

# Liability of Internet Service Providers in the Context of Copyright Infringement in India- A Critical Analysis

**Dr.Heena Basharat**

Assistant Professor, School of Law, University of Kashmir.

## **ABSTRACT**

The ISPs present an attractive regulatory target in relation to online copyright infringement. The reasons for this are both pragmatic and principled. One – the ISPs by virtue of their mediating role are in a position to control third party actions. They can also be used in a compliance-focused way at the pre wrongdoing stage by relying on their monitoring/surveillance potentials – thus reducing the amount of delinquent behaviour .... Two, primary wrongdoers are difficult to sue. By contrast, ISPs are likely to be locatable, fewer in number and with deeper pockets. However, holding ISPs liable for copyright infringement committed by their subscribers has its downside. Impracticability of monitoring the Internet is often cited as a defence by those who argue against imposing liability on ISPs.

Concerns of impracticability (of monitoring) and unfairness notwithstanding, ISPs are being increasingly brought under the legal scanner by nations across the world. This is perhaps because ISPs are "the most important and obvious focal point of Internet control".

Liability of ISPs initially rooted in common law doctrines has albeit, for quite sometime now, shifted to occupy centre stage in the regulatory framework that governs the Internet. The paper attempts to critically evaluate liability of ISPs under the Indian Copyright Act in the light of the amendments to the Act of 1957.

**Key words:** Internet intermediary, safe harbor, Notice and takedown, liability of isps, copyright infringement

Internet intermediaries are key drivers in the development of the Internet as well as in distributing creative content. They host, locate and search for content and facilitate its distribution. Their increasing influence in recent years, as well as their evolving role has led to a debate regarding their liability in relation to online copyright infringement. This controversy is a direct result of the Internet's phenomenal growth. The web 2.0, user-generated content (UGC) websites, the wide spread of online streaming websites, and free hosting of large files are just some of the many examples of the constantly evolving online environment.

The ISPs present an attractive regulatory target. The reasons for this are both pragmatic and principled. One – the ISPs by virtue of their mediating role are in a position to control third party actions. They can also be used in a compliance-focused way at the pre wrongdoing stage by relying on their monitoring/ surveillance potentials – thus reducing the amount of delictual and delinquent behaviour<sup>1</sup>... Two, primary wrongdoers are difficult to sue. This difficulty stems from the fact that the primary wrongdoers may be too numerous or acting under the cover of anonymity or pseudonymity or be living in another country where judgements for damages are difficult or impossible to get recognised and enforced, or they may have no attachable assets. By contrast, ISPs are likely to be locatable, fewer in number and with deeper pockets. However,

\* Dr. Heena Basharat, Assistant Professor, School of Law, University of Kashmir

<sup>1</sup> Uta Kohl, "The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond – Connectivity Intermediaries" 26(2) *International Review of Law, Computers & Technology* 186 (2012).

holding ISPs liable for copyright infringement committed by their subscribers has its downside. Impracticability of monitoring the Internet is often cited as a defence by those who argue against imposing liability on ISPs.

In the words of CompuServe General Counsel and Secretary Steve:

"... in performing their various system functions,(online service providers) simply cannot review and monitor all the data that is transmitted over and stored in their networks or bulletinboards. Indeed, trillions of bits of data—representing millions of individual messages—travel across the country and around the world each day. ... Providers of online services do not know what is being uploaded onto, transmitted through, stored upon, and downloaded from their systems".<sup>2</sup>

Concerns of impracticability (of monitoring) and unfairness notwithstanding, ISPs are being increasingly brought under the legal scanner by nations across the world. This is perhaps because ISPs are "the most important and obvious focal point of Internet control"<sup>3</sup>.

Liability of ISPs initially rooted in common law doctrines has albeit, for quite sometime now, shifted to occupy centre stage in the regulatory framework that governs the Internet. In the succeeding text, liability of ISPs shall be critically discussed under the Indian Copyright Act in the light of the amendments to the Act of 1957.

### **Copyright Act 1957 and IT Act 2000: Interwoven or Independent**

The liability regime of ISPs was conspicuous by its absence in the Copyright Act of 1957 till the recent past.<sup>4</sup> In the absence of provisions relating to liability of ISPs the field was occupied by Section 79 of the Information Technology Act 2000. However, Section 79 provided immunity to service providers only with respect to liability arising under the IT Act 2000 and the rules and regulations there under.<sup>5</sup> This follows from the language employed by Section 79 which provides 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".

Therefore, the question of immunity of service providers under other Statutes was unaddressed across the legal landscape. Pertinently, Information Technology (amendment) Act, 2008 which came into force on 27 October, 2009 has brought significant changes in the ISP liability regime. Section 79 (1) as amended, contains a non obstante clause to the effect "*Notwithstanding anything contained in any other law for the time being in force...*"<sup>6</sup> thereby carving out safe

<sup>2</sup> Hearing on H.R. 2281 and S. 1284 before the Subcommittee on the Courts and Intellectual Property of the House Judiciary Committee and Senate Judiciary Committee, NII Copyright Protection Act of 1995, 104th Cong., 2nd sess. (Feb. 8, 1996) (Statement of Steve Heaton, General Counsel and Secretary, CompuServe).

<sup>3</sup> Jack Goldsmith and Timothy Wu, "Digital Borders - National Boundaries Have Survived in the Virtual World- and Allowed National laws to Exert Control over the Internet" *Legal Aff.* 40,6 (2006).

<sup>4</sup> Provisions relating to the liability of ISPs were incorporated in the Copyright Act by the Amendment Act of 2012.

<sup>5</sup> For a contrary view, See Farooq Ahmed, Liability limits of Service Providers for Copyright Infringement, *Journal of Intellectual Property Rights*, 181-190(2003).

<sup>6</sup> Section 79 of IT Act, 2000 (as amended in 2009) reads as under :  
"Exemption from liability of intermediary in certain cases -

- (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.
- (2) The provisions of sub-section (1) shall apply if
  - (a) the function of the intermediary is limited to providing access to a communication system over which

harbours for ISPs under all Statutes. Ironically, the same amendment act added a proviso to Section 81 which reads as.

*'The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*

*Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970).*

Clearly, the proviso to Section 81 bars the application of Section 79 to cases involving infringement of copyright. To further substantiate this argument, Section 79 opens with a non obstante clause i.e., "Notwithstanding anything contained in any other law for the time being in force...". This would mean Section 79 has an over riding effect over all other legislations, but not over Section 81 as the words used in Section 79 are "any other law". In effect, Section 81 would have primacy over Section 79. Any other interpretation of Section 79 and Section 81 of the IT Act would be tenuous and artificial. This argument is further fortified by the observation of the Delhi High Court in *Super Cassette Industries v. My space & Another*,<sup>7</sup> wherein the Court held that the combine[d] effect of reading Section 81 and the proviso is that the provisions of IT act may override other laws for the time being in force but they cannot restrict the rights of the owner under the Copyright Act and the Patent Act. The Court observed:

"Section 79 is, thus, meant for all other internet wrongs wherein intermediaries may be involved including auctioning, networking servicing, news dissemination, uploading of pornographic content but not certainly relating to the copyright infringement or patent infringement which has been specifically excluded by way of proviso to Section 81. This can be only possible harmonious construction between the two Acts [Copyright Act and the IT Act] which makes both the Acts workable".<sup>8</sup>

Further, the Court held:

"... there is no impact of provisions of Section 79 of IT Act (as amended on 2009) on the copyright infringements relating to internet wrongs where intermediaries are involved and the said provision cannot curtail the rights of the copyright owner by operation of proviso of Section 81 which carves out an exception in cases relating to copyright or patent infringement".<sup>9</sup> Further such a construction is strengthened by the incorporation of certain amendments in the Copyright Act discussed below which specifically deal with the liability of ISPs.

In the light of the above discussion, it is also submitted that India has followed the DMCA pattern in embracing the vertical approach to intermediary liability.

---

information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not -

(i) initiate the transmission,

(ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission;

(c) The intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if -

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material or that resource without vitiating the evidence in any manner

Explanation: For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."

<sup>7</sup> 2011(47) PTC 49 (Del).

<sup>8</sup> Id. at 102.

<sup>9</sup> Id. at 103.

### **Analysis of Liability Regime of ISPs under the Indian Copyright Act**

Before analysing the liability regime of ISPs under the Indian Copyright Act, it would be pertinent to discuss the judgment of the Delhi High Court in *Super Cassette Industries v. My Space & Another*.<sup>10</sup>

In this case, the plaintiff claiming to be the owner of the copyright in the repertoire of songs, cinematograph films, sound recordings etc. filed a suit for restraining infringement of copyright, damages etc. alleging that defendant No. 1 (myspace.com), a social networking site, offering a variety of entertainment applications including sharing, viewing of music, images, cinematograph works, was infringing their copyrighted material. The Plaintiff sought interim relief from the Court for an order of permanent injunction restraining the defendants, their officers, employees, agents, servants and representatives and all others acting on their behalf and in active concert or participation with them or any of them from reproducing, adapting, distributing, communicating, transmitting, disseminating or displaying on their website www.myspace.com, www.in.myspace.com or any sub-domain thereof or otherwise infringing in any manner, the cinematograph films, sound recordings and/or the underlying literary or musical works in which the plaintiff owned exclusive, valid and subsisting copyright(s) and other interim reliefs.

In its defence, *My Space* cited the following defences:

**Non-Specificity of Prayer:-** *Super Cassette Industries's* claim in the suit was for a blanket injunction on copyrighted content on the MySpace website. This imposed a clearly untenable, even impossible, burden for intermediaries to comply with.

**Knowledge:-** MySpace argued that no liability could accrue to it on two counts. The first was that it had no actual or direct knowledge or role in the selection of the content, while the second was that no control was exercised, or was exercisable over the uploading of the content. Additionally, there was no possible means by which it could have identified the offending content and segregated it from lawful content, or monitored all of the content that it served as a platform for.

**Intermediary status and Safe Harbour Protection:-** In relation to its status as an intermediary, MySpace raised several arguments. First, it argued that it had immunity under Section 79 of the IT Act and under the US Digital Millennium Copyright Act (US DMCA). Another argument restated what is arguably the most basic tenet of intermediary liability that merely providing the platform by which infringement could occur cannot amount to infringement. In other words, the mere act of facilitating expression over internet does not amount to infringement. It then made reference to its terms of use and its institution of safeguards (in the form of a hash filter, a rights management tool and a system of take-down-stay-down), which it argued clearly reflected an intention to discourage or else address cases of infringement as they arose. MySpace also emphasized that a US DMCA compliant procedure was in place, although T-Series countered that the notice and take down system would not mitigate the infringement.

**Relationship between MySpace and its Users:-** Taking from previous arguments about a lack of control and its status as an intermediary, MySpace argued that it was simply a licensee of users who uploaded content. The license was limited, in that MySpace was only allowed to alter user-generated content so as to make it viewable.

---

<sup>10</sup> Supra Note 7.

The Court concluded that infringement in terms of Section 51 (a) (ii) had occurred in this case, since web space is a “place” in the terms required by the section and there were monetary gains in the form of ad revenue. The argument as to a lack of knowledge of infringement was also rejected on the ground that MySpace’s provision for safeguards against infringement clearly established a reason to believe that infringement would occur. Also referenced as evidence of knowledge, or at least a reason to believe infringement would occur, was the fact that MySpace modified the format of the content before making it available on its website. It also tested for infringement by authorization in terms of Section 14 read with Section 51 (a) (i), but concluded that this did not arise here.

The Court accepted the argument made by T-Series to the effect that Sections 79 and 81 of the IT Act must be read together. Since Section 79 would be overridden by Section 81’s non-obstante, the effect would be that rights holders’ interests under the Copyright Act will erode intermediaries’ immunity under Section 79.

The Court rejected the argument that the provision of due diligence or curative measures post-infringement would be sufficient. Specifically, the contention that the quantum of content being uploaded precludes close scrutiny, given the amount of labour that would be involved, was rejected. Content should not immediately be made available but must be subject to enquiries as to its title or to authentication of its proprietor before it is made available. In fact, it held that, “There is no reason to axiomatically make each and every work available to the public solely because user has supplied them unless the defendants are so sure that it is not infringement. If the defendants cannot exercise diligence of this nature, the necessary inferences can be drawn is that the defendants are making itself liable for infringement by its inactions to enquire about the source of the works at the appropriate stage.”<sup>11</sup>

There was also an attempt to distinguish the Indian legal framework from the DMCA. While that law calls for post-infringement measures, it was argued that in India, on reading Section 51 with Section 55, the focus was on preventing infringement at the threshold. In response to the case that it would be impossible to do so, the Court held that since the process here requires MySpace to modify the format of content uploaded to it to make it viewable, it will have a reasonable opportunity to test for infringement.

The Delhi High Court’s judgment is worrying for a number of reasons. The Court failed to appreciate the working of intermediaries online and disregarded all pragmatic considerations involved. The judgment imposes a general duty to monitor all the content that is uploaded by its users and scrutinize them for copyright infringement. Such an approach is unheard of in jurisdictions across the globe. For example, Article 15 of the E-commerce Directive<sup>12</sup> prevents Member States from imposing a “general obligation to monitor” content which they transmit or store as provided in Articles 12, 13 and 14, nor a general obligation to “actively seek facts or circumstances indicating illegal activity.”

In effect, the judgment implies that even if an intermediary applies all available means to prevent the publication of potentially infringing content, it would remain potentially liable for any illegality in the content, even though the illegality could not have been detected or addressed.

Further, the Court imposes a duty on the ISP to prevent infringement at the threshold. This puts the ISP in the position of a judge to determine whether or not there is infringement. Given the general difficulty in conclusively establishing whether there is an infringement at all, due to the

<sup>11</sup> Id. at 111.

<sup>12</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

complexities in applying the exceptions contained under Section 52 (which talks about fair-use), it should not be for ordinary private or commercial interests such as ISPs to sit in judgment over whether content is or is not infringing. In order to minimize its own liability, the likelihood of legitimate content being censored by the intermediary prior to posting is high. The consequences for civil liberties, and free speech and expression online in particular, appear to have been completely ignored in favour of rights holders' commercial interests.

Pertinently, the judgment was given before the amendments of 2012, when the liability regime of ISPs was conspicuous by its absence in the Copyright Act of 1957. In the light of the recent amendments, the judgment loses much of its force specially since the amendments have incorporated the notice and take-down (NTD) mechanism in the Copyright Act. NTD was cited as a defence by the defendants and rejected by the Court on the ground that the Indian Act contains no such procedure and hence reliance on the provisions of the Digital Millennium Copyright Act (which provides for NTD) was of no use.<sup>13</sup>

### **Liability of ISPs after the Amendment Act of 2012**

The provisions in the Copyright Act which have a bearing on the liability of ISPs are incorporated in Section 52(ii)(b) and (c)<sup>14</sup>. Section 52(ii)(b) provides that the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public shall not constitute an infringement of copyright. Further, Section 52(ii)(c) provides that transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, shall not constitute an infringement of copyright where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy.

It is however, submitted that these provisions are lacking in a significant number of areas.

The words used in Section 51(ii)(c) are "*person responsible*" which presumably means an intermediary. Further, it refers to two things which might nail an ISP.

First, is '*awareness*,' which, it is submitted turns on actual knowledge of copyright infringement. The second is '*reasonable grounds for believing*' which, it is submitted refers to constructive knowledge of copyright infringement. This criteria of '*reasonable grounds for believing*' lacks sufficient clarity. For example, if an intermediary is aware that its services could be used for infringing copyright, would it mean that "*it had reasonable grounds for believing*".

If such a construction is adopted then a duty would be incumbent on the ISP to actively monitor its users for copyright infringement. Such a proposition, besides, being onerous and a practical impossibility would also be in direct contradiction with both the DMCA<sup>15</sup> and the EC directives<sup>16</sup>

<sup>13</sup> 2011 (47) PTC 49(Del) at 105.

<sup>14</sup> Section 52: Certain acts not to be infringement of copyright. - The following acts shall not constitute an infringement of copyright, namely: (b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public; (c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent Court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.

<sup>15</sup> 17 USC § 512(m)

which specifically absolve an ISP from any duty to monitor. Moreover, the existence of a general duty to monitor content is rejected in practically all the jurisdictions studied, with respect not only to transmission and network access (mere conduit) activities, but also to the hosting of information.<sup>17</sup>

Imposition of such a duty on the ISP to monitor its customers would, it is submitted, violate the right to privacy of such customers. Pertinently, the right to privacy is a fundamental right guaranteed under Article 21 of the Constitution.

It is also submitted that the adoption of a seemingly vague criteria "reasonable grounds for believing" is deliberate. By this, the legislature has left the field open for judicial maneuvering in individual cases. Thus, precision has been sacrificed at the altar of practicality.

### Notice and Takedown (NTD) Regime

The proviso to Section 51(ii)(c) contemplates a notice and takedown(NTD) regime which has become commonplace in copyright legislations across the globe. The Indian NTD regime, however, is a poor replica of its global counterparts. For one, it has potentially chilling effects on freedom of speech and expression. Whenever an ISP receives a notice, it will, in all probability, be inclined to remove or block access to the notified content, without bothering to check the veracity of the claim. The consequences of non compliance with the notice can prove fatal to the survival of an ISP.<sup>18</sup> On the other hand, blocking access to the notified content is almost a risk free proposition for the ISP.<sup>19</sup>

Secondly, NTD can result in indiscriminate censorship. The scheme envisaged under the NTD visualises an ISP in the position of a judge who is called on to pronounce upon the validity of a copyright claim. What is more disturbing about such a scenario is that copyright infringement claims are enmeshed in legal technicalities<sup>20</sup> and ISPs are novices at such tasks. Thus the NTD places on the ISPs, a responsibility which they are ill-equipped to handle.

There is a plethora of evidence available globally which reflects the misuse of the NTD regime.

For instance, in research carried out at Oxford known as the 'Mystery Shopper' test a major ISP in the United Kingdom was asked to take down a web page alleged to be a pirate copy.<sup>21</sup> In fact the web page contained an extract from Mill's 'On Liberty', published in 1869 and long in the public domain. Nonetheless, the webpage was removed without demur. The Oxford researchers concluded from this and other examples that *'the current regulatory settlement has created an environment in which the incentive to take down content from the Internet is higher than the potential costs of not taking it down'*.<sup>22</sup> Looking at the roughly similar copyright NTD regime of the DMCA, Urban and Quilter found that almost a third of takedown requests made by rights holders were apparently flawed or unjustified, and that over half the demands for link removal

<sup>16</sup> Article 15 of the E-commerce Directive (2000/31/EC) prevents Member States from imposing a "general obligation to monitor" content.

<sup>17</sup> Ignacio Garrote Fernández-Díez, "Comparative Analysis on National Approaches to the Liability of Internet Intermediaries for Infringement of Copyright and Related Rights" available at: [www.wipo.org](http://www.wipo.org) (Visited on Feb.31,2022)

<sup>18</sup> If the copyright claim proves to be true.

<sup>19</sup> The chances of a customer suing an ISP for breach of contract are remote owing to the non litigious nature of the vast majority of the population. Also, the ISP can indemnify itself from any liability arising from such suit by incorporating terms and conditions to such effect in the contract with its customers.

<sup>20</sup> Defence of fair-use etc are often found complicated by even judges and lawyers.

<sup>21</sup> See discussion in C Ahlert, C Marsden and C Yung, 'How Liberty Disappeared from Cyberspace: the Mystery Shopper Tests Internet Content Self-Regulation' (*'Mystery Shopper'*) available at: <http://pcmlp.socleg.ox.ac.uk/text/liberty.pdf> (Visited on Jan.25,2022)

<sup>22</sup> *Ibid*, at p. 12.

came from competitor companies.<sup>23</sup> The project analyzed all the take down notices (876 in total) received by the search engine Google between 2002 and 2005 and subsequently posted on the Chilling Effects website.<sup>24</sup> 30% of take down notices received raised “obvious” queries as to validity, which a Court would have been bound to consider before granting an injunctive remedy.

These included defenses for fair use, claims over public domain material, and notices in unclear form. The authors commented:

“The surprising number of questionable takedowns we observed, taken in conjunction with the ex ante removal of content, the minimal remedies for abuse of process, and the lack of knowledge about the counter notice procedures, suggest that few are well served by [the NTD process]”<sup>25</sup>.

Thus NTD regimes present a frightening scenario as power is given to ISPs to takedown content in respect of which a complaint has been received irrespective of how ill-founded the copyright claim is. What complicates the matter further, in the Indian context is the absence of any counter notice provisions in the Indian Copyright Act. In such a scenario, the chances of frivolous and ill founded notices being served on ISPs are exponentially higher.<sup>26</sup> Thus, a citizen can be deprived of his right to freedom of speech and expression on the flimsiest of grounds. This, it is submitted would run counter to the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Indian Constitution.

The Supreme Court in *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*<sup>27</sup> held that “Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feelings to others. Freedom of speech and expression is thus a natural right which a human being acquires on birth. It is, therefore, a basic human right. Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers.”

In *Secretary, Ministry of Information and Broadcasting, Government of India and Others v. Cricket Association of Bengal and others*,<sup>28</sup> the SC observed:

The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it, that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc.

<sup>23</sup>Urban J and Quilter L, Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act: Summary Report, available at: [http://mylaw.usc.edu/documents/512Rep-ExecSum\\_out.pdf](http://mylaw.usc.edu/documents/512Rep-ExecSum_out.pdf). (Visited on Jan.2,2022).

<sup>24</sup>See ‘Chilling Effects Clearinghouse’ at <http://www.chillingeffects.org/>, a joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, and George Washington School of Law clinics. The site hosts take down notices voluntarily submitted by private parties and participating ISPs and sites such as Google.

<sup>25</sup>Urban J and Quilter L, Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act: Summary Report, available at: [http://mylaw.usc.edu/documents/512Rep-ExecSum\\_out.pdf](http://mylaw.usc.edu/documents/512Rep-ExecSum_out.pdf). (Visited on March2,2022).

<sup>26</sup>The chances of the ISP complying with the notice are very high as explained earlier.

<sup>27</sup>AIR 1993 SC 171. Paragraph Nos 5, 21, 22&23.

<sup>28</sup>AIR 1995 SC 1236. para-11.



No doubt, the right to freedom of speech and expression is not absolute but subject to reasonable restrictions. The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness...<sup>29</sup>

Giving power to ISPs<sup>30</sup> to deprive a citizen of his right to freedom of speech and expression without proper safeguards<sup>31</sup> is unreasonable and arbitrary, hence violative of Article 19(1)(a).

Furthermore, if a copyright infringement claim turns out to be false, a general remedy available to an aggrieved person is under Section 60<sup>32</sup> of the Copyright Act. It is submitted that the remedy provided under Section 60 is inefficacious, dilatory and time consuming. A separate provision should be incorporated in the Copyright Act which would penalise serving of notices on ISPs based on unfounded and frivolous claims of copyright. This, it is submitted, would ensure that a provision that can have potentially devastating effects on the freedom of speech and expression is invoked with care and caution.

Pertinently, no time frame is provided either in the Copyright Act or the rules framed there under within which an ISP is obligated to remove the content in respect of which a complaint is received.<sup>33</sup> Under the Information Technology (Intermediaries guidelines) Rules, 2011 an ISP is required to act within 36 hours.<sup>34</sup> It is doubtful that Rules framed under the IT Act would be applicable to the Copyright Act in view of Section 81 of the Information Technology Act discussed earlier.

Another issue which lacks clarity is the interplay between the main part of Section 51(c) and its proviso. According to the proviso to Section 51(ii)(c), if the person responsible for storage of content does not receive the Court order within 21 days from the date of receipt of written complaint, directing him to continue the takedown of allegedly infringing material, he may restore access to the notified content. The word used in the Section is 'may' which means that no obligation is imposed on the ISP to restore access to the content in respect of which a

<sup>29</sup> *Chintamanrao and another v. The State of Madhya Pradesh* AIR (38) 1951 SC 118.

<sup>30</sup> Who are private players.

<sup>31</sup> Such as counter notice, judicial oversight etc.

<sup>32</sup> Section 60 of the Copyright Act reads: Remedy in the case of groundless threat of legal proceedings. - Where any person claiming to be the owner of copyright in any work, by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of an alleged infringement of the copyright, any person aggrieved thereby may, notwithstanding anything contained 124[in section 34 of the Specific Relief Act, 1963] institute a declaratory suit that the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats and may in any such suit-

(a) obtain an injunction against the continuance of such threats; and

(b) recover such damages, if any, as he has sustained by reason of such threats.

Provided that this section shall not apply if the person making such threats, with due diligence, commences and prosecutes an action for infringement of the copyright claimed by him.

<sup>33</sup> This is in contradiction to the DMCA which requires the ISP to act expeditiously[17 USC § 512(c)]

<sup>34</sup> Rule 4 of the Information Technology (Intermediaries guidelines) Rules, 2011 made in exercise of the powers conferred by clause (zg) of subsection (2) of section 87 read with sub-section (2) of Section 79 of the Information Technology Act, 2000 (21 of 2000) provides that the intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) of Rule 3, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2) of Rule 3. Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

complaint is received. Assuming that on failure of the complainant to furnish a Court order within the time frame provided by the Act, the ISP restores access to the allegedly infringing material, what would happen later if a suit is brought by the complainant against the ISP alleging violation of copyright. Can the complainant rely on the original complaint that he made to the ISP to show that the ISP had actual knowledge of the infringement. In such a scenario, would the ISP come within the mischief contemplated by the main body of Section 51(ii)(c). Alternately, can the ISP contend that the failure of the complainant to get the Court order within the stipulated 21 days period, entitles it to restore access to the notified content without jeopardising its right to fall within the safe harbour provided by the main body of Section 51(ii)(c). In other words, can the ISP argue that the failure to furnish a Court order within the statutory period of 21 days, would result in forfeiture of the complainant's right to contend that the ISP had actual knowledge of the infringement (actual knowledge being based on the notice served by the complainant).

That said, the chances of an ISP restoring access to content in respect of which a complaint is received are dismal. To safeguard its own interest, an ISP's approach would border on over cautiousness. The only casualty here would be the freedom of speech and expression of the common citizen.