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Internet Service Provider's Liability for Copyright Infringement- How to Clear the Misty Indian Perspective

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ABSTRACT

{1}Only a fool would question the role and relevance of Internet Service Providers in promoting the Internet. But, unfortunately, Internet Service Providers ("ISPs") are at the receiving end of many disputes involving Intellectual Property violations. The difficulty in pinpointing the real culprit has resulted in a piquant situation where the Internet Service Provider is often taken to court. United States' courts and courts of other advanced countries have confronted this issue since 1993 and have finally enacted specific legislation to solve this mind-boggling issue. The Indian Information Technology Act 2000 ("The Act"), enacted with much hype, is almost silent on this issue. Although it includes a sentence or two about ISP liability, the picture on this issue is a vague one.

{2}This paper attempts to evaluate the ISP picture in the U.S. before the Digital Millennium Copyright Act and passage of The Act. The position in Australia, including the most recent Act is also examined. The situation in Canada, (yet to enact a specific act), and that in Singapore, (the first country in Asia to enact such a law), are briefly mentioned. Finally, the latent defects in the latest Indian Law are analyzed, and some suggestions are made.

1. INTRODUCTION

{3}The Internet with which we are all familiar is a gigantic network of computer networks. As we look back upon the late twentieth century, the evolution of the Internet will undoubtedly be listed as one of mankind's greatest technological achievements. The amazing capability of the Internet to promote the exchange of knowledge, information, and ideas on a universal scale has surely revamped the way people interact. The greatest advantage of this medium is its ability to enable people around the planet to obtain great quantities of information within seconds, thereby propelling intellectual thought and facilitating the spread of information. From 1990 to 1997, the estimated number of Internet users grew from around 1 million to approximately 70 million[1]. The Internet enables a simple user to connect to a local Internet access provider and hop around the globe from one site to another at the cost of a local telephone call. While an underlying collection of networks makes up the Internet, various applications designed to work with Internet protocols provide facilities to Internet users.[2]

{4}It is precisely here that the Internet Service Providers play a significant role. With the growth of the Internet, Intellectual Property Right,[3] ("IPR"), abuses have grown many times over.[4] The intellectual property owners complain that they are losing millions of dollars because of the online copying that the Internet facilitates. Furthermore, they fear that the growth of the Internet will aggravate this existing problem. Thus, in almost all IPR violation cases, the accessed ISP will be added as a respondent. This has created a sense of uncertainty among ISPs who feel they are being made scapegoats through no fault of their own.

2. WHAT IS AN ISP?

{5}First of all, a brief examination of Internet Service Providers is useful in gaining some perspective; these are companies or corporations that enable clients to connect to the Internet. Just as in any other business, ISPs may range from conglomerates to small companies having only a handful of clients. Quite often, the ISPs provide their clients with facilities to create client literature or other articles and make them available over the Internet to the general public - a function ISPs proudly term as a "value-added service." Typically, an ISP provides its clients with more than just an email account and access to the web; it offers facilitation to upload files (including web pages) to the ISP's publicly accessible servers, enabling users to access these files.

3. WHEREIN LIES THE TRUTH?

{6}From the early nineties, the Internet has grown at an exorbitant pace. Initially, cyberspace consisted of fewer than 50 World Wide Web sites; computer scientists and physicists used the majority of these sites. Today, the Internet is no longer reserved for researchers, and it is anticipated that within five years international commerce on the Internet could reach \$3.2 trillion.[5]

{7}In the past 96 months the number of Internet users has risen from hundreds to millions of users.[6] Some experts expect this figure to reach one billion by the year 2008.[7]

{8}While the Internet has helped artists, educators, researchers, and publishers explore and conquer their markets, the very same technology also makes it possible for copyright pirates to copy and distribute anything present on the Internet, while remaining both anonymous and undetectable. Copying is the easiest thing one can do on the Internet, and so has become a valid concern for IPR holders who urge that something be done quickly to address this menace.

{9}Identifying the individual who posts allegedly infringing material is not an easy task, whereas spotting the ISP is quite simple. Even if the offending individual is caught, there is no guarantee that he will have the resources to pay legal damages. ISPs, on the other hand, are in a position to pay with the profits the ISPs make from the pirates' use of the Internet.[8] Therefore, copyright holders target ISPs out of sheer pragmatism. Additionally, in comparison to an independent publisher or author, an ISP is in a much better position to supervise how its subscribers make use of the Internet.[9] Both of these factors make the ISPs especially culpable in the eyes of the law.

{10}In response, ISPs claim they are passive carriers, just like telecommunications companies, and therefore should be given some degree of immunity from copyright infringement liability.[10] Furthermore, they contend that making ISPs liable for pirates' IPR infringements could have a crippling effect on the growth of the Internet. One thing is pretty obvious here, smaller ISPs that lack deep pockets will not be able to fight time-consuming and costly courtroom battles, and ultimately they will be forced to wind up their operations.

4. THE LIABILITY OF ISPs - A LIVELY TOPIC

{11}The liability of ISPs in copyright infringements is a topic which has generated a lot a fiery debate throughout the globe. But here they will be disappointed, because the U.K. courts and legislators haven't much to offer on the topic. In fact, it is the case law and legislation of the U.S. that provides the only adequate direction. To be sure, Americans have adopted many laws addressing the threats from cyberspace; the Digital Millennium Copyright Act 1998 and the Anti-cybersquatting Consumer Protection Act 1999 are good examples. Apart from the U.S. legislation, the latest Australian legislation, the Copyright Amendment (Digital Agenda) Act 2000, took effect in March 2001. It is also given adequate coverage in this paper to highlight ISP liability there. This paper also endeavors to address the position in Canada and the latest legislation in Singapore dealing with the liability of ISPs. While India has enacted the Information Technology Act 2000, yet the Indian position on ISP liability remains vague. A survey of various information technology laws around the globe will help to correct some of the latent deficiencies of the Indian Information Technology Act 2000.

5. THE AMERICAN PERSPECTIVE

{12}Before the enactment of the Digital Millennium Copyright Act of 1998, American courts were called upon to answer questions regarding the liability of ISPs.

5.1 Playboy Enterprises, Inc. v. Frena

{13}The very first case regarding an IPR violation committed on the Internet came in 1993. But that case, *Playboy Enterprises, Inc. v. Frena*, only dealt with the liability of a Bulletin Board Service (BBS) operator, rather than that of an ISP.^[11]

{14}U.S. copyright infringements are classified under two headings:

- Direct infringement or primary infringement
- Secondary copyright infringement. Secondary copyright infringement is then subdivided into two categories: contributory and vicarious copyright infringement.

{15}To succeed in proving direct infringement, a plaintiff must prove that he is the owner of the said work and defendant had indulged in copying.^[12] It is pertinent to note that a finding of direct copyright infringement does not require proof of knowledge or intent to infringe, but only proof that the defendant's acts violated one of the copyright holder's exclusive rights;^[13] the right to make copies is an exclusive right of the copyright holder. A defendant becomes liable for contributory copyright infringement if he, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."^[14] A defendant is liable for vicarious copyright infringement when the defendant has both the right and ability to control or police the infringer's acts and receives a direct financial benefit from the infringement.^[15]

{16}In *Gershwin Publ'g Corp. v. Columbia Artists*,^[16] the defendant, a BBS operator, stored many pictures on a proprietary electronic bulletin board. Among them were copies of the plaintiff's copyrighted ones. The defendant contended that he did not personally upload the photos and removed the infringing ones when he came to know about the matter. The court rejected the proffered defenses and held him liable for infringement. The Second Circuit applied the rule in *Frena* as support for its decision stating,

It does not matter that Defendant Frena may have been unaware of the copyright infringement. Intent to infringe is not needed to find copyright infringement. Intent or knowledge is not an element of copyright infringement, and thus even an innocent is liable for infringement; rather, innocence is significant to a trial court when it fixes

statutory damages.[17]

{17}Because knowledge is not an element of direct copyright infringement, the court stipulated a standard that the mere creation and/or operation of a BBS is enough to establish direct infringement liability when copyrighted materials are stored on the system.[18] This position was reaffirmed in *Sega Enterprises Ltd. v. MAPHIA*.[19]

5.2 RTC v Netcom

{18}One decision confronting ISPs was the one in *Religious Technology Center v. Netcom*.[20] In that case, the defendant, Dennis Erlich, was a former minister of the Church of Scientology, who later became its vocal critic. He was also a subscriber to an online BBS called "support.com" which functions as an online forum for discussion and criticism of the Church.[21] The Netcom, one of America's largest ISPs, helped the BBS to access the Internet. Mr. Erlich posted portions of works for which the plaintiff held copyrights onto the BBS. Initially, Religious Technology Center asked the BBS and Netcom to remove Erlich's matter from the Internet. Both refused, so Netcom was also joined as a party.[22]

{19}The first requirement for satisfying a *prima facie* case of copyright infringement is to show that the defendant made a copy of a valid copyrighted work.[23] The court painstakingly examined the intricacies of the Internet and found that the Internet operates by making transient copies of documents on every computer/system that transfers, receives and/or opens those documents.[24] Thus, the court noted that although copies had technically been made, the ISP had not initiated the copying of the works.[25] The only thing that the ISP had done was to integrate a computer system into the Internet. The court stated, "[I]t does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet." [26] Thus, the claim of direct infringement was dismissed.

{20}The court also looked into the aspect of secondary liability of the ISP. The plaintiff had to prove that Netcom had the authority and ability to check the infringer's actions and also received a direct financial benefit from the infringement.[27] On the latter point, the court noticed that the monthly subscription fees of the ISP did not register any increase, and so the court held that the ISP did not receive a direct financial benefit from the infringement.[28] The ISP was absolved of any vicarious copyright liability, but on the aspect of contributory infringement the court held that the question of whether Netcom encouraged the client to post infringing materials should be determined at the time of trial.[29] Unfortunately, from an academician's point of view, the case settled before trial. But, the decision in this case made it crystal clear that an act of volition is a prerequisite to copyright liability. This was surely good news for American ISPs.

5.3 Playboy Enterprises, Inc. v. Hardenburgh

{21}After the *RTC v. Netcom* decision, some cases regarding infringements on the Internet have been reported, but they did not deal solely with the liability of ISPs. Instead, they dealt with the liability of BBS operators. In one such case, *Playboy Enterprises, Inc. v. Hardenburgh*, the court held that setting up a BBS does not violate the Copyright Act.[30] Thus, the court makes a radical departure from its earlier stand in the *Frena* case.[31] Yet, after going through the facts, the court held that the defendant was not a passive service provider- instead he was found to be an active participant in the infringement.[32]

{22}In addition to holding him responsible for direct infringement, the court also found the defendant guilty of contributory infringement. The court declared that the BBS's policies had "clearly induced, caused and materially contributed to any infringing activity." [33] Concerning the standard of knowledge of the infringing activity, the court held that the defendant possessed at least "constructive knowledge" that infringing activity was likely to take place on their BBS.[34]

{23}After *Hardenburgh*, the U.S. Congress enacted the Online Copyright Infringement Liability Limitation Act^[35] as part of the Digital Millennium Copyright Act of 1998.^[36] At the time of enactment there was heated debate over the need to exempt or limit the ISP industry's liability from copyright infringement. ISPs argued that this was needed to prevent the flurry of lawsuits and also to boost the entrepreneurial spirit in the ISP industry.^[37] Those who opposed this view felt that the ISPs performed a distinct and lucrative function for the Internet, and had the wherewithal to minimize copyright infringement by Internet users.^[38] They argued that individual ISPs should have a legal duty to help reduce online piracy and a legal obligation to monitor their users for copyright infringement.^[39]

6. THE DMCA - MAIN PROVISIONS

{24}The Digital Millennium Copyright Act (DMCA) effectively gives legislative backing to the principle laid down in *RTC v. Netcom* by codifying its ruling that passive automatic acts shall not become grounds for a finding of online copyright infringement. Second, the law clearly spells out the criteria to establish a case of contributory or vicarious copyright infringement against an ISP and makes it more cumbersome. Third, in instances where ISPs proceed to take action against alleged copyright violators, DMCA protects ISPs from lawsuits when they act to assist copyright owners in limiting or preventing infringement and contains provisions requiring the payment of costs incurred when someone knowingly makes false accusations of online infringement.

{25}It should be noted that the law does not establish an exemption to copyright infringement liability. At best, the law is a "limitation" on liability taking the form of a statutory change in the remedies available to a plaintiff, rather than a legal exemption to copyright infringement liability.^[40]

{26}After the enactment, it is difficult to hold an ISP liable for contributory copyright infringement. In order to hold the ISP liable, the law requires the ISP to have actual knowledge of the infringement, be aware of the facts and circumstances of the infringement, or receive notice of the infringing activity.^[41] However, an ISP can escape liability if, upon notification, it promptly acts to remove or disable access to the infringing material.^[42] An ISP that acts in good faith, and removes or disables access to allegedly infringing material, is protected from liability under the law.^[43] Further, the Digital Millennium Copyright Act permits the ISPs to bring claims against persons who misrepresent the infringing activity.^[44] To be eligible for the limitation on liability for the infringing material on hosted web sites, service providers must designate an agent to receive notifications of the claimed infringement. The agent's name must be filed with the Copyright Office.^[45] In addition to the standard technical measures, the ISP is required to terminate the accounts of customers who are repeat offenders.^[46] Thus, the primary purpose of the Digital Millennium Copyright Act is to limit the liability of ISPs because they perform a unique role in building the Internet. However, these limitations can only protect ISPs if they follow the safeguards mentioned above.

7. THE POSITION IN AUSTRALIA

7.1 The Earlier Position

{27}The position in Australia cannot be answered without reference to the case of *Telestra Corp. Ltd. v. Australasian Performing Right Ass'n. Ltd.*^[47] Although this case does not involve ISPs, the decision holds much significance for them. In *Telestra*, the plaintiff played music owned by the defendant to the plaintiff's clients while they were placed "on hold" on the telephone. Here, the court agreed with the defendant that the transmission of another's work through a diffusion service, infringed the defendant copyright owner's rights. The concept of a Diffusion Right is paramount in Australian law and is also used in judging claims against ISPs.^[48]

{28} In order to come under the purview of the diffusion right, three elements must be satisfied:

- There must be a diffusion service. Diffusion involves "the transmission of the work or other subject matter in the course of a service of distributing broadcast or other matter . . . over wires, or other paths provided by a material substance." [49] The music transmitted over the telephone in *Telestra*, amounted to such a diffusion service.
- The work must be transmitted to the subscribers. [50] In *Telestra*, the subscribers to the telephone service were deemed to be subscribers to the diffusion service, because clients who used the telephone service were placed on hold and could receive the music transmission. [51]
- The alleged infringer must cause the transmission of the allegedly infringed material. In *Telestra*, the person operating the service is deemed to be the "person causing work to be transmitted." [52] The "person who undertakes to provide the service to subscribers in agreements with them," is taken to be "the person operating the service." [53]

Therefore, all three elements were satisfied, and the court held *Telestra* liable for the infringement.

{29} Next the Australasian Performing Rights Association, Limited (APRA), filed suit against a leading Australian ISP, OZEmail, that was settled soon thereafter. [54] Based on the decision in *Telestra*, the ISP would most likely have lost because all the three elements of Section 31(1)(a)(v) were present. The ISP involved a diffusion service, it transmitted the works to the premises of the customers, and pursuant to the contract between the customer and the ISP, the ISP provided a service to the customer. The ISP therefore became the entity that caused the transmission.

7.2 The Copyright Amendment (Digital Agenda) Act 2000 - A New Beginning

{30} Since the *Telestra* case, Australia has adopted the Copyright Amendment (Digital Agenda) Act 2000. [55] The Act contains a new, far-reaching copyright of "communication to the public." The Act defines communicate as to "make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter." [56] The functions of the broadcasters, cable operators, and ISPs have come under the new right to communicate. The Act has limited the liability of ISPs. In determining whether the ISP authorized the infringement committed by a third party, the court looks at:

- Whether the ISP had the power to prevent the infringement;
- The nature of any relationship between the ISP and the infringer; and
- Whether the ISP took reasonable steps to prevent infringement. [57]

{31} The Act does not hold the ISPs responsible, if an ISP's only role in the transaction is to provide the server by which the infringing material is distributed to the public. [58] This releases ISPs from allegations of authorizing infringement when the ISP is peripherally involved. However, in cases involving direct infringement, the Act states that a communication other than a broadcast is deemed to be made by the person who determines the content of the communication. [59] Since, more often than not, the ISP is not the "person" who determines the content of the communication, the ISP is not liable for infringement.

{32} In contrast to the decision in *Telestra*, the Australian legislation fully protects ISPs as long as they do not determine the content of the material. Further, in cases where ISPs have to authorize the material, the court looks at the above three elements to determine the ISP's liability. [60]

8. THE POSITION IN CANADA

{33} Canada does not have any specific statutes that deal with the liability of ISPs. The Copyright Act in

Canada has two categories of infringement: a) direct infringement, and b) indirect infringement.[61]

{34}Direct infringement occurs when any person carries out any act that falls within the exclusive purview of the copyright owner. These exclusive acts include reproduction of a work or any substantial part of the work in any material form, performance of the work in public, communication of the work to the public by telecommunication, or by "authorization" to another person to carry out one of these excluded acts.[62]

{35}In contrast, indirect infringement occurs where a person knows that the work infringes copyright, or would infringe copyright if it had been made in Canada, and

- sells or lets for hire, or by way of trade exposes or offers for sale or hire;
- distributes, either for the purposes of trade or to an extent that it prejudicially affects the copyright owner;
- exhibits the work in public for purposes of trade; or
- imports the work for sale or for hire into Canada.[63]

{36}Therefore, in indirect infringement, the infringer must have knowledge of the existence of the copyright; while in direct infringement, this knowledge is immaterial. To date, there is no precedent that deals with ISP liability in copyright infringements. However, if the existing provisions of the Copyright Act were to be applied, the results could be interesting.

{37}Anytime that the infringing material is posted on the Internet, any or all the exclusive rights of the copyright holder can be violated. This can draw the ISP into court because the ISP provided the equipment or facilities to a third party that were used to infringe the copyright. Therefore, the ISP indirectly authorized the violation of the exclusive rights. However, in the past, the Canadian courts have determined that merely supplying equipment does not constitute authorization, if the supplier did not retain control over the use of the equipment.[64] Moreover, in a recent decision, in *de Tervagne v. Beloeil (Town)*, [65] the court clarified that it will not infer any authorization of an illegal act unless the supplier of the equipment has formed a common purpose with the infringer so as to "sanction, approve, and countenance" [66] the infringement in some way. Applying this principle, most of the infringement that occurs on the Internet arises from users giving commands that result in reproductions or communications of copyright works. These commands are given through the equipment that is provided by ISPs and other intermediaries. ISPs, however, do not have any common purpose with the infringer.

{38}Therefore, it can be concluded that if a defendant took constructive steps to prevent the infringement, or if the defendant had no knowledge of the possibility of an infringement, then the defendant cannot be found to have authorized the infringement. Further, the case law appears to indicate that "authorization" is narrowly construed in Canadian law. It should be noted that the above decisions do not specifically deal with ISPs; rather they provide the courts with guidelines to determine whether an ISP authorized the infringement.

{39}This raises the question of whether an ISP would be liable under indirect infringement. For indirect infringement, an alleged infringer must know that the work at issue infringes a copyright. The plaintiff bears the burden of proving that the defendant had this knowledge. This burden of proof is difficult to carry, because when knowledge is an essential element of an infringement, ignorance can be pleaded as a defense. [67]

{40}Canadian courts have addressed the term "knowledge" in Section 27(4) of the Copyright Act.[68] The courts construed "knowledge" as a suggestion to a reasonable man that a copyright violation had occurred. [69] Once an individual has either actual or imputed knowledge that the work may violate a copyright, the individual has the responsibility to determine whether the work is infringing. However, knowledge alone is not enough to create liability for a copyright violation. The defendant must also have completed one or more

of the actions under Section 27(4) of the Copyright Act. This rule has been substantiated in *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, where an individual knowingly financed an operation that infringed copyrights, but had not committed any of the actions listed under Section 27(4) of the Copyright Act, and so escaped liability.^[70] As for ISPs with knowledge about the infringing activity, they are not at risk for indirect infringement so long as they take steps to prevent the continuation of the infringing activity.

{41} Therefore, in Canada, although there is no current specific legislation, the existing Copyright Act appears to be flexible enough to deal with the challenges of the Internet.

9. THE ASIAN SITUATION - SINGAPORE LEADS THE WAY

{42} Interestingly, some Asian countries like India and Singapore, have enacted laws dealing with the challenges posed by the advancements in information technology. In Singapore, the Registry of Trade Marks and Patents formed an Electronic Commerce Committee in 1998 to comprehensively study the issues involved and provide suggestions for dealing with these issues. On August 17, 1999, the Singapore Parliament incorporated these suggestions in a Bill and enacted the Copyright (Amendment) Bill 1999 incorporating it into the Copyright Act.^[71] Under this Act, when the Network Service Provider makes an electronic copy of the copyright material available on the network, it cannot be liable for infringement if:

- a. it is made available in the course of providing connections to the copy;
- b. the storage, transmission, routing, or provision of connections is done at the direction of a user of the network; and
- c. the copy is stored, transmitted, or routed without any deliberate modification of its contents by the Network Service Provider.^[72]

{43} However, if the copyright owner provides an ISP with a statutory declaration expressing his belief of the occurrence of a copyright infringement, then it is not exempt from liability for making the material available on the network under Section 193C(1) of the Copyright (Amendment) Act.^[73] This declaration from the copyright owner must outline the reasons underlying the copyright owner's allegations of copyright infringement. The Network Service Provider then has the responsibility of removing the copy from the network or disabling access to the material on the network. If the Network Service Provider fails to do this in a reasonable time, the Network Service Provider is liable.^[74]

{44} The provisions in the Singapore Copyright (Amendment) Act are similar to the provisions of the Digital Millennium Copyright Act of the United States, where the ISP has to be informed about the violation before liability can attach. In the United States, ISPs must designate an agent with the Copyright Office to allow copyright owners easy access to inform them of violations. In Singapore there is no such requirement, but once an ISP has been alerted by the copyright owner, it has to act expeditiously to remove the infringing material.^[75] If the ISP fails to do so, it can be drawn into an expensive law suit. This is an equitable position because it tries to harmonize the interests of ISPs and copyright owners.

10. THE INDIAN POSITION ACCORDING TO THE INFORMATION ACT OF 2000

{45} Currently, in India, ISPs have not been drawn into any major IPR violations. The new Internet policy announced by the Central Government in July 2000 could bring more service providers, in addition to existing ISPs such as Satyam, Dishnet, and Wipro Netcracker. Therefore, in the future, the probability of these ISPs being dragged into unnecessary courtroom battles is high. The law addressing the ISP liability issue is ambiguous. The Information Technology Act exempts ISPs from liability if they can prove that they

had no knowledge of the occurrence of the alleged act, and that they had taken sufficient steps to prevent a violation.^[76]

11. CONCLUSION

{46}After reviewing some of the "cyberspace" legislation, it is not surprising to find that the legislation in this field lacks clarity. The Digital Millennium Copyright Act of the United States, has clearly defined the standard of knowledge an ISP is required to possess for it to be held liable for illegal third party activities. The Digital Millennium Copyright Act allows ISPs to terminate the accounts of individuals who infringe copyrights on a regular basis. Furthermore, in the United States, ISPs have to register an agent with the appropriate office so they can receive information of copyright infringements. This eliminates the possibility of an ISP being caught unaware of third party infringements.

{47}The Indian position in the "cyberspace" legislation must be made more explicit. It must clearly require an ISP to have actual knowledge of any infringing act to be held liable. To make it convenient for ISPs, they could be asked to designate an agent with the requisite authority to receive complaints regarding offenses committed on the Internet. This will ensure that the ISP has sufficient knowledge of the abuses on the Internet. The Australian Act gives due importance to the financial gain made by ISPs along with the nature of the relationship between an ISP and a third party infringer. Similarly, the Indian Act must include sections that address the financial aspect of the transaction, and the relationship between an ISP and a third party, because this is vital to determining the identity of the violator. The American concept of contributory infringement can also be incorporated into the Indian Act so that if any person "with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another,"^[77] the person can be made liable. And as in the Australian Act, an ISP must not be held liable unless it determines the content of the material.

{48}In order to be exempt from liability, the Indian Act requires the service provider to exercise "due diligence" to prevent the commission of copyright infringement.^[78] The Act does not provide the meaning of the term "due diligence." If "due diligence" means policing each and every aspect of the Internet, it can lead to loss of privacy and can ultimately have a disastrous effect. There is a need for a consensus on the meaning of the term due diligence because the primary function of ISPs is to build the Internet, not to play the role of a policeman. Consequently, "due diligence" should be interpreted narrowly. If the behavior of an ISP is reasonable, then that ISP should not be held liable for each and every activity on the Internet. The laws should be pragmatic because an ISP cannot be expected to monitor all the activities on the Internet.

{49}Although the Information Technology Act 2000 has been enacted with much fanfare, it has failed to clarify some basic issues. This Act requires considerable fine-tuning. Issues concerning ISPs should be taken seriously, because any hesitation over implementing policies or regulation of ISPs can prove detrimental to the institution of the Internet as a whole.

ENDNOTES

[*]The author is an Indian Trademark Attorney holding a LL.M. in Intellectual Property Law. He is, in fact, bereft of words to express his gratitude towards Dr. K. Vikraman Nair, Professor of Law, Mahatma Gandhi University, Kerala, India, and Dr. Fletcher Orlan Lee, Adjunct Associate Professor of Business Laws, University of Science and Technology, Hong Kong, for their zealous support and guidance.

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(Feb. 1999), available at <http://www.infodev.org/projects/fin341.htm>.

[2]. Graham J.H. Smith & Simon Chalton, *Internet Law And Regulation* 1, 3 (2d ed. 1999).

[3]. IPR for purposes of this paper deals mainly with copyright.

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[7]. *Id.*

[8]. *WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the House Comm. on the Judiciary*, 105th Cong. 126 (1998) (statement of Marc Jacobson, Vice President and General Counsel of Prodigy, Inc., a leading provider of Internet access and online services).

[9]. *See id.* at 101 (statement of Edward A. Pease (R-IN)).

[10]. *See id.* at 87 (statement of Roy Neel, president and chief executive officer, U.S. Telephone Association).

[11]. 839 F. Supp. 1552 (M.D. Fla. 1993).

[12]. *Howard v. Sterchi*, 974 F.2d 1272 (11th Cir. 1992).

[13]. 17 U.S.C. § 501(a) (2000).

[14]. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

[15]. *Id.* at 1163.

[16]. *Id.*

[17]. 839 F. Supp. at 1556.

[18]. *See id.*

[19]. 857 F. Supp. 679 (N.D. Cal. 1994).

[20]. 907 F. Supp 1361 (N.D. Cal 1995).

[21]. *See id.* at 1362.

[22]. *Id.*

[23]. *See Feist Publ'ns, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 350 (1991).

[24]. 907 F. Supp. 1361, 1368-69 (N.D. Cal 1995).

[25]. *Id.* at 1372.

[26]. *Id.* (emphasis added).

[27]. *Id.* at 1375.

[28]. *Id.* at 1377.

[29]. *Id.* at 1382.

[30]. 982 F. Supp. 503, 512 (N.D. Ohio 1997).

[31]. *Cf.* *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (where mere conducting of a BBS whose customers posted copyright infringing content created liability).

[32]. *See* *Hardenburgh*, 982 F. Supp. at 512.

[33]. *Id.* at 514.

[34]. *Id.*

[35]. 17 U.S.C.S. § 512 (Law. Co-op. 2001).

[36]. 17 U.S.C.S. §§ 1201 *et seq.* (Law. Co-op. 1998).

[37]. *See supra* note 4, at 48 (statement of the Hon. Marybeth Peters, register of copyrights, Copyright Office of the United States Library of Congress).

[38]. *See supra* note 8.

[39]. *See* Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 118 (1995).

[40]. 17 U.S.C.S. § 512(j)(1)(A) (Law. Co-op. 2001).

[41]. 17 U.S.C.S. § 512(a), (b) (Law. Co-op. 2001).

[42]. *Id.*

[43]. 17 U.S.C.S. § 512(g)(1) (Law. Co-op. 2001).

[44]. 17 U.S.C.S. § 512(f) (Law. Co-op. 2001).

[45]. 17 U.S.C.S. § 512 (c)(2) (Law. Co-op. 2001).

[46]. 17 U.S.C.S. § 512 (i)(1)(A) (Law. Co-op. 2001).

[47]. (1997) 38 I.P.R. 294.

[48]. Copyright Act 1968 (Cth), § 31 (1)(a)(v).

[49]. *Id.* § 26.

[50]. *Id.* § 26(5).

[51]. *Telestra Corp. Ltd. v. Australasian Performing Right Ass'n Ltd.*, (1997) 38 I.P.R. 294.

[52]. Copyright Act 1968 (Cth), § 26(2).

[53]. *Id.* § 26(4).

[54]. See Nat'l Music Publishers' Ass'n, Inc. (NMPA), *News & Views: APRA Brings Internet Court Action in Australia*, at <http://www.nmpa.org/nmpa/nv-sf97/apra.html> (last visited Nov. 6, 2001); Australian Copyright Council Newsletter, *Recent Developments: APRA v. OZEmail Case Settled 1* (June 1998).

[55]. It received royal assent on September 4, 2000, and became applicable as of March 4, 2001. See *News & Views: APRA Brings Internet Court Action in Australia*, *supra* note 53.

[56]. The Copyright Amendment (Digital Agenda) Act 2000, c. 6, § 10(1), sched. 1 (Austl.) (2000). See <http://law.gov.au/publications/copyfactsheet/copyfactsheet.html>.

[57]. *Id.* c. 36, § 1A.

[58]. *Id.* c. 42, § 39B.

[59]. *Id.* c. 26, §§ 22(5), (6).

[60]. *Telestra Corp. Ltd. v. Australasian Performing Rights Ass'n Ltd.* (1997) 38 I.P.R. 294.

[61]. Copyright Act, R.S.C., ch. C-42 (1985) (Can.).

[62]. *Id.* § 3(1).

[63]. *Id.* § 27(2).

[64]. See *Vigneux v. Canadian Performing Right Society, Ltd.* (1945), 4 C.P.R. 65, [1945] 2 D.L.R. 1, 4 Fox Pat. C. 183; *Muzak Corp. v. Composers, Authors & Publishers Ass'n. of Canada Ltd.* (1953), 19 C.P.R. 1, [1953] 2 S.C.R. 182, 13 Fox Pat. C. 168.

[65]. *de Tervagne v. Beloeil (Town)* (1993), 50 C.P.R. (3d) 419, [1993] 3 F.C. 227, 65 F.T.R. 247, 42 A.C.W.S. (3d) 125.

[66]. *Id.* at 243 (citing *Muzak*, 2 S.C.R. at 189).

[67]. Skone James, Copinger and Skone James on Copyright, 240-42 (Sweet & Maxwell 13th ed. 1991).

[68]. Copyright Act, R.S.C., ch. 42 § 27(4) (1985) (Can.).

[69]. *Clarke, Irwin & Co. v. C. Cole & Co. Ltd.*, [1959] 33 C.P.R. 173 (Ont. H.C.J.); *Simon & Schuster Inc. v. Coles Book Stores Ltd.*, [1975] 9 O.R. (2d) 718.

[70]. *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, [1986] 28 D.L.R. (4th) 178, 226-27 (F.C.T.D.).

[71]. Singapore Copyright (Amendment) Act 1999 amending Copyright Act 1987 (Cap. 63, Rev. Ed. 1999), available at <http://www.egazette.com.sg>; see also site for Intellectual Property Office of Singapore at <http://www.ipos.gov.sg/resource/lu1999.html>.

[72]. *Id.* S. 193C(1).

[73]. *Id.*

[74]. *Id.* In fact, the new amendment introduces into the Copyright Act 1987 a new 'Part IXA' on '*Works, or Other Subject Matter in Electronic Form*', comprised of sections 193A, 193B, 193C, 193D, 193E, 193F, and 193G. *Id.*

[75]. *Id.*

[76]. *See* Information Technology Act 2000 § 79 (India Code 2000).

[77]. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

[78]. *See* Information Technology Act 2000 § 79 (India Code 2000).

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 - (4) <http://home1.pacific.net.sg/~jhmk/article15.html> Provides an overview of Singapore's copyright law and how it extends to cyberspace. The article also discusses Internet service provider liability.
 - (5) <http://www.lcweb.loc.gov/copyright/> The United States Copyright Office website. It provides extensive information about copyright law in the United States.
 - (6) <http://www.lawgenius.com/journal/isp/index.html> Discusses Canadian copyright law and its application. There is a particular discussion of the liability of Internet service providers under Canadian law.
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