

“Infringement Liability of Internet Service Providers and Hosts”

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As per the definition given by the Oxford Dictionary of Law, “Copyright” is defined as:

"The exclusive legal right, given to the originator or his or her assignee for a fixed number of years, to print publish, perform, film, or record literary, artistic or musical material, and to authorize others to do the same".¹

In simple words copyright protects the ownership and of the work of its creator. The World Intellectual Property Organization defines intellectual property as any creation of the mind, inventions, literary and artistic works, and symbols, names, images and designs used in commerce.² Copyright infringement occurs when intellectual property is reproduced, performed, broadcast, translated or adapted without the express permission of the creator or the group/individual licensed to handle the material in question.

The copyright statute gives variety of rights to its owner i.e. right to distribution, right to make copies of his/her own work and right to publically perform or display them. This protection of copyright is also available to the works which are transmitted through net.

The digital technology affects our life in many ways the availability of online resources has changed everything from hunting for a new house to reading the newspaper to purchasing plane tickets, and as a result has disrupted established structures, so the need for protection of these digital content was required because its directly affects the life of each and every individual, for this the copyright statute has made various efforts to protect these digital content.

Earlier copyright was given to the authors/publishers of the books. Later it was enormously extended to cover many intellectual creations like paintings, sculptures, musical works, the latest being computer programme.³

The materials available on the internet must pass the test of originality in order to claim copyright over it. Neither registration nor a claim to copyright in the work requires to be expressly made, nor some reasonable notice asserting the claim to copyright needs to be made.⁴ Thus, copyright subsists in all materials available on the internet.

¹ Dr. Vasudevan T. M & Suchithra K. M, *Copyright Awareness of Doctoral Students in Calicut University Campus*, Vol 3, Issue 4, International Journal of Digital Library Services, 95, 94-110 (2013).

² Serkan Çelik & Murat Akçayır, *Perceptions of Academic Staff toward Copyright of Educational Materials*, Vol 4, Issue 2, World Journal on Educational Technology, 69, 68-80 (2012)

³ Ipsita Mishra, *Impact of Digital Technology on Copyright*, LEX WARRIER (September 18, 2015) <http://lex-warrier.in/2013/10/impact-digital-technology-copyright/>

⁴ *Id*

Over the years Internet Service Provider (ISP) has helped influence, shape and moulds the telecom policies, so that ISPs and entrepreneurs in the business of internet can setup and grow their services in an environment that is supportive and enabling.⁵ In the last 10 years of its existence, it has been party to breaking down monopolistic structures in telecom, bringing down barriers to entry for ISPs. It helped shape India from being a bandwidth hungry to a bandwidth surplus country. It was the competitive spirit of the ISP members that, internet access became so widely and cost effectively available to our countrymen. These very ISPs helped to connect India to the rest of the world so effectively that today BPO and call centers can make their global presence felt. India is amongst the top 10 countries of the world in terms of the number of internet users. Today ISP is the recognized apex body of Indian ISPs worldwide. ISP has access to and interacts frequently with international bodies and platforms and is frequently consulted by them on measures for future trends and growth of Internet. It works closely with the Government, the Regulator as well as the major Industry Chambers. It supports exchange of delegations, business visitors from across the globe which provides ISP members a chance to network widely and seek opportunities elsewhere too. It's a platform for the Solution Provider's community such as Hardware and Software manufacturers and suppliers to gain easy access to their ISP clients promote their products and services through personal meetings and through events supported or sponsored by ISP.⁶

Liability for the copyright infringement on the Net can fall upon the infringer himself or upon the Internet Service Provider (ISP). ISPs can be brought under the provision of section 51(a) (ii) of the Copyright Act, 1957 for the online copyright infringement. According to this section, if a person “permits for profit” another person to use “any place” to communicate constitutes infringement, or facilities such infringement under certain conditions, such person may be held liable for such an act.⁷

The provisions relating to the ISPs are specifically enumerated in the Information Technology Act, 2000 which an Internet service provider is referred to as “Internet Service Provider”. The Act specifically imposes liability on the ISPs, interlia, for the copyright infringement. Accordingly, an ISP may be held liable for any third party information or data made available to him by any other person. He can escape from liability, if he proves the offence or contravention was committed without his knowledge or he had exercised all due diligence to prevent such violation of copyright.⁸

Section 43(a) of the IT Act is designed to prevent such persons from infringing acts. According to this section, if any person accesses or secures access to a computer, computer system or computer network or downloads, copies, extracts any data, database or information from it,

⁵ Internet Service Providers Association of India, *Promote Internet/Broadband for All*, <http://www.ispai.in/UI/index.php> (September 18, 2015)

⁶ *Id*

⁷ Mishra, *Supra* note 3

⁸ DR. MN SIROHI, *CYBER TERRORISM AND INFORMATION WARFARE*, 27 (Alpha Editors 1st ed. 2015).

including information or data held or stored in any other medium, without permission of the owner or any other person who is in charge of it, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected which is deterrent enough to prevent copyright violation.⁹

The liability under Copyright Act falls under two categories: civil and criminal. As for as the former is concerned; the remedies may be injunction, damages or accounts for profits. In the case of the latter, normally, imprisonment for a term between six months and three years can be imposed. In addition to this the fine amount between fifty thousand and two lakhs shall also be imposed upon the infringer.¹⁰

Internet Service Providers can act as hosts storing information posted by a subscriber. ISPs also act as a conduit for messages between users, the transmission involves the copying of the message along the way and at the destination's electronic mailbox. Unless the transmission is permitted, the transmission of a file over the Internet and subsequent "copying" onto a users machine may constitute "authorizing" copyright infringement by the person who transmits the file (For an analogy to TV cable companies authorizing infringement).¹¹

It has been *suggested* that under Canadian copyright law the transmission of a file containing a musical work over the Internet might be a performance "in public". Since a "performance" must be a visual or acoustic representation of the work, unless the transmission over the Internet is "real-time" and not merely the transmission of a file for later "playing", such activity is more likely to be found to be a *communication of the work to the public by telecommunication*.¹²

In US, the "service provider" means an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received. In India, 'network service provider' means an intermediary.

Types of liability:

- Direct liability: if any exclusive right of copyright owner is infringed
- Vicarious liability: when a person has a duty to prevent infringement and he can do but he prevents doing it and moreover benefits from it
- Contributory liability: when a person has knowledge of the infringing activity and participates in the act of direct infringement

⁹ Information Technology Act, 2000, § 43

¹⁰ *Id*

¹¹ Donald M. Cameron & Ogilvy Renault, *Copyright on the Internet*, JURISDICTION (September 17, 2015) <http://www.jurisdiction.com/netcopy.htm>

¹² *Id*

INTERNET AS THREAT AND CHALLENGE:

One of the most challenging aspects is that of policing of the net. It has become very difficult to curb infringing acts as internet is everywhere yet it is nowhere today.

Copyright law tolerates some of the acts which otherwise amount to “abuse” of copyright of the authors. A lengthy list has been provided under section 52 of the Copyright Act, 1957. The copyright act extended the list of acts amounting to infringement in respect of computer programmes. The “purpose” for which the copied material is used determines whether there is an infringement or not.

CASE LAWS:

Yahoo Inc Vs Akash Arora was the first case in relation to infringement related to internet. The domain name yahooindia.com (defendant) was restrained by the High Court to be used as a domain name on the basis that trademark law applies on an equal basis on internet. The plaintiff owned the famous internet domain name yahoo.com.

In the case of *Rediff Communication Ltd Vs Cyberbooth & Anr*, defendant was registered as radiff.com as domain name and was enjoined for using it. The high court observed that the domain name is more than internet address and should get equal protection as trademark.