
UNIT 13 LIABILITY OF INTERNET SERVICE PROVIDERS

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13.1 INTRODUCTION

The issue of on-line copyright infringement liability for ISPs has been around since the use of the Internet started to expand rapidly in the early 1990's and has been the subject of extensive debates worldwide. Should ISPs be held responsible for illegal activities committed by their users? To what extent are ISPs responsible for third party material put on the Internet by users of their facilities?

Because of the inherent difficulties of enforcing copyrights against individual Internet users worldwide, the copyright owners have found the answer to this problem in placing legal liability for copyright infringement on those who allow and enable Internet copyright pirates to exist, namely the Internet service providers (ISPs). For the content owners, it is practical to sue the ISPs as they are in a position of policing the Internet. On the other side of the argument, ISPs are passive carriers similar to telecommunications companies and, therefore, should be granted some limitation from liability with regard to copyright infringement. In addition, to make ISPs liable could stifle the growth of the Internet.

13.2 OBJECTIVES

After reading this unit, you should be able to:

- appreciate the role of ISPs in communication on the Internet;

- describe the various approaches for determining the liability of ISPs for eg the horizontal approach, the non-horizontal approach;
- explain the liability of ISPs for Copyright infringement under the Copyright Act, 1957, and The Information Technology Act, 2000.

13.3 ISPs AND THEIR ROLE IN COMMUNICATION ON THE INTERNET

ISP is an entity that connects people to the Internet and provides other allied services such as Web site building and hosting. An ISP has the equipment and the telecommunication line access required to have a point of presence on the Internet for the geographic area served.

Various kinds of intermediaries are involved in delivering content online to end-users, as making a work available over the Internet will involve a chain of intermediaries. A person who is desirous of launching a Web site will first obtain an account with a hosting service provider and then will upload Web pages onto his Web site which is physically located on the host's 'server' - which could best be described as a very large hard disk that is directly accessible on the Internet. Upon storage on the server the uploaded documents become instantly available to everyone with a connection to the Internet. An access provider, in turn, provides access to the Internet. On the way from host to access provider to end user the transported content passes through the infrastructure of a network provider, who, apart from providing the physical facilities to transport a signal, will also transmit and route it to the designated recipient. It is common for a single legal entity to provide a complete range of these services. ISPs are instrumental in transmitting or disseminating third party content, but neither initiate nor take any part in a decision to disseminate particular material. The two main services provided by ISPs are:

- Web site building and hosting; done by an entity that provides space and management for individual or business Web sites; and
- Access providing; done by an entity that arranges for an individual or an organization to have access to the Internet.

13.4 VARIOUS APPROACHES FOR DETERMINING THE LIABILITY OF ISPs

The liability of ISPs may arise in a variety of legal fields, such as tort law, criminal law, trade secret law, copyright law, trademark law, unfair competition law, etc. Worldwide many countries have tried to define the liability of ISPs in disseminating third party content. Many of these national laws relate to criminal law, information technology law or copyright law. These statutes have tried to solve the problem by adopting either of the two approaches; horizontal approach or non-horizontal approach. The horizontal approach covers not only copyright infringement but also all other potential areas of law where liability of ISPs might arise. It fixes the liability regardless of the grounds for illegality of the transmitted material. Whereas, under non-horizontal approach the potential liability of ISPs is determined under each law where it might arise. In this case various statutes would determine ISP liability; for example, adopting non-horizontal approach the copyright statute would address ISP liability that might arise only in relation to copyright violations.

Please answer the following Self Assessment Question.

Self Assessment Question 1	<i>Spend 3 Min.</i>
Who are ISPs?	
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13.4.1 Horizontal Approach

In this manner the liability of ISPs is determined at one place in a single statute. There are laws now in force in Germany, Sweden, Japan, etc. which approach the issue from a horizontal perspective.

Horizontal approach functions through the filtering mechanism i.e. first; the ISPs are made liable according to the general provisions of law related to the conduct of the ISP in question. That means if the ISP is accused of defamation then he shall be tried according to the defamation laws and if the ISP is accused of copyright violation then his liability will be determined as per the provisions of the copyright law. Further, in case an ISP is held guilty say under copyright law then his liability is screened or 'filtered' through the exemptions granted to the ISPs under the specific provisions created under a particular statute.

13.4.2 Non-horizontal Approach

Under non-horizontal approach the potential liability of ISPs is determined under each law where it might arise. In this case various statutes would determine ISP liability; for example, adopting non-horizontal approach the copyright statute would address ISP liability that might arise only in relation to copyright violations. The alternative approach of implementing copyright-specific laws to determine online ISP liability, has been adopted by some countries such as Hungary, Ireland, Singapore and the United States of America. We will consider here the approach adopted by USA.

In order to limit the liability of ISPs, the United States of America amended its Copyright Act in October 1998 by enacting the Digital Millennium Copyright Act (DMCA) which adds a new section 512 to chapter 5 of the US Copyright Act. It establishes 'safe harbours' to shelter ISPs from liability for copyright infringement in certain circumstances.

The DMCA does not define when an ISP is liable for copyright infringement and, in this respect the existing principles of the US copyright law would apply. But the DMCA sets down guidelines with respect to copyright infringement online and specifically states four circumstances where ISPs are exempt from liability for damages. These four categories of activities are:

- (1) Transitory digital network communications;
- (2) System caching;
- (3) Storing information on systems or networks at direction of users;
- (4) Information location tools.

Further these limitations would apply provided: the ISP is merely acting as a ‘passive conduit’, for the information, is not the producer of the information, and has responded expeditiously to remove or disable access to infringing material upon notice from the copyright holder (the so-called ‘notice and take down’ provisions).

The ‘notice and take down’ procedures provide that when a copyright owner becomes aware of infringing material or infringing activity residing or taking place on an ISP’s system or network that copyright owner may notify the ISP of the infringement and require the ISP remove or disable access to the infringing material or activity. Upon receipt of a notification, an ISP will have to take down the material stored on its servers or stop access to the notified infringing material. The ISP in this case will be exempt from liability to its subscribers for its good faith removal of or disabling access to allegedly infringing content residing on its server at the direction of the subscriber. Under the protections afforded by this section of the DMCA, ISPs may act on their own initiative or in response to customer or other third-party complaints to remove or disable access to content believed to be infringing without fear of being held liable for a legal claim made by the person whose material has been removed or access disabled. This exemption applies to any claim that could conceivably be made against an ISP for removing or blocking access to content, such as tort or breach of contract claims.

This exemption only applies with respect to material residing at the direction of a subscriber, however, if the ISP “takes reasonable steps *promptly* to notify the subscriber that it has removed or disabled access to the material” and thereby allows the subscriber to respond to the infringement alleged in the notification. A subscriber’s response is referred to in the statute as a “counter notification”.

Upon receipt of a counter notification, an ISP must promptly provide the original complainant with a copy of the counter notification and inform him that it will replace the removed material or cease disabling access to it within ten business days. The original complainant has to file a suit within the ten-day period to obtain a court order restraining the subscriber from engaging in infringing activity if it wants to prevent access to the material from being restored.

Please answer the following Self Assessment Question.

Self Assessment Question 2

Spend 5 Min.

State the DMCA’s guidelines with respect to copyright information under which ISPs are exempt from liability for damages?

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13.5 ISP LIABILITY FOR COPYRIGHT INFRINGEMENT: INDIAN POSITION

13.5.1 ISP Liability under the Copyright Act, 1957

The Copyright Act, 1957 was obviously drafted in complete oblivion of the phenomenon called the Internet. Even after its latest amendments it does not contain any express provision for determining or limiting ISP liability. However, some provisions in the Act could be interpreted to have some bearing on the liability of ISPs. As per section 51 (a)(ii), copyright in a work shall be deemed to be infringed,

When any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act ... permits for profit of *any place* to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was *not aware* and had *no reasonable ground for believing* that such communication to the public would be an infringement of copyright.

Materially for our purposes section 51 (a)(ii) can be broken down into two parts:

- Permits for profit
- Any place

ISPs allow their servers and other telecommunication facilities for storing user's material and for transmitting that material. The computer servers and other telecommunication facilities are actually located at their business premises and hence they would readily under the expression "*any place*" and could be held liable for the infringing activities of third parties whose material they store or transmit if other requirements are fulfilled. Further, the expression "*permits for profit*" means that to be held liable the activities of ISP should be for profit meaning thereby that he should be financially benefiting out of the infringing activities. ISPs normally charge for their services and even if they offer some services for free, they could indirectly be making profit out of it, for example, from advertisements that they bundle together with the transmitted material. So, the above two requirements are fulfilled by ISPs for most of their activities in case they transmit or store infringing material.

Can an ISP be held primarily or secondarily liable for his contribution to copyright infringement, and if so, under what circumstances? Interestingly, many copyright statutes the world over distinguish between so-called primary and secondary liability. In principle, primary infringers are strictly liable. Secondary infringers, such as mere distributors and organizers of performances, are considered copyright infringers only

if they knew or had reason to believe that they contributed to an infringement. Thus, presence of some form of fault is necessarily included in the notion of secondary liability. Though the Copyright Act does not specifically divide liability into primary and secondary, it could easily be concluded that ISPs could be held only secondarily liable for the infringing activities of their users because their liability has been based on the knowledge of the infringement. The expressions used in section 51(a) (ii) “*not aware*” and “*had no reasonable ground for believing*” make it amply clear.

13.5.2 ISP Liability under the Information Technology Act, 2000

In India the provisions relating to the ISPs are specifically legislated in the IT Act, 2000 where an Internet Service Provider is referred to as *Network service provider* and Explanation (a) to s. 79 defines it as:

“Network service provider” means an intermediary.

Intermediary again has been defined under section 2(w) as:

“Intermediary” with respect to any particular electronic message means any person who *on behalf of another person receives stores or transmits* that message or provides any service with respect to that message.

Further the Act contains in section 79 a clause which limits the liability of ISPs under certain circumstances:

Network service providers not to be liable in certain cases.

For the removal of doubts, it is hereby declared that no person providing any service as a *network service provider* shall be liable *under this Act*, rules or regulations made there under 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.

Please answer the following Self Assessment Question.

Self Assessment Question 3	<i>Spend 3 Min.</i>
Define an intermediary?	
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13.5.2.1 Classification of ISPs under the IT Act, 2000

Under IT Act, 2000 no classification of ISP has been attempted. The expression ‘Network service providers’ used in section 79 subsumes within it all kinds of Internet service providers irrespective of what function they perform in the long chain of intermediaries that transport Internet content to the desired destinations. The ISPs

perform different functions in the task of transporting content and their liability cannot be uniform. It has to be based precisely on what function they perform. It is necessary to categorise the ISPs into functional categories otherwise different ISPs could be held liable under the IT Act, 2000 for something which they have played no role in or for the contents over which they have little control. So, in order to give a meaningful disposition to the limitation on liability of ISPs, for which section 79 has been drafted, it becomes essential to categorise the ISPs.

13.5.2.2 Filtering ISP Liability through the IT Act

The title of section 79 of the IT Act “*Network service providers not to be liable in certain cases*” makes apparent the object behind the section, which is to limit the liability of ISPs. The liability of ISPs could arise in a number of ways under different statutes. The liability could be criminal or civil in nature depending on various factors. It is impractical to define the liability of ISPs which could arise in various forms at one place.

Equally impractical could be to amend all our laws, which could hold ISPs liable, in order to limit their liability. The latter has not been attempted in any of the Indian legislations including the Copyright Act, 1957 till now. The IT Act, 2000 does not attempt the former but just seeks to create a filtering mechanism for determining the liability of ISPs. The idea is that the liability of an ISP for his action or omission be first determined in accordance with the statute under which it arises and then if at all the ISP is held liable, his liability again be filtered through section 79 of the IT Act. For example, if an ISP is accused of illegally distributing pirated copies of music, then his liability be first determined under section 51(a)(ii) and section 63 of the Copyright Act, 1957. If the ISP is found liable then his liability again be tested on the touchstone of section 79 of the IT Act, 2000.

In this context, the expression “*under this Act*” which has been used in section 79 has created some confusion. Apparently, this limitation of liability would be applicable only when the liability has arisen under the IT Act alone. This could not be the motive behind drafting section 79 especially when the Act does not attempt to define the liability of ISPs in any of its provisions; it only talks about limiting their liability.

13.5.2.3 How can an ISP Qualify for Exemption from Liability for Copyright Infringement?

Section 79 of the IT Act also provides two circumstances under which an ISP can qualify for exemption from liability:

- Lack of knowledge
- Exercise of due diligence

Lack of Knowledge

Knowledge of the illegal contents on part of the ISP is a prerequisite for holding him liable under section 79 of the IT Act, 2000. The ISP can escape liability if it could be proved that he was unaware of all that was stored and passing through his servers. But if he is put under a notice that some infringing material is either stored or passing through his servers, he has to take proper action for removing or disabling that material otherwise he could be said to have knowledge of the infringing material and held liable.

Due diligence

For an ISP to escape liability, section 79 prescribes “*due diligence*” to be exercised by him. The provision requires actual knowledge or breach of the duty of care. What should be the extent of the “*due diligence*” requirement? Should the ISPs be required to monitor and judge legality of millions of files that are present or passing through their servers? Considering the gigabyte that are stored or passing through their servers this seems to be an impossible task. But, if we say that the ISPs should not be under an obligation for “*due diligence*”, it might encourage them to consciously ‘look away’ and evade all liability. It can be safely concluded that ISPs are not liable for the (infringing) gigabytes that are stored and passing through their servers unless they are put on notice. If an ISP encounters particularly suspicious circumstances, he may be subject to “*due diligence*” i.e. a duty of care to investigate further whether material he hosts or refers to is unlawful and, where found to be so, to block access.

Please answer the following Self Assessment Question.

Self Assessment Question 4

Spend 3 Min.

What are the circumstances under the IT Act when an ISP is exempted from liability for copyright information?

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13.6 CRITICISM OF PROVISIONS OF IT ACT VIS-À-VIS ISP LIABILITY

Since the enforcement of the IT Act, 2000, section 79 has been criticised on a number of grounds as stated above. The Ministry of Communications and Information Technology appointed an Expert Committee to propose amendments to the IT Act. The Expert Committee has proposed revision of section 79. The proposed section 79 is as follows:

79. Exemption from liability of intermediary in certain cases

1. An “Intermediary” shall not be liable under any law for the time being in force, for any third party information, data, or link made available by him, except when the intermediary has conspired or abetted in the commission of the unlawful act.
2. The provisions of sub-section (1) shall apply in circumstances including but not limited to where:

Intermediary’s function is limited to giving access to a communication network over which information made available by third parties is transmitted or

temporarily stored; or the intermediary: (i) does not initiate the transmission, (ii) does not select the receiver of the transmission, and (iii) does not select or modify the information contained in the transmission.

3. The provisions of sub-section (1) shall not apply if, upon receiving actual knowledge of, or being notified by the Central Government or its agency that any information, data or link residing on a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails expeditiously to remove or disable access to that material on that resource.

Explanation: For the purpose of this section:-

- (a) Term 'Intermediary' has been defined in Chapter I, Section 2(w).
- (b) 'Intermediary' shall include, but not limited to, telecom service providers, network service providers, Internet service providers, web-hosting service providers, search engines including on-line auction sites, online-market places, and Cyber Cafés.
- (c) 'Third Party Information' means any information dealt with by an intermediary in his capacity as an intermediary.

13.7 WHY ARE ISPs SUED FOR COPYRIGHT INFRINGEMENT ON THE INTERNET?

Most of the time in every set of action that a copyright owner takes against infringements on the Internet, by and large the action is simultaneously taken against the ISP as well, apart from the person who actually commits the infringement. There are reasons behind ISPs being sued so often when it comes to Internet infringements.

It is very easy to trace an ISP. For example a software product is found loaded on a Web site which anyone is free to download. Let's presume the Web site actually operates some kind of bulletin board, i.e. a site where people just upload and download files and where anyone can contribute as well as can take. In such situations, often you can trace out the Web site owner but you can't trace out the actual contributor. But you definitely can find out the ISP who's facilities have been used to upload the software. In digital environment products are priced high and much damage can occur in less time. So, apart from suing the actual offender people would always like to sue the ISP as well.

Normally an ISP, as a business entity, has deeper pockets and is also more capable of paying the damages than is an individual private user. Another reason is that it deters infringement by other subscribers. If on a Web site there are 15 subscribers, all of whom can upload and download content to and from that Web site, if you sue one of them, the next day someone else might upload the same content. But if you sue the ISP directly it would have to shut off and make it very clear to his subscribers that the infringing content will not be uploaded on this Web site ever again. So with the intent of deterring infringement again, suing an ISP is quite practical. It is far easier to try and stop the copyright infringement by suing the ISP directly because he controls that network.

Let us now summarize the points covered in this unit.

13.8 SUMMARY

- ISP is an entity that connects people to the Internet and provides other allied services such as Web site building and hosting.
- ISPs are instrumental in transmitting or disseminating third party content, but neither initiate nor take any part in a decision to disseminate particular material.
- The liability of ISPs may arise in a variety of legal fields, such as tort law, criminal law, trade secret law, copyright law, trademark law, unfair competition law, etc.
- Internationally the problem has been tackled by adopting either of the two approaches; horizontal approach or non-horizontal approach.
- In this manner the liability of ISPs is determined at one place in a single statute.
- Under non-horizontal approach the potential liability of ISPs is determined under each law where it might arise.
- Certain provisions of Copyright Act, 1957 could be used to determine the liability of the ISPs for copyright violation on the Internet.
- The IT Act, 2000 lays down exemptions for limiting the liability of ISPs.
- For the content owners, it is practical to sue the ISPs as they are in a position of policing the Internet.
- Amendments have been proposed in the IT Act, 2000 vis-à-vis liability of ISPs.

13.9 TERMINAL QUESTIONS

1. What are the amendments that have been proposed in section 79 of the IT Act, 2000 vis-à-vis the liability of ISPs? Do you think they are desirable and beneficial in the overall regulation of the Internet? Give reasons.
2. How can ISP qualify for exemption from liability under the IT Act, 2000?
3. Who are ISP and what role they play in the overall communication on the Internet?

13.10 ANSWERS AND HINTS

Self Assessment Questions

1. ISP is an entity that connects people to the internet and provides other allied sciences such as web site building and hosting.
2. They are
 - 1) Transitory delegate Network communications.
 - 2) System caching.
 - 3) Strong information on system or networks at direction of users.
 - 4) Information location tools.
3. An intermediary is any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.
4. a) Lack of knowledge
b) Exercise of due diligence.

Terminal Questions

1. Refer to sub section 13.4.2.2 of the unit.
2. Refer to sub section 13.4.2.3 of the unit.
3. Refer to sub section 13.2 of the unit.