GIVE ME MY SPACE AND TAKE DOWN HIS

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The Copyright (Amendment) Act, 2012 has introduced fair use provisions to exempt intermediaries from liability in certain specific situations and provides them an opportunity to take down infringing content when brought to their notice. Lawmakers in India have certainly taken a positive step forward, and the above provisions on a plain reading, seem to protect and nurture a file-sharing business model that offers immense possibilities for the future, even at this nascent stage. However, the judicial response to this Parliamentary intent is a matter of serious concern, considering the recent pronouncements of the Delhi High Court in the Myspace case and the decision of the Madras High Court in the R.K. Productions case. The amendments also have to be viewed in light of the widely worded John Doe orders issued by Indian Courts, which pose a potential risk to the growth of the file-sharing industry and the possibility of a chilling effect on free expression and dissemination of information.

In this paper, the author examines the content of the amendment and the nuances in its language, the manner in which it could be interpreted by Courts and the extent to which this amendment could foster the growth of the file-sharing and streaming industry. To do this, the issue of intermediary liability in Indian law prior to the amendment has been examined. The paper also briefly studies the legal position on intermediary liability in the United Kingdom as discussed in the Newzbin2 case and examines whether the post-amendment provisions in India are open to similar interpretation and application.

TRANSIENT 'AND' INCIDENTAL: OR SHOULD IT BE AN 'OR'?

In 2010, the controversial Copyright (Amendment) Bill came up for deliberation before the Parliamentary Standing Committee on Human Resource Development, headed by Mr. Oscar Fernandes. While a major part of the discussion revolved around the altered royalty structure and rights allocation between music composers and lyricists on one hand, and film producers on the other, it can be safely stated that this is the most significant amendment to the Copyright Act, 1957 beyond this reason alone. The amendment seeks to reform the Copyright Board, bring in a scheme of statutory licenses, expand the scope of performers' rights and introduce anti-circumvention measures to check copyright piracy. As part of its ambitious objective, the amendment also attempts to create a new fair use model to protect intermediaries and file-sharing websites.

The Copyright (Amendment) Act, 2012, which gives expression to this fair use model through Sections 52(1)(b) and (c), reads thus:

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52. Certain acts not to be infringement of copyright. – *(1) The following acts shall not constitute an infringement of copyright, namely:*

*(a) to (ad) – ******

(b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

(c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.[1]

From a plain reading, it is clear that two important exceptions are carved out: *first*, in respect of the technical process of electronic transmission, and *second*, in respect of providing electronic links, access or integration. The discussion on this provision by the Parliamentary Standing Committee, and the representations made before this Committee by various stakeholders have been recorded in the Standing Committee Report[2] and merit attention. The Human Resources Department, in its submission, made it clear that the purpose behind clause (b) was only to exempt liability arising out of 'caching', in tandem with international practice. Therefore, any *deliberate* storing of the works would still amount to infringement. Similarly, the Department contended that clause (c) only sought to carve out a safe harbour exemption for internet service providers.

Content providers such as Saregama RPG Enterprises, the Indian Motion Picture Producers Association, the Indian Music Industry and the South India Music Companies Association cried wolf and placed on record their concern that such a fair use model would certainly end up being abused. The specific worries were that even illegal downloaders and suppliers of copyrighted

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[1] Indian Copyright Act, 1957, § 52.

[2] DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HUMAN RES. DEV., TWO HUNDRED TWENTY-SEVENTH REPORT ON THE COPYRIGHT (AMENDMENT) BILL, 2010 (2010), *available at* http://copyright.gov.in/Documents/227-Copyrightamendment.pdf .

content would rely upon this provision to plead that their storage was incidentally made, in the process of transmission, and that these provisions cast an additional burden on content providers to specifically request the take down of each infringing file – a task virtually impossible in the case of online piracy. The Business Software Alliance also lent their support to these stakeholders by submitting that the initially prescribed period of fourteen days, given to the content providers to obtain a judicial order to ensure the continued restriction on access to the infringing content, was too short a period.

On the other hand, intermediaries and online service providers were critical of the proposed provisions which, in their opinion, did precious little to safeguard their interests. Ebay India proposed that the words "transient and incidental", as found in the Bill, should be substituted with "transient or incidental". Yahoo India incisively analysed the wording of the Bill and submitted that the loose language employed therein could result in problems while carrying out various operations such as search, hosting, information retrieval and caching. A specific request was placed to amend the Act to provide clearly that an internet service provider would be liable only if it: (i) had knowledge of the infringing activity, and despite such knowledge, failed to remove the infringing content, or (ii) induced, caused or materially contributed to the infringing conduct of another. The Standing Committee accepted some of the above suggestions and recommended that the fourteen day period may be reviewed in order to achieve a more harmonious balance between the rights of content owners and that of a service provider to do business. This later translated into the twenty-one day window, as currently seen in Section 52(1)(c). The Standing Committee also accepted Ebay India's proposal to substitute the expression "transient and incidental" with the expression "transient or incidental". However, no heed was paid to the submissions made by Yahoo India pertaining to the inherent ambiguity in the language employed in Section 52(1)(c), and this is precisely where the amendments could actually falter in achieving their stated objective.

Infringement: Of Primary and Secondary

The conceptual issue that lies at the heart of the debate on fair use exemption for intermediaries is one of liability. Liability for copyright infringement can either be primary or secondary in nature. Primary liability, such as the case of a file-sharer *deliberately* storing or facilitating the transmission of infringing works to the public, is in any case not covered within the purview of the fair use exceptions introduced. It is only secondary liability, where the primary infringer is provided with a space that can be used as a conduit pipe, channel or network to transmit illegal copies created by him, that forms the subject matter of the newly introduced fair use model. Hence, it is imperative to understand the difficulty faced, even by Courts, while adjudicating on the permissible limits of activity that facilitates, or could potentially facilitate, copyright infringement.

The classic divide on this issue is reflected in two judicial pronouncements – separated by a gap of more than two decades – delivered by the U.S. Supreme Court. In *Sony Corporation v. Universal City Studios Inc.*,[3] popularly known as the *Betamax* case, the U.S. Supreme Court held that the manufacturers of home video recording devices, known in the market as Betamax, would not be liable to copyright owners for secondary infringement since the technology was capable of substantially non-infringing and legitimate purposes. The U.S. Supreme Court even observed that such time-shifting devices would actually enhance television viewership and therefore find favour with a majority of copyright holders as well. The majority did concede however, that in an appropriate situation, liability for secondary infringement of copyright could well arise. In the words of the Court, "*vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another*." However, if vicarious liability had to be imposed on the manufactures of the time-shifting devices, it had to rest on the fact that they sold equipment with constructive knowledge of the fact that their customers *may* use that equipment to make unauthorised copies of copyrighted material. In the view of the Court, there was no precedent in the law of copyright for the imposition of vicarious liability merely on the showing of such fact.

Notes of dissent were struck by Justice Blackmun, who wrote an opinion on behalf of himself and three other judges. The learned judge noted that there was no private use exemption in favour of making of copies of a copyrighted work and hence, unauthorised time-shifting would amount to copyright infringement. He also concluded that there was no fair use in such activity that could exempt it from the purview of infringement. The dissent held the manufacturer liable as a contributory infringer and reasoned that the test for contributory infringement would only be whether the contributory infringer had *reason to know or believe* that infringement would take place, and *not whether he actually knew of the same*. Off-the-air recording was not only a foreseeable use for the Betamax, but also its intended use, for which Sony would be liable for copyright infringement.

[3] Sony Corp. v. Universal City Studios, Inc. (*Betamax*), 464 U.S. 417 (1984).

This dissent has considerably influenced the seemingly contrarian position taken by the majority in the subsequent decision, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*[4] This case called into question the liability of websites that facilitated peer-to-peer (P2P) file-sharing. Re-formulating the test for copyright infringement, the U.S. Supreme Court held that "*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*." In re-drawing the boundaries of contributory infringement, the Court observed that contributory infringement is committed by any person who intentionally induces or encourages direct infringement, and vicarious infringement is committed by those who profit from direct infringement while declining to exercise their right to limit or stop it. When an article of commerce was good for nothing else but infringement, there was no legitimate public interest in its unlicensed availability and there would be no injustice in presuming or imputing intent to infringe in such cases. This doctrine would at the same time absolve the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and would limit the liability to instances of more acute fault than the mere understanding that some of the products shall be misused, thus ensuring that innovation and commerce are not unreasonably hindered.

The Court distinguished the case at hand from the *Betamax* case, and noted that there was evidence here of active steps taken by the respondents to encourage direct copyright infringement, such as advertising an infringing use or instructing how to engage in an infringing use. This evidence revealed an affirmative intent that the product be used to infringe, and an encouragement of infringement. Without reversing the decision in *Betamax*, but holding that it was misinterpreted by the lower court, the Court observed that *Betamax* was not an authority for the proposition that whenever a product was capable of substantial lawful use, the producer could never be held liable as a contributor for the use of such product for infringing activity by third parties. In the view of the Court, *Betamax* did not displace other theories of secondary liability. This other theory of secondary liability applicable to the case at hand was held to be the inducement rule, as per which any person who distributed a device with the object of promoting its use to infringe copyright, as evidenced by clear expression or other affirmative steps taken to foster infringement, would be liable for the resulting acts of infringement by third parties. However, the Court clarified that *mere knowledge of infringing potential or of actual infringing uses would not be enough* under this rule to subject a distributor to liability. Similarly, ordinary acts incident to product distribution, such as offering

[4] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. (*Grokster*), 545 U.S. 913 (2005).

customers technical support or product updates, support liability, etc. would not by themselves attract the operation of this rule. The inducement rule, instead, premised liability on *purposeful, culpable expression and conduct*, and thus did nothing to compromise *legitimate* commerce or discourage innovation having a *lawful* promise.

These seemingly divergent views on secondary infringement expressed by the U.S. Supreme Court are of significant relevance for India, due to the peculiar language used in the Indian Copyright Act, 1957 (hereinafter, "the Act"). As I will seek to show, this language has been retained even in the amendments of 2012, thus casting doubts on the efficacy of the fair use model that they legitimise. The starting point for this enquiry is Section 51 of the Act, which defines infringement. This provision bifurcates the two types of infringement, i.e., primary and secondary infringement, without indicating so in as many words. While Section 51(a)(i) speaks to primary infringement, 51(a)(ii) and 51(b) renders certain conduct to be secondary infringement. Even here, there is an important distinction between Sections 51(a)(ii) and 51(b). The former exempts the alleged infringer from liability if he can establish that *he was not aware and had no reasonable ground for believing that* the communication to the public, facilitated through the use of his "place", would amount to copyright infringement. The latter, on the other hand, permits no such exception. Thus, any person, who makes for sale or hire, or by way of trade, displays or offers for sale or hire, or distributes for the purpose of trade, or publicly exhibits by way of trade, or imports into India, any infringing copies of a work, shall be liable for infringement, without any specific *mens rea* required to attract such liability. It is in the context of the former provision, i.e., Section 51(a)(ii) that the liability of certain file-sharing websites for copyright infringement has arisen.

The *Myspace* Litigation and Secondary Infringement

In *Super Cassettes Industries Ltd. v. Myspace Inc.*,[5] the defendant was running a website that facilitated the sharing of media content by users/subscribers. The plaintiff, a leading sound recording and video label, alleged that the defendant, by providing a search and indexing function that allowed users to search for video/sound recordings and play such content on a computer, promoted copyright infringement. The plaintiff alleged both primary and secondary infringement on the part of the defendant. The plaintiff's case for primary infringement was that the defendant authorised the communication of the copyrighted works of the plaintiff to members of the public without

[5] Super Cassettes Industries Ltd. v. Myspace Inc. (*Myspace*), MIPR 2011 (2) 303.

the plaintiff's consent. To support the plea of secondary infringement, the plaintiff relied on Section 51(a)(ii) of the Act.

Rejecting the primary infringement plea raised by the plaintiff, the Delhi High Court held that although authorising an act which was part of the owner's exclusive right under Section 14 would no doubt amount to primary infringement under Section 51(a)(i), such authorisation required something more than merely providing the means to communicate the work to the public or providing the place for such communication. Explaining the level of involvement required for being a primary infringer on the ground of authorisation of infringement, the High Court held that active participation, inducement, or approval was a necessary ingredient to establish authorisation. The High Court clarified that knowledge of the fact that certain acts were infringing in character was different from active participation in, or any inducement of, such acts. The Court concluded that merely providing the means for infringement would not establish control, and therefore, any person providing such means could not be said to have approved or countenanced such act.

However, on the secondary infringement plea, the High Court, with all due respect, adopted a fairly dangerous yardstick to define the expression "*was not aware and had no reasonable ground for believing*" found in Section 51(a)(ii). The first error committed by the Court was in equating physical space and the virtual world, and assuming that the word "place" in this provision would automatically apply to the internet. To justify the view, the Court relied upon certain prior precedents on statutory interpretation to the effect that the language used in a statute must be given dynamic meaning to accommodate technological changes. These judgments were extremely fact-sensitive and most often involved situations where the regulation in question could realistically be extended to the new technology. The internet and physical space can perhaps be equated while drawing parallels between domain name infringement and passing off due to the common nature of the property involved, i.e., the identity of the person or business source identifier. However, the regulatory laws applicable to the control of physical property cannot be extended to the virtual world in similar fashion. Section 51(a)(ii) is, in effect, a provision that regulates control of physical property, by casting the onus upon the owner or possessor of the property to ensure that his place is not used for copyright infringement. The natural presumption is that this actor is indeed in a position to control the use to which his property can be put. This presumption does not hold good at all in the case of the internet. The architecture of the internet is such that an individual has much less control over what can be termed as his "space", whether it be an e-mail account, a page in a social networking website, or a website "managed" by him. Hence, it was erroneous in the first place, to have applied a provision such as Section 51(a)(ii), worded with the specific purpose of fixing liability on a person having control over a physical space, to a similar actor in the online world, because the level of control in the hands of the latter is much lesser.

The second error was in interpreting the safe harbour provision contained in this section in a manner highly inconsistent with the spirit of other internet regulations, such as the Information Technology Act, 2000 (hereinafter, "the IT Act"). This again stemmed from the previous error, i.e., assuming that a person has *reasonable ground of belief* in respect of activities that go on in his backyard, except in certain limited situations. This assumption is valid in the case of physical spaces, and the actor who owns or possesses the same would indeed be in the best position to ascertain what really goes on. In the virtual world, this assumption breaks down and it is self-evident to any internet user that the level of control over any information that passes through our Twitter handles, Facebook status updates and so on, is quite low. Axiomatically, the situations for which we are exempt from liability for failing to regulate should be much higher in the latter scenario. The Delhi High Court completely ignored this perspective. While furnishing cause for its conclusion that the defendant was in a position of such reasonable belief as to the infringing activity, the Court relied on facts such as the revenue model of the defendant, which depended largely on advertisements displayed on the web pages, and automatically generated advertisements that would come up for a few seconds before the infringing video clips started playing. Shockingly, the Court even considered relevant the fact that the defendant provided safeguards such as hash block filters, take-down-stay-down functionality and rights management tools operational through fingerprinting technology, to prevent or curb infringing activities on its website. This, in the view of the Court, made it evident that the defendant had a *reasonable apprehension or belief* that the activities on the website *could* infringe someone else's copyright, including that of the plaintiff.

Once the Court had committed an error of such alarming proportions, having misunderstood the internet's architecture and the role and responsibilities of various actors therein, it was but natural for its interpretation of the safe harbour provisions in the Information Technology Act, 2000 to be coloured by such error. The defendant had, as an argument of last resort, contended that it was an intermediary under Section 2(w)[6] of the IT Act, and thus stood protected under Section 79[7] of the same. Rejecting this contention, the Court reasoned that while the fulfilment of either one of the conditions under Section 79(2)(a) or 79(2)(b) would suffice, the immunity under Section 79(1) would not be available unless the due diligence requirement under Section 79(2)(c) was mandatorily satisfied along with the condition in Section 79(2)(a) *or* 79(2)(b). Coming to each sub-clause, the Court held that Section 79(2)(a) was not attracted as the function of the defendant was not confined to *only* providing access to the communication system where the third party information was stored, transmitted or hosted. Section 79(2)(b), to be attracted, required all three conditions mentioned therein to be satisfied. Since the defendant was already found to be modifying the content uploaded on its website, the Court held that the condition of non-modification of the

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[6] "[I]ntermediary", with respect to any particular electronic records [sic], means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.

Information Technology Act (2000), § 2(w).

[7] Exemption from liability of intermediary in certain cases – (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if–

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not –

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if –

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation – For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

Information Technology Act (2000), § 79.

information contained in the transmission was unfulfilled. Section 79(2)(c) was also held to be inapplicable, as the Court explained that such due diligence was required while the intermediary was discharging its duties. Thus, if the defendant was put to notice about the rights of the plaintiff in certain works, the defendant had to conduct a preliminary check in all the cinematographic works relating to Indian titles before communicating the works to the public, rather than falling back on post-infringement measures. The defendant's act of permitting the user to upload content on its server, and then modifying the same, was held to be contrary to the due diligence requirement. In the view of the Court, this conduct signified that the defendant had the chance to keep a check on the works, which the defendant avoided making use of for reasons best known to it. With all due respect, this view is erroneous as the modification of content was only auto-generated and done as part of the business model of the service provider, and happened regardless of the infringing or non-infringing character of the content uploaded onto its server. The view taken by the Court could potentially cripple a novel business model by rendering the service provider a pirate in the eyes of the law.

Website Blocking Orders and Intermediary Liability

The development in the *Myspace* case has to be considered along with the issuance of widely worded orders blocking access to websites, which courts in India have been granting of late.[8] The strategy employed by counsel representing the copyright owner in such cases is to seek injunctive relief against various John Does, i.e., unknown infringers, as well as to implead different internet service providers ('ISPs') as defendants along with such John Does. The permissibility of this strategy was called into question before the Madras High Court in *R.K. Productions Pvt. Ltd. v. B.S.N.L.*[9]

This case arose out of John Doe orders, or their Indian variant, Ashok Kumar orders, sought in respect of the Tamil film "3", which enjoyed considerable pre-release buzz due to its song "Kolaveri Di". The producers of the film wanted an omnibus order against all websites that hosted torrents or links facilitating access to or download of the film, apprehending that such electronic access would be made available immediately after the film's release due to the pre-release

[8] Reliance Big Entertainment Pvt. Ltd. v. Multivision Network, C.S. (O.S.) No. 3207/2011, I.A. No. 20510/2011 (Delhi High Court Dec. 19, 2011) (order), *available at* http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=269404&yr=2011; Sagarika Music Pvt. Ltd. v. Dishnet Wireless Ltd., C.S. No. 23/2012, G.A. No. 187/2012 (Calcutta High Court Jan. 27, 2012) (order), *available at* http://www.indiankanoon.org/doc/147345981/.

[9] R.K. Productions Pvt. Ltd. v. B.S.N.L. (*R.K. Productions*), (2012) 5 LW 626.

popularity. The Madras High Court initially granted an *ex parte* order.[10] A plain reading of this order made it clear that the known defendants, i.e., the ISPs, and the unknown Ashok Kumars, were restrained only from infringing the copyright in the specific cinematographic film/motion picture "3" through different means. However, the operationalisation of this order for a period of around two months after it was pronounced resulted in the blocking of access to various torrent and file-sharing websites.[11] The other problem with this order was the possibility of hauling up ISPs for contempt, upon failure to effectively implement this order. This prompted the ISPs to file applications under Order VII, Rule 11 of the Civil Procedure Code, 1908, seeking rejection of the plaint on the ground that the suit against them was barred by law.

In the *R.K. Productions* case, the Madras High Court has dismissed these applications for rejection of the plaint, after accepting the contention that the ISPs are necessary parties to the suit as the act of piracy occurs through the channel or network provided by them. The High Court has in fact relied on the decision in the *Myspace* case as well as given independent reasoning to conclude that the ISPs are liable for infringement. This is evident from the view taken by the Court on the safe harbour provision in Section 79 of the IT Act. Relying on the proviso to Section 81, the Court held that the exemption from intermediary liability carved out in Section 79 would not apply to cases of copyright infringement under Section 51(a)(ii) of the Copyright Act, 1957. This is totally incorrect as the proviso to Section 81 only mandates that "nothing contained in this Act shall restrict any person *from exercising any right conferred under* the Copyright Act". This then would bring us back to the language contained in Section 51(a)(ii), wherein the copyright owner would enjoy the *right to maintain an action of infringement* only if the alleged infringer was either aware or had reasonable ground to believe that the communication to the public was infringing in character. By holding that the proviso to Section 81 would override the exemption from liability in Section 79, the Madras High Court is in effect saying that an ISP, whose activity is restricted to facilitating the

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[10] *R.K. Productions*, C.S. No. 208/2012, O.A. No. 230/2012 (Madras High Court Mar. 29, 2012) (order), *available at* https://docs.google.com/file/d/0Bxi2TzVXul5ZUl9EclRQZXlRdVdUb3c2S3EwSk1Udw/edit?pli=1.

[11] This prompted the Court to clarify the interim injunctions *vide* its common order dated June 22, 2012, in the following manner:

> The order of interim injunction, dated 29.3.2012 and 25.4.2012 passed in O.A.No.230 of 2012 in C.S.No.208 of 2012 and O.A.No.358 of 2012 in C.S.No.294 of 2012 respectively are hereby clarified that the interim injunction is granted only in respect of a particular URL where the infringing movie is kept and not in respect of the entire website. Further, the applicant is directed to inform the respondents/ defendants about the particulars of URL where the infringing movie is kept and on such receipt of particulars of URL from the plaintiff/applicant, the defendants shall take necessary steps to block such URLs within 48 hours.

technical transmission of information, can be imputed with reasonable grounds of belief that various communications that happen through the use of its network amount to copyright infringement. This is indeed shocking, and goes way beyond the decision in the *Myspace* case as well.

The other infirmity with this order is that it is *per incuriam*. The counsel appearing for both sides, i.e., the content owner and the ISPs, do not seem to have brought the factum of notification of the Copyright (Amendment) Act, 2012 about a month prior to the actual date of hearing in this case, to the Court's attention. A bare perusal of the newly introduced Sections 52(1)(b) and 52(1)(c), reproduced above, alone makes it abundantly clear that their content posed significant relevance to the issue at hand in the *R.K. Productions* case. Unfortunately, the Court missed out on the opportunity to be the first in the country to take a hard look at the correct interpretation of Sections 52(1)(b) and 52(1)(c), a task left now for us to undertake in the coming years. The author hence avails this opportunity to develop some of the interpretive possibilities.

Interpreting Section 52(1)(b) – The "Mere Conduit" Exception in U.K.

A plain reading of Section 52(1)(b) of the Copyright Act makes it clear that an entity, which carries on the sole activity of facilitating the technical process of electronic transmission or communication of infringing works to the public, or is in other words a "mere conduit", can in no situation be held liable for copyright infringement. There is no room for fixing any kind of liability on such entities, including contributory or vicarious liability. As a necessary corollary, the decision in the *R.K. Productions* case is incorrect as no suit for infringement would be maintainable against ISPs, who are solely facilitating such electronic transmission in a technical manner. However, it is still debatable whether ISPs can be impleaded as parties to a copyright infringement action on the basis that the current legal regime casts a duty on ISPs to remove, or disable access to, infringing content once they are put to notice of such infringement. This dichotomy between liability for infringement on the one hand and a general duty to assist in the prevention of infringement on the other is explained clearly by the Chancery Division in *Twentieth Century Fox Film Corporation v. British Telecommunications Plc.*[12]

[12] Twentieth Century Fox Film Corp. v. British Telecommunications Plc. (*Newzbin2*), [2011] EWHC 1981 (Ch).

In the *Newzbin2* case, the Chancery Division took note of the safe harbour provisions created by the E-Commerce Directive,[13] particularly Articles 12, 13 and 14 that deal with acting as a "mere conduit", caching and hosting respectively. The interesting feature with the "mere conduit" exception, which in all other respects is akin to the exception contained in Section 52(1)(b) of the Copyright Act, 1957, is the additional presence of Article 12(3). This provision clarifies that the "mere conduit" exception shall not stand in the way of a court or administrative authority requiring the service provider to terminate or *prevent* an infringement. Article 18 of this Directive also casts an obligation upon Member States to ensure that court actions available under national law permit the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved. Similarly, the Court looked into the Information Society Directive,[14]Article 8(3) of which provides that "Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right." This Directive was transposed into the domestic law of U.K. by the Copyright and Related Rights Regulations 2003, SI 2003/2498, resulting in the insertion of Section 97A in the Copyright, Designs and Patents Act, 1988. This provision empowers the Court to grant an injunction against a service provider who has actual knowledge of another person using his service to infringe copyright, such as where the service provider is given sufficient notice of the infringement. Finally, the Chancery Division also took note of the Enforcement Directive,[15] Article 11 of which provides that Member States shall ensure that copyright owners are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right. This entire legislative scheme compelled the Court in the *Newzbin2* case to conclude that an order of injunction could be granted against ISPs who are "mere conduits", restraining them from providing access to websites that indulged in mass copyright infringement. The Court reasoned that the language used in Section 97A did not require knowledge of any particular infringement but only a more general kind of knowledge about certain persons using the ISPs' services to infringe copyright. Thus, it is seen that in the United Kingdom, though a "mere conduit" activity is not considered

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[13] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market. This Directive was transposed into the domestic law of UK by the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.

[14] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

[15] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 157). This Directive was transposed into the UK domestic law primarily by the Intellectual Property (Enforcement, etc.) Regulations 2006, SI 2006/1028.

infringement, the concerned ISP can be directed by the Court to block access to a website that hosts infringing content on the basis of the above legislative scheme. The enquiry should therefore be directed towards whether India has a similar scheme for copyright enforcement.

The IT Act – An Inapplicable Scheme for Website Blocking

The IT Act, read with the recently framed Information Technology (Intermediary Guidelines), 2011 which came into effect on April 4, 2011, provides for a duty that could be thrust upon even "mere conduit" ISPs to disable access to copyrighted works. This is due to the presence of Section 79(2)(c) of the Act, which makes it clear that an intermediary shall be exempt from liability only where the intermediary observes due diligence and complies with other guidelines framed by the Central Government in this behalf. Moreover, Section 79(3) provides that the intermediary shall not be entitled to the benefit of the exemption in Section 79(1) in a situation where the intermediary, upon receiving actual knowledge that any information, data, or communication link residing in or connected to a computer resource controlled by the intermediary, is being used to commit an unlawful act, fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner. Rule 4, when read along with Rule 2(d) of these Guidelines, casts an obligation on an intermediary on whose computer system copyright infringing content has been *stored, hosted or published*, to *disable* such information within thirty six hours of it being brought to its actual knowledge by any affected person.

One way of understanding and harmoniously interpreting the provisions of the IT Act and the Guidelines therein along with the recent amendments to the Copyright Act, is to contend that the issue of copyright infringement by "mere conduit" ISPs is governed by Section 52(1)(b), which completely absolves them of any liability, while that of enforcement of copyright through the medium of such ISPs is governed by the IT Act. This bifurcation suffers from the difficulty that Section 79 of the IT Act is not an enforcement provision. It is a provision meant to exempt intermediaries from certain kinds of liability, in the same way as Section 52 of the Copyright Act. This provision, read with Section 81, makes it clear that the IT Act does not speak to liability for copyright infringement. From this, it has to necessarily follow that all issues pertaining to liability for such infringement have to be decided by the provisions of the Copyright Act. Therefore, the scheme in the IT Act read with the Intermediaries Guidelines cannot confer additional liability for copyright infringement on ISPs, where the Copyright Act exempts them from liability. More to the point, the intermediary cannot be liable for copyright infringement in the event of non-compliance with Section 79(3) or Rule 4 of the Intermediaries Guidelines read with Section

79(1)(c) of the IT Act. Rule 4 of the Intermediaries Guidelines, 2011 to the extent that it renders intermediaries outside the protective ambit of Section 79(1), upon failure to disable access to copyrighted content, is of no relevance as "mere conduits" have already been exempted from liability under Section 52(1)(b). Moreover, since these provisions in the IT Act do not deal with enforcement measures such as injunction orders from the Court to disable access to infringing content in particular or infringing websites in general, it would be wrong to contend that the scheme in India is similar to the one in the United Kingdom, where the issue of infringement has been divorced from that of enforcement.

To conclude, Section 52(1)(b) is a blanket "mere conduit" exemption from liability for copyright infringement that stands uninfluenced by the presence of Section 79 of the IT Act or the Intermediaries Guidelines. In the absence of a legislative scheme for enforcement in India akin to Section 97A of the U.K. Copyright, Designs and Patents Act, 1988, Indian Courts cannot grant an injunction directing such "mere conduit" ISPs to block access to websites in general or infringing content in particular, and any such action is not even maintainable in law post the insertion of Section 52(1)(b). The decision to the contrary in the *R.K. Productions* case is incorrect.

Interpreting Section 52(1)(c) – *Myspace* and Interpretive Concerns

The liability for copyright infringement of file-sharing websites and other service providers who perform roles beyond that of a "mere conduit" shall again be governed solely by the Copyright Act and not the IT Act, for the same reasons advanced above in the context of Section 52(1)(b). However, in the case of such file-sharing networks, the important issue is whether a safe harbour has really been created. One striking distinction between clauses (b) and (c) is the presence of the phrase "*unless the person responsible is aware or has reasonable grounds for believing*" in the latter provision. As a result, if a file-sharer has such reasonable grounds of belief, the exemption from liability would not be attracted.

The actual concern for file-sharing websites is the similarity in language employed in Sections 51(a)(ii) and 52(1)(b) of the Copyright Act. As already seen above, the *Myspace* case interprets this expression in a wide manner, to include even conduct such as the inclusion of system generated advertisements, the introduction of specific measures to curb the possibility of infringing content being made available, and the receipt of a general list from the content owner that contains the names of all their copyrighted works without identifying specific acts of infringement in respect of these works. It is reiterated that this standard is incorrect as it confuses the possibility of regulation over physical space with that over the internet, paying no heed to specificities of the latter medium and its architecture.

Assuming that the interpretation in the *Myspace* case will be discarded while giving meaning to the fair use exception in Section 52(1)(c), this provision is again attracted only where the storage of the infringing file is transient or incidental to the act of providing links or access to the work. A possible rationale for the usage of the expression "transient or incidental" could be to distinguish legitimate file-sharing websites that operate in content neutral fashion from those where the file-sharing website actively promotes the perpetration of piracy and the storage of the file is no longer incidental. In the latter kind of situation, the file-sharing website would also be liable under the doctrine of contributory liability for communication of the copyrighted work to the public, using the standard laid down in *Grokster*.

Finally, Section 52(1)(c), as opposed to Section 52(1)(b), is not a blanket exemption and permits the issuance of notice to the file-sharing website to remove infringing content. This is indeed a healthy practice and can result in a culture of self-regulation, which in the author's view, is the only effective kind of regulation when it comes to the internet.