



LIABILITY OF INTERNET SERVICE PROVIDERS ACROSS VARIOUS COUNTRIES: AN OVERVIEW

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Abstract

The role of I.S.P. or Intermediary is very important for effective utilization of information technology. The liability of Intermediary or I.S.P. has gain immense importance at international level. Various countries have defined the liability of I.S.P. either in the form of copyright infringement or for the infringement of information technology. Australia was the first country to enact the legislation relating to the liability aspect of I.S.P. in the form of Copyright Act, 1968 making I.S.P. liable to disable the access to online services hosted outside Australia. Some safe harbors were also provided for I.S.P. as part of the Australia - United States Free Trade Agreement. The US provides for the liability of ISP in the form of Communications Decency Act, 1996, Digital Millennium Copyright Act, 1998. Title II of the D.M.C.A. specifically deals with the issue of I.S.P. liability and also provides for the penalties for unauthorized access to a copyright work. As regarding the legislations of Canada, it does not specifically defines the liability of I.S.P., instead it provides safe harbor for those ISP's providing any means for Internet access. I.S.P.'s are also protected for copyright infringement in Canada. In Singapore the liability of I.S.P. is regulated by the Internet class license and Internet code of Practice which requires the I.S.P. to abide by the conditions of license. I.S.P.'s are also restricted to make public access of those websites which contain offensive content harmful to national interest. Japan's Copyright Act, 1970, The Provider Liability Limitation Law 2002 protects the I.S.P. against any kind of liability for Copyright infringement. UK enacted two legislations in form of Copyright, Designs and Patents Act 1988 Digital Economy Act 2010 which imposes the obligations on ISP to notify the infringement to its subscribers, also liable to take technical measures to terminate the Internet services after reporting of infringement. The countries also make the provisions for the penalties for offences relating to the infringement of copyright or unauthorized access of information by various I.S.P.'s or Intermediaries. The quantum of punishment is differed in every country according to the nature of offence.

Key Words – Comparison, Countries, Intermediary, Online, Punishment.

1. INTRODUCTION

Intermediary in broad sense includes telecom service providers, network service providers, web-hosting service providers, search engines etc.¹ Information Technology (Amendment) Act, 2008 clarified and expanded the definition of intermediary and gave them better protection from legal liabilities that could arise out of user generated content. The amended definition of intermediary includes every person/entity that facilitates transactions between a recipient and a content provider. The present paper undertakes to examine the legal provisions and approach of the Courts towards liability of ISPs in USA, Canada, Australia, Singapore, Japan and UK. The present paper uses the terms intermediary and ISP interchangeably. The position in India is quite similar to the legal provisions in the countries discussed below and from 2008, more strict and clear provisions have evolved.²

2. LEGISLATIVE POSITION IN VARIOUS COUNTRIES

The Table 1 below outlines the major legislations regulating the ISP.

Table 1 - Relevant Legislations in Various Countries vis-a-vis Liability of ISPs³

S.No.	Country	Relevant Legislations
1.	USA	<ul style="list-style-type: none"> • Communications Decency Act,1996, • Digital Millennium Copyright Act ,1998
2.	Canada	<ul style="list-style-type: none"> • Copyright Act, 1985 • <u>Copyright Modernization Act, 2012</u>
3.	Australia	<ul style="list-style-type: none"> • Copyright Act, 1968
4.	Singapore	<ul style="list-style-type: none"> • Electronic Transactions Act, 1998 ; • Copyright Act,2005 and • <u>Personal Data Protection Act 2012</u>
5.	Japan	<ul style="list-style-type: none"> • Copyright Act, 1970; • Provider Liability Limitation Law , 2002
6.	UK	<ul style="list-style-type: none"> • Copyright, Designs and Patents Act, 1988 • Digital Economy Act , 2010 and • Defamation Act, 2013

2.1 Position in USA

The United States is the earliest country which enacted new copyright statutes to specifically deal with digital network challenges. Among the five titles of the DMCA, Title II, the “Online Copyright Infringement Liability Limitation Act”, specifically addresses the issue of ISP liability and creates limitations on infringing liability for certain types of activities by ISPs.

¹ For details, see Bhumika Sharma & Poonam Pant, “Evolution of Intermediaries and Internet Service Providers: An Outline”, Commonwealth Law Review Journal , Vol. 3.1, (Annual Ed.) , 2007 at 45.

² For details, see Bhumika Sharma & Poonam Pant, “Online Intermediaries Rationale And Aspects of Liability” at 29, LawZ , Vol.17, No.2, Issue 186 , February 2017.

³ Compiled by Researchers.

In 1998, the Internet intermediary industry gained the legal right by having statutory limitations on their liability in U.S. Digital Millennium Copyright Act, 1998 (“DMCA”). The Digital Millennium Copyright Act (DMCA) effectively gives legislative backing to the principle by codifying its ruling that passive automatic acts shall not become grounds for a finding of online copyright infringement.⁴ 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.

The owner of copyright has the exclusive rights “to do and to authorize” any of the rights of copyright.⁵ While there is some debate as to whether section 106 provides the statutory basis for secondary liability under U.S. copyright law, there is no doubt that two distinct theories of secondary liability have been developed under U.S. copyright law: “vicarious liability” and “contributory infringement.”

Liability for offline content distributors or hosts largely turns on whether the host knows or has reason to know that they are hosting tortious content. In the earliest days of the Internet, courts used these standards to assess liability of online intermediaries, but found that the law created a perverse result. Online intermediaries possessed the technical ability to filter or screen content in the way an offline intermediary never could, but under existing standards this meant that the intermediary would assume liability for all the content over which they had supervisory control.⁶

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁷ An “interactive computer service” under Section 230 is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”⁸ Online intermediaries of all sorts meet this definition, including Internet service providers, social media websites, blogging platforms, message boards, and search engines. An “information content provider” in turn is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of

⁴ RTC V. Netcom ,

⁵ Digital Millennium Copyright Act, 1998; Section 106.

⁶ Adam Holland entl. , NOC Online Intermediaries Case Studies Series: Intermediary Liability in the United States, Berkman Center for Internet & Society, February 2015, available at http://cyber.law.harvard.edu/is2015/sites/is2015/images/NOC_United_States_case_study.pdf , accessed on 10 February, 2019.

⁷ Communications Decency Act, 1996, Section 230.

⁸ *Id.*

information provided through the Internet or any other interactive computer service.”⁹ Section 230 effectively removes any duty for an interactive computer service to monitor content on its platforms, a tremendous boon for the development of new intermediaries and services.

2.2 Position in Australia

Copyright owners to the Federal Court of Australia for an injunction requiring ISPs to disable access to online services hosted outside Australia.¹⁰ Before granting the injunction, the Court must be satisfied that the foreign site either directly infringes copyright or ‘facilitates’ infringement. Rights holders bear the onus of showing that ‘the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).’ The Court must take into consideration a range of factors including whether disabling access to the online location is a proportionate response in the circumstances, the impact on any person likely to be affected by the grant of the injunction, and whether it is in the public interest to disable access to the online location. Once granted, the injunction requires the ISP to take reasonable steps to disable access to the online location. The Court has further powers to make detailed orders in relation to the technical means to be adopted by the ISP to disable access. Safe harbours for intermediaries were introduced as part of the Australia - United States Free Trade Agreement.

Australia has also adopted the Copyright Amendment (Digital Agenda) Act 2000. 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."¹¹ 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.

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.¹² 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.¹³

3.3. Position in Canada

In Canada, there is no current specific legislation, the existing Copyright Act appears to be flexible enough to deal with the challenges of the Internet.

⁹ *Id.*

¹⁰ Copyright Act ,1968 , Section 115A (introduced by Copyright Amendment (Online Infringement) Act, 2015).

¹¹ The Copyright Amendment (Digital Agenda) Act 2000, Section 10(1).

¹² *Id.*; Section 39B.

¹³ *Id.*, Sections 56.

ISPs, provided that they are content neutral, cannot be held liable by providing any means for Internet access.¹⁴ The fact that “any means” for telecommunication is used instead of “the means” necessary for telecommunication, which appears in section 2.4(1)(b), signifies that this provision is intended to cover a wider range of intermediaries that provide access to third party content such as bloggers, video and social networking websites. ISPs are protected from copyright infringement as a result of caching or other “incidental” acts that provide more efficient Internet services.¹⁵

An intermediary is not liable for copyright infringement by merely providing “the means of telecommunication necessary” for others to communicate digital content.¹⁶

3.4. Position in Singapore

Internet Service Providers (ISPs) and Internet Content Providers (ICPs) in Singapore are regulated through the Broadcasting (Class Licence) Notification and are required to abide by the conditions of the licence and to exercise judgement in ensuring that their content complies with the Internet Class Licence and the Internet Code of Practice.

The key focus is on content issues of concern to Singapore such as those relating to public interest, race, religion, pornography and content harmful to children. As a symbolic statement of our societal values, local ISPs are required to restrict public access to a limited number of mass impact websites which contain content that the community regards as offensive or harmful to Singapore's racial and religious harmony, or against national interest. The majority of the websites on the list are pornographic in nature. Beyond this, MDA does not restrict or monitor individuals' access to online content. MDA's guidelines do not cover webpages operated by individuals and personal communications such as email and instant messaging.

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, 2005. 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 it is made available in the course of providing connections to the copy; the storage, transmission, routing, or provision of connections is done at the direction of a user of the network; and the copy is stored, transmitted, or routed without any deliberate modification of its contents by the Network Service Provider.¹⁷

¹⁴ Copyright Modernization Act, 2012; Section 31.1(1).

¹⁵ *Id.*

¹⁶ Copyright Act, 1985, Sections 2.4(1)(b), 27 and 29. Section 2.4(1) (b) (“Common Carrier Exemption”).

¹⁷ Copyright Act, 2005.

An organization that qualifies as a “data intermediary” only has to observe limited obligations regarding use of reasonable security arrangements to protect personal data from unauthorized access and similar risks.¹⁸

3.5. Position in Japan

Japanese special liability regime does not divide service providers into three / four subcategories. Instead, the liability protection applies to any online service provider whose purpose is to communicate third party information to other parties, whether or not such service is offered for remuneration. Similar to the E-Commerce Directive, the Japanese legal framework protects against any type of liability, but does not protect against injunctions. Interestingly, the Japanese legal framework also protects the intermediary against claims from its users for having wrongfully taken down illegal material. ISP liability for copyright infringing content is limited. Breaches shall be punishable by imprisonment or by a fine or by both.¹⁹

3.6. Position in U.K.

The United Kingdom was the first European country to specifically adopt legislation to limit online intermediary liability prior to the introduction of the E-Commerce Directive, although this legislation was limited to defamation issues. The Defamation Act, 1996 introduced an “innocent dissemination” defence for distributors of hard copy publications, as well as online service providers and internet access providers. It exempted online intermediaries from liability for third party materials, provided they could prove to have taken reasonable care with respect to the publication, and did not have any reason to believe that it contributed to the publication of a defamatory statement.²⁰

In June 2010, the U.K. became the fourth country in the world (after Republic of Korea, New Zealand and France) to enact what is known as a “graduated response” law. The Digital Economy Act 2010 imposes obligations on ISPs to notify its subscribers of reported infringements by right holders,²¹ to supply to right holders a “copyright infringement list” that sets out an anonymous list of its subscribers who have reached a prescribed threshold of infringement reports (“relevant subscribers”)²² and to take “technical measures” to limit, suspend or terminate Internet services of relevant subscribers.²³ The provision also empower the Secretary of State to make regulations to get a court order to direct a service provider block access to Internet locations which the court is satisfied is likely to be involved in an

¹⁸ Personal Data Protection Act 2012, Section 24.

¹⁹ Copyright Act, 1970, Article 119.

²⁰ Defamation Act, 1996, Section 1(1).

²¹ The Digital Economy Act, 2010 ; Section 124A.

²² *Id* ,Section 124B.

²³ *Id*, Section 124G.

activity that infringes copyright.²⁴ In November 2010, on an application by two U.K. ISPs, the U.K. High Court granted permission for a judicial review of the aforesaid provisions of the Digital Economy Act.

Website operators are exempt from liability for defamatory statements uploaded onto their websites by the websites' users.²⁵ However, this defence can be overcome if the claimant proves: that it was not possible for the claimant to identify the person who posted the statement, that the claimant gave the operator a notice of complaint in relation to the statement, and that the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.²⁶

The owner of a copyrighted work is granted exclusive rights over certain restricted activities, as well as, the right to authorise others to engage in these activities; accordingly, copyright in a work may be infringed by any person who either does any of the listed restricted acts without licence from the copyright owner himself or authorizes another person to commit them.²⁷

Table 2 – Provisions vis-à-vis liability of ISPs in Various Countries²⁸

S.No.	Country	Legislation	Relevant Provision	Offence	Penalties/Punishment		Other remedies (if any)
					Imprisonment	Fine	
1.	USA	Digital Millennium Copyright Act ,1998	Section 1204	(i)Unauthorized access to a copyright work ²⁹ (ii)intentional distribution, removal and alteration of false CMI (copyright management	Imprisonment- (first offence) up to 5 years (Subsequent offence)- Imprisonment up to 10 years	Fine- (first offence) \$500,000 (Subsequent offence) Fine- \$1000,000	-

²⁴ *Id*, Section 17, 18.

²⁵ Defamation Act 2013, Section 5.

²⁶ *Id*.

²⁷ Copyright, Designs and Patents Act 1988; Section 16.

²⁸ Compiled by Researchers.

²⁹ Digital Millennium Copyright Act ,1998 ;Section 1201,

				information) without authority ³⁰			
2.	Canada	Copyright Act, 1985	Section 42	Making, selling, distributing infringing copy of a work ³¹	Imprisonment - not more than 5 years ³²	Fine- \$1,000,000 or with both	Remedy for infringement by way of injunction, damages ³³
		Copyright Modernization Act, 2012	Section 48	Circumvention of technological protection measures	Imprisonment for a term not exceeding five years	fine not exceeding \$1,000,000 or to both;	-
3.	Australia	Copyright Act, 1968	Section 47A(3), 47A(3A), 132AC to 132AO	infringements of the copyright in a work, Substantial infringement on a commercial scale	Imprisonment for not more than 5 years,	fine of not more than 550 penalty units or both	-
4.	Singapore	Electronic Transactions Act, 1998,	Section 25, 26, 42(3), 48, 51, 53, 56	Publication for fraudulent purpose, false or unauthorized request, noncompliance of directions of controller	Not exceeding 12 months	Not exceeding \$50,000 or with both	-
		Copyright Act, 2005	Sections 136, 139, 140EA, 140LA, 140M, 140O, 141, 179,	Selling or supply of infringing copy of the work, obstructing the	Imprisonment of 5 years	Not exceeding \$20,000	-

³⁰ *Id* ; Section 1202.

³¹ *Id*; Section 42(1) &(2) Copyright Act, 1985.

³² *Id* ; Section 42(2.1).

³³ *Id* ; Section 34.

			180,181,193DD, 201B,	investigating officer from executing duties			
		<u>Personal Data Protection Act 2012</u>	Section 42,43,44,45, 51,53,55,56,61	Access of personal data without authority, using of symbol of commission without authority	Imprisonment upto 12 months	Not exceeding \$10,000	-
5.	Japan	Copyright Act, 1970	Article 119	Infringement of copyright, violation of protected order	Imprisonment upto 5 years	Not exceeding 5 million yen	-
6.	UK	Copyright, Designs and Patents Act, 1988	Sections 107,108,109,110	Making or dealing with infringing articles,	Not exceeding 6 months	Not exceeding statutory maximum	Damages, injunction available to the plaintiff for infringement ³⁴
		Digital Economy Act, 2010	Sections 14	The contravention by ISP of their initial obligations or obligations to impose technical measures.	-	£250,000	Website-blocking injunctions provisions in respect of location infringing copyright ³⁵

Table 2 above discusses the offence committed by ISP and the punishment for the same.

3. CONCLUSION

Thus, it can be concluded that the role of ISP or Intermediary is very important for effective utilization of information technology. The liability of Intermediary or ISP has gain immense importance at international level. Various countries have defined the liability of ISP either in the form of copyright infringement or for the infringement of information technology. Australia was the first country to enact the legislation relating to the liability aspect of ISP in the form of Copyright Act, 1968 making ISP

³⁴ Copyright, Designs and Patents Act 1988; Section 96, 97,100,101,102,103.

³⁵ Digital Economy Act 2010; Section 17,18.

liable to disable the access to online services hosted outside Australia. Some safe harbors were also provided for ISP as part of the Australia - United States Free Trade Agreement. The US provides for the liability of ISP in the form of Communications Decency Act,1996, Digital Millennium Copyright Act,1998. Title II of the DMCA specifically deals with the issue of ISP liability and also provides for the penalties for unauthorized access to a copyright work. As regarding the legislations of Canada, it does not specifically defines the liability of ISP, instead it provides safe harbor for those ISP's providing any means for Internet access. ISP's are also protected for copyright infringement in Canada. In Singapore the liability of ISP is regulated by the Internet class license and Internet code of Practice which requires the ISP to abide by the conditions of license. ISP's are also restricted to make public access of those websites which contain offensive content harmful to national interest. Japan's Copyright Act, 1970, The Provider Liability Limitation Law 2002 protects the ISP against any kind of liability for Copyright infringement. UK enacted two legislations in form of Copyright, Designs and Patents Act 1988 Digital Economy Act 2010 which imposes the obligations on ISP to notify the infringement to its subscribers, also liable to take technical measures to terminate the Internet services after reporting of infringement. The countries also make the provisions for the penalties for offences relating to the infringement of copyright or unauthorized access of information by various ISP's or Intermediaries. The quantum of punishment is different in every country according to the nature of offence.
