

“Liability of Online Service Providers and the Impact of Rapid Growth of Internet: the Online Infringement Issues”.

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Abstract- The paper examines the rapid growth of technology in present scenario and infringement of copyrights in the cyber world. It would not be erroneous to say that the technological development is much faster than law. The main focus of paper is to analyze the role of intermediaries, the impact of fast growing internet technology and to determine the liabilities of ISPs and end-users; who is the real infringer. It is very hard to watch the user's activities on the internet and novel changes in technology makes it challenging to even trace a primary infringer. The online issues that are going on will get complicated in future. The universal mechanism of intellectual property rights are still baffling with the definition of various rights that is provided to the copyright owners and ironically saying the answer would be available for these complexities when the massive infringements of protected work take place. Current scenario is very complex as on the one hand it deals with the question of freedom of expression whereas on the other hand issues of law of torts and IPR are also at stake. Although, the developed states are trying to capture the monster but still need to improve the legislation procedure.

Index Terms- ISPs (Internet Service Providers), Infringement, Intermediary, Liabilities, internet, computer, Network, USA, UK, Rapid Growth.

INTRODUCTION

In 1991, Senator Al Gore in his book *“Infrastructure for the Global Village”* suggested that in the coming years new technology would rephrase all the legal ideas of originality, ownership, property, intellectual freedom and privacy. He pointed out that officials would have to take these upcoming issues into account and one would have to take appropriate steps that enabled the economic and intellectual opportunities of the latest technologies to be realized. Currently, the involvement of internet is increasing rapidly in our life. The internet has revolutionized the whole system of communication, in particular reading, selling and advertising. Companies prefer to advertise and sell their products online rather than any other method and web-sites are set up for this purpose e.g. EBay.co.uk, Amazon.com, and Auto-traders.com etc.

It is impossible to deny the success of British band ‘Arctic Monkeys’¹. They achieved their overwhelming success due to the use of the internet. They have focused on the idea of using online file sharing and this made them a global phenomenon. They have released their music world wide and therefore they became successful in capturing the attention of audiences from various parts of the world. A positive aspect of reaching to such a global audience is that it brings together the people of different cultures through music. Another important development is the introduction of virtual universities e.g. American International University-Bangladesh, Canadian Virtual University, Intercultural Open University, Virtual University of Pakistan, Virtual Global University (VGU), International Virtual University UK etc. The students can attend the lectures without their physical presence in that place through video conferencing. Despite such a

¹ See History of ‘Arctic Monkeys’ at:
<http://www.lyricsfreak.com/a/arctic+monkeys/biography.html> (last accessed 03 March 2014)

transformational change of the world and making such positive impact on the lives of people it brings some negative points along with the positive ones.

The critics of information technology argue about the legality of sharing online information suggesting that there is a need to put limits on the process as it is anticipated that legal problems will be caused and privacy issues will arise.

The misuse of the internet has caused some serious legal issues which seem to overshadow the positives it brings to the society. On one hand it can promote a band to the whole world but on the other hand it has opened the doors for illegal downloading of music. This has caused severe problems in the field of copyrights and patent. This situation has become so serious that in 2008 the music band U2 had to issue a personal statement to prevent their fans illegally downloading music. Secondly there is a problem of criminal people hacking the financial information of others carrying out online transactions. This is causing huge losses to the people as their information is misused. Now there is urgency among the jurists to design the law in order to protect the people from cyber-crimes.

The whole debate revolves around the subject of liabilities of ISPs in the, especially, UK and USA, with a comparative study of both systems the US approach seems to be less rigid as compared to the UK². Both USA and UK have a similar legal approach with some slight differences.

The liabilities of Online Service Providers in respect of online infringement are the chief focus of this paper.

² M. F. Makeen 'Copyright in a global information society : the scope of copyright protection under international, US, UK, and French law' (London; Boston: Kluwer Law International, 2000)

COPYRIGHT LAW

Starting from the sixteenth century, copyright has developed safeguards to cover a wide range of works from printing to digital material. Copyright extends to all sorts of works irrespective of quality, subject to some fundamental requirements. Tables, compilations and code-books came within copyright during the nineteenth century. The twentieth century is regarded as a flourishing period for copyright law as its ambit extended to cover literary works (works generated by computers as well), musical, dramatic, photograph, films, broadcast, recording, sounds, cable programmes, computer programmes and all programmes created or stored or produced with the help of computer³.

The idea of copyright is supported by the judges who acknowledge and sympathise with the principle of rewarding a "person's labour, skill and effort". As Peterson J commented in *University of London Press Ltd V University Tutorial press Ltd* [1916]⁴:

"...What is worth copying is prima facie worth protecting"

As the title indicates copyright protects works from being copied without the approval of the original creator. Moreover, copyright not only deals with copying of material but also it deals with question of making an adaption of work; such as displaying work in public, broadcasting and copying of work. The Copyright Act sets out some restricted acts⁵ which only the owner of the copyright can do or authorise with regard to his work. In

³Section 1 of Copyright, Design and Patent Act 1988.

⁴*University of London Press v University Tutorial Press* [1916] 2 Ch. 601.

⁵ Section 16 of Copyright, Design & Patent Act 1988: some restricted acts which can only done by owner of copyright; (a) copy the work, (b) issues copy of the work to the public, (c) Perform, display or play the work in public, (d) broadcast the work, (e) make an adaption of the work.

fact, the owner is usually the person who creates the work except when he is in course of employment; the employer will be considered the owner of that work unless or otherwise agreed⁶.

*"The Copyright, Design & Patent Act 1988 usually talks in terms of the creator of a work being the 'author' of the work"*⁷.

Therefore, an individual who creates a piece of music is the author of the music and in the same way a photographer is the author of his work. According to section 9 of Copyright, Design & Patent Act 1988, in the case of sound recordings, films and digital works, the author would be the person who formulates the essential arrangements for creation of the work, so an owner of a piece of work generated automatically by a digital device would usually be the individual who supervises or arranges the computer which generates it.⁸

COMPUTER AND COPYRIGHT

Digital technology has modernized human life from the last quarter of this century, directly or indirectly, but copyright law has only just come to terms with technology. The previous source of copyright law, Copyright Act 1956, said nothing about the development of computer technology as it was at an early stage when this act came into force. With the passage of time, the digital technology developed rapidly, and a need was felt to include computer programmes within copyright protection, resulting in an amending piece of legislation introduced as the Copyright (Computer software) Amendment Act 1985. The Act ensured that programmes and work generated with the aid

of computer, by computer or stored in a computer were protected by copyright. Moreover, the Copyright, Design & Patent Act 1988 strengthened the law related to computer programmes and consolidated the work formulated with the help of computer or generated by computer, by every means. Works created by or with the assistance of computer were protected in the earlier law but there were some complexities in identifying the author of the work for the purpose of copyright. For instance, for a newspaper competition known as 'Millionaire of the Month', random numbers chosen by computer were decided to be protected by copyright in *Express Newspaper plc. V Liverpool Daily Post & Echo plc. [1985]*⁹. It was claimed that there was no human author and, resultantly, the numbers selected by the computer were not entitled to claim for copyright protection. However, these arguments were rejected and announced childish by Whitford J., who declared:

*"This claim is as silly as saying that a pen could be the author of literary work"*¹⁰

The human effort can be found either in the form of a person who puts data into the computer to generate output or in the work engaged in writing the programme used or a combination of both¹¹. Section 9(3) of Copyright, Design & Patent Act 1988 deals particularly with computer produced dramatic, musical, literary or artistic works and states that the author is the person by whom the essential arrangements were made for producing the work. Simply, the individual who has control over the computer is the

⁶Section 11 of Copyright, Design & Patent Act 1988.

⁷Bainbridge, D. I., (1990) 'Computer and the Law', London, Longman Group UK Ltd., Pp. 13

⁸ *Express Newspaper plc. v Liverpool Daily Post & Echo plc.* [1985] FSR 306; [1985] ALL ER 680.

⁹*Express Newspaper plc. V Liverpool Daily Post & Echo plc.* [1985] FSR 306; [1985] ALL ER 680.

¹⁰Ibid, this was said by Justice Whitford J.

¹¹Bainbridge, D. I., (1990) 'Computer and the Law', London, Longman Group UK Ltd., Pp. 31

author of any sort of 'computer-generated' work. Section 178 of CDPA explains as:

"A work as 'computer-generated' when it is generated by a computer in circumstances such that there is no human author of the work".¹²

However, this concept makes the situation complex because, in several incidents of works generated *with the aid of computer*, it will be difficult to state with any assurance whether the work has a human author.

INTERNET AND INTERMEDIARIES

The internet has extended rapidly from the APRANET (Advance Research Project Agency Network)¹³ into an advanced network system that can be accessed with a computer by everyone¹⁴. Thus the APRANET provided a way of creating a network system. The main reason behind the invention of this innovation is to create numerous networks of multiple designs starting with the pioneering packet switching network, and later on, packet radio networks, packet satellite networks and other networks¹⁵. Academia and governmental bodies have also been influential and contributed significantly in the development of internet based communication.

"The Internet's pace of adoption eclipses all other technologies that preceded it. Radio was in existence 38 years before 50 million people tuned in; TV took 13 years to reach that benchmark. Sixteen years after the first PC kit came out; 50 million people

¹²Ibid, pp. 31

¹³Primarily, this system was used for the academic and military purposes.

¹⁴Harvey D., (2005) *'Internet. Law.Nz'*, 2nd ed., Wellington, N.Z. : LexisNexis, 103

¹⁵Ibid, 107

were using one. Once it was opened to the general public, the Internet crossed that line in four years."—quote from U.S. Department report *"The Emerging Digital Economy"*¹⁶.

It is important to note that the cyber network systems are established without any human intervention. The link of one consumer to another consumer through the internet is made possible by the packet of data sent to each. Therefore, an automatically generated network extends and bonds all together. However, this modern communication system has entirely revolutionized the world of information technology¹⁷. It is noteworthy that all of this information goes through intermediary systems following different ways and at different times without any specific sequence.

Several intermediaries are involved in the transforming of data through digital devices. These stakeholders can be divided into two sections for the purposes of this research¹⁸.

- The parties to the exchange: those who at the end of the transmission are either senders or recipients¹⁹.
- Online service providers (Intermediaries): all the computers which pass the information on the packets to the parties²⁰.

Online service providers can further be categorized into two sections; websites and internet service providers (ISPs). Websites can be defined as a set of images, web pages, videos or different other electronic means that can be

¹⁶ Mary Bellis 'Inventors of the Modern Computer' at: <http://inventors.about.com/library/weekly/aa091598.htm> (last accessed on 03 March 2014)

¹⁷ 'The Principles for User Generated Content Services: A Middle Ground Approach to Cyber Governance' Harvard Law Review, Volume 121, Issue 5.

¹⁸ibid, 9

¹⁹Ibid.

²⁰ibid

accessed by using the internet. Internet service providers (ISPs) give access to the internet by using dial up or other source of communication. Internet Service Providers and websites perform a significant role in the course of modern communication. Internet service providers establish connection between sender and receiver to maintain the communication and the websites provide access to the data. Currently, the intermediaries have become significant actors in the communication process and legal issues against service providers have increased. There have been a number of cases against ISPs recently such as the sale of pirated movies, music, images and other related issues.

INTERMEDIARY LIABILITY AND COPYRIGHT INFRINGEMENT

The birth and expansion of the internet has developed a new way of business and services e.g. social networking websites (Facebook, Twitter, LinkedIn, Badoo, Bebo, hi5 etc.), search engines and online market places (EBay, Amazon, Auto-trade etc.)²¹. Sometimes end-users of these online services could infringe copyright. Practically speaking, these infringing acts may be hard to trace as to do so requires substantial financial resources and may have occurred in different jurisdictions. Therefore, the protection of intellectual property rights against infringers can be complicated and costly. That is why, the attention of copyright owners has shifted from taking action against end-users to online service providers who allow and facilitate the infringements²².

One of the issues that have remained debateable for a long time is the conflict between right holders and online service

²¹G Robert, (2009) 'liability of Online Service Providers and Domain Names', SJ Berwin, London.

²²Ibid.

providers about the unlawful downloading and uploading of music²³. The industry remained remarkably successful against the likes of Napster and Pirate Bay who served as a vehicle to infringe copyrights. Currently, ISPs are considered responsible for infringements, as they provide access to the internet.

Reasons and counter reasons put forward for holding ISPs liable are as follows:

1. A reason to hold ISPs responsible for the misconduct of their users is, their 'Authority' to suspend the users' websites and e-mail in case of violation. They have also got the power to report such abuse to the help lines²⁴, such as those of right holders and concerned authorities. However, in the UK, under Data Protection Act, ISPs are not allowed to disclose the identity of their subscribers except in a few cases, which are firstly, by the order of the court and secondly, where the subscribers themselves allowed them to do so. Keeping in view the above circumstances it is assumed that a copyright owner cannot sue the infringer directly without the support of the ISP, as the identity of infringer cannot be located without their help. So only if the owner can force the ISPs to disclose the names²⁵ of an infringer will the ISP be able to divest itself of liability. When ISPs monitor the transaction of subscriber to check

²³Ibid.

²⁴ Kahandawaarachchi, T. (2007) 'Liability of Internet Service Providers for Third Party Online Copyright Infringement: A Study of the US and Indian Laws', *Journal of Intellectual Property Rights*, vol. 12, NOV, pp. 553-561.

²⁵ Cooper R, 'Media law, music copy right, ISP's liability for file sharing', http://ezinearticles.com/?Media-Law---Music-Copyright---ISP%E2%80%99s-Liability-for-file-Sharing&id=360608_2 (03 March 2014)

the copyright infringement, it is not only a violation of subscriber's rights but it affects ISPs business model.²⁶

2. Another reason for holding ISPs responsible is their capacity to reproduce the material on their own server when the subscriber uploads it. This view never seems to be strong as it has been decided that 'temporary electronic copies' are excluded from the ambit of 'copies'²⁷. The reaction of ISPs was vigorous in response to the views, in which they are regarded liable for the acts of their subscribers. They put the defence that their position is more like a postman, who delivered letters unaware of the fact that a particular letter is having a defamatory statement. Their role can be further compared with Telephone Company which cannot be held responsible for the obscene calls of the users. Moreover, by imposing liability on ISPs the probable growth of internet would be restricted²⁸.

3. A further reason for holding ISPs responsible for infringements is that they are better able to pay²⁹.

4. Some reasons for holding an ISP liable are dependent on their 'knowledge of the activities of the subscribers'. For example, if ISPs are aware of the infringements done by the users then they would be considered liable by the courts for

such an activity of the users³⁰. However, they are under an obligation to remove such material soon after the action came in their notice³¹. Practically speaking, there are various reasons for which ISPs cannot take the responsibility of their users' infringements. As there are countless transactions that are completed with the help of ISPs, it is not possible in practice for ISPs to check the content that passes through their networks. Again it is expensive and difficult for ISPs to regulate the content that is used by countless users. Then again it becomes difficult for ISPs, just because of the instant nature of the content, to verify, amend and scrutinize it. As stated by William Foster,

*'ISPs are similar to common carriers in that they have no control over which members of the public use their facilities ,or the content , members of the public choose to transmit.'*³²

5. A further example of whether to hold an ISP liable is dependent on circumstances relating to the two processes in internet communication, the process of 'providing the contents' and that of 'transferring the contents'.³³ It is

²⁶ Foster W , 'Copyright: Internet Service Providers rights and responsibilities',

http://www.isoc.org/inet97/proceedings/B1/B1_2.HTM

²⁷ Ibid.

²⁸ Cooper R, Media law , music copy right, ISP's liability for file sharing, <http://ezinearticles.com/?Media-Law---Music-Copyright---ISP%E2%80%99s-Liability-for-file-Sharing&id=360608>, (29 July 2011)

²⁹Kahandawaarachchi, T. (2007) 'Liability of Internet Service Providers for Third Party Online Copyright Infringement: A Study of the US and Indian Laws', *Journal of Intellectual Property Rights*, vol. 12, NOV, pp. 553-561.

³⁰V.K. Unni, *Internet Service Provider's Liability for Copyright Infringement - How to Clear the Misty Indian Perspective*, 8 RICH. J.L. & TECH. 13 (Fall 2001).

<http://jolt.richmond.edu/v8i2/article1.html>

³¹ Osborne D, "Copyright and trademark infringement on the net- Looking to the Internet Service Provider first" , <http://www.iprights.com/cms/templates/articles.aspx?articleid=146&zoneid=2>

³² Foster W , "Copyright: Internet Service Providers rights and responsibilities", <http://www.isoc.org/inet97/proceedings/B1/B1-2.htm>

³³Wei, W. (2006) 'the Liability of Internet Service Providers for Copyright Infringement and Defamation Actions in the United Kingdom And China: A Comparative Study.', *European Intellectual Property Review*, OCT, p. 528.

considered justified to hold ISPs responsible in the former situation³⁴, but not the latter when done by the subscribers. They are considered to be liable if they directly copy the 'protected material' as evidence, if ISPs make it possible for the subscribers to get the latest songs from their website, they are responsible for infringements. But they would not be responsible for the acts of subscribers when they share such unlawfully downloaded copies of the material with one another.

6. One of the latest viewpoints is that ISPs should be considered responsible for direct copyright infringement where they deal with 'automatic data flow and conduct a human screening process of objects posted to the websites they host.³⁵ But inspire of human screening, it is difficult to control copyright infringement absolutely. But this fact makes the position of ISPs more strong that ISPs involved a person to scrutinize for violation. To gather with above mentioned efforts, the very terms and conditions of ISPs for subscribers is regarded as a compact proof of their efforts to stop the copyrights infringement. Keeping in view all the efforts, it would be unjustified to hold ISPs liable for the acts of their users. But still this matter is debatable³⁶.

Internet Service Providers are liable for primary infringement where they directly violate the rights of real owners. For instance, if an Internet Service Provider gives access to infringing material kept and preserved on its own

server without valid permission³⁷. The United States approach has been to find Internet Service Providers (ISPs) strictly liable for primary infringement although this has been a controversial³⁸. Before the existence of the Digital Millennium Copyright Act 1998, in order to determine the liability of ISPs, the courts only depended on copyright law but some courts viewed ISPs as being strictly liability³⁹. In 1996, immunity was provided to online service providers under Communication Decency Act 1996⁴⁰.

The United States has also developed a secondary liability for Internet Service Providers making them contributory or vicariously liable for infringements. The contributory and vicarious liability theories have developed by the US courts through different cases (*Napster, Sony Corp. etc*) especially when 'Internet Service Providers' were held liable as secondary infringers.

CONCLUSION

There is still a considerable distance between law makers and technology in this area. The swift growth of digital world has not only made it simple to access the internet, but has also given rise to numerous problems. There appears to be no doubt that copyright owners should receive protection for their work and this protection is clear in certain areas. What seems to be unjustified is holding ISPs liable for the misconduct of their users. It is really

³⁴ That is providing the content on the internet.

³⁵Schuerman E , Internet Service Providers and copyright liability-don't touch!.... or at least not too much :Coster v Loopnet,373 F 3D 544 (4th CIR 2004), Southern Illinois University Law Journal ,30(2006)573.

³⁶Coster v Loopnet,373 F 3D 544 (4th CIR 2004).

³⁷Seagull Haiyan Song Dr.. "A Comparative Copyright Analysis of ISP Liability in China versus the United States and Europe" *The Computer & Internet Lawyer* 27.7 (2010): 7-24.

³⁸Ibid.

³⁹Kahandawaarachchi, T. (2007). '*Liability of Internet Service Providers for Third Party Online Copyright Infringement: A Study of US and Indian Laws*'. *Journal of Intellectual Property Right* (vol.12), pp. 556

⁴⁰Ibid.

difficult for them to keep a record of the activities of the subscribers. Then there should be a harmonising balance system to check the rights and liabilities of ISPs in relation to the matters of copyright on the internet.

It is time to adopt at least three primary steps to protect the users on internet. Firstly, the law makers will have to pay attention on territorial issues and need to revise territory.

The previous approach regarding territorial application is now not applicable in present complex and continuous developing world. So, there is need to redefine the territory. Second thing which need to do is harmonization between legislatures and IT experts, it will be the basic source to bring masses close to each other through internet. The harmonization means not only the harmonization between different laws makers but also need to minimize the differences between traditional thinkers and technology specialists. Thirdly and finally, various campaigns of mass awareness will be helpful to bring society in conformity with laws. One important fact that needs to keep in mind that future prospective of human civilization completely depends on controlled internet growth.

I will discuss the comparative role of USA and UK in strengthening the digital copyrights in my next Article.

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