Section 81 being ‘contained in any law’, the law being the IT Act, 2000.

In view of the above submissions, a harmonious interpretation is required of Section 79 and the proviso of Section 81. Section 81 may be interpreted as having overriding effect over all other sections of the IT Act, 2000 except Section 79, thereby ensuring that the rights of copyright holders are not restricted by the Act in cases other than those covered by Section 79. In the alternative, a proposed interpretation of the proviso to Section 81 is that it provides the right holder the right to approach the Court, insofar as that no intermediary can claim that the Court lacks the jurisdiction to hear the matter by virtue of application of Section 79. This conclusion is fortified by reference to the terminology used in the proviso to Section 81. The term used in the proviso to Section 81 is ‘restrict any person from exercising any right’ rather than ‘restrict the rights of any person’. The former may be interpreted to refer to the right of a person to approach a Court, while the latter refers to the substantive rights which presumably may be restricted by the application of Section 79. Such an interpretational exercise is mandated in order to ensure that the purpose of Section 79 is not defeated and, since we are unaware of the legislative intent behind the introduction of the proviso to Section 81. The exact scope of the two provisions, however, shall be determinable only on a judicial pronouncement in this regard.

Section 79(2) and 79(3) of the Amendment Act, 2008, however, introduce certain conditions for and exceptions to the applicability of sub - section (1). Section 79(2) introduces the following disjunctive conditions for the application of Section 79(1):

1. The function of the intermediary is limited to providing access to a communication over which the information made available by the third parties is temporarily stored or hosted by him. Section 79(2)(a), therefore, seeks to provide immunity to service providers which play a passive role in the unlawful acts and, their role in the act is limited to providing a passive medium for transmission of information. It seeks to immunize ‘access only Internet Service Providers’ which provide a medium of communication for the passage of information to and from third parties.

2. The intermediary does not initiate transmission and select the receiver of the transmission, and select or modify the information contained in the transmission. Section 79(2)(b), therefore, envisages the fulfilment of three conjunctive conditions for claiming immunity under Section 79(1), insofar as the service provider must not be involved in initiation of transmission, or the selection of receiver, or the selection or modification of information, and the involvement in either of these three acts would disentitle it from claiming said immunity. The language of Section 79(2)(b) is borrowed from Regulation 17 of the Electronic Commerce (EC Directive) Regulations, 2002. These are the circumstances where the ISP acts as a mere conduit for information in a communication network. In such cases, the role of service providers has been compared to the telephone carriers and postal services, which play no role in the creation or

Section 2(w): A Comprehensive Definition of ‘Intermediaries’

Further, it bears noting that the term ‘network service provider’ has been omitted from Section 79 of the IT Act, 2000 and the protection under the said section is available to intermediaries as defined under Section 2(w) of the IT Act, 2000. The IT (Amendment) Act, 2008 amends the definition of intermediary, making it more comprehensive and illustrative. The definition of intermediary, as amended, stipulates that an intermediary with respect to any particular electronic records means any person who on behalf of another person receives stores or transmits that message or provides any service with respect to that record. Further, the Section contains specific inclusions, such as telecom service providers, Internet service providers, web–hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes. The list of inclusions is extensive and provides much needed clarity with regard to the scope of applicability of the exemptions under Section 79, clearly encompassing online service providers within its scope.

Conditions for Claiming Immunity under Section 79(1)

Sections 79(2) and 79(3) of the Amendment Act, 2008, however, introduce certain conditions for and exceptions to the applicability of sub - section (1).
preparation of the content.\textsuperscript{23} This sub-section incorporates the concept of ‘control’ in the Indian context, insofar as an intermediary actively exercising editorial control over the content hosted by him shall be considered to be involved in the selection or modification of information.\textsuperscript{24}

As aforementioned, the two conditions are disjunctive insofar as the intermediary is required to fulfil either of the above conditions to claim immunity under Section 79(1). In addition to the above, Section 79(2)(c) introduces a due diligence requirement, requiring the service providers to observe due diligence in discharging their duties under the Act or under any guidelines as specified by the Central Government in this behalf. The judgment of the High Court of Delhi in \textit{Avnish Bajaj v State}\textsuperscript{25}, in the highly publicized MMS scandal case, throws light on the degree of diligence required to be observed by service providers. In 2004, an Internet website, www.bazee.com carried a listing which offered for sale a video clip, shot on a mobile phone, of two students indulging in an explicitly sexual act. Proceedings were initiated against the Managing Director (MD) of the company that owned the website under Section 292 of the Indian Penal Code and Section 67 of the Information Technology Act, 2000. While deciding a petition for the annulment of the criminal prosecution under Section 482 of the Code of Criminal Procedure, 1973, the Honourable High Court found that the said website had failed to exercise due diligence. The Court based its finding on the fact that the website failed to provide for efficient filters to screen pornographic content and it failed to introduce any operative or policy changes to prevent the listing/display/sale of the same on the portal. Though this judgement is not on the issue of copyright liability, it is indicative of the high standard of diligence which the service providers are required to exercise in the Indian context. As some authors have opined, the degree of diligence to be taken by an OSP is likely to 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.\textsuperscript{3}

\textbf{Section 79(3): Exceptions to Immunity}

Section 79(3) creates certain exceptions to Section 79(1), in that the immunity under Section 79(1) cannot be claimed if either of the following two conditions is satisfied:

1. The intermediary conspires or abets or aids or induces, whether by threats or promise or otherwise in the commission of the unlawful act. The object of this clause is to exclude claims for immunity in cases where the intermediary is actively involved, either directly or indirectly, in the commission of the unlawful act. The terms ‘abets’ and ‘induces’ signify intent on the part of the intermediary. Therefore, the intention on the part of the intermediary to commit infringement shall form a pre-requisite for the applicability of these parts of Section 79(3) (a), and the intermediary may take the defence of lack of intent in order to claim denial of liability. However, an intermediary may aid the commission of an unlawful act, without intending the same (i.e. unintentional aiding), and this provides a major ground for right holders for claiming that the intermediary is disentitled to the immunity under Section 79 especially in view of the ‘authorization of infringement’ argument elaborated upon in later sections of this article.

2. The second exception crafted under the Section is commonly known as the notice and take-down procedure.\textsuperscript{26} Under this exception, the intermediary’s failure to remove or disable the access to material on his computer resource if he receives actual knowledge or notification by the Central Government (or its agency) that the material (which may be any information, data or communication link) residing in or connected to a computer resource controlled by the intermediary is being used to commit an unlawful act exposes him to liability. Section 512(c) of the Digital Millennium Copyright Act, 1988 (DMCA) in the United States contains similar procedures wherein the service provider is required to remove or disable access to material that is claimed to infringing or subject of infringing activity.\textsuperscript{27} However, the procedural requirements for notification under the DMCA are elaborate, in that the specific contents of the notification are provided for under Section 512(c)(3)(A) of the DMCA. Further, the DMCA recognizes the immense potential for abuse posed by the notice and take-down procedure and it is not without protection of the interests of the OSP whose service is potentially jeopardized by any claim of infringement brought to the attention of servicing OSP.\textsuperscript{28} In this regard, the DMCA contains counter-notification procedures, stating essentially that the OSP is legally obligated to restore access to material at the direction of an alleged infringer who feels he or she has been wronged by
an infringement allegation. Where the alleged infringer receives notice from the OSP that his or her material is going to be removed due to a claim of infringement alleged by another party, or, where material has already been removed, the alleged infringer may send the OSP a counter notice that the material in question is not infringing. Upon receipt of counter notification, the OSP must then inform the copyright holder that counter notice has been filed, and that the material will be replaced or access to it restored in a period of 10 days.\(^{29}\) If the copyright holder intends to pursue the matter and prevent the material from being replaced or restored, it must then file suit in an appropriate federal district court within 10-day period, and obtain an order restraining the subscriber from engaging in infringing activity. In absence of any notice by the complainant regarding the filing of such a suit, the OSP is required to replace the removed material and cease disabling access to the material in not less than 10 days and not more than 14 days from the receipt of the counter notice.\(^{29}\) The IT (Amendment) Act, 2008 lacks similar provisions, thereby failing to strike a balance between the interests of the right holders and those of the online service providers and presents immense potential for abuse.

The IT (Amendment) Act, 2008 came into force on 27 October 2009.\(^{30}\) The amendment signifies a major shift in the scope of OSP liability in India, and has far-reaching consequences on OSP liability in India. Though it brings significant clarity with respect to the statutory mandate, the true scope of the immunity provision shall be determinable only on judicial discussion on interpretation of issues such as control and due diligence expected from the OSP.

The above discussion reveals that the IT (Amendment) Act, 2008 provides only limited immunity to online service providers with respect to material hosted/transmitted by them. This is further indicated by the heading of Chapter XII (Intermediaries not to be liable in certain cases) and the marginal of the section 79 (Exemption from liability in certain cases) of the IT Act, 2000. Hence, the OSPs may still be subject to liabilities in certain cases (such as those where the exceptions under Section 79(3) are applicable or where the OSPs fail to fulfill the conditions under Section 79(2)). In these cases, the liability shall be imposed on the OSP only by reference to other statutes (such as the Copyright Act, 1957 or the Indian Penal Code, 1860) and, therefore, reference must be had to these statutes for determining the scope of their liability.

**OSPs Liability under Copyright Regime**

The liability of OSPs in India under the copyright law is yet to be considered and decided by the Indian Courts\(^{31}\). Under the Indian law, the question of OSPs liability must only be considered with reference to statutory provisions. This is in view of Section 16 of the Copyright Act, 1957 which expressly bars the import of common law principles for according liability under copyright law. A claimant in India cannot claim a copyright and sue for infringement dehors the Act\(^{32}\), and, therefore, there is no place for application of tort law principles to accord liability to OSPs\(^{33}\) as has been done by the Courts in the United States.\(^{34}\) The liability of the OSPs under the copyright law may be studied under the different heads namely direct liability, secondary liability and criminal liability.

**Direct Liability for Online Service Providers**

The direct liability of OSPs under the Copyright Act, 1957 arises from a conjoint reading of Section 14 and Section 51(a)(i) of the Act. Section 14 of the Act provides meaning of copyright and the extent of the rights in a work under the Act. The authorization of doing of an infringing act is a separate act of infringement from the act which is itself authorized and a person is liable for having authorized an infringement.\(^{35}\) Therefore, the relevant term in Section 14 which may be construed to imply direct liability on OSPs is ‘authorize’. OSPs may be held to be authorizing infringement of copyright by virtue of the fact that they are providing means to the third parties through which the protected works are communicated to the public i.e. they are providing the means through which the infringement is committed. Hence, the liability of OSPs under this provision hinges upon the interpretation of the term ‘authorize’ so as to determine the acts which may be construed as authorising the doing of an infringing act.

**Interpreting ‘Authorize’ under Section 14 of the Copyright Act, 1957**

Authorization means the grant or purported grant, which may be express or implied, of the right to do the act complained of.\(^{36}\) An expression which has been often used equivalent to the ‘authorize’ is ‘sanction, approve or countenance’\(^{37}\) with each of...
these phrases being read conjunctively. In fact, the term ‘countenance’ has been interpreted according to its strongest dictionary meaning to mean ‘to give approval to, sanction, permit, favour or encourage’.

**Interpretation Accrued under the UK and Canadian Law**

According to the UK and Canadian law, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright if those means could be used for perfectly legitimate purposes even where it is known that the means will inevitably be used for an infringing purpose. A presumption is raised in favour of authorizing person that such authorization was with respect to an activity which is in accordance with the law and such presumption may be rebutted if it is shown that a certain relationship or degree of control existed between alleged authorizer and the persons who committed copyright infringement. The UK courts have reasoned that the control forms an essential requirement to constitute authorization on the basis that it is the essence of the grant of authorisation that the grantor must retain some degree of actual or apparent right to control relevant actions of the grantee. Under the UK law, an authorization can only come from someone having or purporting to have authority, and an act is not authorized by someone who merely enables or possibly assists or even encourages to do that act. Therefore, the UK law requires a positive act on behalf of the defendant in order to constitute an authorization of infringement and mere enablement of infringement would not constitute authorization.

The issue of authorization has arisen in the UK with respect to manufacture and sale of tape – recording machines which act as a means for the infringement of protected works. The House of Lords in *CBS Songs Ltd v Amstrad Plc* proceeded to hold that such manufacturers and sellers were not authorizing infringement since they did not have control over the tape – recording machines once they were sold. Therefore, the element of control is significant in determination of the liability of the person providing a means for infringement. If interpretation as provided under the UK law is applied in the OSPs liability context, an OSP who retains control over the material posted over his website shall be held liable for authorizing copyright infringement. Conversely, the absence of such control may act as a defence for OSPs from liability for copyright infringement.

**Authorization of Infringement and OSPs Liability: An Analysis under Canadian Law**

Under Canadian law, OSPs liability for authorization of copyright infringement has been specifically decided upon by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*. The Court held that it is impossible to impute actual knowledge on an OSP of a copyright violation, and thus cannot impose liability. The Court noted that OSPs cannot be held liable for authorizing copyright even if the OSP has knowledge that its facilities may be employed for infringing purposes, if it does not purport to grant the person committing infringement, a license or permission to infringe. A finding of authorization requires a demonstration that the defendant gave approval to, sanctioned, permitted, favoured, encouraged infringement. According to the Court, such finding cannot be based on mere knowledge that someone might be using a neutral technology for infringing purposes. However, as obiter, the Court did observe that where the OSP has notice of the infringing activities and fails to take remedial action, the same may lead to an inference of authorization of copyright infringement.

**Authorization of Infringement under Australian Law: Providing Clarity through Statute**

The Australian courts have shed further light on the issue of authorization of copyright infringement. Under the Australian law, a person who makes available a means by which an infringement of copyright may be committed and makes it available knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use. In *Moorhouse v University of New South Wales*, the leading case on authorization under Australian law, question arose regarding liability of a university who provided photocopiers which were used for photocopying copyrighted works. The High Court of Australia held that authorization was established on the basis that the university knew or had reason to suspect that the photocopiers were being used for infringing purposes and it failed to take reasonable steps to prevent the same. Therefore, the Australian approach shifts the duty on to the party providing means for infringement to ensure that the means so provided by such party are not utilized for infringing
purposes and the party is required to take affirmative action to ensure that the use is limited to legitimate purposes. In fact, the Australian courts have held that the power to prevent an infringement could be regarded as a significant component to the power of authorizing an infringing use.\(^49\)

Similar to the position under UK law, in *Australasian Performing Right Association Ltd v Metro on George Pty Ltd*\(^50\), Bennett J agreed that mere facilitation of infringing conduct and knowledge that there is likelihood that there will be infringing use are insufficient to constitute authorization. The element of control is necessary to constitute authorization to infringe copyright. However, in contrast to the UK position, under Australian law, the question remains open as to what degree of connection or control is necessary between the alleged authorizer and primary infringer. Inactivity or indifference, exhibited by conduct, by acts of commission or omission, may reach a degree from which authorization or permission may be inferred.\(^51\)

The likelihood of the occurrence of the infringing act, as well as the evidence of the degree of indifference displayed are relevant to a determination of whether the infringement of copyright has been authorized.\(^52\)

In 2000, by virtue of an amendment to the Copyright Act, 1968 (the Australian legislation on copyright), Section 36(1A) was introduced. Section 36(1A) of the Copyright Act, 1968 lays down the following three factors to be accounted for in authorization cases: (i) the extent (if any) of the person’s power to prevent doing of the act concerned; (ii) the nature of any relationship existing between the person and the person who did the act concerned; (iii) whether the person took any reasonable steps to prevent or avoid doing of the act, including whether the person complied with any relevant industry codes of practice.

Section 39B of the Copyright Act, 1968 (and Section 112E) provides that any person who provides facilities for making, or facilitating the making of, a communication is not taken to have authorized any infringement of copyright in a work merely because another person uses the facilities so provided to do something the right to do which is included in the copyright. Thus, Section 39B (or Section 112E) of the Copyright Act, 1968 immunises OSPs against liability for authorization of infringement of copyright if the OSP is merely providing the network facilities by which the private infringement by network users can occur.\(^53\)

The authorization of copyright infringement argument in the OSPs liability context has been argued before and accepted by the Australian Courts. In 2007, the Full Federal Court in *Cooper v Universal Music Australia Pty Ltd*\(^54\), a copyright infringement action was filed against the owner of the domain name ‘mp3s4free.net’ and the Internet service provider (ISP) hosting the website. The website contained hyperlinks to music files on other websites not owned or operated by the defendant. When a person clicked on one of these music file hyperlinks, the music files were transmitted directly to the person’s computer from the other website. The Court held the ISP to be liable for authorizing copyright infringement. On the count of the power of the ISP to prevent infringement, the Court held that the ISP was responsible for hosting the website and providing necessary connection to the Internet, and thereby had the power to withdraw such hosting. The failure on part of the ISP to take any steps to withdraw the website was indicative of the fact that they did not take any steps to prevent infringement. Further, the Court denied the protection available under Section 112E on the grounds that the immunity under the said section is not available to a host who is on notice of an irregularity and deliberately elects not to investigate the operation and contents of a site. It is pertinent to note that this part of the judgment effectively incorporates the notice and takes down policy with respect to Australian law on OSPs liability.

In a highly publicized OSPs liability dispute, an Australian Court, in October 2009, started hearing a matter between the Australian Federation Against Copyright Theft (AFACT) and an OSP iiNet.\(^55\) The core issue involved in the matter is the authorization of infringement by the OSPs.\(^56\) The decision in this case shall provide more clarity regarding applicability of authorization of infringement argument for imposing liability on OSPs for copyright infringement.

**The Potency of ‘Authorization of Infringement’ Argument in the Indian Context**

The position of OSPs liability in India is likely to depend on the interpretation which Indian Courts accord to the term ‘authorize’ under Section 14 of the Act. In light of the above stated position of law in different jurisdictions around the world, it is submitted that the retention of control, profits made by the OSPs and the non-removal of infringing
material on receipt of information regarding the same shall be relevant factors for determining the liability of OSPs. Further, the test of control itself may vary, as is indicated by the diverse approaches adopted by the courts in the United Kingdom and those in Australia.

It is relevant to note that the Copyright Act, 1957 does not have any corresponding provision to Section 39B (or Section 112E) of the Australian legislation which provides immunity to OSPs. In absence of such a provision, the authorization of legislation which provides immunity to OSPs. Further, the test of control itself may vary, as is indicated by the diverse approaches adopted by the courts in the United Kingdom and those in Australia.

**Secondary Liability: Providing ‘a place’ for Communication of Work to the Public**

Under the Indian statute, secondary liability may be accorded to OSPs under Section 51(a)(ii) of the Copyright Act, 1957. Section 51(a)(ii) stipulates that a person, who permits any place to be used for communication of work to the public for profit and where such communication constitutes an infringement of the copyright in the work, shall be liable for copyright infringement. Therefore, even in cases where the intermediary is responsible only to the extent of providing a place for communication of the work, he may be held liable for infringement of the copyright in the work though he has not performed any act which directly infringes the copyright. This section has a bearing on OSPs liability as OSPs may be construed to be providing a ‘place’ in the form of cyberspace (in form of bulletin boards etc.) where the subscribers may communicate to the public certain work in which copyright subsists. OSPs allow their servers to be used for the storage and transmission of information of Internet users and the same may be construed to be ‘a place’ for the communication of copyrighted works to other users of the Internet.57

The term ‘communicate to the public’ has been defined under Section 2(ff) of the Act and includes the communication of the work through any means of ‘display or diffusion’ which may be interpreted to include the means provided by the OSPs.

Another important ingredient of the section is that the OSPs must provide the services for profit. Such profits may be associated with either payments made by the end users of services or proceeds from the advertisements hosted by the OSPs along with the infringing material.3

The provision makes available to the OSPs, the defence of lack of knowledge and that of absence of reasonable ground for believing that such communication would lead to infringement. This defence is similar to the defence of absence of knowledge which is available under United States Copyright law for contributory infringement which requires that secondary infringer ‘must know or have reason to know’ of the direct infringement.58 In such cases, the OSPs may argue that the general knowledge that infringement is likely to occur is not sufficient and that the doctrine of actual or constructive knowledge may be applied. Such arguments may be fortified by reference to American jurisprudence on the issue which requires specific evidence to prove such actual or constructive knowledge on part of the defendant.59

**Criminal Liability for Copyright Infringement**

Section 63 of the Act stipulates that any person who abets the infringement of copyright in a work shall bear criminal liability and would be liable to be punished with imprisonment for a specific term and for the payment of fine. This section is relevant to OSPs liability as the acts of OSPs may be construed to be ‘abetment’ of the infringement of a copyright. The term abetment is defined under Section 107 of the Indian Penal Code, 1860 (hereinafter referred to as IPC) according to which a person is said to abet an offence if he instigates, engages in a conspiracy or intentionally aids the commission of such offence.

A person is said to ‘instigate’ another to act, when he actively suggests or stimulates him to the act by means of language, direct or indirect, and it may be in the form of express solicitation, or of hints, insinuation or encouragement.60 Instigation necessarily connotes active suggestion or stimulation to the commission of the act.61 However, instigation must be differed from mere placing of temptation of committing offence and mere acquiescence or permission to commit offence does not amount to instigation.60 Therefore, in a criminal case, the OSPs may take a defence that providing of means to commit offence is not sufficient and, absence of an active stimulation obviates it from liability. Further, intentional aiding clause under Section 107 requires an intention to be proved on part of the OSPs and, therefore, liability may be negated by the OSPs by producing evidence that it never ‘desired’ (intention is often defined as a conjunction of knowledge and desire) that such means be used for infringing activities.
It further bears noting that the failure to prevent the commission of an offence does not constitute abetment. However, under criminal law, passive assistance may amount to abetment of the offence, in cases where the accused have the intent to commit said unlawful act. In this context, the lack of intent on part of the OSPs shall be an important consideration for the courts to impose liability for third party content. In the opinion of the author, the intent of the OSPs that infringement be committed through the medium hosted by him will be required for the applicability of this section. This would cover cases where the primary intent of the OSPs behind hosting the website is to derive revenue from the illegal distribution of copyright works, even where the website could be used for distribution of work which was in the public domain.

Conclusion
The scope of online service provider liability for copyright infringing third party content under the Indian law has seen a paradigm shift with the IT (Amendment) Act, 2008 coming into force. In section 79 of the IT Act, 2000 (as amended), India has its own ‘safe harbour provision’ which provides immunity to intermediaries for third party content. In the opinion of the author, the intent of the OSPs that infringement be committed through the medium hosted by him will be required for the applicability of this section. This would cover cases where the primary intent of the OSPs behind hosting the website is to derive revenue from the illegal distribution of copyright works, even where the website could be used for distribution of work which was in the public domain.

References
2. For instance, in Canada, the Canadian Supreme Court in Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers, 2004 SCC 45 determined the liability of the online service providers under the existing Canadian Copyright Act, R.S.C. 1985.

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The Information Technology (Amendment) Act, 2008 (No. 10 of 2009) [hereinafter IT(Amendment) Act, 2008].

Section 79 of the IT Act, 2000 prior to amendment read as: ‘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 third party information or data made available by him if he proves that the offence or the contravention was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence or contravention.’


Compare this ‘notwithstanding anything contained in any other law for the time being in force’ with the language often employed in Indian statutes which signifies that the provision has overriding effect over the provisions of other statutes but not over provisions contained in the same statute.

For instance, offences covered under Section 43 of the IT Act, 2000 (such as damage, deletion and alteration of data) may also have implications on copyright liability. In such cases, the proviso to Section 81 might operate to the effect that liability may arise both under Section 43 as well as under the Copyright Act, 1957.

Section 2(w) of the IT Act, 2000, prior to amendment, read as follows: ‘intermediary with respect to any particular electronic message means any person who on the behalf of another person receives, stores, transmits, that message or provides any service with respect to that message’. 

Section 79(2)(a) of the IT (Amendment) Act, 2008 (No. 10 of 2009).

The term ‘Internet Service Provider’ refers to a company which provides access to the Internet to its subscribers for a specific monthly fee. It leases access to computer facilities to subscribers, thus allowing subscribers to access the Internet.


Lee, Decoding the DMCA safe harbour provisions, Columbia Journal of Law & Arts, 32 (2009) 233; This corresponds to Section 512(c) of 17 USC 512 (Digital Millennium Copyright Act) wherein such procedures mandating the removal of information have been to as ‘notice and take down procedures’.

17 USC 512(c)(1)(c).


Section 512(g)(2)(B) of the DMCA, 1998.


In 2007, T–series has instituted proceedings against Youtube.com and Google for copyright infringement of its works. The matter is currently at its interim stage and no determination of legal principles can be made by reference to the case. For further information on this matter, see Mishra and Dutta, Striking a balance between liability of Internet Service Providers and protection of copyright over the Internet: The need of the hour, Journal of Intellectual Property Rights, 14(4) (2009), 321 – 329; In the case of JK Rowling and Anr v Mr Vinay Varma and Anr, (CS(OS) No. 1242 of 2004 before the Delhi High Court) bazee.com (subsequently ebay) was restrained from displaying offending ads on its website, and continued an injunction granted on the basis of a statement made by the defendants to the effect that they would not display the offending ads. Further, in the case of Himalaya Drug Co v Sumit (CS(OS) No. 1719 of 2000 before the High Court of Delhi) the alleged infringer hosted the content on Go2Net’s website. Go2Net, the ISP, removed the infringing content from its server on receiving a copy of the court order. This was a purely volitional act on behalf of Go2Net since it was not made a party to the suit. None of the above cases through any light on the principle of intermediary liability for copyright infringing third party content in India, and there seems to be no judicial deliberation on this issue.

Time Warner Entertainment Co v RPG Netcom and Ors, AIR 2007 Del 226.


Moorhouse v University of New South Wales, [1976] RPC 151.


Moorhouse v University of New South Wales, [1976] RPC 151.
