

EXTENT OF LIABILITY FOR INTERMEDIARIES IN EU, USA AND
INDIA – A STAKEHOLDER PERSPECTIVE

Lakshmi Srinivasan¹

¹ B.A., LL.B. (Hons.), NMIMS School of Law, Mumbai; LLM in Intellectual Property and Information Law, King's College London

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ABSTRACT

With the current EU Directive specifically calling out on online platforms or OCSSPs for their liability in infringement, many questions have arisen. It is true that the provisions call for a harsher liability on intermediaries to copyright infringement. But, the impact on end users' rights is immense. In the long run, it will also not serve its purpose for the rightsholders

The safe harbour rules in many jurisdictions provide some immunity to the internet services providers. However, the key is that most of the issues concerning intermediary liability stems from their involvement in the acts of infringement concerned. What if their involvement is measured and liability is ascertained as per the extent of their involvement? If done so, what would be the benefits or drawbacks for the other stakeholders?

In jurisdictions like the EU which have inclusive definitions of 'intermediaries', certain liabilities only pertain to a certain kind. However, in jurisdictions like India, all kinds of intermediaries are included within the ambit of one definition. At this juncture, categorization of the kinds of the intermediaries based on their functions could prove to be legally feasible in ascertaining their liability.

The aim of this paper is to examine three aspects – Firstly, while holding an intermediary liable, how are the rights of the end users affected in an act of copyright infringement? Secondly, for ascertaining liability of intermediaries, would their categorization as per their functions by way of policy and legislation improve the status quo? Thirdly, if the intermediaries were to be categorized, would it alleviate the said impact on end users?

The study is doctrinal and normative as it suggests a new model. The research methodology relied on are both primary legal data and secondary sources for making observations on the status quo. Hence, there will be references to cases, statutes, scholarly writings and governmental websites for current affairs, policy insights and the proposed solutions.

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ABBREVIATIONS

1. DSM – Digital Single Market
2. DMCA – Digital Millennium Copyright Act
3. IT – Information Technology
4. CJEU – Court of the Justice of the European Union
5. ECtHR – European Court of Human Rights
6. ECHR – European Charter of Human Rights
7. SABAM - Société d'Auteurs Belge – Belgische Auteurs Maatschappij
8. UGC – User-generated Content
9. OCSSPs – Online Content Sharing Service Providers
10. WCT – WIPO Copyright Treaty
11. ISPs – Internet Service Providers
12. AOIC – Author’s Own Intellectual Creation
13. CIPIL – Centre for Intellectual Property and Information Law, University of Cambridge
14. Ors. - Others
15. TRIPS – Agreement on Trade Related Aspects of Intellectual Property
16. OECD – Organisation for Economic Co-operation and Development
17. ECR – European Court Reports
18. CSLR – Computer and Security Law Review
19. IJLIT – International Journal of Law and Information Technology
20. Re: - Referred in
21. Ree: - Referring to
22. EF – elaborated further in
23. VARA – Visual Artists Rights Act
24. NULR - North-western University Law Review
25. RIAA – Recording Industry Association of America
26. EFF – Electronic Frontier Foundation
27. CJLT – Canadian Journal of Law and Technology
28. JIPLP – Journal of Intellectual Property Law and Practice
29. CWLR – Case Western Law Review
30. NTD – Notice and Takedown

INTRODUCTION

‘The intellectual property enforcement environment is complex, with multiple agencies involved in the fight to stem piracy and infringement, both nationally and internationally.’¹ The question of Intermediary liability and enforcement is a burning issue considering the recent Directive by EU, attempting a method never used before. Most jurisdictions face a general lack of awareness and understanding of how the mechanism of intermediaries, end-users, rights holders and potential infringers/ actual infringers work. Partly also because, technological basics as a whole, need understanding and consideration in the policy.

This paper will be addressing one main argument – the way forward to the policy on infringement and remedies by online intermediaries, through an analysis of the impact on the stakeholders. Currently, the policy is juggling between extreme liability attributed to intermediaries, the enforcement of copyright for rightsholders and the unintended impact on end-users. Considering these issues, this paper attempts to find a solution to the problems faced by the stakeholders and create a favourable atmosphere between them. Hence, the paper is divided into three parts to take into account three perspectives – Intermediaries, Rightsholders and End-Users.

Justifications for the Stakeholder Perspective

The key jurisdictions that would be dealt with are the USA, EU and India, with limited references to South Korea. If one were to examine the provisions for intermediary liability in EU², USA³ and India⁴, there is a pattern of how the provisions are drafted. An **unauthorised act** of copyright, which, **within the intermediary’s** sphere, was proliferated and/or downloaded by the **end-users**. Hence, the intermediary is also found liable for that act of copyright infringement. Whether the party knew of the infringing content or not is another

¹ Frederick Mostert, ‘Study on IP Enforcement Measures, Especially Anti-Piracy Measures in the Digital Environment’, (Fourteenth Session of WIPO Advisory Committee on Enforcement, Geneva, September 2019) (forthcoming) para 8

² Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Digital Single Market Directive) (2019) *OJL 130*, Article 17; Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) (2000) *OJL 178*, 17.7.2000 Articles 12, 13, 14, 15; Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive) (2001) *OJL 167*, 22/06/2001, Article 8

³ Digital Millennium Copyright Act 1998, s 512

⁴ Copyright Act 1957, s 52, r/w Copyright Rules, 2013 and Information Technology Act 2000, s 79

perspective of debate for different laws (E-Commerce Directive and DSM Directive) and disputed by scholars. The kind of liability is also discussed further.

Hence, if one were to analyse the patterns, it is clear that it is **this arrangement of stakeholders and their interests** that decides the direction of the law. So, the three parts of the law are as follows

1. Rightsholders (an act unauthorised by rightsholders becomes an act of infringement)
2. Intermediaries (with the variations in liability to their functions and knowledgeability of such act)
3. End-Users (whether primarily responsible for uploading content or just on the receiving end of information)⁵

Scope of Concepts (For this Paper)

Intermediary

This term forms the central concept of this paper. While there is a mention of this term, it means to say any entity that enables such communications on the Internet⁶ unless specified in certain cases. Unless their specific category is mentioned in a contextual sense in this paper, one can construe the meaning of this term as per the following definition.

The Organisation for Economic Co-operation and Development proposes the definition as – ‘Internet intermediaries bring together or facilitate transactions between third parties on the internet. They give access to host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.’⁷ It also provides further categories of intermediaries.

⁵ Perspective inspired by the drafting of the Law in the EU Directives

⁶ Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, (Information Law Series, Kluwer Law International 2016) 15

⁷ OECD (2011), *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, (OECD Publishing) 20 <https://read.oecd-ilibrary.org/science-and-technology/the-role-of-internet-intermediaries-in-advancing-public-policy-objectives_9789264115644-en#page5> Last accessed 12 August 2019

Accessory Liability

Riordan suggests that much ‘of the confusion that has bedevilled (accessory liability) stems from the use of undefined, inconsistent or misleading terminology’.⁸ Looking at the history of US Law, Secondary liability could also have connotations of Contributory liability, vicarious liability. Angelopoulos elaborates that ‘a further possibility is that of “third party liability”’. ‘Yet this term has a significant disadvantage, as it does not immediately make clear who the third party is: is it the accessory or the principal? The same lack of clarity is presented by other less widespread terms, such as “tertiary liability”, “gatekeeper liability”, “participatory liability” or “joint liability”’.⁹ Hence, ‘secondary Liability’ forms the broader concept while ‘accessory liability’ is a specific term.

Herein, the term ‘accessory liability’ is used. This is because of the nature of the laws discussed and the methods implemented to hold intermediaries liable. Accessory liability essentially means being held liable for an act of copyright infringement even if the act of intermediary was merely facilitating communication or use of services provided over the Internet.

Primary liability

Primary liability would equate to the liability normally attributed to the main or primary infringer. This infringer is the subject of laws of copyright in many jurisdictions and the subject of Copyright Directive and the DSM Directive of the EU. In other words, the person who commits the unauthorised act of abusing the rights guaranteed by copyright.

Additionally, as the situation requires, this liability may also be used to refer to the ‘infringer treatment’ that would be meted out to the intermediaries as per certain laws discussed here.

Justifications for the jurisdictions discussed

The EU, with its latest Directive, has made news and prompted many scholars to rethink the stance on intermediary liability. Being the subject of controversy and popular criticism, it forms the subject that inspires most of the content in this paper.

⁸ Jaani Riordan, ‘The Liability of Internet Intermediaries’, (PhD Thesis, University of Oxford, 2013) (Now an Oxford University Press publication), 66

⁹ Angelopoulos (n 6) 26

The USA could work like a weighing scale for the EU policy in certain aspects. However, with its drawbacks, it would set an example of what would and wouldn't work for ascertaining liability.

India, with its beginner provisions, has a lot to learn from the above jurisdictions. As a key country with one of the highest numbers of internet users and pirates, its policy requires a critique.

South Korea, on the other hand, is an extreme jurisdiction. Its hard measures to tackle liability and enforcement gets criticism from its scholars and raises questions on aspects like net neutrality.

Key concerns for the Stakeholders at a glance

1. Intermediaries
 - a. Being held liable for more than their role (rule of proportionality)
 - b. Not knowing about the act of infringement and still being held liable all the same
 - c. The acts of copyright infringement involved (for which they can be held potentially liable)
2. Rightsholders
 - a. Unlawful or unauthorised content being circulated on the online platforms
 - b. Loss of royalty revenue as rights holders for all the content uploaded illegally
 - c. Inability to seek the appropriate measures to tackle infringement in the market
3. End users
 - a. A neutral Internet
 - b. Refrain from overpriced copyright regimes (a key concern for developing countries)
 - c. Protection of fundamental rights

PART 1 – INTERMEDIARIES

POSITION

There are certain common approaches with different variations that the jurisdictions in question have taken to hold the intermediaries in some liability for third party infringement (commonly accessory liability).

If the intermediaries were to be categorised according to their actions or role in a particular chain of action, it would be beneficial to determine liability and seek damages or impose penalty accordingly. The EU Directive, initially driving towards the above conclusion has lost its direction and prescribes extreme steps towards the intermediaries, which, in the long run, would neither be useful in curbing infringement nor proliferate the usage of internet. India, in its initial steps, cannot even fathom such changes unless it readies its policy to have a considerable impact. The current situation in India does not have an impressive show, considering that India replicates the EU approach along with its mistakes. South Korea, on the other hand, is quite a revolutionary regime with its limitations.

The goal must be to create a policy that features all the stakeholders in the online chain of actions, in a win-win if not a beneficial position. The facilitation of this goal starts by examining the position of the intermediaries.

The interesting aspect of analysing the stakeholders in this policy is to understand how these jurisdictions have attempted to define intermediaries. They have broad definitions of intermediaries, as has been mentioned above. But within these definitions and expectations of intermediaries, there are notable differences in each jurisdiction. For example, the EU, despite having a broad spectrum of constituting intermediaries, keeps its applicable definition strictly contextual in its directives.¹⁰

However, the key to decoding the problems in our policy towards intermediaries is to understand each of their type and category that can potentially be in an act of infringement. It

¹⁰ E-Commerce Directive; Copyright Directive and the DSM Directive (addressing only certain kinds of intermediaries)

is a three-pronged approach – based on their **general functions, their knowledge standards and expectations of their functioning or behaviour** in that infringement.

For example, the general function of an Internet Access Provider is to provide the services of broadband and the Internet to its subscribers. Where an act of infringement occurred in its sphere, if it knows the number of subscribers indulging in infringing uses or uploading of content, it could prove a case for ascertaining liability. The specific function or expectation would be to report those users. But not doing that would trigger liability. Most of the laws are shaped around these aspects and this shall be the basis for categorisation of the intermediaries.

Hence, it is imperative to analyse the jurisdictions and their current scenario before making a case for the way forward based on the above.

SAFE HARBOUR MODEL

The connotations of safe harbour differ from jurisdiction to jurisdiction. In the USA, under the Digital Millennium Copyright Act, 1998 (hereinafter DMCA), there is a scheme for several groups of intermediaries, on the condition of acting expeditiously on notification of infringement.¹¹ In the EU, under the e-Commerce Directive, the same safe harbour is provided with what has been termed as a horizontal approach.¹² Various intermediaries are liable if they have knowledge of illegal content. Also, the knowledge level to ascertain for deciding liability has been provided. In India, the policy tends to be inspired by the EU with some specific changes.

EU

This jurisdiction is one that places the onus on the intermediary to prove that they did not possess any knowledge of the infringing information as for hosting services.¹³ For conduits¹⁴ or cached copies¹⁵, expeditious action against infringement (as has been specified by the provisions) would enable them to claim safe harbour. These would lead to believe that these service providers would have to regularly monitor the traffic and the data uploaded. But the Directive provides no such obligation¹⁶, at least not directly¹⁷.

Hence, *prima facie*, the system may seem to be favourable to the intermediaries for their liability.

The Courts have, in many landmark cases like *Google*¹⁸ and *L'Oréal*¹⁹, provided insights to interpret Article 14 of the E-Commerce Directive. It established that the liability ascertained depends on the nature of the transfer of material, caching or as a conduit service. However, as the provisions have not restricted the Member States from making monitoring provisions, jurisprudential instances of monitoring attempts have been found from those jurisdictions, as

¹¹ DMCA, (n 3)

¹² E-Commerce Directive, Art 14

¹³ *Ibid*

¹⁴ *Ibid*, Article 12

¹⁵ *Ibid*, Article 13

¹⁶ *Ibid*, Article 15

¹⁷ *Ibid* Article 15 (2)

¹⁸ Case C-236/08 *Google France, Google Inc. v Louis Vuitton Malletier* (2010) I-02417

¹⁹ Case C- 324/09 *L'Oréal SA and Others v eBay International AG and Others*. (2011) I-06011

decided by the CJEU. Distinguishing peer-to-peer traffic, identifying the infringing files and blocking were some of the actions to be included in a web filtering system.²⁰

However, what proves as an asylum for host providers on paper, can also work against them. Indeed, that was the case in *Delfi*²¹, where the ECtHR, dealing with these provisions for the first time under its jurisdiction, imposed an obligation to exercise an ex-ante control over the comments on its platform (particularly defamatory). Having completely sidestepped and misinterpreted the requirement of an order or notification to take action, this judgment is a testament to the imposition of a duty of care in a far-reaching interpretation of Article 10 obligations.²² Synodinou, while referring to the opinion of Van Eecke, comments that any such good intention measures of the hosts wanting to proactively prevent infringement would only work against them.²³ AG Jääskinen, in *L'Oréal*, referring to the recitals, excludes hosts from expeditious action exemptions.²⁴

Hence, while the conduits and caching intermediaries may have a true asylum, the case for hosts and their treatment under the Directives have proved to be a different story. If one were to think about it now, this may perhaps be a premonition for what “hosts” of user-generated content may be liable for, as has been discussed further.

USA

Under the DMCA, the intermediary must not have knowledge of the infringing material on his service. Once there is knowledge of any of this kind, it has to compulsorily take down such infringing material.²⁵ ‘Actual knowledge’ is difficult to prove, but the objective nature of ‘Red’ flag knowledge of the infringing material, makes it easier to ascertain the involvement and liability of intermediaries to the infringing activity. The provisions work somewhat like a shield for the intermediaries which lack ‘actual or constructive knowledge of specific and identifiable infringements of individual items’ and unwillingly facilitate them.²⁶ Although in the

²⁰ Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* ECR 2011 -00000

²¹ *Delfi AS v Estonia* (2015) Case no 64569/09

²² European Charter of Human Rights, Article 10

²³ Tatiana-Eleni Synodinou., ‘Intermediaries’ Liability for Online Copyright Infringements in the EU: Evolutions and Confusions’ (2015) 31CLSR 57, 65, <<https://www.sciencedirect.com/science/article/pii/S0267364914001897>> accessed 23 July 2019

²⁴ *L'Oréal* (n 19) 41 (Jääskinen AG)

²⁵ DMCA (n 3)

²⁶ *Viacom Intl. Inc v YouTube Inc.*, (2010) WL 2532404 (S.D.N.Y 2010)

subsequent appeal, the 2nd Circuit found that the district court erred in its decision, it agreed that knowledge requires specific instances of infringement.²⁷ Looking at the impossible nature of proving knowledge, the notice-and-takedown system became more relied on. Further elaborating on the scope, the 4th Circuit held that ‘This immunity, however, is not presumptive, but granted only to innocent service providers who can prove they do not have actual or constructive knowledge of the infringement...’²⁸

Interpreting the red flag, *Corbis*²⁹ explains that, ‘... it requires at a minimum, that a service provider who receives notice of a copyright violation be able to tell merely from looking at the user’s activities, statements, or conduct that copyright infringement is occurring.’ Considering this strict knowledge and financial benefit criteria, Ginsburg, in the context of UGC sites states that the law should exclude ‘a website that is not economically viable without its users’ infringements’ from the safe harbour.³⁰ Her opinion can be interpreted to distinguish sites like Pirate Bay from a Soundcloud or YouTube.

INDIA

Interestingly, this jurisdiction limited intermediary liability after a case of a UGC site being held liable for the content.³¹ As enumerated under the relevant provisions of the Information Technology Act, 2000³² and Copyright Act, 1957³³, the policy was guided by the EU and adopted its mistakes. However, the Indian safe harbour is in many ways broader than their counterparts in the USA and EU.

As per Section 52(1)(b), ISPs are exempt from liability since they are merely intermediaries “storing work in the technical process of electronic transmission or communication to the public.” Intermediaries, covered under Section 52(1)(c), are provided similar immunity, except in situations wherein they are “aware or have reasonable grounds for believing that such storage is of an infringing copy”. Unlike its inspiration, India does not distinguish between the kinds

²⁷ *Viacom Int'l, Inc. v. YouTube, Inc.* 676 F.3d 19 (2d Cir. 2012)

²⁸ *ALS Scan Inc. RemarQ Cmtys Inc* 239 F.3d 619 625, (4th circuit 2001)

²⁹ *Corbis Corp v Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1104-1105

³⁰ Ginsburg, J, ‘User-Generated Content Sites and Section 512 of the US Copyright Act’ (eds) *Copyright Enforcement and the Internet* (Kluwer Law International, Information Law Series, 2010) 197

³¹ *Avnish Bajaj v. State (N.C.T.) Of Delhi*, 116 (2005) DLT 427 (Bazee.com case)

³² Information Technology Act, 2000, s 79 (IT Act)

³³ Copyright Act (n 4) Section 52(1)(b), (c)

of intermediaries. The application is grave since the awareness of an intermediary concerning infringing material cannot be conclusively proved.³⁴

NOTICE AND ACTION MODEL

EU – NOTICE AND TAKEDOWN

Since 2010, the Commission launched a public consultation on the periodic review process on the E-Commerce Directive.³⁵ Many respondents wanted to clarify certain aspects of the Directive, the process of notice and action and its scope being such an aspect. This mechanism was introduced in light of the difficulties in the existing system. The safe harbour mechanism needed to be provided with a support mechanism that would be better utilised in expeditious action against infringement.

However, for a jurisdiction that heavily relies on this model, there is no proper procedure that has been mentioned in the relevant Directive.³⁶ As a result, no member state, contrary to EU expectations, has established a proper procedure for Notice and Take Down. Hence, harmonisation on this procedure is highly questionable among the Member States.

USA – NOTICE AND TAKEDOWN

Similar to the notice and action system in the EU, this system was used as a tool by the rightsholders to have infringing material pulled down from the services of the intermediaries. The model of the DMCA Notice and Takedown has become the model to be adopted in most countries³⁷ Also, with the proliferation of the internet, now large rightsholders have started using the aid of technology to send notices for taking down infringing content to the intermediaries. This has become a question of debate, due to the potential effect on these technological means on user rights.³⁸ Hence, despite having a model system of law worth

³⁴ Agarwal, Pankhuri, 'Developments in ISP Liability on Copyright Infringement' (2018), Spicy IP <<https://spicyip.com/2018/08/spicyip-fellowship-2018-19-developments-in-isp-liability-on-copyright-infringement.html>> Last accessed 16 August 2019

³⁵ Aleksandra Kuczerawy, Intermediary Liability and freedom of expression: Recent Developments in the EU Notice and action Initiative [2015] 31 CLSR 46, 49

<<https://www.sciencedirect.com/science/article/pii/S0267364914001836>> Last accessed 7 August 2019

³⁶ E-Commerce Directive

³⁷ Jennifer. M. Urban, Joe Karaganis & Brianna L. Schofield, Notice Takedown in Everyday Practice, March 2017 v.2, 8

³⁸ Ibid

replicating, there has been no dearth of problematic Notices to take down even in the US jurisdiction. There have also been issues with the standards of due process.

Yet that does not deny the fact that the USA model is one of the most viable models of notice and takedown, replicated by others.

INDIA

The proviso of Section 52(c) provides for a clause that corresponds to a notice and action provision similar to the E-Commerce Directive.³⁹ Read with the Rules, the notice and takedown procedure is operative in India as a privately administered mechanism.⁴⁰

PRIMARY LIABILITY OF OCSSPS – ARTICLE 17 OF DSM DIRECTIVE

A subject of the furore, Article 17 of the DSM Directive considers the uploading of content on an OCSSP as a communication to the public by the provider. Hence any unauthorised 'communication to the public' would render the OCSSP liable as under Article 5 of the Information Society Directive.⁴¹ This is interpreted as the primary liability as to any other infringer for these intermediaries. Prima facie, this does look like sifting of a certain kind of intermediary based on their inherent functions. This provision is assumed as a solution to the subject matter of cases like *Pirate Bay* and *YouTube Referral*.⁴² But the key issue is placing an intermediary providing the above services in the position as that of any infringer.

The provision intends to address the 'value gap', that the intermediaries make more profit from proliferating the unauthorised content than the rightsholders, who do not get their due share. Taking cues from the USA, it is, to a certain extent well found. In its 2015 Communication⁴³, the Commission stated that 'with due regard to freedom of expression and information, ISPs should be required to exercise greater responsibility and due diligence in the way they protect

³⁹ Rishabh Dara, 'Intermediary Liability in India: Chilling Effects on Free Expression on the Internet', Centre for Internet and Society (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038214> last accessed 18 August 2019

⁴⁰ Rule 3(4), Copyright Rules, 2013

⁴¹ Interpretation of Art 17, DSM Directive r/w Art 5, Copyright Directive

⁴² Eleonora Rosati, 'DSM Directive Series #1: Do Member States have to transpose the value gap provision and does the YouTube referral matter?' IPKat, 29 March 2019, <<http://ipkitten.blogspot.com/2019/03/dsm-directive-series-1-do-member-states.html>> Last accessed 19 August 2019

⁴³ Commission, 'A Digital Single Market Strategy for Europe', (Communication) COM (2015) 192 Final, s 2.4 and s 3.3.2

their networks and systems from illegal materials.’ Additionally, Colangelo⁴⁴, while referring to other Communications, has observed that ‘the Commission has suggested to follow another approach – the so-called ‘follow the money approach’ – that could deprive those engaging in commercial infringements of the revenues arising from their illegal activities.’

TECHNICAL MEASURES – SOUTH KOREA

Provided under Articles 102 to 104, safe harbours, notice and takedown measures are taken with a completely different perspective in South Korea.

If one were to consider this as a model, it seems like an extension of strict liability under torts. Where most countries hold intermediaries liable only if they had actual knowledge and did not act upon such knowledge, South Korea makes it an obligation to take down content immediately if it is potentially problematic. The key issue is, there may be no notification. Scholars have always complained about the ultimate impact on the end-users and the Internet in general. Park is of the opinion that unless the freedom of uploading content and the Internet in itself is sought to be paralysed, intermediaries, having no knowledge of infringing content should not be held liable.⁴⁵

Having intermediaries of their own (Naver, Daum etc.) more popular than the international companies, definitely makes it easier to monitor and detect any potentially infringing material there may be. Such interpretation also brings a general obligation to monitor. This can backfire if the matter being assessed is not completely an infringement (if it falls under the exceptions of the law).

In a judgment of 2009, the Supreme Court held that where the illegality of the content is clear; the provider had the knowledge and means to technically control the contents, it can be held liable.⁴⁶ This combination of the provisions and the rigid judicial stance has led to private censorship by intermediaries.

⁴⁴ Giuseppe Colangelo, Mariateresa Maggolino ‘ISP’s Copyright Liability in the EU digital single market strategy’ (2018) 26 IJLIT 148

⁴⁵ Kyung-Sin Park, ‘Online Intermediaries Case Studies Series: Intermediary Liability – Not Just Backward but Going Back’ The Global Network of Internet & Society Research Centers (2015) <<http://opennetkorea.org/en/wp/main-free-speech/intermediary-liability-korea-2014?ckattempt=3>> last accessed 16 August 2019

⁴⁶ Supreme Court, 2008Da53812, Apr. 16, 2009 (S. Kor.).

Hence, Safe harbours are granted as exemptions only when intermediaries can prove that it was 'technologically impossible' to take any action or bring down the content.

CRITICISM OF THE POLICY

EU

‘The law in EU governing the liability of Intermediaries sings between two antipodes - on the one hand, there is a broad safe harbour and on the other hand, the judicial authorities of EU can order the ISPs working within the boundaries of their Member States to prevent or terminate any infringement on their platforms.’⁴⁷ This situation has been prevalent before the passing of the EU Digital Single Market Directive.

Since the emergence of the Internet industry, the determination of the liability of intermediaries has been a controversial path. Hosts and access providers have become aware of the risks in content liability cases.⁴⁸ The regimes of each country consist of two basic principles- lack of responsibility of intermediaries for third party content (provided they don’t modify that content) and are not aware of its illegal character and no general obligation to monitor content.

EU has different approaches, as mentioned earlier in each of its directives. Three directives are in question here – the E-Commerce Directive, the Copyright Directive and most recently, the Digital Single Market Directive (DSM). While the E-Commerce Directive has a very cautious approach to the extent of intermediaries, the Copyright Directive takes a laxer approach.⁴⁹ The DSM Directive is a subject of separate analysis subsequently.

In the EU, all the three Directives have a common fault, they analyse intermediaries to the limited extent of their subject matter. For example, ‘Intermediaries’ under the e-Commerce Directive are limited to mere conduits⁵⁰, hosting⁵¹ and caching⁵² service providers. The DSM Directive focuses mainly on online content sharing service providers⁵³ in its key provision on intermediaries. A slight discrepancy can be discerned between these directives and the implementation of their key provisions such as the safe harbours due to this fragmented

⁴⁷ Colangelo, Maggiolino, (n 44)

⁴⁸ OECD (n 7)

⁴⁹ Angelopoulos (n 6) 75

⁵⁰ E-Commerce Directive Art 12

⁵¹ E-Commerce Directive Art 14

⁵² E-Commerce Directive Art 13

⁵³ DSM Directive Art 17

approach.⁵⁴ It may have been beneficial to have a focused approach on certain aspects of laws. But with the evolving times, these perspectives need to change.

Considering the knowledge, that the intermediaries may or may not have of the infringement, it often clashes with the idea of monitoring. In simple terms, once an intermediary has knowledge of a certain infringement through its monitoring mechanism, it cannot seek safe harbours.

Christina Angelopoulos, in her book, points to the conundrum as ‘challenge to the achievement of a balance between too aggressive and too lax enforcement of IPRs.’⁵⁵ Subsequently, in *L’Oréal*, this was discussed by the AG, where he suggested rules to identify an injunction to prevent infringements of a mark to preventing infringing acts from a future perspective.⁵⁶

Monitoring and Filtering

One may argue that there is no general obligation to monitor.⁵⁷ But that does not prevent the Member states from making laws that allow judicial authorities to order specific monitoring of a certain site. Differentiating the two, Riordan suggests that ‘monitoring is general when it is a systematic arrangement requiring random or universal inspection, rather than relating to individual notified instances- for example, judicial or administrative orders requiring monitoring of "a specific site during a given period of time" to prevent "specific tortious activity".’⁵⁸

In *L’Oréal*, where the CJEU clarified that the intermediaries must take measures which contribute not only to ending the IPR infringement but also preventing any further infringement. The injunctions so granted must be proportionate, effective and dissuasive, but should not be a barrier to any form of legitimate trade.

But the CJEU clarification did not translate well into practice. Not having a general obligation to monitor does not absolve the E-Commerce Directive from actually initiating the filtering from the intermediaries’ interpretation. If one were to carefully analyse the consequences of

⁵⁴ Angelopoulos (n 6) 69

⁵⁵ Ibid 101

⁵⁶ *L’Oréal* (n 19)

⁵⁷ E-Commerce Directive Art 15

⁵⁸ Riordan (n 8) 85

the above models and the knowledge requirements, this was a clever piece of drafting if intended to ultimately monitor and filter.

Due to the sheer volume of requests and injunctions, intermediaries have established filtering and monitoring systems in practice. Regardless of the fact whether they are against the basic principles of the EU Fundamental Rights and the ECHR, these filtering systems have become the natural consequence of the law so drafted.

It was not until *Scarlet*⁵⁹, that the CJEU clarified that this EU legislation does not allow the national authorities to make the intermediaries set up filtering systems as a consequence of their order. Explaining the demerits of the filtering system and its technological implications, they concluded that it would affect the business of intermediaries, also be against the fundamental rights.⁶⁰ Subsequently reiterated in *Netlog*⁶¹, but completely turned in favour of copyright protection in *Telekabel*⁶², the EU in many ways established the basis for its extreme approach in the DSM Directive.

Even if one were to consider that the monitoring and filtering were an unintended consequence of the law, there were no considerations to the intermediaries and injunctions imposed upon them. Hence, even at the risk of letting go safe harbour, the law resulted in the intermediaries' proactivity in copyright enforcement.

DSM Directive

With the DSM directive, the position of intermediaries has become graver. Where there was little clarity on accessory liability, this Directive, in a bid to have a harsh takedown of copyright infringement, introduces direct liability for the OCSSPs under its controversial provision.⁶³ By definition, they also constitute as intermediaries. They have been rendered ineligible for safe harbours as they 'communicate to the public' in such situations.⁶⁴

If one were to analyse the motivations for this provision, the *Pirate Bay* case and the *YouTube Referral* of the German Court would be prompt answers. But, the approach to have all such

⁵⁹ *Scarlet* (n 20)

⁶⁰ EU Charter of Fundamental Rights, Art 8 Art 11

⁶¹ Case C-360 /10 *SABAM v Netlog NV* (2012) ECLI:EU:C:2012:85

⁶² Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (2014) ECLI:EU:C:2014:192

⁶³ DSM Directive (n 53)

⁶⁴ *Ibid*

intermediaries cornered for liability due to a Pirate Bay, a 123movies, is stretching the implementation. Hence Intermediaries are not held in a favourable situation in this jurisdiction.

Measuring the Laws against the impact on Intermediaries

While it comes to the key parties impacted by the current laws, as has been discussed, it has been quite unsatisfactory in certain aspects. To measure this in terms of a more official scale, it is imperative to mention the Manila Principles. The key aspects of the principles⁶⁵ concern the intermediaries as the main stakeholders. The policy fails in the aspects mentioned below:

1. Accessory Liability

In different Directives, if one were to paint the whole picture, there are missing parts to the puzzle that is accessory liability. Firstly, the knowledge standards for these parties, as has been mentioned in the earlier chapter, consists of a patchwork of Directives and the CJEU judgments, which are unclear on certain aspects.

The broad nature of the definition of intermediary but tapering towards each Directive according to its subject matter is a confusing stance to take in the current scenario. Not to mention the ‘hush-hush’ approach to monitoring under the garb of ‘no general obligation’.

2. Primary Liability

By far the most controversial and rightfully so is the primary liability for OCSSPs in the latest Directive. EU is moving towards the direction of jurisdictions like South Korea. The provision is flawed in many ways.

- a. The Basis – if the above-mentioned decisions are indeed the basis of such a strict step, then it is ill-founded. Let us take the example of YouTube and Pirate Bay. One website is functioning with the intent to let its users upload their creations (in the form of videos) and create a base for themselves. Pirate Bay, on the other hand, as is common end-user knowledge, is used only to upload illegal entertainment material. If YouTube is used to proliferate illegal content, then it is technically a

⁶⁵ Manila Principles on Intermediary Liability, 2015,
<https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf> Last accessed 29 July 2019

‘misuse’ of its service. If Pirate Bay is used to proliferate illegal content, then it is a ‘use’ of the service. Hence, allowing “limited monitoring” of these contents, subject to the existing safe harbour and accessory liability, would be a more desirable step. However, Eleanora Rosati ⁶⁶ asks how to differentiate the illegal content proliferation sites (with names like Pirate Bay). The solution is empirical evidence and surveys to understand the general methods in which such websites are created (addressed in detail in part 4).

- b. The Method – Holding these intermediaries and the primary infringers on the same pedestal is a misinterpretation of the OCSSP's functions. The ultimate goal of this is to ensure that infringement does not happen. By holding them primarily liable, the internet would no longer encourage budding creators of copyrightable content like YouTube does. It is akin to closing a book shop that has both authorised and pirated copies of a book. The method to come upon these intermediaries requires a lot of deliberation.
- c. The potential implications – To ensure that they are not in the radar, these intermediaries would resort to two reactions, similar to their reactions during the E-Commerce Directive. Firstly, they would engage in proactive monitoring, which is against the very philosophy of EU law. Or they would only be able to urge its users to not indulge in such activities. Since the routine safe harbour and NTD would not be available, all they can do is wait to be subjected to litigation despite having warned its users. This would put them in a difficult position, especially for their business models. J.D. Lasica has observed, ‘Let a thousand business models bloom.’⁶⁷ Clearly, the Directive has no such plans.
- d. Economic impact – Needless to say, the policy will have deep economic implications as well. As per a report that addressed the filtering methods in DMCA ⁶⁸, such subtle filtering requirements would bear great costs to the intermediaries and be unsustainable for them and their business models. Making an exception for the smaller enterprises in the provision does not reduce the impact

⁶⁶ In her Presentation to the CIPIL Annual Spring Conference: ‘Mens Rea in IP, Knowledge, Intent and Infringement of Intellectual Property Rights’, University of Cambridge on 9 March 2019

⁶⁷ J.D. Lasica, *Darknet: Hollywood's War Against the Digital Generation* Hoboken NJ: Wiley and Sons (2005) 209, ref: Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my iPod*, Edward Elgar (2007) 218

⁶⁸ E Engstorm and N Feamster, ‘The Limits of Filtering’ Engine Report (2017) <<https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf>> Last Accessed 17 August 2019

that the threat of primary liability places upon the OCSSPs.⁶⁹ Also, the efficiency of these filtering systems is highly disputed for identification of infringing content in the general sphere or P2P. South Korea (discussed later), makes the same mistake as its 'technical measures' and scholars⁷⁰, while criticising the law, have been working to revoke the law.

USA

Having a history of primary liability⁷¹, vicarious liability⁷² and contributory liability⁷³ for intermediaries, the USA, with DMCA, attempts to limit the liability to secondary after careful consideration.

The USA is an interesting jurisdiction, wherein the safe harbours are vertical. Despite the functions of the intermediary, if the conditions of the statute⁷⁴ are met, the intermediary can fall under the ambit of safe harbour. The key motivations of jurisdictions such as the USA come from all the stakeholders above. The USA generates major copyrighted content and also is home to major service providers like Google. Additionally, the First Amendment concerning Freedom of speech and expression is also really broad in its wording in the Constitution. Whether their internet is truly neutral is a question of another research. On paper, the USA has strong motivations to keep the interests of all the three stakeholders in mind.

The key affirmative point for intermediaries is the red flag test. The House of Representatives⁷⁵ clarify the same as where there is an absence of customary indicia (like the standard and accepted digital watermark or other copyright management information⁷⁶), intermediaries can identify the difference in its source or authorization, would constitute a red flag. So, the USA seemingly provides a regime that gives the benefit of doubt in favour of the intermediaries.

⁶⁹ DSM Directive Art 17(5)

⁷⁰ Kyung-sin Park, 'Intermediary liability safe harbor in Asia and AI-based Future at Google Legal Summit' (2017) Opennet Korea < <http://opennetkorea.org/en/wp/2203?ckattempt=3> > Last accessed 24 July 2019

⁷¹ *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp. 1552 (M.D. Fla. 1993); *Religious Technology Center v. Netcom*, 907 F.Supp 1361 (N.D. Cal. 1995)

⁷² *A&M Records Inc. v Napster Inc.*, 239 F.3d 1004, 1022; *Gershwin Publishing Corp. v. Columbia Artists*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Sega Enterprises Ltd. v. MAPHIA*, 839 F. Supp. at 1556.

⁷³ *Sony Corp. v Universal City Studios*, 464 U.S. 417

⁷⁴ DMCA (n 3)

⁷⁵ US House of Representatives, 'WIPO Copyright Treaties Implementation and On-Line Copyright Infringement Liability Limitation' Rept. 105-551 May 1998 re: Angelopoulos (n 6) 83

⁷⁶ Ibid

However, US law is not without its limitations. It has had effects on the end-users through intermediaries and to the rightsholders, which has been discussed subsequently. But that does not change the fact that the USA is also the only jurisdiction discussed in this paper, that provides a viable model for dealing with intermediary liability.

INDIA

Being a young jurisdiction in this aspect, India has a similar background and motivations as the USA. The creation of copyright content is very high. Though it is not home to any popular service provider, the proliferation of the internet has increased leaps and bounds in recent years. Most statistics point out to India as the country with the second-largest number of Internet users, behind China.⁷⁷ A newspaper report establishes that in 2019, the rate of internet users would reach double-digit growth.⁷⁸ But, another newspaper report⁷⁹ also notes that India is among the top countries in the world for internet piracy, including P2P downloads and Blu-Ray files.

India has only started taking steps to have intermediary liability. Following the vertical approach, it has a separate regime for intermediary liability of copyright.⁸⁰ It has one definition of intermediaries⁸¹ and safe harbours in its copyright legislation.⁸² It also has a notice and takedown provision limited to transient storage of a work in electronic links⁸³.

However, India had its drawbacks. Before the amendment of 2012, the Delhi High Court⁸⁴, while holding intermediaries liable also held that all user-generated content must be screened. The Single Judge order was subsequently challenged and overruled by a bench of the same

⁷⁷ 'List of Countries by Internet Users' World Atlas, January 2019 <<https://www.worldatlas.com/articles/the-20-countries-with-the-most-internet-users.html>>; 'Top 20 Countries with Highest Number Of Internet Users' Internet World Stats, June 2019 <<https://www.internetworldstats.com/top20.htm>> Last accessed 19 August 2019

⁷⁸ Press Trust of India 'Internet users in India to reach 627 million in 2019: Report' Economic Times (6 March 2019)

<https://economictimes.indiatimes.com/articleshow/68288868.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> Last accessed 19 August 2019

⁷⁹ TH Bureau 'P2P downloads, Blu-ray files: India ranks high on online piracy, says report', The Hindu (Business Line) (21 August 2018) <<https://www.thehindubusinessline.com/info-tech/p2p-downloads-blu-ray-files-india-ranks-high-on-online-piracy-says-report/article24743909.ece>> Last accessed 19 August 2019

⁸⁰ Electronic Frontier Foundation, Jurisdictional Analysis Comparative Study Of Intermediary Liability Regimes Chile, Canada, India, South Korea, UK and USA in support of the Manila Principles on Intermediary Liability, (2015) version 1.0 <https://www.eff.org/files/2015/07/08/manila_principles_jurisdictional_analysis.pdf> Last accessed 11 August 2019

⁸¹ IT Act (n 33)

⁸² Copyright Act (n 4) s 51(a) (Amended 2012), r/w Copyright Rules 2013

⁸³ Ibid Section 52(c)

⁸⁴ *Super Cassettes Industries Ltd. v. MySpace Inc. & Another*, IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008 (2011)

court.⁸⁵ But, even with the supposed clarity of the Amendment Act of 2012, the policy still lacks.

The key issue with this law is the sheer inadequacy of it. More importantly, as discussed in the earlier chapters, the bigger issue is the implementation. It is important that India at least attempts to be in a similar frequency as the other jurisdictions, on implementation, if not on policy. Merely formulating a law similar to the leading jurisdictions, without understanding the demographics and enforcement mechanisms of the country would be an oversight. It will also not be beneficial to any of the stakeholders.

The recent statistics are a testament to its failing policy. With its latest draft rules, it proposes technological mechanisms and tools for proactive filtering, going closer to the South Korean regime.⁸⁶ Yet, currently, most of the implementation falls upon the judicial authorities, which, as elaborated subsequently, is a failure.

SOUTH KOREA

Known to be a rigid jurisdiction, it provides for safe harbours⁸⁷ as in EU and USA reflecting its FTAs with both the jurisdictions.⁸⁸ Technological impossibility in the removal of the content is the requirement for safe harbour. However, the courts have seldom granted this defence to intermediaries, holding them liable in the majority of the occasions. It also categorises certain intermediaries like P2P and cyber-lockers (cloud storage), holding them directly liable for failure in filtering out infringing content.⁸⁹

In jurisdictions like these, intermediaries and end-users are both affected, both being the receiving end of the enforcement spectrum.

In hindsight, one may argue that this model is necessary to ensure the enforcement of intellectual property. A jurisdiction like India, where implementation is the key issue, may want to implement such a model. But if one were to carefully deliberate, such a system is

⁸⁵ *MySpace Inc. & Another v Super Cassettes Industries Ltd.* (2017) 236 DLT 478 (DB)

⁸⁶ Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 (DRAFT) r 3(9) <https://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf> Last Accessed 29 July 2019

⁸⁷ (Korea) Copyright Act 1957 Art 102

⁸⁸ Translated Version <<https://wilmap.law.stanford.edu/entries/copyright-act-last-amended-act-no-12137>> Last Accessed 29 July 2019

⁸⁹ Copyright (n 87)

potentially dangerous as it can be used for purposes such as surveillance and general monitoring.

DRAWBACKS TO THE CRITICISM

The key drawback to the criticisms made above is the reference to Manila Principles⁹⁰. These principles have been chiefly formulated keeping in mind the fundamental rights and the intermediaries. Some principles, viz. ‘due process for restriction policies and their unambiguous nature’, ‘proportionality in the restriction orders’, the ‘need for transparency and accountability’ should be given a thought for the policy.

But others like ‘shielding from liability for third-party content’ is impossible to uphold in the current scenario. Some others like ‘requiring content not to be restricted without the order of judicial authority’ in the current scenario where blockchain is examined as a possible tool of copyright enforcement⁹¹ is also a difficult idea to work with.

Hence, the references to these principles in this paper are only to the limited extent of their intent and any principle mentioned specifically and not for every principle verbatim.

⁹⁰ Manila Principles (n 65)

⁹¹ Frederick Mostert, ‘Digital tools of Intellectual Property Enforcement – their intended and unintended norm-setting consequences’, Chapter in *Research Handbook on IP and Digital Technologies* by Tanya Aplin (in Press)

PART 2 – RIGHTSHOLDERS

POSITION

A crucial spectrum of this chain that is copyright infringement is the rights in question. The ultimate effect of any act of infringement is to the main revenue of the rights holders. Hence making this policy must have a strong consideration for them. In jurisdictions like South Korea, and now with the DSM Directive in EU, laws tend to be tipped to scale towards the rightsholders.

However, these parties particularly face issues of enforcement in a jurisdiction like India. Where the policy is weak to ensure implementation or where the enforcement agencies are divided on their priorities, rights holders cannot necessarily invoke their rights. As a result, approaches regarding intermediary liability require changes in a manner that places rights holders in a prioritised position.

Before delving into details, it is necessary to understand the aspect of copyright infringement and the potential areas where the intermediaries may play a role to facilitate infringement. The rights here in question are limited to the economic rights provided under copyright protection. This is because the concept of economic rights is in harmony in the EU⁹², accepted and acted upon by the USA⁹³, India⁹⁴ and South Korea⁹⁵. Moral rights⁹⁶, with the differences in opinion on an international sphere, would be a subject of this discussion in another era.

The rights in discussion here are the right of reproduction and the right of communication to the public, including the making available right to the public.

⁹² Subject of various directives

⁹³ VARA, DMCA, Copyright Act of 1976

⁹⁴ Copyright Act, 1957, Information Technology Act, 2000

⁹⁵ Copyright (n 87)

⁹⁶ Berne Convention Art 6^{bis} r/w TRIPS Art 9

RIGHT OF REPRODUCTION

The rise of technology entails both temporary and permanent copies cached of the copyrighted material. Transient copies which are made in the course of action, which is authorised, they would fall under the exception to this right⁹⁷. The CJEU has also held that the work so protected must be an author's own intellectual creation (AOIC).⁹⁸ In USA on the other hand, the rights holder needs to prove the similarity between the works in question and his/her work. Additionally, the defendant must have had access to the original work.⁹⁹

Transient copying exception is available in most of the jurisdictions under consideration in this paper. However, scholars like Dr. Makeen, Hugenholtz and Litman and have criticised the now overarching interpretation of the right of reproduction in the online sphere.¹⁰⁰ Considering the technical aspects and methods in which such reproduction takes place, applying the protection of copyright to every such copy has been believed to be complicated and inconsistent with the development of copyright law. These discussions can potentially affect the extent of intermediary liability and rightsholders.

Hence, in the long run, the idea of the right of reproduction for enforcement remains vague.

RIGHT OF COMMUNICATION TO THE PUBLIC

The key right in question here is that of making available to the public as per the WIPO Copyright Treaty¹⁰¹. Interestingly, one of the earlier Agreed Statements of this Treaty mentions that merely providing the physical facilities for enabling communication would not constitute a communication to the public.¹⁰² This seems to point out towards intermediaries, like the Internet Access Providers.¹⁰³ But can intermediaries like the online content sharing service providers be placed on the same pedestal as the internet access providers? The DSM Directive attempts to answer.

⁹⁷ Copyright Directive, Art 5

⁹⁸ Case C-5/08 *Infopaq International As v Danske Dagblades Forening* (2009) ECR I-06569

⁹⁹ *Nichols vs Universal Pictures et al.* 45 F.2d 119 (2d Cir. 1930); *Arnstein v Porter* 154 F.2d 464 (2d. Cir 1946); *Sid & Marty Krofft Television Productions Inc. v McDonald's Corp.* 562 F.2d 1157 (9th Cir. 1977)

¹⁰⁰ Makeen F. Makeen, 'Copyright in a Global Information Society: The Scope of Copyright Protection Under International, US, UK and French Law' London: Kluwer (2000) 308-314

¹⁰¹ WIPO Copyright Treaty, Art 8

¹⁰² Angelopoulos (n 6) 57

¹⁰³ 'Communication Service Networks' – Hoboken (n 118) 123-124, Frabboni (n 163) 120-122

CRITICISM OF THE POLICY

The key issue is with the right of communication to the public. With the DSM Directive, the activities of an OCSSP (intermediary) has been construed to be 'communication to the public'. This situation has particularly arisen due to a lack of definition of the right in the Copyright Directive (also known as the InfoSoc Directive).¹⁰⁴

The issue in this policy, as has been pointed out by Colangelo¹⁰⁵, is the argument that the OCSSPs must conclude licensing agreements with the rightsholders or prove that they had "made their best efforts" to do so. Otherwise, they shall be liable for direct copyright infringement. This extension of the act of communication to the public favours none. The intermediaries need to fret about ensuring that they get every right holder to authorise content or gather evidence of attempting the same. The rightsholders or even the societies on behalf of them have to ensure that their authorisations are provided, with no guarantee of this step facilitating enforcement and future prevention of infringement.

The CJEU, in many initial cases¹⁰⁶, carefully laid out the criteria of an 'act of communication to the public' to include transmission and retransmission of a copyrighted work regardless of the means. However, the Court had also clarified that the mere provision of technical infrastructures for user access is not an act of communication.¹⁰⁷ In a departure, 'for profit' was equated to be a criterion for assessing communication.¹⁰⁸ But on the aspect of 'public', the Court, through a combined reading of all the cases, has held that communication has to be to a 'new public', that is the public not accounted for in the authorisation by rightsholders.¹⁰⁹

Despite its confusing history, the CJEU has managed to put forth criteria that could be a fair indication of what constitutes 'communication to the public'. However, in its recent case laws with *Ziggo* and *Filmspeler*, the CJEU may have echoed the sentiments of the current

¹⁰⁴ Copyright Directive, Art 3(1)

¹⁰⁵ Colangelo, Maggiolino (n 44)

¹⁰⁶ Case C-306/05 *SGAE v Rafael Hoteles SA* (2006) ECR I-11519; Case C-117/15 *Reha Training v GEMA* (2016) ECLI:EU:C:2016:379

¹⁰⁷ Case C-527/15 *Stichting Brein v Jack Frederik Willems (Filmspeler)* (2017) OJ C 195

¹⁰⁸ Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV* (2016) ECLI:EU:C:2016:644 (regarding the posting of hyperlinks)

¹⁰⁹ Case C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV (Pirate Bay)*, *GS Media, Filmspeler*, Case C-484/93 *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme (Svensson)* (1995) ECR I-03955

provision.¹¹⁰ If one were to apply the inducement rule¹¹¹, the intermediaries in the above cases were found to have a specific model to induce infringement including the advertisers and the users' comments on other methods to download infringing content. But the same is not true in all cases. Generalising this finding to all the intermediaries engaged in the same service is a fallacy of the Directive.

Ultimately, the broad construct of merely providing access to user-generated content puts the intermediaries in no better position than a primary infringer. This is because prescribing primary liability in itself allows no room to speculate and question whether there was knowledge of infringement or not. As Rosati¹¹² points out, with the disappearance of secondary liability, the possibility of a safe harbour, notice and takedown or any other automatically disappears.

Issues with the knowledge criterion to prove safe harbours in the USA

The open-ended safe harbour knowledge standards can potentially create issues for right holders. Whether the situation was a red flag, would only be highlighted when the matter is taken up before a judicial authority. Until then, unauthorised content may have already been circulated. Conversely, if the intermediaries interpret the red flag test as an excuse to monitor, the end-users' rights and neutrality of the internet would be affected. This is because, the entire basis of the red flag test, unlike a notification, is 'suspicion' of infringing activity.

But, 'in practice, the courts have tended to adopt such a high standard of "awareness" that it arguably often, in fact, coincides with "actual knowledge"'.¹¹³ In *Tiffany*¹¹⁴, the court held the requirement of 'more than general knowledge or reason to know that its service is being used to sell counterfeit goods'. As has been observed by Farano and Angelopoulos¹¹⁵, it is actual knowledge that is a requirement to hold an intermediary liable. It is potentially disadvantageous to the rightsholders. The regime, in its benefit of doubt for intermediaries, makes enforcement tough for rightsholders.

¹¹⁰ Giancarlo F. Frosio, 'Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy' (2017) 112 NULR 37

¹¹¹ *Grokster case* (elaborated further in Part 4) (n 157)

¹¹² Rosati (n 66)

¹¹³ Angelopoulos (n 6) 83

¹¹⁴ *Tiffany v eBay*, 600 F.3d 93, 107, (2d Cir. 2010)

¹¹⁵ B Martinet Farano, 'Internet Intermediaries Liability for Copyright and Trademark Infringement: Reconciling the EU and US Approaches' (2012) TTLF Working Paper No.14 79-82; Re: Angelopoulos (n 6) 84

PART 3 – END USERS

POSITION

The key philosophy of both the US and EU is to not hold the end-users directly liable for any of the content they download. Firstly, such a policy would not be practically viable for intermediaries or the enforcing authorities to chase every end-user who has violated the rightsholder's copyright. Secondly, it will also constitute problems with Privacy and Data protection laws in these jurisdictions. Hence, the expectation is placed on intermediaries to remove infringing content.

However, this does not eliminate the effects on end-users of a policy on the service provider liability. Be it primary or accessory, the ultimate effect is on the end-user as it is his internet sphere and browsing that gets affected. The confusion of general and specific monitoring would particularly affect and compromise the privacy of these end-users. Similarly, for any content that they may upload on OCSSPs, if the infringing nature of the content is questionable, their freedom of expression is affected in the crossfire between right holders and end-users.

CRITICISM OF THE POLICY

EU

The Charter of Fundamental Rights of the EU includes the rights and freedoms enshrined in the ECHR.¹¹⁶ As discussed earlier, the unintended consequence of monitoring and filtering due to self-regulation after the E-Commerce Directive does leave its implications on end-users. The Bonn Declaration¹¹⁷ mentions that the rules of responsibility ‘should give effect to the principle of freedom of speech, respect public and private interests and not impose disproportionate burdens on actors.’ Hoboken¹¹⁸ further clarifies that the E-Commerce Directive differs in its context of freedoms, for the European Internal Market (economic freedoms). Hence, any

¹¹⁶ EU Commission, ‘Why do we need the Charter?’ < https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en > Last accessed 13 August 2019

¹¹⁷ European Union Ministers ‘Global Information Networks: Realising the Potential’ (Ministerial Declaration, Bonn, 1997), <http://web.mclink.it/MC8216/netmark/attach/bonn_en.htm#Heading01> Last Accessed 19 August 2019

¹¹⁸ Joris van Hoboken, *Search Engine Freedom: On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines*, Kluwer Law International B.V, 2012, 138

consequence that the Directive may have had on end-users due to the monitoring and filtering cannot be called in as violation of end-users' rights under the Charter for two reasons

1. It is not a direct consequence of the provisions of the Directive. There is no mention in the directive directly which can cause a potential violation of rights. The consequences were incidental.
2. The E-Commerce Directive is limited in certain aspects in its context of free movement of goods.

‘The nature of online communications means one has to consider the possible ramifications of Article 8 ECHR¹¹⁹, which protects the right to private life and correspondence or similar constitutional safeguards.’¹²⁰ Hugenholtz, on this, refers to *Scarlet* and states that filtering obligations were indeed questioned for their legitimacy by the Court of Brussels.¹²¹ Regarding privacy, while referring to *Telefonica*¹²², he further states that, ‘while not ruling out that the European acquis allows for national statutory procedures that mandate disclosures (of the identities of subscribers suspected of copyright infringement), the ECJ warns that the right to privacy needs to be fully taken into account.’¹²³

However, the real issue is with the DSM Directive. When its provisions hold the mentioned intermediaries primarily liable, it is bound to have its effects on the rights of end users. There is no general monitoring obligation in theory under the provision.¹²⁴ But the circumstances of liability would result in active monitoring and filtering of data, which is an unavoidable consequence.

This will limit the information to the end-users or prevent them from creating anything in the fear that they may be potentially infringing, especially on platforms like YouTube. The European Court of Human Rights has held that ‘Article 10¹²⁵... applies not only to the content of information but also to the means of transmission or reception since any restriction imposed

¹¹⁹ Charter of Fundamental Rights, Art 7 r/w Art 8

¹²⁰ Hoboken, (n 118) 117 referring to cases Case no 6205/73 *Silver and ors. v United Kingdom*, ECtHR March 23, 1983; Case no 121/1996/740/939 *Grigoriades v Greece*, ECtHR November 25, 1997

¹²¹ P. Bernt Hugenholtz, ‘Codes of Conduct and Copyright Enforcement in Cyberspace’ (eds) Copyright Enforcement and the Internet, (Kluwer law International Information Law Services) 318

¹²² Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* (2008) ECR 22

¹²³ Hugenholtz (n 121) 318

¹²⁴ DSM Directive, Art 17 (8)

¹²⁵ Charter of Fundamental Rights, Article 11

on the means necessarily interferes with the right to receive and impart information.’¹²⁶ If one were to consider the functions of intermediaries with secondary liability or the OCSSPs, they fall within the ambit of Article 10.

USA

Hoboken further comments on the difference of the USA Approach to user rights. He says, ‘The other point of view... does not make the connection between the protection of access providers under the freedom of expression and the rights and freedoms of the users of the network. It instead conceptualizes the right to freedom of expression as a negative right which prevents the government from regulating the way the free exercise of the right to freedom of expression plays out in private relations.’¹²⁷ If one was to extend this concept to all kinds of intermediaries, one can conclude that the concept of freedoms is broad.

Yet the self-regulations would render the jurisdiction more susceptible to violations of the freedom of expression and privacy enumerated in the First Amendment. Arguing on the philosophy of rightsholders’ due, Sonia Katyal¹²⁸ remarks, ‘A few years ago, it was fanciful to imagine a world where intellectual property owners – such as record companies, software owners, and publishers – were capable of invading the most sacred areas of the home in order to track, deter and control uses of their products. Yet today, precisely that is taking place.’

There have been many issues about the subpoena provision in the DMCA¹²⁹. However, when it comes to the disclosure of the identities of the users involved in the infringement, the courts have been steadfast in their opinion in favour of end-users and safeguarding their identity in some cases.¹³⁰ In *Verizon* for P2P sharing, the court said that neither the text of Section 512(h) nor its overall structure permits a subpoena to be sent to an ISP acting as a conduit for the transmission of information, nor do they have the capacity to police copyright material on its subscribers’ computers. Though in some other cases,¹³¹ the courts have held against the infringer in P2P situations. Yet, there has been a general notion that such liabilities would be

¹²⁶ App No 12726/87 *Autronic AG v Switzerland* (1990) 178 EHRR.12

¹²⁷ Hoboken (n 118) 123

¹²⁸ Sonia Katyal, ‘The New Surveillance’, 54 CWLR 297-385 at 297; re: Rimmer (n 67) 192, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=527003> Last accessed 29 July 2019

¹²⁹ DMCA (n 3), s 512(h),

¹³⁰ *RIAA v Verizon Internet Services* 351 F.3d 1229 (DC Cir 2003); *In Re Charter Communications*, 393 F.3d 771 (8th Cir. 2005)

¹³¹ *BMG et al. v Cecilia Gonzalez* WL 1066592 (N.D.III.) (2005)

an overreach and violation of fundamental rights. Jeremy deBeer¹³² observes, ‘...such shotgun approaches which splatter liability around with the hope that some of the intended targets will be hit may cause unacceptable collateral damage in the war on putative piracy’. Though said in the context of levies on P2P file sharing, one could extend this statement to most intermediaries, including OCSSPs. Holding them for high liability for being facilitators of information does not curb the real problem, that is copyright infringement.

Concerning the NTD process, private regulation processes have led to an automated mechanism for removal of infringing content. Studies have shown their impact on individual rights because of lack of due process.¹³³ Also, a combination of Section 1201 (circumvention) and the NTD have often been used in violation of freedom of speech.¹³⁴ With the discussion to replace NTD with a fully automated mechanism¹³⁵, end-users and their generated content will only be threatened further.

INDIA

As for a jurisdiction like India, the question arises of implementation and the end-users' complete lack of awareness of the policy. Hence, they are one of the reasons for the failing policy. Apart from their general lack of awareness, the implementation, as described earlier, also forms the main issue. In the copyright front, with the recent draft rules' lack of definition of ‘unlawful content’¹³⁶, there may be issues of proactive filtering affecting end users.

SOUTH KOREA

Statistics¹³⁷ have not rated the country favourably on its net freedom. As for neutrality, monitoring on the local intermediaries like Kakao, Naver, Daum etc. are common instances,

¹³² Jeremy DeBeer, ‘The Role of Levies in Canada’s Digital Music Market’ (2005) 4(3) CJLT 153 at 164, re: Rimmer (n 67) 217

¹³³ Notice and Take Down (n 37) 120

¹³⁴ Electronic Frontier Foundation, ‘Unintended Consequences: Sixteen Years under the DMCA’ September 2014 <<https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf>> Last Accessed 18 August 2019

¹³⁵ Rebecca Jeshke, ‘EFF to Copyright Office: Safe Harbors Work’ (*Electronic Frontier Foundation* 22 February 2017) <<https://www.eff.org/deeplinks/2017/02/eff-copyright-office-safe-harbors-work>> Last accessed 18 August 2019

¹³⁶ IT Draft Rules (n 86) r 3(9)

¹³⁷ ‘Freedom on the Net 2018 – South Korea’, Freedom House <<https://freedomhouse.org/report/freedom-net/2018/south-korea>> Last accessed 17 August 2019

which suggest that the users' rights have not been one of the foremost priorities and strengths of this jurisdiction.

PART 4 – WAY FORWARD

STANCE AND JUSTIFICATION

The general policy intends to ensure that the intermediaries are not held liable for the content that they have no knowledge of. But with the passing of the current directive on Digital Single Market¹³⁸, the question of addressing the liability of intermediaries has become even more complex.

There have been different models suggested by scholars that have been analysed below. Keeping in mind all the jurisdictions, they have their advantages and drawbacks.

For the proposed model to be applicable, it is important to demonstrate how it will blend well and provide a more meaningful conclusion to the current systems around the world. Analysing the law in the jurisdictions like EU, USA, South Korea and the closely following India will hold a perspective to the major models to be implemented in the other states.

After a thorough study of the jurisdictions in question, two patterns can be observed. Firstly, the general confusion as to how to shape up the liability for intermediaries for third party copyright infringement. Secondly, how to ensure its implementation across borders. The Internet cannot be restricted by borders. Hence, the basic framework must be similar around the world to ensure that all the stakeholders are in the position they are required to be.

The policy forward needs discussion and deliberation on two main aspects concerning intermediaries and copyright infringement.

1. The kind of liability (primary or accessory and its application to intermediaries)
2. Harmonisation (in terms of an international instrument or amendment to the current instruments)

It is pertinent to note that the current laws in the EU place the intermediaries and the rights holders on the opposite ends of the spectrum. This would be of no avail in the long run and would not achieve the requisite outcome. The states and the intermediaries need to work together in a quasi- co-regulation mechanism, which would ensure

¹³⁸ EU Directive on Digital Single Market, as brought into effect in 2019

1. That the rights of the people including privacy and freedom of expression are intact
2. That the rightsholders are in a position to enforce their rights
3. That the voice of the intermediaries (small or large) is heard for administration.

A few models have been proposed to deal with the question of liability and copyright enforcement. They have been discussed and analysed below.

TORTUOUS LIABILITY

Rightly observing the European framework as patchy,¹³⁹ Angelopoulos states ‘...the proper starting point for the European harmonisation of intermediary copyright liability should be searched for on more stable ground: the general rules of law.’¹⁴⁰ The opinion of AG Szpunar in *Ziggo*¹⁴¹, on ‘harmonisation of the scope of rights’ (including liability) has been touted to be the trigger factor of the DSM Directive by Rosati.¹⁴² The truth is, accessory liability remains almost entirely unharmonized and left to the Member States.¹⁴³ All that the DSM Directive did was to take the short route and declare a fraction of the intermediaries as primarily liable and rely on the harmonised aspect of EU law for enforcement.

Hence, by advocating to go to the general rules of law, Angelopoulos suggests a mechanism of tortuous liability to consider factors like **intent** (general and specific), **knowledge** (general and specific), **duty of care** based on the **conduct** of the intermediary and the **causal connection** to the infringement. The main contention that she proposes in the model is that mere conduct alone cannot lead to liability.¹⁴⁴ It requires intent, and for lack of it, knowledge, with a combination of whether in that particular case, steps had been taken to reduce the infringement based on the balancing criteria she proposes on a case-by-case basis.

This is a clear difference and a criticism of the approach of the DSM Directive. The conclusion is proposed to be arrived on a case-by-case basis and not due to the mere function or definition

¹³⁹ Angelopoulos (n 6) 4, Ree: Leistner, Structural Aspects of Secondary (provider) Liability in Europe (2014) JIPLP 75

¹⁴⁰ Ibid 3

¹⁴¹ *Ziggo* (n 109)

¹⁴² Rosati (n 66)

¹⁴³ Angelopoulos (n 6) 65

¹⁴⁴ Ibid 495

of an intermediary's business model. This departs from the 'one kind' approach of most EU Directives.

However, the key drawback to this model is the fact that the basis is tort law. While Angelopoulos¹⁴⁵ has clearly stated that her model only dictates the substantial aspect of the tort basis, one cannot overlook the procedural implications. The European tort law and the English Common Law systems may work on a different frequency. But the tort law procedures, being enforced under the judicial authority, in a jurisdiction like India is not impressive. Judicial delays are a common fact.¹⁴⁶ Hence, despite the Manila Principles, India as a jurisdiction needs to rely less on judicial procedures while ensuring due process through statutory and special authorities for enforcement. The above model is not enforceable without the presence of a proper judicial authority. Hence, unless enforceable by special authorities, this model is not workable for jurisdictions with less effective judicial authorities.

SELF-REGULATION

Codes of conduct and voluntary measures have been in effect in certain jurisdictions.¹⁴⁷ Most of these are not undiluted self-regulation. Either the State or the Industry has put pressure on the intermediaries to observe these in varying degrees of intensity.¹⁴⁸ In his Study, Professor Mostert is of the opinion that self-regulation is more advantageous than regulation by legislation.¹⁴⁹ Rightly so, self-regulation is more dynamic and has better regard for the stakeholders in the industry. In the current scenario, where the system and business model of most intermediaries are misunderstood and the policy is misinformed, self-regulation can seem to be a great way out for intermediary liability.

However, as Hugenholtz points out, '... the gradual displacement of civil law remedies by mechanisms of self-imposed enforcement gives reason for concern, particularly since fundamental freedoms of the citizens subscribing to the Internet – notably rights of due process,

¹⁴⁵ Angelopoulos (n 6) 3

¹⁴⁶ Ministry of Finance, India, 'Economic Survey 2017-18' (2018) Vol.1 Chpt 9 132-138 <https://mofapp.nic.in/economicsurvey/economicsurvey/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf> Last Accessed 18 August 2019

¹⁴⁴ Chapter_09_ENGLISH_Vol%2001_2017-18.pdf

¹⁴⁷ Code of Practice and Ethics, Internet Service Providers Association, Ireland, 2002; Dutch Notice-and-Take-Down Code of Conduct, 2008

¹⁴⁸ Hugenholtz (n 121) 305, Ree: Price and Verhulst, *Self-Regulation and the Internet*, The Hague: Kluwer Law International, (2005)

¹⁴⁹ Mostert (n 1) para 66

freedom of expression and information and right to privacy- are at stake.’¹⁵⁰ It cannot be denied that self-regulation is largely fuelled by the interests of the industry viz. the intermediaries. This will get to the situation similar to the one today – an imbalance of stakeholder interests. Even in *Telefonica*, the ECJ states proportionality as the main requirement for applying any measures which do not violate privacy.¹⁵¹ But the legal uncertainty that self-regulation entails leaves no room for negotiation or transparency in the consideration of end-users' rights. Hence, this model, in its format mentioned above may not be workable.

This still does not mean that intermediaries should not have a say in the policy. A co-regulation mechanism which entails a combination of legislation, intermediaries' duty and due process may be a better workable model.

OTHER MODELS

Notice and Stay down

A measure entailing the expeditious action of the intermediaries for taking down infringing content and monitoring their space thereafter. It is present in the EU¹⁵² and the USA¹⁵³. But this would bring the situation back to what it already is. The monitoring and filtering of content are harmful to the end-users' rights as it is to the business models of intermediaries, as has been discussed above.

Bad Actor Listing

It is similar to a co-regulation mechanism as it is a collaborative effort between the law enforcement authorities and platforms. It attacks the advertisement revenue of the key infringers on the sphere. It has a different take to the ‘follow-the-money’ approach of the USA.

But it depends to a great extent on a cooperative effort between the enforcement agencies and the intermediaries. In a weak enforcement state, this model may not be workable.

¹⁵⁰ Hugenholtz (n 121) 304

¹⁵¹ *Promusicae* (n 122) EF in Irini Stamatoudi, ‘Data Protection, Secrecy of Communications and Copyright: Conflicts and Convergences – The Example of *Promusicae v. Telefonica*’ (eds) *Copyright Enforcement and the Internet* (n 121) 215

¹⁵² DSM Directive (n 53)

¹⁵³ Expansion of measures under the DMCA

HENCE IT IS PROPOSED THAT...

...Taking into account the positive aspects of the models listed above, **categorising intermediaries** in terms of their general functions while allowing room for case-by-case specificity may be workable. The basis of this model is the arrangement of stakeholders as has been mentioned above.

Establishing different kinds of intermediaries, in accordance with their functions and the maximum extent of their liability in a particular act of infringement is an obvious conclusion to the current policy. While the EU does categorise in a patchy manner¹⁵⁴, the directives have a very narrow approach. The categorisation proposed here is like a Penal Code Table, except that the liability is civil. A tabular format, with a sample of kinds of intermediaries and the liabilities attributed to them, is given below:

Category	Act of infringement	Action expected	Liability on failure to take action (except where primary liability is accorded)
Uploader of Illegal Content	Communication to public	Remove it from his/her/its page	Primary Liability (as per Article 5 of Information Society Directive and other relevant laws)
Online Content Sharing Service Provider (OCSSP) (inherently illegal purpose and content)	Communication to the public and reproduction	Remove the content (due to the nature of the involvement in the act of infringement, assumes the position of an infringer)	Primary Liability
Online Content Sharing Service Provider (OCSSP) (inherently legal)	Communication to the public and reproduction	Take Down on receiving notice or upon knowledge through any means	Accessory liability (eligible for safe harbour on proven duty of care)

¹⁵⁴ Depending on the Directive's context

purpose and illegal content)		of limited monitoring (which would not otherwise constitute general monitoring)	
Search Engines	Communication to the public	Take Down on Notice, no general obligation to monitor	Accessory Liability (eligible for safe harbour on proven lack of knowledge)
Search engines	Cached copies (transient storage) Reproduction	Remove such copies, if not incidental	Accessory liability (eligible for safe harbour if copies proved incidental)
Cyber lockers (Cloud Storage)	Reproduction	Remove any such illegal content through limited monitoring or identifying the source of material	Accessory liability (eligibility for safe harbour on proven duty of care)
Internet Access Providers	Conduit for acts of infringement	Report in case of knowledge of such activity	No general liability in case of proven lack of knowledge Safe harbour in case of knowledge and report Accessory Liability in case of knowledge or facilitation of infringement

Justifications

Prima facie, this table may seem to have a very narrow approach to the concept of intermediary liability. But this allows room for questioning the intent, the knowledge duty of care without the tortuous terminology suggested by Angelopoulos. As Professor Bently has pointed out, when it comes to cases of secondary infringement, the liability is dependent on the knowledge

of the act of infringement, that the defendant may have.¹⁵⁵ Hence, flexibility based on their proven intent and/or knowledge has been kept in mind while formulating the table.

The table may also seem complex on the aspect of adding each different kind of intermediary. It translates to the fact that whenever there is a different business model of an intermediary, one may have to debate the level of its liability. Some scholars and jurisdictions have discussed the possibility of technology-neutral provision for ease in implementation.¹⁵⁶ But such a regime is not possible for the concept of intermediary liability. This is because there would be difficulty in assessing the scope of regulation in a manner that benefits the stakeholders. Due to the dynamics of this market, it is difficult to have a one-size-fits-all provision.

Key Explanations

Duty of Care

Given its tortious basis, duty of care in this context means certain acts taken on the knowledge of infringement or absence of it. If the duty of care of the intermediary has been proved, the safe harbours, given currently, come into effect.

The ways to ascertain the fulfilment of this duty includes limited monitoring, taking down the content on any notice, or any such action that has been proactively taken to remove the infringing content.

Limited Monitoring

For this model, limited monitoring refers to methods which do not involve stay down monitoring or direct monitoring of the digital sphere amounting to surveillance. It is a method of specific monitoring to be done based on a contractual instrument for a limited period.

This is the aspect where the intermediaries and the rights holders can work in tandem through contractual obligations to ensure lesser copyright infringement. Instead of an overbearing legislation, this co-regulation mechanism will solely rely on contractual limits for monitoring

¹⁵⁵ Lionel Bently, Brad Sherman, Dev Gangjee, Philip Johnson, *Intellectual Property Law*, (5th edn OUP 2018)

¹⁵⁶ Winston Maxwell, Marc Boureau, 'Technology Neutrality in Internet, Telecoms and Data Protection Regulation, Computer and Telecommunications Law Review', 2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529680> Last accessed 17 August 2019

the sphere between the creators of copyright and the intermediaries. This can be placed as a Voluntary Code in an attachment to the law of intermediary liability. This approach would be a shift from ‘best efforts of licensing and gaining authorisation’ that the DSM Directive provides. Instead of looking for licensing and authorisation from each of the rightsholders, the platforms can now seek such instruments from groups of rightsholders voluntarily or vice versa to ensure proactive participation in combating infringement. This method also provides possibilities for end-user participation.

Sample Methods of limited monitoring

1. Surveys of users and other methods of empirical evidence before filtering the content
2. Disclaimers to users to not indulge in acts of copyright infringement
3. For certain entertainment content, keeping an eye around the period around which the content is released (e.g. for films, when they are released, for TV shows, the time after an episode airs, to prevent piracy)

The above table explains how liability can be differentiated based on potential acts of infringement and intermediary involvement. There are many more categories, which can be added to the table and whose liability can be decided accordingly.

Intent

Intent would resolve to mean the intent to commit the infringement. Analysing whether the platform provider facilitated infringement is the actual indication of intent. It should be taken into account to particularly analyse OCSSPs which deal with UGC.

In *Grokster*¹⁵⁷, the inducement rule formulated as follows, ‘one who distributes a device with the object of promoting its use to infringe copyright as shown by clear expression or other affirmative steps taken to foster infringement is liable for the resulting acts of infringement by third parties’.¹⁵⁸ Hence, it is the requirement of a specific intent that would be considered.

¹⁵⁷ *Metro Goldwyn Mayer Studios Inc. v Grokster* 545 U.S. 913 (2005)

¹⁵⁸ *Ibid*

Inherently illegal

This is a term used to refer to the sites that proactively engage in encouraging uploads of infringing content. After *Pirate Bay*, the key aspect that the EU failed on was generalising all the OCSSPs as the direct party indulging to the communication to the public. However, there is a difference in these business models. For a website like Pirate Bay, the **inherent intent of the infringer is shared by the intermediary**. However, the same is not the case with a website like YouTube.

Ginsburg, on the inducement rule, suggests ‘Speculation is hazardous, but one might predict that where a device or service facilitates infringement on a massive scale, its distributor will likely be found to have intended that result.’¹⁵⁹ But Angelopoulos, on this suggestion, notes ‘... for example, if an intermediary creates categories of downloadable content available on its website that include suggestive keywords such as ‘recent Hollywood blockbusters’, this would be a clear indication of its intention that its users infringe copyright. The same could be said where the intermediary advertises its infringing capabilities to users.’¹⁶⁰ In *Grokster*, Justice Souter further explains, ‘mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves.’

An example of ascertaining intent would be to check if the website had the history of NTD and blocking. If that OCSSP did, it is an indication of a Good Samaritan.

Hence, any inherently illegal provider must have a specific intent of actually providing its services to facilitate the infringement of copyright. Then such an intermediary ceases to be a mere intermediary but gets regarded on the same level as the infringer.

Limitation on the liability to Access Providers

Access providers merely provided access to the internet to users and may encompass broadband providers, mobile networks and other communication service providers. Frabboni states, ‘from a policy perspective, the main question is whether it is appropriate for them to be

¹⁵⁹ Jane Ginsburg, ‘Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs’, (2008) 50(2) ALR 577, Re: Angelopoulos (n 6) 417

¹⁶⁰ Ibid Angelopoulos (n 6)

gatekeepers and guardians of the balance between the exclusive rights granted under copyright law, and fundamental rights and freedoms such as the freedom of expression or the right to private life.’ But she also says that where they are in a position to discriminate between lawful and unlawful usages, they could evolve new business models, thus allowing the law also to make changes around their involvement.

Cvetkovski comments that ‘Telcos are the mere conduit – P2P platforms and BitTorrent protocols and related software and the Internet support acts of piracy. Telcos may aid piracy, but they are a means of communication and should not prima facie be liable.’¹⁶¹ Considering the fact that most of the access providers are communication service providers or the telecom companies, the mentioned opinion has to be taken into account.

Hence, in the above table, the liability that has been attributed to the Access providers has been flexible based on their involvement, knowledge and facilitation of infringement.

Merits of the system

1. It would provide some clarity for a basis to hold any intermediary liable. It may be on a case-to-case basis, but if there is a range of liability that is provided, one can avoid overreaching decisions.
2. One can seek end-users' opinion as well, to ascertain if an intermediary has an inherently legal or illegal purpose.
3. For an intermediary like the OCSSP with a legal purpose, specifying the monitoring obligations similar to a red flag test would be sufficient enough. There would not be an overreaching implementation of the law as in primary liability, where the intermediary may be forced to monitor. This would also serve the interests of the business model of intermediary and of the users who may be creators of genuine copyrightable material.
4. This would tackle the communication to the public or reproduction of the illegal content in a reasonably responsible fashion.
5. It takes the Manila Principles into account in terms of proportionality for liability.
6. It ultimately strengthens the proliferation of the Internet with an assurance to the rights of the Rightsholders and End users.

¹⁶¹ Trajce Cvetkovski, *Copyright and Popular Media – Liberal villains and technological change*, Palgrave Macmillan 2013 140

Acknowledged Demerits of the system

1. This provision is not technologically neutral. Hence, it can prove cumbersome to debate every new intermediary to be added as a part of this policy that rises with the changes in technology. Ascertaining their liability as per their functions can prove tedious.
2. Rightsholders may face issues in enforcement to the extent that there may be a delay to stop communication of illegal material.
3. There would be a requirement of further interpretation of the concepts involved. Since this system takes a cue from the concepts of tortious liability, there may be clarifications of scope required as the case may be.

With the current technological advancements, this method would be a way to actually regard the intermediaries on their role in an act of infringement and not simply because they are intermediaries. This is because the roles that intermediaries play have also undergone many changes over the years. Hence it would be unfair to lump them in one definition and deal with them in that method. It would also be tiresome to have separate legal instruments with contextual definitions of intermediaries.

Second Proposal - Harmonisation of Liability

Following the categorisation, it is submitted that the policy on intermediary liability should be unified. The TRIPS Agreement¹⁶² mentions that members to the Agreement should set up enforcement procedures to permit effective action against infringement of ISPs. Such enforcement procedures should include expeditious remedies but should also be fair and equitable.¹⁶³

But in the current scenario, an international agreement should do more than just give broad guidelines of what 'ought' to be. By having an amendment to the current treaties or creating new treaties, a staunch mechanism to deal with intermediary liability should be in place in

¹⁶² TRIPS, Art 41

¹⁶³ Maria Mercedes Frabboni, 'File Sharing and the Role of Intermediaries in the Marketplace: National, European Union and International Developments' (eds.) *Copyright Enforcement and the Internet* (n 121) 128

International Law. Preferably, if a method like 'TRIPS-plus' is used for enforcement of such a mechanism, countries with the most internet users are likely to follow the model with changes as per their demographics.

Merits of the Solution

1. Despite certain differences, there would be a common basis for laws around the world.
2. Given the nature of boundaries that the Internet has, a uniform policy would be helpful to curb infringers and the liable intermediaries in any jurisdiction.

Demerits of the Solution

1. It is complicated to get most countries to the negotiating table and make them agree and consent to certain common points of ascertaining intermediary liability.
2. The potential differences of opinion between developed, developing and least developed countries is a history which everybody is familiar with.
3. The enforcement agency for an international instrument so signed and ratified must be effective. Potential agencies like the WTO and the WIPO come with their own merits and demerits.

If one were to look at history, every aspect of any internationally harmonised law was complexity in itself to come to its conclusion as it is today. Hence, international harmonisation may seem a far-fetched solution. However, considering the circumstances of this legal issue, an international treaty seems to be the need of this time.

Other Additional Suggestions

1. There must be separate judicial authorities for issues pertaining to this, to ensure expeditious and speedy disposal of cases, in the interest of preventing further proliferation of illegal content.
2. Based on certain criteria like the number of occasions, the creator and other such aspects, it is proposed that there must be an international database of works, as per the category, which is most likely to be infringed on an online sphere. This would be helpful in the limited monitoring mechanism and would be beneficial to the rights holders and intermediaries. It is in the same method as bad actors listing, albeit for works that are most likely to be infringed.

3. Besides using the routine measures, technology like blockchain and AI must also be used to ascertain and take action against any copyright infringement by the intermediaries and the states. Countries must explore such avenues for speedy redressal and enforcement. There are limitations to this suggestion. As has been observed with the push for technological measures in the USA, end-user rights may be affected if such methods are being utilised in a careless manner. Unless there is a way to keep these technologies within proper control, it may be risky.

CONCLUSION

The key feature of a mediation process or any alternative dispute resolution, is creating a favourable outcome for all the parties involved. Formulating policy is no different from that perspective and analogy. Placing the stakeholders in a formation that is a win-win for all and also minimising complexities for enforcement is the hallmark of a good policy. Concerning that harmony on intermediary liability for these jurisdictions is not yet achieved, it is time to consider how to ensure a favourable outcome for all the above parties.

For intermediaries, it is key that they are not held liable for more than what they have done or facilitated. The Korean policy is the embodiment of a strict regime, placing intermediaries in a grave position, as has been discussed. The EU policy, with its latest directive, is not far from becoming a strict regime like its Asian counterpart. The USA, with its laws and supplementing case laws, despite its flaws, manages to carve out a reasonably strong and fair regime for intermediary liability. India, on the other hand, needs more work on better enforcement mechanisms. Instead of focusing on enacting extreme measures, India must work towards clearing its current law's ambiguous scope and enforceability.

It is very difficult to come up with a mechanism that fits the variations in each of the jurisdictions. But it is also important that it is done, as international legal instruments set standards for most countries to follow.

With the increase in the usage of the internet and the evolution of different models of intermediaries, it would be complex to lump all intermediaries into one liability. Proportionality is of extreme importance. As it has been proved in this paper, any misguided policy on their liability affects the end-users and their rights as well. South Korea serves as an example of the same.

Hence, it is important that EU stops right at the track it is going in and starts thinking and analysing about a better legislation for formulating intermediary liability. The DSM Directive proves what could be termed as 'lethargic drafting' or 'generalisation', which would be of no avail in the long run.

As for Rightsholders, taking a cue from the Manila Principles, establishing specialised bodies in the same effect as a judicial authority, would be a more favourable solution. These authorities

may follow the due process but also be expeditious in its disposal. Especially for a jurisdiction like India, this solution is one that would benefit the rights holders as well as users.

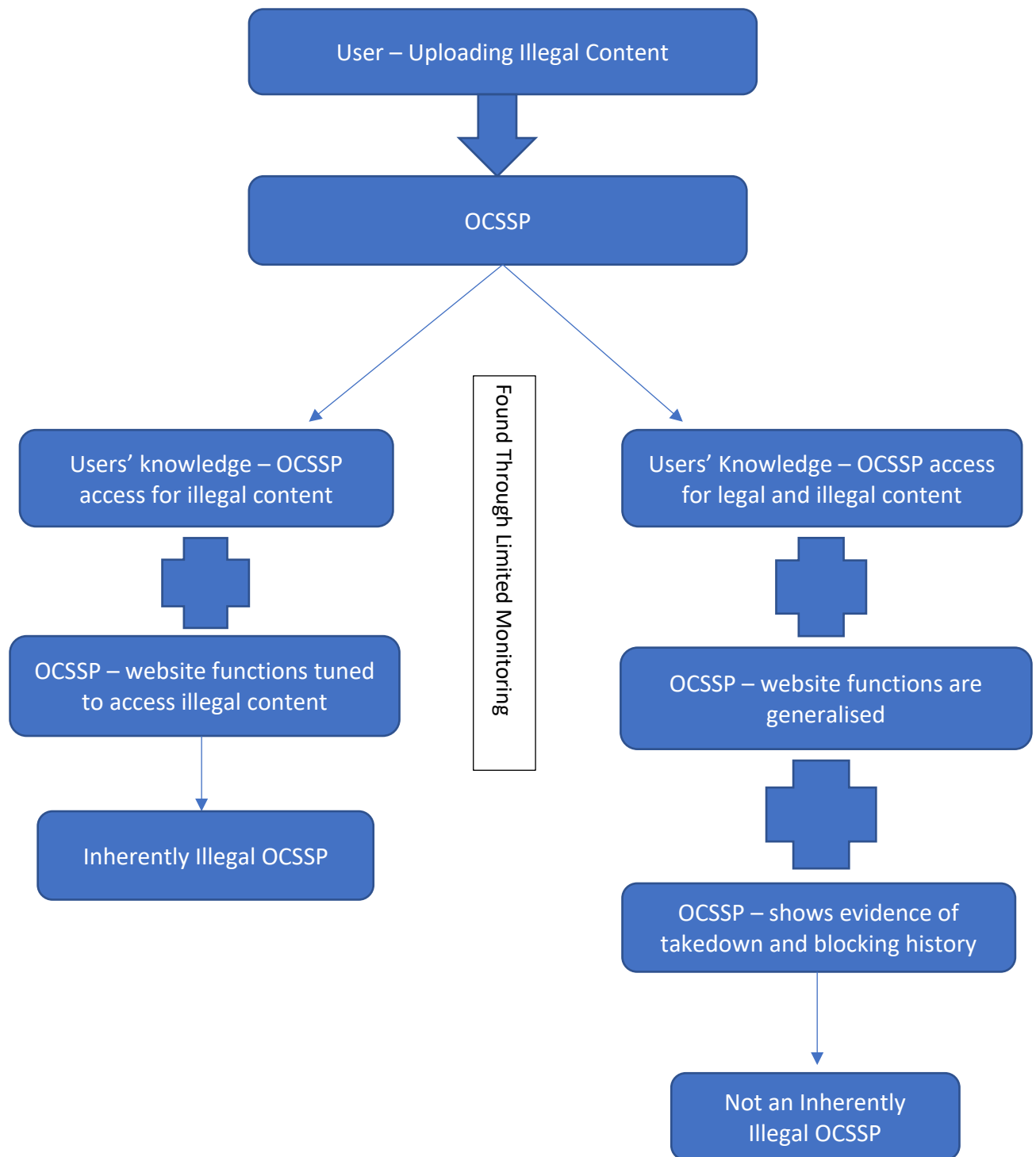
As for end-users, it is important that the intermediaries spread more awareness and warnings against creating and uploading infringing content. The current policy has too many ambiguous limitations on monitoring and filtering, which affects them. But at the same time, in a jurisdiction like India, piracy is still a huge problem. Hence, the laws and policies should be proportional in a manner that their rights do not get affected and at the same time, the end-users themselves do not fail the law.

Hence, categorising intermediaries on the basis of their functions and the proportionality of potential actions is a way of ensuring a balance between the interests of the intermediaries, end users and rights holders. The model proposed above is one way of ensuring the balance between the stakeholders involved.

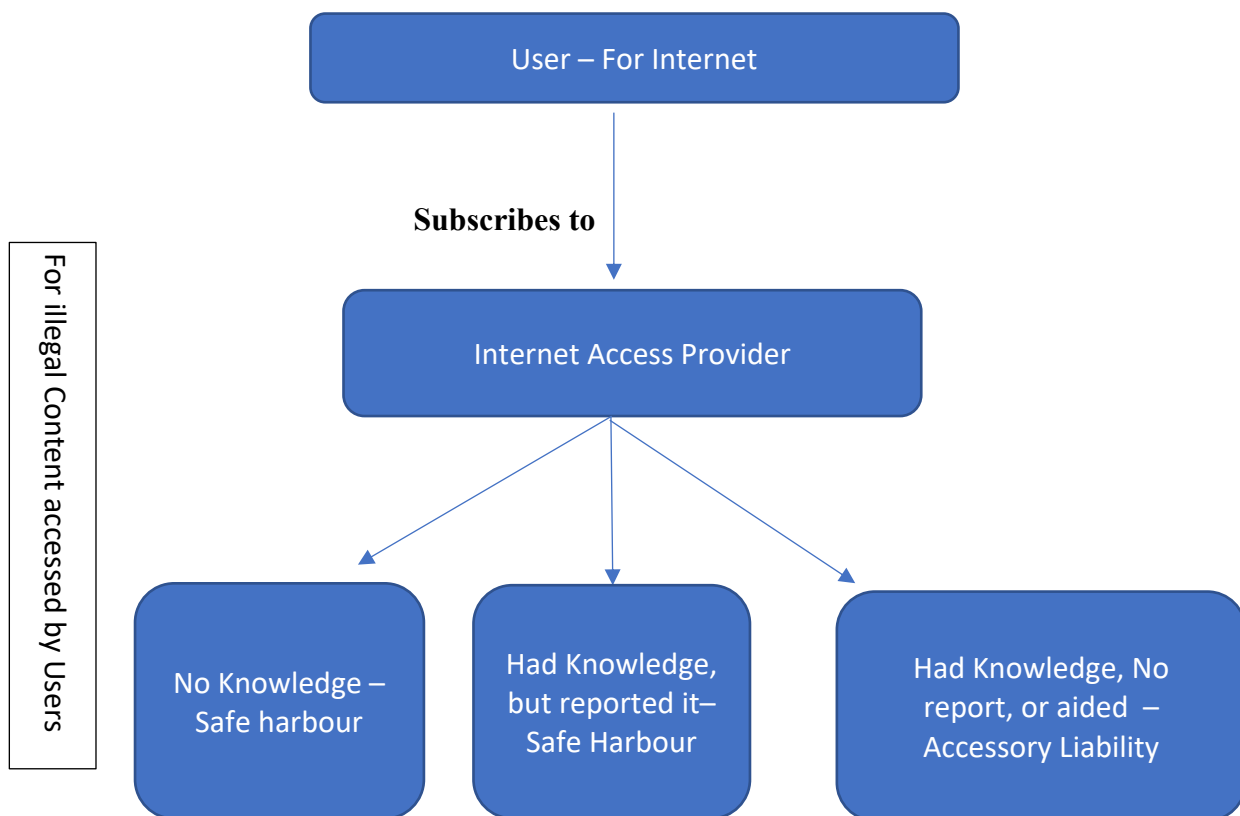
APPENDIX

Explaining Intent and Liability

1. Distinguishing Inherently Legal and Illegal OCSSP



2. Internet Access Providers – Limitation on Liability



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