

Issues of Copyright Protection in the Digital Era : The Issue of Online Piracy, the DMCA and the Amendments to the Copyright Act¹

Introduction

On 20th January 2012, Megaupload website, based in the United States and Hong Kong, which allows users to download pirated music, films and music was taken down. Recently in September 2012, the Kerala police registered cases on more than 1000 persons for the alleged uploading and downloading of a Malayalam movie, the Bachelor Party. The legal question that arises in such a situation is that who should be made liable for such an infringing activity.

Digitalisation and the easily accessible network connection enable copyrighted works including literary, artistic, dramatic work, cinematographic film, and sound recording to be easily copied and distributed around the world in very less time without the author's permission. This leads to an infringement of copyright. Unfortunately in most countries there is no regulation to control this infringement and ensure adequate returns to the copyright holder and even if present requires proper enforcement. This results in a loss for copyright holders. It is also difficult for the intellectual property owners to detect the infringement and identify the infringer. Content can be downloaded from the World Wide Web without the author's permission and without paying a single penny to him. It is feared that that due to this widespread infringement, creativity and power of innovation will decline as the financial reward stands diminished. Online piracy is the term that describes the illegal copying of copyrighted materials from the Internet.

This article makes an attempt to briefly introduce the traditional treaties on Copyright protection in the International field, the various issues in the protection of copyright in the digital era, the concept of digital rights management which ensures protection of copyright in the digital era and the position in the United States of America.

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WIPO Copyright Treaty

The WIPO Copyright Treaty, 1996 is a special agreement under the Berne Convention for the Protection of Literary and Artistic Works. Under this treaty authors of literary and artistic works enjoy the exclusive right of authorizing any communication to the public of their works, by wired or wireless means, and also make available to the public their works in such a way that they may access these works from a place and time chosen by them. Since the arrival of internet has resulted in the violation of the reproduction rights of the author this treaty contains certain anti circumvention measures which prohibit the circumvention of technological barriers used by the authors for protecting their works. The treaty also requires the contracting parties to provide adequate legal protection and legal remedies in case of circumvention of technological measures used by authors to restrict their works by removing altering any electronics rights management information without authority. Rights management information is the information which identifies the author of the work and protects his work from unauthorized use. Therefore it is only the author of the work who has the right to reproduce the work in any form which has been laid down by several domestic legislations as well. In India according to Section 14 of the Copyright Act the author or the creator of the work has the right to reproduce the work in any form even store it by way of electronic means or communicate it to the public and issue copies to the public. If anyone else does so it will amount to a violation of the economic and moral rights of the author.

Digital Rights Management

Digital rights management is a type of server software that is developed to enable secure distribution and disable illegal distribution of content on the web and protect the rights of the authors. It prevents other persons from copying the content or converting it into other formats. The Digital Rights Management Techniques include :

Restrictive Licensing Agreements: A method by which licenses are imposed on consumers as a before they enter a website of download software.

Encryption : A method by which the content is secured and prohibits copying or even creating a back up copy.

However due to improved technology it is even possible to encompass these software and obtain copyrighted material without giving adequate returns to the copyright owner.

Copyright Protection Issues in the Digital Era

Though there are laws which prohibit violation of author's rights, there is widespread violation of these rights through the internet due to which there are several legal disputes. In such disputes there are several issues that arise such as the court which is to have jurisdiction over the matter since infringement over Internet can be spread over different jurisdictions. Moreover it is difficult to determine who should be liable for the infringement, the person who uploads the content or the server on which it is uploaded or the user who downloads the content.

Jurisdictional issues

In the case of infringement of copyright through the internet the question arises as to which court should have jurisdiction over the offence. Jurisdiction is based on territorial principles, so when a person is within a country jurisdiction can be exercised over him. However the internet diminishes the significance of physical location. When an infringement through the internet occurs, the place where the server is located, the place of residence of the person who posts the infringing content, each and every country where the information was accessible, the country of the author whose right was infringed are all the possible places which may have jurisdiction over the matter. The European Court has held that it is only the court where the defendant resides that will have jurisdiction over the matter.ⁱ In the United States the forum in which the defendant resides or carries on business is to have jurisdiction. It also has jurisdiction over an infringing act that has occurred within its forum. The Indian Copyright Act makes determining the jurisdiction an easy affair. Section 62(2) of the Copyright Act provides that a suit for infringement of copyright can be filed at the place where the plaintiff resides or carries on business. This has also been settled by the Supreme Court in the case of *Expfar SA & Anr. v. Eupharma Laboratories Ltd. & Anr.*ⁱⁱ

Issue of Intermediary liability

The main question that arises when works are disseminated over the internet without authority of the copyright holder is on whom the liability should be ascribed to. In the physical world, intermediaries such as publishers are liable for the content published by the authors. However in the electronic world there are intermediaries who carry the data but do not exercise control over the content. Intermediaries include Internet service providers, Internet portals, software and games providers, interactive forums and comment facilities with or without a moderation system, aggregators, universities, libraries and archives, web search engines, chat rooms, web blogs, mailing lists, and any website which provides access to third party content through hyperlinks. They should not be held liable for any objectionable content or defamatory statements on the websites over which they have no control. It is not possible for them to screen all the material before it is made available on the site. However it is only the intermediary other than the information provider who can stop the infringement and so it is necessary to ensure that they do not shirk their responsibilities to regulate undesirable control. There are several cases in which the intermediary's liability has been called into question both in India and internationally. Chapter XII of the Indian Information Technology Act, 2000 provides specific provisions in relation to internet service providers. Section 79 gives protection to the ISP for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had not exercised due diligence to prevent the commission of the offence. The 2009 amendment to Section 81 of the Information Technology Act provides that the intermediary will be liable if he is found to infringe any provisions under the Indian Copyright Act. Therefore immunity will not be available to the intermediary if he is found to infringe the provisions of the Indian Copyright Act. The Information Technology (Intermediary Guidelines), 2011 also seeks to protect intermediaries if they take due diligence while publishing any content. The case of intermediary in India came up before the Delhi High Court in the case of *Super Cassettes India Ltd (SCIL) v. MySpace*.ⁱⁱⁱ SCIL claims that Myspace had infringed the copyright it has over certain songs, cinematographic films and sound recordings since Myspace makes available the multimedia that can be shared and accessed through the internet. The Court held that since Myspace was aware that the works on its website was infringing material and hence they were held guilty of infringement of copyright.

The Issue of Intermediary Liability in the United States

Among the first few cases that dealt with Intermediary liability was the case of *Playboy Enterprises v. Frena*^{iv} in which the court made the internet service provider liable since the infringed material on its system was sufficient to impose liability on it. Even in the case of *Sega Enterprises v. Maphia*^v liability was imposed on the online service provider for copyright infringement under direct, contributory and vicarious liability.

Digital Millennium Copyright Act

However subsequent to these cases, in the United States The Digital Millennium Copyright Act, 1998 created an exemption to protect Internet service providers from liability for the infringing actions of their subscribers or for links to sites that contain infringing information. It contains safe harbour provisions to protect service providers when they are only an entity offering transmission, routing or providing of connections for digital online communication and have not initiated the transmission. To be entitled to the safe harbour provisions they should have also not taken part in editing or selecting its audience and should have had no actual knowledge of the infringement nor have gained any financial benefit from the infringing activity. Once service providers learn from copyright holders that material accessible through their systems is infringing, they are have to remove or disable access to it immediately. Several cases after this Act have made an attempt to protect intermediaries, to cite a few, in the case of *Blake A Field v. Google Inc.*,^{vi} the plaintiff had alleged that Google was liable for copying and distributing his copyrighted work, the U.S. District Court applying the DMCA safe harbour provisions held that the plaintiff had given an implied license to Google to distribute the data on its website and depending upon the nature of the use a copyrighted work can be used without the owner's consent and since it was already freely available in the market through the internet there was no infringement.. Further in the case of *Viacom International Inc. v. You tube Inc*^{vii} decided by the U.S. Court of Appeals in 2012 it was held that the safe harbour provisions will apply only if the service provider does not have actual knowledge that the material on the system or network is infringing and is not aware of facts or circumstances from which infringing activity is apparent and upon receiving such knowledge takes measures to remove or disable access to it immediately. Moreover he should

not receive any financial benefit directly from the infringing activity. However in this case You tube, the intermediary was considered to be liable since it had information about the infringing activity.

On analysis these cases show that the DMCA has made a huge effort in minimizing the liability of internet service providers when they are not aware of the infringing activity or have taken efforts to stop it on becoming aware.

Changes brought about by the 2012 Copyright Act in India

In India since the case of MySpace raised the risk of intermediaries, the Amendment to the Indian Copyright Act in 2012 made a few changes to reduce the liability of the intermediaries. Section 52(1)(b) & (c) provides that any temporary or incidental storage or work in the technical process of electronic transmission or communication to the public would amount to a fair use and further provides that such storage for the purpose of providing electronic links or access would amount to a fair use of the copyrighted work and will not amount to an infringement unless the person who stores it believes it be an infringing copy. The proviso further states that the intermediary who becomes aware of the infringing content has to refrain from facilitating access to it for 21 days and if the right holder gets a court order to stop the infringement, the provider has to permanently stop access to the infringed material. Therefore the Act seeks to protect intermediaries from secondary infringement. Based on the WIPO Copyright Treaty the other amendments that have been brought to the Act include inclusion of Section 65A which lays down that circumvention of any technological measures which are used to protect an author's information is an offence and Section 65B which further punishes any person who removes any rights management information without authority and distributes, broadcasts or communicates to the public.

Conclusion

It is very difficult to control the information that is circulated on the internet. Due to the copyright infringement over the internet and other digital media authors are not able to reap the profits of their work. It is important to curb these activities in order to protect the rights of

authors. The difficulty in punishing the offender lies in the fact that it is often difficult to determine on whom liability is to be imposed. In US the Stop Online Piracy Act and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (Protect IP Act) which were passed in 2011 aim to reduce the copyright infringement. Intermediaries only store the information and therefore those who make available the infringing content should be made liable for the copyright infringing activities. In India the Jon Doe order, which helps in curbing online piracy has been passed for several recent movies including the Gangs of Wasseypur, Singham, Bodyguard, Don 2 and movies in other regional languages. The order safeguards the copyright over the content against unidentified and probable infringers. The 2012 Amendments to the Indian Copyright Act have also made an effort to protect the intermediaries. The protection of intellectual property needs to be more stringent in the digital era to give due credit to the authors of copyrighted works. India is amongst the top 10 countries for illegal online activity.

ⁱ Case 68/93, *Shevill v. Press Alliance SA*, E.C.R. 415 (1985).

ⁱⁱ (2004) 3 SCC 688.

ⁱⁱⁱ 2011 (48) PTC 49 (Del).

^{iv} 839 F. Supp, 1552.

^v (1994), 948 F. Supp. 923 ND Cal.

^{vi} 412 F.Supp. 2d 1106 (D. Nev. 2006).

^{vii} Decided on 5th April 2012, Docket No. 10-3270-cv.

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