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ASSIMILATING INTERMEDIARY LIABILITY REGIMES IN COPYRIGHT INFRINGEMENT

Akanksha Badika* and Pragya Mishra**

Abstract

The concept of intermediary liability has always been a bone of contention as intermediaries at times become medium of infusing infringing content on the web. In this modern era, where circumvention becomes rampant and massive, the copyright holder loses control on its dissemination. This article will primarily focus on the evolved intermediary liability regimes which have evolved to the rescue of copyright holders and their assimilation in Indian judicial environs as these intermediaries play a pivotal role in circumvention of material all over the world. Firstly, the article would introduce the concept of intermediaries and their conditional liability in the digital world uploaded by third parties in wake of numerous judgments with a brief discussion on their accountability as per the US DMCA and EU Directives on Copyright Act. Secondly, the article would analyze the historical background and evolution of the regime in realms of copyright laws in India and other sovereigns resulting from digitization and the need to curb circumvention of infringing content being the intellectual domain of its rightful copyright holder. Subsequently, the article assesses the qualifications of an intermediary within the purview of IT Act (hereinafter, "the Act"), Indian Copyright Act and recent judgments. Thereafter, the article would explore the synergy between Indian legislative framework, combating the above mentioned in light of Intermediary Guidelines Rules, 2018 and judicial precedents highlighting how digitization has made more vigilant yet inept in harmonizing safe harbour exception to import immunity to intermediaries. Conclusively, the article would suggest the alternatives available to infer the conception with a more preferable option, minimizing the discrepancies of the present mechanism to make copyright laws inhibitory rather than following a 'take-down' approach post-infringement when the damage has already materialized.

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INTRODUCTION

The principle of intermediary liability has always been a bone of contention because intermediaries often become a tool for infusing web-based infringement content. In this new age, in which circumvention is widespread and huge, the holder of copyright loses power over its dissemination. Recent judgements have held intermediaries as not liable as they come under the safe harbour provisions of Sec. 79 of the Act, others have held them liable despite safe harbour which at times is vaguely applied. Dynamism has been the epicentre of a ubiquitously contemporary world. The emergence of e-commerce and digitization has always been a boon for the society as it has provided a platform for discussion; however it has also been a bane for copyright holders, as intermediaries disseminate information at the click of a mouse.[1] In the process of such circumvention of infringing content the copyright holder gradually loses control over this dissemination, impacting the society at large as if they do not feel confident about posting content over the net, their freedom of speech and expression does get curbed. This article will primarily focus on the intermediary liability regimes which have been evolved to the rescue of copyright holders and their assimilation in Indian judicial environs as these intermediaries play a pivotal role in circumvention of material all over the world.

The word 'intermediary' in Indian context has been defined as storage, transmission, receipt of information or message or provision of any service related to information on behalf of another person and includes- telecom and network service providers, search engines, internet auction websites, internet service providers, etc.,[2] the definition has been widened to include the enumeration after the IT (Amendment) Act, 2008. In EU, the E-Commerce Directives define intermediaries as any person providing an information society service, which in turn is defined as a remunerated service at individual's request by electronic means[3],

1 R. S. Gowda, Sonakshi Banerjee, *Intermediary Liability – The Inconsistencies in the European Union Jurisprudence*, The Indian Journal of Law and Technology (Nov. 10, 2018), http://ijlt.in/index.php/2018/11/10/intermediary-liability-the-inconsistencies-in-the-european-union-jurisprudence/#_edn2. *See* Lemley MA, "*Rationalising Internet Safe Harbours*", Journal on Telecommunication and High Technology Law (2007).

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

3 E- Commerce Directive 2000/31/EC article 2(a) & rec.17-18, cf. Directive 98/34/EC article 1(2) as amended by Directive 98/48/EC. *See* Faculty of Law, UiO, *Intermediary Liability for Copyright Infringement in the EU's Digital Single Market*, University of Oslo, (Nov. 10, 2018) https://www.duo.uio.no/bitstream/handle/10852/60876/Thesis-Intermediary-Liability-for-Copyright-Infringement-in-the-

Recital 18 further clarifies that it includes not only internet contracting but also services not paid for as it constitutes an economic activity.[4] In US, the DMCA the term intermediaries are known as 'service providers' to broaden their ambit to include even universities which provide students with access to information,[5] the definition includes transmission, routing and providing connection,[6] with some eligible conditions for limitation.

The old Copyright Act, 1957 did have provisions relating to secondary liability for copyright infringement much before the advent of internet. These provisions along with ISP liability provisions[7] of the Act, have formed the base for safe harbour provisions in India until Intermediary Liability Rules of 2011 were framed and published. There have been a host of case laws which have changed the statutes, one among them being, *Super Cassettes Industries Ltd. v. MySpace Inc. Ltd.*[8], wherein the court had opined that intermediaries should be responsible in uploading content on the website and should carry due diligence for the same at the time of infringement rather than conducting the same after the damage has already occurred. The court further handed down that legislative mechanism in India and USA are completely different and post infringement measures can work there but India needs to have more pre-infringement measures to prevent copyright infringement in the online world. During this case, the defendants, MySpace had enough opportunity to change the work by obtaining permissions from the customers, inserting advertisements to the plaintiff's works. However, the 2012 Amendment to the Copyright Act has significantly stifled such possibilities to materialize. In of *Avnish Bajaj v. State of Delhi*[9], the Court observed that Baazee.com had failed to practice the requisite due diligence because its filters were defective and allowed pornographic material, despite the post containing salacious material, the intermediary could not justify any amendments in its policy to counter the likelihood that such content could be published on the website.

EU-s-DSM.pdf?sequence=1&isAllowed=y.

4 Recitals 2 and 19 of Directive 98/48 state that services as used in the definition cited is to be understood as defined in Treaty on the Functioning of EU (TFEU) Article 57: services which are "normally provided for remuneration".

5 Akanksha Kumar, *Intermediary Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as Tarde Barrier*, 19 J. Intellec. Prop. Rights 272, 274. (2014).

6 Digital Millennium Copyright Act, 17 U.S. C. § 512(k)(1)(A) (1998). *See* Mohammad Sadeghi, The Knowledge Standard for ISP Copyright and Trademark Secondary Liability: A Comparative Study on the Analysis of US and EU Laws, Brunel University London (2013) 48, https://bura.brunel.ac.uk/bitstream/2438/8922/1/FulltextThesis.pdf.

7 IT (Amendment) Act, 2008, S. 79 & S. 81, IT (Amendment) Act, 2008.

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

9 *Avnish Bajaj v. State of Delhi,* (2005) 3 CompLJ 364 Del.

The Intermediary Safe Harbour: An Escape Route

A safe harbour provision provides for a conditional immunity to the intermediaries for liability of third-party infringers. The safe harbour rules have evolved over times in different jurisdictions and accordingly formed the much-needed backbone in ensuring intermediaries are not pestered for infringements or illegal activities in the digital space which has unrestricted flow of information. However, the immunity provided to intermediaries is subjected to conditions in international spheres.

International Approach

In the EU, a sectoral and vertical approach is followed for intermediary liability. The ECD divides the liability –exempt intermediaries in three distinct categories based on which the liability of an intermediary depends, those have been mentioned in Art. 12, 13 and 14 of the ECD. If the ISPs function as conduits for information i.e., only transmission or providing access, then the ISPs are exempt from liability.[10] If the information received by a client is transmitted in a communication network where the intermediary stores the information in a 'safe, temporary and intermediate manner' solely for the purpose of transmitting the information to other recipients of the service, then the intermediary is also not liable solely for the storage of such information (popularly known as caching).[11] The intermediary's responsibility will depend upon the knowledge of contents of the information where the ISP provides for the storage of the receiver's information. If they have no actual knowledge of the infringing content, they are pardoned and the Article have different thresholds of civil claims which depends upon the degrees of awareness of the infringing material to the operator.[12]

The US has twin conditions for enabling intermediary to claim immunity, which have been embodied in Section 512 of the DMCA, which further create four safe harbour provisions: for conduits, there exists no monetary liability, only injunctive relief, for caching, the liability is limited to only those ISPs who upon notification to take down infringing content, take it down expeditiously, for information residing at the direction of users, the liability arises only when the ISPs had actual knowledge about the infringing content and they do not actively take efforts to disable access after a notice and when the ISP provides a referral or link to an online location or domain, the liability does not arise provided the conditions

10 E- Commerce Directive 2000/31/EC Article 12(2).

11 E- Commerce Directive 2000/31/EC Article 13.

12 E- Commerce Directive 2000/31/EC Article 14(1)(a).

of aforementioned case are fulfilled about the actual knowledge of infringing content.[13] The case of *Doe v. MySpace*[14] also illustrates that an intermediary cannot be held responsible for third party communications and how they are protected extensively, where MySpace was not held liable when minors interacted with sexual predators after lying about their age, the US Court held that MySpace cannot be held liable for any communication published by third parties and the case of negligence was dismissed.[15]

Indian Legal Regime

The intermediary liability regime in India has evolved over the years. Initially, the IT Act did not provide for any safe harbour significantly it was after the *Avnish Bajaj v. State*[16], where the managing director was able to escape because of inadequate intermediary liability and the amendment thereafter in 2008, which brought in the requisite broadening of the intermediary liability by inserting Section 79 of the IT Act, which provides immunity to intermediaries from all unlawful activities if they cater to the due diligence and other condition provided in the Section. According to the Section, it only includes those cases in which the intermediaries do not have any knowledge or control over the information that is being transmitted.[17] Moreover, the intermediary will only take down the information upon receiving actual knowledge of the same.[18] The Intermediary Guidelines 2011 clarified the conditions for claiming safe harbour under the IT Act and later the judgements of *Shreya Singhal v. Union of India*[19] and *MySpace*[20] case also added to the existing literature of intermediary liability of the 'actual or specific knowledge requirement'. *M/s Luxottica Group SPA v, M/s Mify Solutions*,[21] also clarified the laws regarding interaction of Intellectual Property Rights with e-commerce platforms, wherein an e-commerce platform cannot escape the liability if it allows for storage of counterfeit goods, advertises marks of

13 Kumar, *supra* note 7, at 275.

14 *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008).

15 Smitha K. Prasad et al., *Intermediaries –Messengers or Guardians? How India and US deal with the role and liability of intermediaries*, Legal Services Newsletter, US-India Business Council (2013). See Stefan Kulk, Internet Intermediaries and Copyright Law: EU and US Perspectives 216-220 (Kluwer Law International BV 2019) (2019).

16 *Supra* note 11.

17 Malvika Kapila Kalra, *Intermediary Liability under the Information Technology Act: Time for an Amendment?,* Bar & Bench (July 28, 2019), https://www.barandbench.com/columns/intermediary-liability-under-the-information-technology-act-time-for-an-amendment.

18 IT (Amendment) Act, 2008, S. 79 (3) (b).

19 *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73.

20 *Supra* note 10.

21 *M/s Luxottica Group SPA v, M/s Mify Solutions*, CS (COMM) 453/2016.

plaintiff, stating that active participation would render them liable.[22] Further, the Copyright Amendment in 2012 had broadened the safe harbour for 'transient or incidental storage', thereby indicating how and why the storage of content is actually effectuated.[23]

To claim immunity under the Act and the Information Technology (Intermediary Guidelines) 2011, the function of such intermediary of ISP should be restricted to providing ingress or where the intermediary doesn't modify the information uploaded by a third party or does not select the receiver or does not initiate the process and the intermediary follows Rule 3 of the guidelines issued in 2011, namely publishing of rules and regulations which informs the user not to host, share or display any information which belongs to some other person and over which he possess no right or infringes any patent or copyright or any other Intellectual Property Right.

Despite all the efforts of the of the government to make the laws related to intermediaries simpler, however everything was in vain and in the year 2013 mouthshut.com along with the other petitioners like Shreya Singhal challenged the validity of Section 66 and Section 79 of the IT Act and claimed it that these Sections are infringing their Right to Freedom of Speech and Expression under Article 19 of the Constitution. The main reason for mouthshut.com to file the case was that they had received humongous amount of take down notices which is infringing their freedom of speech. According to the owners of the website it is "privatisation of censorship"[24]. The apex court gave its decision in the petitioners favour and ordered reading down of Section 79.

Under the Indian legal regime, one of the difficulties arising in pretext of Copyright law was the scope of Section 51(a)(ii), however in *MySpace*[25] judgement, the same was clarified to include even cyberspace, however the broad interpretation of the word 'place' as virtual space would effectually require more consideration as online platforms are more vulnerable as the control is lost eventually over the content.[26]

However, in these cases even, can an intermediary claim immunity in cases of public advertisements which they agree to publish, as then the ISP possess actual knowledge

22 Chadha & Chadha Intellectual Property Law Firm, *Tracing the Development of "Intermediary Liability" in India*, Lexology (Apr. 3, 2020), https://www.lexology.com/library/detail.aspx?g=be8df572-55b1-499a-85cf-8b44b59ee0bc.

23 *Supra* note 17.

24 Sourav Datta, *This Supreme Court petition could be a big step in the fight for Internet democracy in India*, Scroll.in, (Sep 18, 2014), https://scroll.in/article/678539/this-supreme-court-petition-could-be-a-big-step-in-the-fight-for-internet-democracy-in-india.

25 *Supra* note 10.

26 Ananth Padmanabhan, *Give Me My Space and Take Down His*, 9 IJLT 1, 7 (2013).

about the illegal or infringing content not enough to shield them from liability in the garb of being an intermediary as per Sec. 79 of the Act, as while advertising, they act more like a publisher.[27]

Fixing Liability on Intermediaries: Increased Digitization and its Impact

With rampant digitization and massive dissemination of information, intermediaries can heavily influence the way content is read worldwide. As a result of which the Intermediary Guidelines have proven to be useful wherein the liability has been more clearly specified for various categories of intermediaries, though not as segregated in types of intermediaries in terms of functional variations as that in US or EU. It becomes really impossible for intermediaries to filter content or even be aware about the content which could have been published by over millions of populations across the world due to digitization and increased computer literacy, hence the red flag test, with subjective and objective elements, to understand an intermediary's liability about the knowledge factor to fix liability becomes important. *Viacom v. YouTube*[28] has significantly demonstrated this point, where Viacom sued You Tube for copyright infringement of content which belonged to Viacom and uploaded on You Tube by third party users, to which You Tube claimed immunity under S. 512 of the DMCA, the court ruled in favour of YouTube based on the red flag test and further observed that real knowledge involved clear and observable violations of sensitive information and not general understanding of its existence and YouTube had already followed the notice and take down procedure.[29] However, the take down approach only has remedied the damage after it has materialized but not looked after the damage which has already occurred due to infringement, it becomes really easy for an intermediary to escape liability without the need to monitor content. This way, the intermediaries claim vast immunity from liability as there are no civil or criminal claims against them. However, the intent of the Act was to absolve them from criminal liability as has been reinstated in the Standing Committee Report on the IT Amendment Act.[30]

27 P. Reddy, *Do Online Advertising Platforms Qualify for 'Intermediary Liability' Protection?*, Spicy IP (Aug. 7, 2016), https://spicyip.com/2016/08/do-online-advertising-platforms-qualify-for-intermediary-liability-protection.html.

28 *Viacom v. YouTube*, 07 Civ. 3582, (LLS).

29 Amlan Mohanty, *Intermediary Liability for Copyright Infringement in India: Few Thoughts in the Wake of Viacom v. Youtube [Part I]*, Spicy IP (July 8, 2010), https://spicyip.com/2010/07/intermediary-liability-for-copyright.html.

30 Ministry of Communications and Information Technology (Department of Telecommunications), *Sixty-Eighth Report Standing Committee on Information Technology (2008-2009),* PRS India (February 17, 2009), https://www.prsindia.org/sites/default/files/bill_files/scrTRAI.pdf.

Under the Intermediary Guidelines Rules of 2018, Rule 3(8) of the Guidelines, mention a take-down approach, according to which an intermediary shall, upon receipt of specific information in the form of a court order or upon notification by the Government or its agency, remove or disable access to material legally restricted under Article 19(2) of the Indian Constitution no later than 24 (twenty-four) hours. It is a robust step because it helps in protecting the rights of the intermediaries and the users as it is becomes a herculean task for the intermediaries to examine all the uploaded documents or content and check the validity of the same. After this Rule, the intermediaries are required only to examine those documents for which the court has specifically asked them to do so. However, the factors on which the content should be removed have still not been clear. In addition, the Draft Rule does not cover the request for taking down of content in case of infringement of Intellectual Property which was there in the earlier Rules.

Under Rule 3(5) the intermediary needs to provide information or assistance as asked for by any government agency or assistance concerning security of the State within 72 (seventy-two) hours of communication. This step of providing assistance is a welcoming step however; the provision to ask for assistance is really wide giving too much power to the government agency immense powers to request any kind of assistance. In addition, the rules have just mentioned the government agencies and do not specify which kind of government agency. Therefore, the revision to Rule 3(5) is necessary to clarify which all rights of assistance is vested to the government agencies and to whom.

Moreover, according to Rule 3(9) intermediaries must also deploy automated tools for proactively identifying and removing unlawful information or content[31] however, the criteria for installing automated tools is unclear, because there is no explanation under the Draft Rules as to how such automated tools can detect unlawful information or content. The Rules do not define the term 'unlawful information or content' the absence of which creates confusion and inconsistency between intermediaries.[32] The usage of automated tools has been previously discussed in the landmark

31 The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018, Rule 3(9).

32 *Supra* note 15.

case of *Sabu Mathew George v. UOI,*[33] where the Supreme Court directed the respondents, Google, Microsoft and Yahoo to 'auto-block' sex determination advertisements. They also ordered establishment of a 'nodal agency' whose main work is to provide a list of blocked websites to the search engines[34].

In addition, Rule 3(7) of the Draft Intermediaries Guidelines makes it compulsory for all the intermediaries incorporated with more than 5 million users in India to get a permanent registered office in India and appointment of a nodal officer for all time coordination with the different Law Enforcement Agencies. The particular rule does not elucidate the method to calculate the numbers of users. An intermediary's number of users can be determined using different methods such as the registered user or active regular members, or number of installations or VIP users etc. This leads to a lot of uncertainty, as it is very difficult for an intermediary to determine whether or not it has passed the threshold of fifty lakh[35]. Moreover, registering also leads to a lot of burdensome formalities and statutory compliances.

Recent Judicial Observations: Stringency or Harmony?

The recent judicial response on intermediary's liability in cases of copyright infringement, will help us delve deeper into the intricacies of the Act and Copyright Act, especially when no objective tests exists for determination of fixing accountability on an intermediary, one can always determine the type of intermediary and its involvement with target audience while considering the same.

In case of *M/S Shree Krishna International Film Productions v. Google India and YouTube LLC*[36], the plaintiff was alleging that the defendants had been reproducing various sound recordings, cinematographic films and audio-visual recordings of the plaintiff on its platform

33 *Sabu Mathew George v. UOI*, 2017 (1) RC R (Civil) 175.

34 CCG NLU Delhi, *Roundup of Sabu Mathew George vs. Union of India: Intermediary liability and the 'doctrine of auto-block'*, Legally India - News for Lawyers (Feb 3, 2017), https://www.legallyindia.com/views/entry/roundup-of-sabu-mathew-george-vs-union-of-india-intermediary-liability-and-the-doctrine-of-auto-block.

35 *Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018*, PRS India (Jan 3, 2019), https://www.prsindia.org/billtrack/draft-information-technology-intermediaries-guidelines-amendment-rules-2018.

36 *M/S Shree Krishna International Film Productions v. Google India and YouTube LLC,* CR No.2198 of 2016.

without authorization, the defendants on the contrary argued that they were intermediary and had no knowledge of the infringing content, as they cannot plausibly evaluate each user generated or user uploaded content. The court ruled that defendants should have taken down the content after getting a notice for the same from the plaintiff as per the Intermediary Rules, 2011, the defence that proper notice procedure under the Rules have been catered to is invalid as the burden was on defendant to locate the URL even if the same was not mentioned in the notice. The decision has been appealed in Punjab and Haryana HC and has been admitted by the Bench, the grounds being- Status of You Tube as intermediary under the Act, no notice in furtherance of Article 51(a)(ii) prior to filing infringement case, no URL mentioned in the notice, 15 of the 18 works were assigned to Shemaroo which was not party to the suit.[37]

Also in case of Fermat Education v. Sorting Hat Technologies P. Ltd[38], the court observed that the defendant, Unacademy (managed by Sorting Hat Technologies) had about 200 questions and answers of the plaintiff (2IIM-CAT course), copied in literary and video form, the issue was whether Unacademy was an intermediary and can claim safe harbour and if not, whether the same was fair use under Sec. 52(1)(i) of the Copyright Act. The court held that Unacademy was not an intermediary as the Terms and Conditions stated that user content could be created by Unacademy itself, publication can only occur only after being approved by Unacademy and they have editorial control over the content being uploaded, hence Unacademy was not qualified as an intermediary. Also, when the defendants claimed fair use, which is an exception to infringement, the court held that Unacademy was paying consideration to educators for furnishing content hence, it was a business venture and the same will not come under fair use exception.[39]

In the case of *Amway India Enterprises Pvt Ltd v. 1Mg Technologies Pvt Ltd & Anr*.[40], the court observed that most of the e-commerce platforms are actively involved and thus cannot come under the safe harbour provision of Section 79 given to intermediaries. It was held that the e-commerce platforms will be liable for fine if they fail to comply with the statutory requirement given in the Intermediary Guidelines.

37 Akshat Agrawal, *Shree Krishna International Film Productions v. Google India and You Tube LLC: Revisiting the Intermediary Liability Jurisprudence in the Indian Copyright Law*, IPR MENT LAW (Dec. 8, 2019), http://iprmentlaw.com/2019/12/08/shree-krishna-international-film-productions-vs-google-india-and-youtube-llc-revisiting-the-intermediary-liability-jurisprudence-in-the-indian-copyright-law/.

38 Fermat Education v. Sorting Hat Technologies P. Ltd, CS(OS) 330 of 2018.

39 Sreyoshi Guha, *Unacademically Speaking: Madras HC Upholds Copyright Claim in 2IIM-CAT Questions*, SPICY IP (Aug. 22, 2018), https://spicyip.com/2018/08/un-academically-speaking-madras-hc-upholds-copyright-claim-in-2iim-cat-questions.html.

40 *Amway India Enterprises Pvt Ltd v. 1Mg Technologies Pvt Ltd & Anr*, CS (OS) 410/2018.

Analysing the Judicially *Cold-Shouldered* Aspects of Intermediary Liability

Intermediaries play a significant role in case the data uploaded is an infringing content, however their liability has to be matched with the interests of third party provider of information, who significantly has no role to play as per the Act and Intermediary Guidelines, hence a balance between freedom of speech and intermediary liability (following the chilling effect after the take down approach) needs to be achieved. A lot of intermediaries lack the ability to determine legality of expression, the qualifications and objective due diligence requirements have not been mentioned under the rules, third party provider of information is not informed about the take down, no mechanism for put back, no reasonable rejection by intermediaries is accepted, no transparency in take down procedure, procedural lacuna exists as there are no CPC or CrPC provisions with respect to it.[41] Also, one of the criteria to affix responsibility should be the nature of interaction an intermediary has with the target audience, here we can say the level of interactivity be categorised as- active, passive or intermediate and then, it will be even easier to compute damages.

Conclusion and Suggestions

Intermediary liability regimes have undergone tremendous change as now the liability depends upon the role intermediary plays in dissemination of infringing content. However, the Copyright Act should always follow an inhibitory approach rather than a notice and take down approach where the damage is remedied long after it has materialized and when the copyright holder gets apprised of the fact of such infringement. The diligence system should be clearer on the type of content that is infringing and what action an intermediary should take and the degree to which such action may be taken as intermediaries cannot always act as censorship boards inhibiting freedom of speech which is a Fundamental Right. At times, these intermediaries do over comply and take down content even if it does not result in copyright infringement in order to avoid the consequences as per the research done by Centre for internet and Society, Bangalore.[42] However, more clarity on working of these intermediaries is required and the blocking orders by governmental agencies should also take into consideration the aftermath of these intermediaries. Wilful blindness to infringing content can always lead to following an approach which will diminish the possibility of inhibitory approach.

41 Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet, 2011*, Centre for Internet and Society (2011), https://cis-india.org/internet-governance/intermediary-liability-in-india.pdf.

42 *Supra* note 30.

Automated mechanisms have also proved to be ineffective in determining copyright infringement as they rely on matching technologies in order to detect such infringements and have been criticized by rights holders and fair use advocates. Hence, a clear approach in defining the law clearly and then focusing towards its implementation can to some extent balance the intermediary liability regimes with freedom of speech and expression. The Draft amendment rules, 2018 are somewhere vague in nature. However, the State has tried to take a liberal approach to solve the earlier problems raised by the earlier rules.

A few suggestions to ascertain intermediary liabilities are as follows:

- **Harmonisation of conflicting laws**- The conflict between the safe harbour provisions under the Act and IPR laws in India need to be in harmony. The legislators and the judges should have a balanced view towards ascertaining intermediary liability.
- **Restricting the safe harbour window**- The legislation should mention the specific acts of intermediary that would lead to disqualification of an ISP from escaping liability under Sec. 79 of the Act in copyright infringement cases.
- **IT professionals as *amicus curiae* for determination of intermediary liability** - It would be more objective in ascertaining the Intermediary's liability by having an opinion of a reasonable IT professional working in some other intermediary having similar target audience other the intermediary in question. Such IT professionals can act as *amicus curie* in adjudging the liability as InternetLab had presented an amicus curiae brief where Facebook was alleged liable due to a fake profile generated on the platform of the plaintiff.[43] When third party information provider is willing to fortify, no real knowledge is ascribed to the intermediary, and if not, the intermediary is liable to actual knowledge.

With such balanced view, India can successfully assimilate the Intermediary liability regimes in cases of copyright infringement keeping in view rampant dissemination of content in this digital world.

43 Dennys Antonialli & Thiago Oliva, *InternetLab Files Amicus Curiae Brief in a Federal Supreme Court Case that Can Change Internet Intermediaries' Liability Regime in Brazil*, InternetLab (Dec. 14, 2018), https://www.internetlab.org.br/en/news/internetlab-sends-contribution-to-the-stf-on-the-constitutionality-of-article-19-of-the-brazilian-internet-civil-rights-framework/.