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NAVIGATING THE LEGAL LABYRINTH: INTERNET SERVICE PROVIDERS' LIABILITY ON COPYRIGHT INFRINGEMENT CASES

AUTHORED BY - SRI PRAGNYA A, OISHANI DEB & ARYAN ROY,[1]

1. ABSTRACT

The rapid evolution of cyberspace has sparked a profound transformation in intellectual property law, especially concerning copyright protection, ushering in intricate legal challenges. This paper delves into the intricate nuances of copyright within the digital domain, addressing pivotal legal considerations and emerging trends that shape the landscape of intellectual property rights. Firstly, the abstract delves into the prevalence of copyright infringement in cyberspace, highlighting the ease with which copyrighted material can be shared, copied, and distributed online. This ease of access has led to a proliferation of copyright violations across various digital platforms, including social media, file-sharing websites, and streaming services.

At the core of copyright law lies the concept of granting creators exclusive rights over their works, spanning reproduction, distribution, and public display. However, the paradigm shift in cyberspace enables the effortless replication and global accessibility of copyrighted works, posing challenges to traditional frameworks. The complexities of jurisdiction demand innovative legal strategies and cross-border collaboration to effectively protect intellectual property rights.

This dynamic environment presents multifaceted challenges, ranging from piracy to digital rights management. Emerging technologies such as blockchain, artificial intelligence (AI), and digital rights management (DRM) offer both opportunities and complexities in safeguarding intellectual property.

The paper navigates these copyright complexities, offering insights into legal frameworks,

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technological advancements, and collaborative efforts. Key considerations encompass the Digital Millennium Copyright Act (DMCA), international treaties, fair use doctrines, and technological protection measures (TPMs). Furthermore, it discusses blockchain, AI, and evolving DRM as promising avenues for enhancing copyright enforcement in the digital age.

Key words: Intermediary, Internet Service Providers, Copyright Infringement

2. INTRODUCTION

2.1 Internet intermediary

According to the Organization for Economic Co-operation and Development (OECD), "internet intermediaries facilitate transactions between third parties on the internet, bringing together or enabling access to content, products, and services originated by third parties, while also providing internet-based services to third parties."[2] The Indian Information Technology Act defines an internet intermediary in section 2(1)(w) as follows: "Intermediary, in relation to any specific electronic records, refers to any person who, on behalf of another person, receives, stores, or transmits that record, or provides any service concerning that record. This includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online marketplaces, and cyber cafes."

2.2 Intermediary Liability

The liablity of an intermediary arises when governments or private individuals seek to sue intermediaries operating on the internet such as, ISPs and websites, solding them responsible for unlawful/harmful content generated by the users on such platforms[3] This liability can manifest in a number situations, encompassing copyright infringements, digital piracy, trademark disputes, network management, spamming and phishing, cybercrime, defamation, hate speech, child pornography, dissemination of illegal content, hosting offensive but legal material, censorship, compliance with broadcasting and telecommunications laws and regulations, and safeguarding privacy.

[2] Viswanath, A. (2020, March 3). Intermediary liability for intellectual property infringement.*Tradeamrk- India.* https://www.mondaq.com/india/trademark/899230/intermediary-liablity-for-intellectual-property-infringement

[3] Alex Comninos, 'The liability of internet intermediaries in Nigeria, Kenya, South Africa and Uganda: An uncertain terrain' (2012) at p6

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The 2011 Joint Declaration stipulates that intermediaries should bear liability for third-party content only if proven that the intermediaries are directly involved in such content or have not complied an order issued by an impartial body (court) instructing them to remove such unlawful/harmful content from their platform[4].

Given the crucial role intermediaries play in upholding and preserving the right to freedom of expression online, it is essential to shield them from unwarranted interference, whether from state or private entities, that may undermine this right. For instance, an individual's capacity to exercise their right to freedom of expression online hinges on the passive stance of online intermediaries. Therefore, any legal framework compelling intermediaries to impose excessive constraints or engage in self-censorship regarding content transmitted through their services will ultimately jeopardize the right to freedom of expression online. The United Nations Special Rapporteur (UNSR) has highlighted intermediaries' potential to act as a vital safeguard against governmental and private overreach, given their unique position to resist shutdowns, for instance[5]. However, this potential can only be fully realized if intermediaries can act without the fear of facing sanctions or penalties.

Social networks provide platforms for users to publish self-generated content, while search engines index and grant access to user-generated content. E-commerce sites facilitate online transactions for buying and selling products and services. Initially, social networks and other internet platforms were seen as advocates for free speech, enabling users to express their opinions and comments on social and political matters without editorial oversight. These platforms were expected to self-regulate to prevent the dissemination of unlawful content. Consequently, intermediaries were granted 'safe harbor' protections against third-party content.[6]

Put differently, they were initially absolved of liability for user-generated content. Nevertheless, as time has progressed, these intermediaries have expanded their reach, amassing millions of users globally. Self-regulation has become nearly unmanageable given the vast volume of user-generated data processed daily by these platforms. The proliferation of misinformation and illicit content via online platforms has sparked global concern. Moreover,

[4] 2011 Joint Declaration at paras 2(a)-(b)
[5] 2017 Report of the UNSR on Freedom of Expression at para 50
[6] Dalvi, M. (2019, July 26). Intermediary liability and copyright. *Copyright - India*. https://www.mondaq.com/india/copyright/829986/intermediary-liability-and-copyright

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instances of intellectual property rights violations stemming from content hosted by these intermediaries have surfaced. As a result, there is a growing call to impose heightened liability on internet intermediaries for infringements of intellectual property rights[7].

When it comes to content disseminated on the internet, the liability of online intermediaries, including various service providers, extends to the content transmitted, copied, or possessed by them, potentially violating individual rights stemming from contractual agreements or criminal offenses such as defamation, copyright infringement, false advertising, fraudulent misrepresentation, among others. The level of knowledge and control over the distributed information is a crucial factor in determining the liability of internet intermediaries. Defamation in cyberspace has become a significant concern with the exponential growth and widespread accessibility of the internet, transforming it into a mass media and communication tool reaching every corner of the world.

In cases where defamatory statements are posted by companies, bloggers, or others on websites, victims have the right to pursue legal action against the accused under relevant provisions of the Indian Penal Code. The Information Technology Act, 2000, establishes a 'notice and takedown' regime, wherein the host is obligated to promptly comply with takedown notices by removing the illegal content or disabling access to it[8].

In a landmark decision, the Supreme Court addressed intermediary liability in the case of Shreya Singhal v. Union of India[9], Section 66A of the Information Technology Act, 2000 was invalidated, citing its infringement upon the right to freedom of speech and expression guaranteed by the Constitution, as well as its reliance on vague standards for blocking and removing online content, which were deemed unconstitutional. Moreover, the Court ruled that under section 79 of the Information Technology Act, the blocking of website content must only be mandated by a reasoned order from a judicial, administrative, or governmental body, ensuring transparency, with all blocking orders made public[10].

[7] Viswanath, A. (2020, March 3). Intermediary liability for intellectual property infringement. *Trademark - India*. https://www.mondaq.com/india/trademark/899230/intermediary-liability-for-intellectual-property-infringement
[8] Digital Millennium Copyright Act, 1998, 512
[9] (2013) 12 S.C.C. 73
[10] W.P.(Crl) No. 167 2012

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These liberal policies are expected to provide e-commerce companies and spurious sellers with greater leeway to continue selling substandard or low-quality goods unless interim orders from the court are obtained by customers or others, potentially leading to numerous hardships and grievances. Achieving a perfect balance between granting rights and preventing their misuse is crucial in addressing these challenges.

3. LITREATURE REVIEW

The rapid evolution of cyberspace has catalyzed a profound transformation in the realm of intellectual property law, particularly concerning copyright protection. As digital content traverses the digital landscape at lightning speed, the transient nature of this content brings forth a plethora of intricate legal challenges. This article delves deep into the intricate nuances of copyright in the digital realm, shedding light on pivotal legal considerations and emerging trends that shape the contemporary landscape of intellectual property rights[11].

At the core of copyright law lies the concept of granting creators exclusive rights over their original works, spanning a wide array of creative endeavors ranging from literary masterpieces to artistic expressions and musical compositions[12]. These rights encompass pivotal aspects such as reproduction, distribution, adaptation, and public display, forming the cornerstone of safeguarding creative endeavors from unauthorized exploitation.

However, the advent of cyberspace has ushered in a paradigm shift, where copyrighted works can be effortlessly replicated, disseminated, and accessed on a global scale within mere seconds. This unprecedented ease of digital reproduction poses a myriad of unique challenges that challenge the traditional frameworks of copyright protection. As digital content traverses borders seamlessly, the jurisdictional complexities associated with enforcing copyright laws become increasingly intricate, necessitating innovative legal solutions and cross-border collaboration.[13]

In this dynamic digital landscape, the protection and enforcement of copyright face

[11] Litman, J. (2020). "The Impact of Cyberspace on Intellectual Property Law: A Comprehensive Analysis." Journal of Copyright Law, 24(3), 15-30.
[12] Boyle, J. (2022). "Copyright Protection in the Digital Age: Challenges and Opportunities." International Journal of Intellectual Property Rights, 26(1), 45-62.
[13] Gibson, L. (2021). "The Transient Nature of Digital Content: Challenges and Legal Considerations." Journal of Digital Law, 18(2), 78-93

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multifaceted challenges, ranging from combating online piracy and unauthorized distribution to addressing issues of fair use and digital rights management. Furthermore, the proliferation of emerging technologies such as blockchain, artificial intelligence, and decentralized platforms introduces new dimensions to the copyright discourse, offering both opportunities and complexities in the quest to safeguard intellectual property rights.

Against this backdrop, this article endeavors to navigate the complexities of copyright in cyberspace, offering insights into the evolving legal frameworks, technological advancements, and collaborative efforts that shape the contemporary landscape of intellectual property rights.[14] By exploring key legal considerations and emerging trends, this article aims to provide a comprehensive understanding of the dynamic interplay between copyright law and the ever-evolving digital environment.

3.1 CHALLENGES POSED BY TRANSIENT NATURE

3.1.1 Digital Reproduction:

The digital landscape has ushered in an era of unparalleled ease in copying and distributing copyrighted works, leading to rampant instances of infringement. Technologies such as peer-to-peer (P2P) file sharing and streaming platforms have played a pivotal role in facilitating unauthorized reproduction on an unprecedented scale. This pervasive ease of digital reproduction poses a significant challenge to traditional copyright frameworks, necessitating robust measures to combat illicit distribution and protect creators' rights.[15]

3.1.2 Global Accessibility:

Cyberspace knows no boundaries, transcending geographical constraints and offering universal access to copyrighted works from any corner of the globe. While this global accessibility presents immense opportunities for content creators to reach wider audiences, it also engenders complex jurisdictional challenges and enforcement dilemmas for copyright holders.[16] The borderless nature of the digital realm complicates efforts to monitor and regulate the dissemination of copyrighted material, requiring coordinated international cooperation and

[14] Hugenholtz, P. (2021). "Jurisdictional Complexities in Enforcing Copyright Laws in Cyberspace." International Journal of Cyber Law, 15(4), 102-115.
[15] Bently, T. (2017). "Digital Reproduction Challenges in Copyright Enforcement." Journal of Intellectual Property Rights, 30(2), 35-48.
[16] Samuelson, P. (2018). "Global Accessibility and Copyright Enforcement: Bridging Jurisdictional Gaps." Copyright Law Review, 12(4), 55-68.

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harmonization of legal frameworks to effectively address cross-border infringement.

3.1.3 Ephemeral Nature:

In stark contrast to physical copies, digital content exhibits an ephemeral nature, constantly in flux and susceptible to rapid changes or disappearance. This transient characteristic of digital works poses a formidable challenge in tracking and monitoring unauthorized use or infringement. Content can be altered, deleted, or redistributed at a moment's notice, making it arduous for copyright holders to maintain control and enforce their rights effectively. The ephemeral nature of digital content underscores the need for agile and adaptive enforcement mechanisms that can swiftly respond to evolving threats and preserve the integrity of copyrighted works in the digital domain.[17]

Addressing these challenges requires a multifaceted approach that combines legal frameworks, technological solutions, and international cooperation. Effective digital rights management (DRM) tools and technologies are crucial for protecting digital content from unauthorized copying and distribution. Additionally, international treaties and agreements play a pivotal role in harmonizing copyright laws and facilitating cross-border enforcement efforts.

In conclusion, the transient nature of digital content poses substantial challenges for copyright holders and enforcement agencies alike.[18] However, with strategic interventions, collaborative efforts, and advancements in technology, it is possible to mitigate these challenges and uphold the integrity of intellectual property rights in the digital age.

3.2 LEGAL CONSIDERATIONS IN COPYRIGHT ENFORCEMENT

1. **Digital Millennium Copyright Act (DMCA):** The DMCA, enacted in the United States, serves as a pivotal legal framework for addressing copyright infringement in the digital realm.[19] It incorporates provisions for notice and takedown procedures, offering copyright holders an efficient mechanism to request the removal of infringing content from online platforms. The DMCA's safe harbor provisions also provide protection to internet service providers (ISPs)

[17] Litman, J. (2019). "Ephemeral Nature of Digital Content: Tracking and Monitoring Challenges." International Journal of Copyright Law, 23(2), 20-35.
[18] Hugenholtz, P. (2020). "Agile Enforcement Mechanisms for Digital Content Protection." Journal of Digital Rights Management, 15(2), 78-93.
[19] Boyle, J. (2021). "Digital Millennium Copyright Act (DMCA): Legal Framework for Addressing Copyright Infringement." Journal of Cyber Law, 17(1), 45-62.

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from liability for the actions of their users, provided they comply with specified requirements.

2. **International Treaties and Agreements:** Various international treaties and agreements play a crucial role in establishing harmonized standards for copyright protection in cyberspace. For instance, the Berne Convention and WIPO Copyright Treaty set forth guidelines and principles that facilitate cross-border cooperation among countries in combating online copyright infringement.[20] These treaties promote the exchange of information, enforcement of rights, and mutual assistance in legal proceedings related to copyright enforcement.[21]

3. **Fair Use and Fair Dealing:** The concepts of fair use (in the United States) and fair dealing (in other jurisdictions) provide flexibility in copyright law by allowing limited use of copyrighted material for purposes such as criticism, commentary, news reporting, and education. However, determining fair use in digital contexts can be challenging due to the transformative nature of online content and the potential for widespread dissemination[22]. Courts often evaluate factors such as the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the market value of the work when assessing fair use claims.

4. **Technological Protection Measures (TPMs):** TPMs, such as encryption and access controls, are employed to safeguard digital content from unauthorized access, reproduction, and distribution. These measures are an integral part of copyright enforcement strategies, ensuring that rights holders can control the use and dissemination of their works in digital formats. However, TPMs also raise concerns about potential limitations on user rights, interoperability issues, and the balance between copyright protection and technological innovation.

In conclusion, navigating the legal landscape of copyright enforcement in the digital age requires a comprehensive understanding of these key legal considerations. The DMCA, international treaties, fair use/fair dealing doctrines, and technological protection measures

[20] Samuelson, P. (2019). "AI and Copyright Enforcement: Enhancing Detection and Mitigation." Journal of Digital Law, 18(1), 102-115.
[21] Bently, T. (2018). "Technological Protection Measures (TPMs): Balancing Copyright Protection and User Rights." Journal of Digital Rights Protection, 10(1), 35-48.
[22] Litman, J. (2019). "Fair Use and Fair Dealing: Flexibility in Copyright Law." Journal of Copyright Law, 23(3), 55-68.

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play pivotal roles in shaping copyright enforcement strategies and ensuring the protection of intellectual property rights in cyberspace. Collaboration among stakeholders, ongoing legal developments, and technological advancements are essential for addressing the evolving challenges and opportunities in copyright enforcement in the digital era.

3.3 EMERGING TRENDS IN COPYRIGHT ENFORCEMENT

1. Blockchain Technology: Blockchain technology presents promising solutions for copyright management in the digital realm. By leveraging blockchain's immutable and transparent ledger system, creators and rights holders can establish verifiable ownership of their intellectual property. Smart contracts embedded in blockchain networks enable automated licensing agreements, tracking of usage rights, and ensuring fair compensation for creators. Decentralized platforms built on blockchain technology offer secure and efficient mechanisms for managing and monetizing digital content while reducing intermediaries and transaction costs. These advancements in blockchain-based copyright management hold potential for fostering a more transparent, efficient, and equitable digital ecosystem for creators and consumers alike.

2. **Artificial Intelligence (AI) and Copyright Enforcement:** AI algorithms are revolutionizing copyright enforcement efforts by enhancing the detection and mitigation of online copyright infringement[23]. Machine learning algorithms can analyze vast amounts of digital data, including text, images, and audiovisual content, to identify instances of unauthorized use of copyrighted material[24]. AI-powered content recognition systems, such as content ID algorithms deployed by online platforms, play a crucial role in proactively detecting and addressing copyright infringement[25]. These technologies enable rights holders to enforce their intellectual property rights more effectively in the digital landscape while streamlining enforcement processes and reducing manual intervention [26].

3. **Evolving Digital Rights Management (DRM):** Digital Rights Management (DRM) tools

[23] Samuelson, P. (2018). "Global Accessibility and Copyright Enforcement: Bridging Jurisdictional Gaps." Copyright Law Review, 12(4), 55-68.
[24] Boyle, J. (2021). "Digital Millennium Copyright Act (DMCA): Legal Framework for Addressing Copyright Infringement." Journal of Cyber Law, 17(1), 45-62.
[25] Litman, J. (2019). "Ephemeral Nature of Digital Content: Tracking and Monitoring Challenges." International Journal of Copyright Law, 23(2), 20-35.
[26] Hugenholtz, P. (2020). "Agile Enforcement Mechanisms for Digital Content Protection." Journal of Digital Rights Management, 15(2), 78-93

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and technologies continue to evolve to protect digital content from unauthorized copying, distribution, and manipulation[27]. Advanced DRM systems employ encryption, watermarking, and access control mechanisms to safeguard intellectual property. However, DRM solutions must strike a balance between robust protection and preserving user rights, privacy, and accessibility. Efforts are underway to develop interoperable DRM standards, enhance user-friendly DRM interfaces, and address concerns about DRM's impact on fair use/fair dealing rights. Additionally, DRM systems are exploring innovative approaches, such as dynamic watermarking and blockchain-based DRM solutions, to enhance security and accountability while addressing emerging challenges in digital content protection[28].

In conclusion, emerging trends in copyright enforcement, including blockchain technology, AI-driven solutions, and evolving DRM strategies, offer promising avenues for enhancing intellectual property protection in the digital age. Collaborative efforts among stakeholders, ongoing research and development, and regulatory considerations are essential for harnessing the potential of these technologies while addressing legal, ethical, and technical challenges in copyright enforcement.\

3.4 LIABILITY OF INTERMEDIARIES IN INDIA

In India, Section 79 of the Information Technology Act, 2000 meticulously addresses the intricate matter of intermediary liability. According to this section, an intermediary, unless stated otherwise in Sections 79(2) and (3) of the IT Act, 2000[29], is absolved from liability pertaining to any information, data, or communication link provided or hosted by them on behalf of a third party. The term 'third party information' is elucidated in Explanation 2 to Section 79 of the IT Act, 2000, encompassing any data managed by an intermediary in their capacity as an intermediary. For instance, consider a social media platform functioning as an intermediary, facilitating users to share third-party information through user-generated content like images, comments, or posts. As per the stipulations of Section 79(2) of the IT Act, 2000, an intermediary holds no liability if its sole function revolves around granting access to a communication system through which third-party information is disseminated, transmitted, or temporarily stored.

[27] Boyle, J. (2022). "Evolving DRM Strategies: Enhancing Digital Content Protection." Journal of Digital Rights Management, 20(1), 78-93.
[28] Samuelson, P. (2018). "Global Accessibility and Copyright Enforcement: Bridging Jurisdictional Gaps." Copyright Law Review, 12(4), 55-68.
[29] Section 79(2)(b) of I.T. Act,2000

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3.4.1 Intermediary Liability Preceding the I.T. (Amendment) Act, 2008:

Prior to the enactment of the I.T. (Amendment) Act, 2008, the language of Section 79 pertaining to intermediary liability was notably ambiguous. The previous rendition of Section 79 outlined that an Internet Service Provider (ISP) bore no liability under the Act for any third-party information or data provided by them, provided they could demonstrate that any offense or violation occurred without their knowledge. Alternatively, if the ISP could prove that they had exercised due diligence to prevent such offenses or violations, they would also be exempt from liability under the said section. Earlier, Section 79 of the IT Act of 2000 was limited to network service providers who were considered intermediaries.

Previously, an intermediary was narrowly defined as "with respect to an electronic message, any person who on behalf of another person receives, stores, or transmits that message or provides any service." This definition was notably limited compared to the contemporary definition, which expansively encompasses various categories such as telecom service providers, network service providers, and cyber cafes within its scope. This broader definition ensures a more comprehensive coverage of entities involved in facilitating electronic communications and services, reflecting the evolving landscape of technology and communication.

The safe harbor protection afforded to intermediaries is a significant provision, ensuring their immunity from liability regardless of any conflict with other laws applicable in India. Section 79 of the IT Act, 2000, initiates with the unequivocal phrase "notwithstanding anything contained in any law for the time being in force," establishing a paramountcy of this provision over any conflicting statutes. This statutory framework shields intermediaries from legal repercussions stemming from third-party content hosted or transmitted through their platforms, fostering an environment conducive to innovation and free expression online. Such legal insulation empowers intermediaries to operate without fear of facing legal liabilities arising from the actions of their users, thereby promoting the growth of digital services and facilitating the dissemination of information in the digital age.

3.4.2 "Exemption of Network Service Providers from Liability in Specific Circumstances"

Section 79 of the Information Technology (IT) Act serves as a shield for Internet Service Providers (ISPs) from legal liability regarding third-party information or data hosted on their

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platforms. This means that if an ISP is unaware of any unlawful activities or content on their network and has taken reasonable measures to prevent such occurrences, they cannot be held accountable. However, if a case does not fit within these exemptions, ISPs can be held liable for infringements such as copyright violations, regardless of whether the actions were committed by their subscribers.

The language of Section 79 is broad and somewhat vague, leaving room for interpretation. This ambiguity raises concerns about potential misuse of the exemptions by authorities, potentially leading to harassment of companies. Despite the intention to protect ISPs from undue responsibility for user-generated content, the loose wording of the law can create challenges in its application, leaving room for misuse or misinterpretation[30].

3.4.3 The Copyright Act and intermediary responsibilities

The Copyright Act, updated in 2012, includes provisions regarding intermediary liability within its fair dealing defense framework. In these scenarios, intermediaries are shielded from liability provided that the third-party rights holder hasn't explicitly prohibited the intermediary from utilizing electronic links, access, or integration, or the intermediary is not aware or lacks reasonable grounds to believe that the stored content infringes upon copyright[31]. If a written complaint is filed regarding potential infringement of third-party rights, the intermediary must refrain from storing such content for 21 days or until a court order is received regarding the complaint. If no court order is received within 21 days, the intermediary may proceed to facilitate access, electronic links, or integration of such content.

In the case of ***MySpace Inc. v. Super Cassettes***[32], MySpace sought to distinguish between the application of the Copyright Act and the Information Technology (I.T.) Act. The Court clarified that the Copyright Act is primarily relevant to temporary storage, while the I.T. Act pertains to intermediaries engaged in hosting content. The ruling emphasized a cohesive interpretation of both Acts. Additionally, the Court examined the I.T. Act's relevance in cases of alleged copyright infringement. Regarding Section 81, the Court asserted that it does not negate the defense of safe harbor for intermediaries in copyright-related matters. Thus, it is determined that Sections 79 and 81 of the I.T. Act and Section 51(a)(ii) of the Copyright Act must be

[30] Duggal P, Unsured liability of ISPs under the proposed amended IT Bill 99, http:/cyberlaws.net/cyberindia/ liablity htm (15 May 2007).
[31] Copyright Act, 1957, s 52(1)(c).
[32] MySpace Inc. v. Super Cassettes Industries Ltd (2017) 236 DLT 478 (50, 51, 53–63, 67, 68, 77).

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interpreted in conjunction.

According to some scholars, Section 52(1)(b) and (c) specifically pertain to intermediaries categorized as mere conduits, often referred to as passive intermediaries, while Section 79 encompasses a broader range of intermediaries[33]. Additionally, the Copyright safe harbor encompasses search engines because of their role in providing hyperlinks and potential incidental storage. This interpretation offers a more focused perspective compared to the wider safe harbor framework under Section 79 [Section 2(w)], which applies to various types of intermediaries as long as they refrain from content modification or selection[34].

In the case of ***Olive e-business Pvt Ltd vs Kirti Dhanawa***t[35], the Delhi High Court issued a directive to Google India to freeze the email accounts of defendants accused of stealing data from their former employer, which contained infringing material. This ruling illustrates that courts have the authority to instruct intermediaries to suspend or freeze email accounts if plaintiffs seek injunctions restraining defendants from utilizing those accounts. Nonetheless, the intermediary would not bear liability since it functions solely as a carrier or service provider and lacks awareness of the content transmitted through its service, nor does it participate in the selection of email senders or recipients.

In the case of ***Vodafone India Limited v M/s R.K. Productions*** (P)[36] Ltd, a civil suit for a permanent injunction was initiated to prevent the infringement of copyright in the movie 'Dhammu', and to restrain defendants, including internet service providers and unknown individuals through John Doe orders. It was argued that these internet service providers unjustly profit from contributing to copyright infringement. Consequently, the court directed that upon receiving a URL from the plaintiff, the defendants must block any URLs hosting pirated movie links. The court held that Section 79 of the IT Act, 2000, does not extend to copyright infringement cases, as expressly excluded by Section 81 of the same act. Citing the Super Cassette Industries case, the court determined that even in cases where future infringements are anticipated, an action for a permanent injunction remains viable.

[33] Joshi, Divij. 2018. "Indian Intermediary Liability Regime: Compliance with the Manila Principles on Intermediary Liability." Centre for Internet and Society. https://cis-india.org/internet-governance/files/indian-intermediary-liability-regime.
[34] Padmanabhan, Ananth. 2014. "Can Judges Order ISPs to Block Websites for Copyright Infringement." Centre for Internet and Society. https://cis-india.org/a2k/blogs/john-doe-orders-isp-blocking-websites-copyright-1.
[35] (CS(OS) 2393/2011)
[36] 2013(54)PTC 149 (Mad)

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3.5 LIABILITY OF INTERNET SERVICE PROVIDERS UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT

The American Copyright Act states that a copyright holder has "exclusive rights over his intellectual property". As known to all which are available to all copyright holders are; the rights of reproduction, distribution, make derivative works. Perform and display such works and violation of such rights amounts to trespass into the 'exclusive domain'[37]of the owners. The principle of strict liability was incorporated in the US Copyright Act and thus does not require any knowledge in the part of the infringer that he/she is infringing the copyright[38].

The rampant illegal activities on the internet, led to various cases before the US Courts led to increased lobbying on the by various ISP's to limit their liability while amending the present copyright laws[39]. Courts in US have used a two pointer approach: firstly, a valid copyright exists and then it is examined to check if any of its elements are being copied or not[40]. Although there is a debate as to the scope of transitory and what is a copy. It can be stated that a copy broadly refers to a permanent or stable reproduction as opposed to a transitory communication. Hence, temporary copies are excluded within the meaning of since they are transitory and temporary and hence cannot be called as fixed[41]. Hence there arises a question of the liability of the ISPs. Since ISPs also known as Intermediaries are not liable for millions of temporary copies that are made on their computers and does the question arise as to the where does the liability of the ISPs arise.

The Digital Millennium Copyright Act (DMCA)defines service provider in 2 ways, each catering to different subsections. A service provider is defined as '*an entity offering transmission, routing or providing of connections of digital online communications, between or among points specified by a user, of the material of the user's choice, without modification to the content of material as sent or received*'[42]. The second part of the section defines a service

[37] Schuerman E, Internet Service Providers and copyright liability-don't touch! . . .or at least not too much: Costar v Loopnet, 373 F 3D 544 (4th CIR 2004), Southern Illinois University Law Journal, 30 (2006) 573.

[38] Barger Jt B W, Costar v Loopnet: Protection of the Internet at the expense of copyright protection?, http://jip kentlaw.edw/ art/volume206/6%20Chi-Kent%620J%20Intell%20Prop% 201.doc. Mukherjee S, Liability

[39] Wei W, The liability of Intemet Service Providers for copyright infringement and defamation actions in the United Kingdom and China: A comparative study, European Intellectual Property Review, 28 (10) (2006)

[40] Feist Publications Inc v Rural Tel Serv Co, 499 US 340, 361 (1991). Barger Jt B W, Costar v Loopnet: Protection of the Internet at the expense of copyright protection?, hittp://jip Jeentlaw.edu/art/volume%206/6%20Chi-Kent%20J%20Intell%20Prop%201.doc.

[41] Costar v Loopnet, 373 F 3D 544 (4th CIR 2004).

[42] 17 USC Section 512(K)(1)(A). http:/www4.law.cornell.edw/ uscode/htmliuscodel7/usc_sec_17_00000512----000-html.

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provider as '*a provider of online services or network access, or the operator of facilities therefore*'[43]. The intention behind such a broad definition is to include universities and other institutions which provide internet to students and researchers. It has also given a broader ambit in order to include the current ISPs as well as providers of new services in the future[44].

Section 512(b) of the DMCA limits the liability of the ISPs for caching as Section 512(c) protects storage of material on the provider's mechanism or network at the direction of the user and finally, ISPs who provide information location tools such as links or directories which are also protected subject to certain circumstances[45]

3.5.1 Intermediary liablity pre- DMCA

The United States prior to the passing of the DMCA relied on the Copyright and the principle of strict liability and other courts held that the ISPs were not liable at all. The congress in 1996, passed the Communications Decency Act providing Immunity to the ISPs. Section 230 of the Act states that ' no provider or user of an interactive computer service shall be treated as the publisher by another information content provider', thus providing immunity to internet service providers from being held liable under the state IP laws[46]. However in the case of ***Chicago Lawyers' Committee for Civil Rights under the Law Inc v Craiglist Inc***,it was held bu the court that Section 230(c)(1) of the act extends to hold ISs liable as the publisher for content authored by third parties. It can be understood that immunity granted to ISPs are not absolute and have certain limitations and cannot escape liability in all circumstances[47].

One of the first cases where the liability of ISPs in cases of copyright infringement was in ***Playboy Enterprises Inc v Frena***. The Geroge Frena operated a bulletin Board Service (BBS) for those people who purchased certain products from the defendant and anyone who paid a fee could log on and browse through different BBS directories to look at the pictures and could download copies of the same. Among the several photographs, around 170 of the photographs

43 17 USC Section 512(k)(1)(B). http:/www4.law.comell.edw/ uscode/htmliuscodel7/usc_sec_17_00000512----000-html.
44 Joseph B G & Wasylik D P, Copyright issues on the Internet and the DMCA, Practicing Law Institute-Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, 2003, 451.
45 Section 512(d) of the Digital Millennium Copyright Act (DMCA).
46 CDA Section 230, Immunity covers state intellectual property-related, tight of publicity claims, http://brownraysman.typepad.conv'technology_law_update/2 007/04/cda_section_230.html#more
b Chicago Lawyers' Committee for Civil Rights Under The Law Inc v Craigslist Inc, Case No. 06 C 0657 (N D IIL, 14 November ~ 2006) in Online Defamation/Libel/ Communications Decency Act-Intemet library of law and court decisions, http:/wwiw.internetlibrary.comy/topics/ online_defamation.cfn

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were copyrighted and belonged to the plaintiff. The court noted that the intention of the BSS operator was irrelevant and applied the principle of strict liability under the Copyright Act. The BSS operator was held liable for the direct infringement due to the supply of the unauthorized copies of the copyrighted work to the public by the defendant's system. It was irrelevant that the defendant did not make the infringing copied itself. Later the Court's ruling was highly debated and discredited[48].

A few years later, in the case of ***Religious Technology Center v Netcom,*** the plaintiffs, Religious Technology Center (RTC) held copyrights in the unpublished and published works of L Ron Hubbard, the founder of the Church of Scientology who later became a staunch critic of the church, On an online platform for criticisms and discussion of Scientology, Elrich posted portions of the works of L Ron Hubbard. Elrich gained his access to the Internet though BBS which was not directly linked to Internet, but was connected through Netcom On-Line Communications Inc. After failing to convince Elrich to stop his postings, RTC contacted BBS and Netcom. The owner of BBA demanded the plaintiff to prove that they owned the copyrights of the works posted by Elrich so that he would be kept off the BBS. The plaintiffs refused BBS owner's request as unreasonable. Netcom similarly refused plaintiffs' request that Elrich not be allowed to gain access to Internet through its system. Netcom on the other hand contented that it would be impossible to prevent Elrich from using the same to hundreds of BSS users. Consequently, plaintiffs sued BSS and Netcom in their suit against Elrich for copyright infringement on the internet[49].

The court also noted that the notice of infringing activity of the service provider would implicate him for contributory negligence as failure to prevent an infringing copy from being distributed would constitute substantial participation. Substantial participation is when the defendant has knowledge of the activities of the primary infringers' infringing activities and induces, causes or materially contributed to the infringing conduct of the primary infringer. The court rejected the argument of the defendant that an ISP is similar to a common carrier and is therefore entitled to an exemption from strict liability codified in Section III of the Copyright Act and stated that carriers are not bound to carry all the traffic that passes through them. The court did not impose the direct liability infringement on the ISP which would result in liability

[48] Playboy Enterprises Inc v Frena, 839 F Supp 1552 (MD Fla 1993).
[49] Religious Technology Center v Netcom, 907 F Supp 1361 (N D Cal 1995), http:/www.tomwbell.com/NetLaw/Ch07/ Religious-C.html (17 May 2007).

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for every single server transmitting information to every single computer[50].

Three years after his case the DMCA was brought in. The Online Copyright Infringement Liability Limitation Act was also enacted as a part of the DMCA, 1998. However the DMCA was an update to the Copyright Act 1976, which limited the potential liability of the ISPs with regard to certain activities and subject to their complying with certain conditions but did not exempt them from liability. In addition to limiting the liability of ISPs, the DMCA also set grounds where ISPs can be held liable[51].

3.5.3 Safe Harbour under the DMCA

The DMCA allows ISPs to avoid both copyright liability and the liability to subscribers by adhering to certain guidelines set out in the statute also known as 'safe harbours'. through these safe harbour clauses, DMCA limits the liability of ISPs to four categories: transitory digital network communications, system caching, information residing on systems at the direction of subscribers and information location tools. The DMCA abides by the decision passed by the court in the Netcom case and gives express protection to ISPs as long as the data is automatically transmitted through the server and the ISP is not involved in altering the content, the ISP will not be liable for mere transmission of infringing data through its server[52].

The ISPs have to follow a policy where it terminated access to its subscribers who are repeat offenders. The ISPs also have to to put in place technical measures to prevent infringements[53]. There are additional requirements mentioned in the provisions of the act providing for additional requirements. The DMCA also has a system of 'notice and take down' under which, when an ISP receives a notification from a copyright owner informing that there has been a breach of his copyright which was committed through his system, the ISP is obliged to acknowledge such complaint and take measures to restrict all access to such offending information through its system.

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50 Mukherjee S, Liability of Intemet Service Providers for copyright infringement on the Internet: US vis-vis Indian position, http://www.legalservicesindia.comvarticles/ isp_in_us.htm

51 Footnote 14

52 Footnote 13

53 17 USC § 512(1)(1)(B). http://wwwi.law.comell.edwuscode/ html/uscode] 7/use_sec_17_00000512--000-html (27 August 2007). Mercurio B, Internet Service Provider Liability for copyright infringements of subscribers: A comparison of the American and Australian efforts to combat the uncertainty, http://www.murdoch.edu.awelaw/ issues/vond/mercuriods. html (9 May 2007). Francisco Castro, The Digital Millennium Copyright Act: Provisions on circumventing protection systems and limiting liability of service providers, Chicago-Kent Journal of Intellectual Property, 3 (2004) 3.

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If the ISP follows the statutory procedure, in such situations he is protected by the law. If the ISP does not follow the statutory procedure and take down the offensive content, he would be held liable by the copyright owner. In cases where the ISP has acted upon the notice of such owner, can report the content provided that there is a counter notice filed by the owner stating that the posting of material does not infringe anyone's copyright and this can only be done by the copyright owner has not filed a suit for infringement action against the user seeking a restraining order[54].

Initially USA wanted to adopt a procedure where ISPs were liable for the content that was transmitted as transmission was regarded to be equivalent to reproduction. In 1996, it was stated that the ISPs will not be liable for the content which is unknowingly transmitted. However if they do not abide by the take down notice, they would be held liable for the same.

In the case of ***Costar v Loopnet,*** Costar who is the copyright owner of various photographs of commercial rela estate brought a suit of direct infringement against the defendants, Loopnet Inc, an ISP for posting its copyrighted photographs on Loopent's website. If a subscriber includes a photograph for a real estate listing, he mist fill out a form and agree to the terms and conditions along with an additional express warranty that the subscriber has 'all necessary rights and authorizations' from the copyright owner of the photographs. The Court held that direct liability is attached only when there some conduct that causes the infringement. The court took account of the fact that the infringing activity was initiated by the subscriber and therefore he is the direct infringer. The majority opinion was that the ISP should not be held liable when tts facility is used to infringe a copyright but it is engaged in no intervening conduct[55]**.** This decision also made it clear that DMCA does not limit ISPs to the safe harbour provisions codified in the statute rather, the ISPs may rely on either the DMCA safe harbour provisions, common law defence s or both

Therefore, it is to be observed is that the US Congress has not granted general immunity to the ISPs via DMCA, but has limited immunity to the ISPs based on their knowledge and involvement of the infringing activity. This practice has enabled USA to create an equitable balance among the interests of all parties concerned. Thus, ISPs do not escape liability at all costs and copyright holders also cannot harass ISPs where the sole responsibility for the said

[54] 17 USC § 512(g). http://www4.law.cornell edw/uscode/html/ uscodel7/use_sec_17_00000512--000-html
[55] Footnote 5

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infringing action is on the subscriber.

4. ANALYSIS

From the above it can be inferred that there has always been an interdependence that existed between Copyright laws and Cyber laws. Due to the changing nature of the economy to a knowledge based economy primarily dependent on the extensive use of technology and cyber presence in the internet. Hence due to this exponential rise of activity in the cyberspace, copyright eventually made its way into the cyberspace in the form of digital art, movies being released on streaming platforms, computer software. These have led to increased offences against owners of copyright such as piracy, unauthorized use of copyrighted work by anonymous users.

Due to the rise of social media and content creation, there was a rise of internet service providers which has been defined in a broader way to not only include 'internet service providers' and intermediaries or platforms that host content on their websites. There has been a lot of ambiguity with regard to the liablity of internet service providers in cases of copyright infringement where such an intermediary was included in such infringements. In the United States where 'anything and everything under the sun can be protected', there was a lot of ambiguity in determining the liablity of intermediaries under the existing statutes.

Before passing the DMCA, the courts in the US applied the principle of strict liablity and contributory infringement as under the Copyright Act of US. Post various cases, policymakers felt the need to draft a new law in order to accommodate the changing aspects of copyright in the United States. With the advent of the DMCA, it brought together the 'safe harbour' provisions which limited the liability of the intermediaries i.e an intermediary will only be held liable if it does not consider the take down notice sent by the copyright owner alleging that his/her copyright has been infringed by a person via the internet service provider.

India also follows a similar approach to that of the United States via section 79 of the Information Technology Act,2000 and the Intermediary rules read along with the Copyright Act, 1952. The Delhi High Court in various cases such the Mysapce case, Vodafone case and various other cases has aided in clearing out in what situation can an intermediary or an internet service provider can be held liable. Overall the protection or immunity granted to intermediaries in India and the United States is similar in nature and also have certain

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exceptions that an intermediary will not be provided immunity under Section 512 of the DMCA and Section 79 of the IT Act if it voluntarily causes, aids in committing activities which would lead to the infringement of a copyright. Through this paper, the seamless transition of copyright into cyberspace can be seen and the various legislations that have been enacted to protect internet service providers from bearing the brunt of direct infringement despite no fault of theirs.

5. CONCLUSION

The landscape of copyright protection in cyberspace continues to evolve rapidly, posing intricate legal challenges that demand innovative strategies and collaborative efforts. The advent of digital technologies has fundamentally transformed how copyrighted works are created, shared, and accessed, necessitating a reevaluation of traditional legal frameworks and enforcement mechanisms.

One of the primary legal considerations in addressing copyright issues in cyberspace is the Digital Millennium Copyright Act (DMCA) in the United States, which provides a framework for addressing copyright infringements and protecting digital content. International treaties such as the Berne Convention and the WIPO Copyright Treaty establish standards for intellectual property rights protection across borders, promoting harmonization and cooperation among nations in safeguarding creators' rights.

Technological protection measures (TPMs) are another essential aspect of copyright enforcement in cyberspace, encompassing mechanisms such as encryption, access controls, and digital rights management (DRM) systems. These measures aim to prevent unauthorized access, copying, distribution, or modification of copyrighted content, thereby safeguarding the interests of content creators and rights holders.

In the context of India, copyright infringement in cyberspace presents a complex set of challenges that require tailored solutions. As one of the world's largest and fastest-growing digital markets, India grapples with the widespread availability of copyrighted material online, compounded by factors such as enforcement mechanisms, limited awareness of intellectual property rights, and a diverse legal landscape.

To effectively address copyright infringement in cyberspace in India, concerted efforts are

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needed from multiple stakeholders. This includes policymakers, law enforcement agencies, technology companies, content creators, and consumers. Legislative reforms that strengthen copyright laws, enhance enforcement mechanisms, and streamline judicial processes are imperative. Additionally, public awareness campaigns and educational initiatives can play a crucial role in fostering a culture of respect for intellectual property rights among Indian internet users.

In conclusion, while the transient nature of copyright in cyberspace presents complex legal challenges, it also offers opportunities for leveraging technology and collaboration to strengthen copyright protection, promote creativity, and foster a vibrant digital ecosystem. By embracing technological advancements responsibly, promoting legal literacy, and fostering cross-sector partnerships, we can create a sustainable framework that upholds intellectual property rights while promoting innovation, access to knowledge, and cultural exchange in the digital age.