

# **CONSILIENCE 2010**

## **CONFERENCE REPORT**

Prepared by The Law & Technology Committee,  
National Law School of India University, Bangalore

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# EMERGING TECHNOLOGIES AND RELATED LEGAL ISSUES

## KEYNOTE ADDRESS

by **HON. JUSTICE MURALIDHAR of the Delhi High Court**

The complex nature of the Internet precludes its easy regulation by the State. The general assumption regarding the overwhelming benefits of free access of the Internet is a myth, and often, the reality lies somewhere else. It must also be remembered that the Internet is not merely a tool – it is also a versatile medium for a number of different activities. Social networking, a hugely popular activity, is an example. Another concern is that in the world of the Web, a person loses control over what information about him/her becomes publicly available. He thus, in a manner of speaking, loses agency and autonomy.

Various issues should be taken into consideration while determining the nature and extent of Internet regulation and liability. For instance, the Internet has no mechanism to regulate who operates in the system, and issues of consent and capacity to contract under Contract Law are difficult to adequately resolve. Moreover, there is a very weak filter for content on websites, and there exist weak viewer restrictions as well.

Privacy concerns constitute another important issue. Every activity of an individual leaves an imprint on the Internet. Furthermore, there are instances where service providers retain user data, and control over these then lies with the service providers. Therefore, an individual's privacy hinges on a relationship between government and service provider. This raises concerns about the protection of individuals.

Can one really effectively regulate the Internet? The cutting edge nature of the problem renders any form of regulation a post event regulation. Within the same, the roles of different players should be examined. The intermediary plays an important role.

Another pertinent issue is regarding the regime of legal framework that should be adopted. The two possibilities are the property rule and the liability rule. The property rule, involving a remedy of the nature of an injunction, is not adequate. Therefore, there is arguably a need to

shift to a liability regime. This was most prominent in the *Bazee.com* case,<sup>1</sup> which now is before the Supreme Court in appeal.

The regime of criminal liability alone, too, is not sufficient, especially since the police are not adequately equipped to deal with such offences, and in such cases, convictions are even more difficult. The primary concern is that when you severely criminalize acts, the proof required is higher, and conviction rates fall. The jurisdiction issue is also of very wide import. At the same time, the physical location of the computer in India important. So, how do you enforce provisions? Therefore, regulating by criminal liability may not be the answer.

Thus, we see that a number of challenges lie before us today. The role of the intermediary is of particular relevance.

There have also been a slew of amendments in light of the issues that have emerged of late. These include the definition of an intermediary u/s. 2(1)(w) of the Information Technology Act, 2000, and the newly introduced s. 79, which deals with the exemption of liability of intermediaries. S. 79 includes a *non obstante* clause and has the objective of protecting the intermediary.

All of these need to be addressed before efficient and adequate regulation of activity on the Internet – especially in a nation like ours where Internet usage increases exponentially each year – can be achieved. This is, however, an issue of paramount importance and must be addressed as soon as possible.

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<sup>1</sup> Avnish Bajaj v. State, 150 (2008) D.L.T. 769.

## INTERNET SERVICE PROVIDER LIABILITY

**Chair: Nikhil Krishnamurthy** (Senior Partner, Krishnamurthy & Co., India)

Mr. Krishnamurthy opened the discussion with an observation on the case of C.E.O. of *Guruji* being arrested, and opined that *Guruji* is the new *Baazi*. He spoke of how the case may play out, given the Amendments in 2008 to the Information Technology, 2000.

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### CHOKEPOINTS AND CHILLING EFFECT – AGAINST ISP LIABILITY

by **WENDY SELTZER**

FELLOW, BERKMAN CENTER FOR INTERNET & SOCIETY, HARVARD UNIVERSITY

YouTube, which we all know is a privately operated video hosting site, hosts not merely private or home-made or entertainment videos; even US political candidates (McCain is one of numerous examples) use YouTube to speak about, publicise and clarify their election manifestos. However, in October 2008, one month before the Presidential Elections, there was a notice on the site that stated: “this [election speeches] video is no longer available due to copyright claim”.

If the intermediary is to be made liable for not taking down videos that do not meet certain requirements (legal or on the basis of principles such as offence), the intermediary expeditiously takes down the content and puts it back only if there is a counter-notification. This is an elaborate procedure (the D.M.C.A. issues notices, hears parties, or grants a preliminary injunction, etc. – questions of fair use feature prominently in a take-down process). This leads to a chilling effect on political debate (in this case) in the civil society.

A suggestion to counter opposition to hosting of such controversial material is to place prior restraint by proxy. However, this is as a strong denial of freedom of expression. It essentially silences speech before the Court has the opportunity to examine it. This increases error costs. These (the paramount interest to promote free speech, and possible increases in error costs) are strong reasons to oppose intermediary liability.

Another characterization is of the Internet as a cloud; sometimes, chokepoints are identified that are identified as possible spots for the imposition of liability. Intermediaries can serve as gatekeepers of content; all the more so because they are more centralized, and it is thus easier for them to find and regulate their conduct/component. This looks attractive to policy makers. But the costs that we pay for such a closed policy is a direct negative impact on the position of free speech and expression (and as an important component of this: self-expression in numerous forms) in society.

The wealth of content opportunity that the Internet provides and the risk of misdirected regulation are two important considerations to be kept in mind while seeking to regulate Web content. The costs of misguidedly imposing liability on intermediaries for site content could lead to a compromise on the intrinsic principle of free speech, and create chilling effect against the same because of identification by the intermediary. This leads to two unwanted effects: an invasion of privacy (which is a dangerous thing and a violation of a basic human right), and stifling of innovation and creativity in self-expression.

### **Theories on Intermediate Liability**

Several theories are proposed on the idea of intermediary liability, both in support of and against it. The first is the test of ‘active participation responsibility’. The test here is whether the intermediary participation in allowing the site content contribute to the alleged harm. To satisfy this test and be liable, the intermediary must be a necessary party to the harm caused, but if the intermediary’s act is not volitional, he should not be held liable.

Another theory concerns ‘strict liability gatekeeping’ or ‘least cost avoidance’. The defining proposition here is that the intermediary is the cheapest and/or best-positioned enforcer, regardless of whether he is guilty of faults. This is tempting for law makers, as it is the easiest option, and imposes the least cost to the system.

In yet another theory, ‘environmental stewardship’, the test is to identify whether the intermediary’s involvement promotes a democratic speech environment, and if it does not, then he may be held liable. However, this is a test more subjective than the previous two.

## **Stakeholders**

The stakeholders in such a case are clear: There is the man who posts the allegedly objectionable content on the site (the second stakeholder, who also has an incentive to promote free speech), for whom the biggest reasons and incentives to post are that he/she is exercising his/her right to free speech. He is engaging in self-expression, and in the process, initiating a beneficial exchange of ideas and knowledge. Content can further provide reputation to the one posting and lead to increased revenue from the site for the government and the people, who are also stakeholders. However, such content is risk-sensitive, but it is possible for the 'post-er' to continue with the posting.

For the content host (or the intermediary), besides free speech, the loss of revenue from screening content or if the content is taken down is a great disincentive. The taking down of content may also result in reputation-loss, which in a competitive industry is no laughing matter. The costs of litigation and the loss of customer support are other, and closely related, harms to the intermediary.

For the fourth stakeholder, the complainant, the greatest argument in support would be that (a) he/she wished to protect revenue of the government, (b) that moral rights of the people should not be affected, (c) that reputation or exposure of the actors/persons in the video (a video is a example, since there has been a mention of YouTube already) might be damaged.

Under the U.S. law, s. 512 of the D.C.M.A. states that no liability for user copyright infringement will be imposed if they expeditiously remove material on being served notice. This is a good provision because it granted people a certain sense of certainty: there shall be no liability where no notice has been served. There is thus no need to pre-screen, for they shall not be held strictly liable if no notice was served. The flipside of this is that it motivates abusive/mistaken takedowns.

The case of electronic voting machines is an example. Some emails regarding information about elections leaked. The Court held that this was a misuse of the D.C.M.A., for fair use is permitted (political discussion is given a high level of protection). Further, consider Darknet: mass content is likely to be shared despite regulatory efforts; if something is interesting, it will be shared by users, whether it stays legal or goes underground.

There are also architectural biases in arguments supporting intermediary liability. Firstly, it is not popular speech *per se* that is going to create trouble. With a move for the imposition of intermediary liability, what really suffers is the unpopular speech – the sort of non profit, non commercial speech that is the critical dissenting channel in most situations. Enabling such this is what we should be concerned about, for that is the mandate and spirit of free speech.



## INTERNET LIABILITY – NOTICE AND TAKEDOWN PROCEDURES

by **STEPHEN MATHIAS,**

PARTNER, KOCHAR & CO., INDIA.

In the context of Indian law specifically, while the liability relating to mere conduit and hosting is reasonably clear, the procedure for takedown of content is not very clear. The primary difference here is one of an hosting v. adjudicative role. While the law relating to hosting imposes liability after a competent court has considered the nature of the hosted content, a take-down procedure in essence converts an intermediary into a judge: if it considers a certain site content to be offensive, etc. (it has knowledge, in other words), then it is required to act on self-initiative.

How may this seemingly irreconcilable problem be solved? There is a broad approach: one based on a certain branch of the law for copyright issues, and another branch for other issues. The D.M.C.A. lists a detailed notice and take-down procedure.

What, then, is the basis for a global order that we should set in this direction? S. 79 of the Information Technology Act, 2000, notes that the worded such that it casts the Government and its officers in the role of a Court. The Court itself (not delegated power to the government) is, ideally, the best forum for adjudication. However, this very often proves to be too expensive and hence, a balance needs to be found.

The U.D.R.P. method under the W.I.P.O. is an interesting experiment in such a direction, but would such an approach be viable in the Indian context with arbitrators adjudicating the matter, without the requirement of even physical presence?

## RETHINKING ONLINE INTERMEDIARY LIABILITY: IN SEARCH OF THE 'BABY BEAR'

### APPROACH

by GAVIN SUTTER,

LECTURER IN LAW, QMUL, UNIVERSITY OF LONDON.

When the Three Bears (Mama, Papa and Baby) found that Goldilocks had interfered with the contents of their home, did her method of dealing with them strike you as 'just right'? Is there, at all, mode of regulation for intermediary liability that is 'just right'?

While freedom of expression is a concept accepted universally and across diverse political structures, it is part of the axiomatic understanding that it is not an absolute freedom. The difficulty, then, lies in coming to an understanding of what exactly 'unacceptable content' constitutes, for therein lies the definition of a reasonable restriction of content. One must also address cultural issues – competing cultural and religious values with respect to the propriety and acceptability of content may be a huge consideration for stakeholders in deciding on the unlawfulness of content.

A pressing concern is the identity of who exactly is to be regulated. If this is sought to be at the source, the technical problem of identifying the source of the unlawful (or deemed unlawful because of the undesirable effects generated by the content under question) content arises; this is compounded by a jurisdiction problem, and various other practical problem of implementation. However, if the regulation is sought to be at the point of receipt (for example, the case of possession of pornographic material rather than participation in its creation), it is futile since it becomes the proverbial Lernean Hydra (for there are possibly millions of receivers in the form of viewers or the informed) and this does not really address the problem.

There is, then, a need to balance efficiency and fairness – elements of the carrot-and-stick approach are required. China is an example of a country that approaches the problem with a 'hard touch' policy. The 'Great Firewall of China', by which they regulated all content on Websites in the country (Google is a prominent and controversial example), is their golden-shield project. In such a policy, there is direct state involvement, and license requirements for

service providers willing to set up enterprise in China are strictly regulated by the state. However, a possible loophole with such an approach, which would undermine its very application and efficiency, is that technology is not adequate to handle such content regulation (for contrast, take CIRCAMP, the European Commission Proposal on child porn).

An alternative approach is the well-known ‘three strikes’ approach, which the U.K. Digital Economy Act, 2010, follows. Under this rule, persistent offenders are targeted primarily, and rights (say, to the Internet) are terminated or curtailed. There is, though, a high possibility that such an approach cannot tackle the magnitude of the problem; neither can it tackle it efficiently, for the greatest infractions may go undetected or may come from unexpected offenders.

So now we must consider an alternative approach: Is awareness-based liability a middle (and more effective) way? The system of qualified immunities and the Electronic Commerce Directive, 2002 may give us an idea of how such an approach would work. However, we must give thought to whether this is a Baby Bear approach: Is there any regulatory framework that is ‘just right’, or is it really the ‘least worst’ option?

## INTERNET REGULATION IN INDIA

by SUDHIR KRISHNASWAMY,

PROFESSOR OF LAW, NATIONAL UNIVERSITY OF JURIDICAL SCIENCES, KOLKATA.

The issue of ISP liability raises the following pertinent questions:

- Does the I.P. Act make a choice on where liability should be located?
- Does the Copyright Act make a choice on where liability should be located?

The biggest possible threat to regulatory framework is an approach similar to that taken by China – blanket regulation of the government against private regulators on grounds created and employed by it against the private ISPs.

We must constantly remind ourselves that the Internet is not a *sui generis* medium of technology. We do have something to learn from the pre-existing media law. Print and media liability can teach us much about content regulation, and they are pertinent and important lessons in this regard: they can teach us about command and control measure. However, no specific legislations have been applied here.

It is important to understand that the state's regulatory powers are still very broad – for example, FM radio still can't broadcast news. Indian law does not ban prior restraint. Therefore, the government can regulate user generated content before it is released in the public forum. The question now is: Why hasn't the government acted so far, for Internet regulation hasn't progressed as much as in other technologies? It is submitted that a part of the rationale for the ostensible sluggishness is the complexity of the issue.

There are three kinds of liability that ISPs face. These relate, broadly, to the three layers of the Internet – physical, logical, and content. One must question whether the I.P. Act makes a choice about which of these three layers warrant regulation? The regulatory Act right now focuses on the players/actors. All actors are described as intermediaries: no internal distinctions are made as far as the Act and imposition of liability is concerned. To elaborate, Web hosters, ISP providers – they are all treated at par, though their functions are markedly different.

Further, does the Copyright Act do anything differently? Indeed, it does not focus on the players at all. Its main focus is on the activities – secondary liability on permission to use space, liability on the hosting, etc.

Concerns about these approaches are manifold. One of the primary dangers arising from this policy is the issue of privacy of identity and how easily the identity of users is disclosed when questions of content regulation come up. The possibility of restricting absolute government control over user identity is one that needs urgent attention. There is also a need to be concerned about the nature of administrative control that has to be exercised in the next decade, for there exists a possibility of excessive and dangerous discretion in the hands of regulating officers of the government, and this may lead to violation of basic human rights and constitutionally protected fundamental rights of citizens.

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### **CONTRIBUTORY LIABILITY V. STRICT LIABILITY**

*by* **DHRUV BHATTACHARYA AND SOURAV ROY,**

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## ONLINE SERVICE PROVIDERS AND INTERMEDIARY LIABILITY

**Moderator: Sunil Abraham** (Executive Director, the Centre for Internet and Society, Bangalore)

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### ONLINE SERVICE PROVIDERS

**NIKHIL KRISHNAMURTHY**

Senior Partner, Krishnamurthy & Co., India

The law regarding Online Service Providers in India has undergone several changes in the recent past: there have been Amendments in 2009. Indian and foreign cases, focusing on copyright law, have relevant consequences for the ISP.

The defining moment in intermediary liability in India came during the *Bazee* case. Several defences were argued, including the liability of the hall-owner, the question of jurisdiction. It also brought into focus the difficulty of incorporating safeguards to regulate content, as well as the problem of detection of the 'offence' as from a particular area: the point of origin, or the point of the receiver.

The charge-sheet for Bazee was filed 38 hours before the MMS clip was taken down from the site. It was alleged that the filtering was inadequate. It was held by the Court that there is a great need for reasonable precaution and prompt corrective action (and these are to be established at the trial court) on the part of the intermediary. Adequate filters are an example of a reasonable precaution. To understand this more clearly, we may consider the distinctions and similarities between Bazee and services like Perfectshare and Rapidshare, where users make a conscious decision to upload the file, and the file is shared by the user, not the service. This makes it impossible to perform an automatic or manual filtering, and even then, the user (the source of the file) cannot be indentified, only the violation itself.

Another line of argument taken was under s. 51(a)(ii) concerning the hall owner's liability. It was held that he/she must be aware or have reasonable ground for believing that the alleged communication would infringe copyright. While it is of no consequence whether the place of

offence is physical or virtual, the communication must be public. Thus, 52(a)(ii) only covers streaming, and not downloading. That is, in India, Rapidshare would not be liable.

Furore over the decision of the Delhi High Court drew statements even from the U.S. on the existing law, as a result of which the legislation reviewed and an amendment was duly made. This was the insertion of the new s. 79 in the Act, defining intermediary liability and detailing conditions on which liability can be imposed. A point of note, however, is that the phrase 'due diligence' was retained in the process. What we must consider now is the very recent *Guruji case* on April 29, 2010: is this the new *Bazee*?

Many types of intermediaries exist: ISP, hosting providers, search engines, caching providers, and this is among the problems that makes regulation complex. The new s. 79 makes the provision more elaborate, rather than gives them greater protection. The ambit of the provision being unclear, it is not up to judicial interpretation; we must look at how the courts end up interpreting the section.

The relationship between s. 81 and s. 79 may dilute the strength or the meaning of s. 79. The principle of abundant caution must also be considered, for the consequences for an ISP would include the possibility of abetment of an offence committed by the user. S. 45 of the Information Technology Act must also be analysed in light of this. The ISP may, in a claim of violation of copyright, defend itself by contending that the primary act has a defence, and so no ISP liability can lie. Further, the defence of fair use applies as it is for private and domestic use. The proposed copyright amendments include s. 52, and incorporating a new defence – transient and incidental storage of a work. A similar provision exists in Australia; merely because the facilities provided are used, doesn't imply that the facilities are superfluous or ineffective.

### **Cases on intermediary liability**

In India, the following cases are on the point:

- Bazee/ebay
- Super Cassettes v. YouTube
- Guruji

### **Proposed Safeguards**

It is suggested that expeditious removal of objectionable content be carried out on receipt of notice. It is necessary that provision to respond be given to the defendant (the ISP). Immediate takedown by regulator of unlawful content must be effected. Terms of service of the intermediary must clearly specify that to the users that they must not upload offensive content. Certain content keys are to be notified at the time of upload. Due diligence on the part of the intermediary is necessary.

Problem areas that persist and require urgent reworking include: degree of due diligence, problem of identification using a link/keyword, frame of order, authorization (sanction, approve, countenance on a case by case basis), etc.



## **“ISSP LIABILITY: WHICH WAY DO WE GO, JUDGE...”**

**SUBHAYU CHAKRABORTY AND PRITHWIJIT GANGOPADHYAY,**  
STUDENTS.

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### **ONLINE SERVICE PROVIDERS: THE FALL AND RISE OF INTERMEDIARY LIABILITY**

*by* **AZMUL HAQUE,**

SENIOR ASSOCIATE, BERWIN LEIGHTON PAISNER LLP, SINGAPORE.

We are living in the world of the Web 2.0, and in this world, user-generated-content websites are more popular than they have ever been before. Before entering into detail, one must first define terms clearly. The Internet is a giant network of networks, designed to carry, host and transmit information of content. This (carrying, hosting, transmitting) is done by the online intermediary.

Several types of online intermediary liability exist. Any sort of defamatory material that is published infringes various rights of individuals. User content facilitated by ISPs can sometimes lead to the infringement of IPRs. These may descend to the hosting and transmission of child porn. These are also a great threat to data protection and privacy, for safeguards within these systems are less than perfect.

There are, however, several arguments detailing the philosophical bases of liability. But several questions of the utmost importance should be considered.

- Is it practical for law to control dissemination of undesirable content?
- If so, should the intermediary be responsible? Is he expected to do something about it?
- Impact of liability on the online Internet intermediary?

## **ROLLING THE DICE: ONLINE GAMBLING**

*by* **NEHAA CHAUDHARI AND VISHWAJITH A.S.**

**STUDENTS.**

The massive and widespread use of Internet is the primary cause for one of the highest revenue grosses in the world. Its popularity is primarily due to the low transaction loss. Internet intermediaries include multiple providers such as ISPs, payment intermediaries, websites directing user to gambling websites. Since the transaction costs are low, the Internet easier to access.

## TECHNOLOGY AND LAW – AVATAR 2.0

by **PROF. ANIL BANGALORE SURAJ**,

PROFESSOR OF LAW AND PUBLIC POLICY, IIM BANGALORE.

It is inevitable that technology-based law come with certain inherent challenges. Policy questions are to be expected: The entire Information Technology Act and its purpose is being questioned. The Ministry observes that even despite amendment, the legislation is not adequately addressing cyber crime, and so we need new law. Further, the IT Act is trying to straddle conflicting objectives, and needs clarification through substantive and procedural laws. Consider the best technological practices: how much of it needs to be adopted by service providers to ensure compliance with DD? What is DD?

Also, a question that is not considered in these issues that today, the government itself is a service provider in many aspects; for example, income tax returns may be filed online. Further, fair use in India is statutorily allowed in certain respects: consider s. 52. Data privacy concerns, however, are bigger issues than aspects of regulatory governance.

Law cannot catch up with technology. Technology is many strides ahead of law. Technological possibilities are impossible to capture; however, this cannot be left to the fluctuating uncertainties of the market.

An Open Source model is uniquely positioned. Note, however, that open source does not protect IPR. Its object is the involvement, participation of the population, and mutually beneficial influences of this.

The concept of corporate criminal liability is over a 100 years old, but there is still no single judicial or legislative formula behind mens rea, and how to penalize an offence. If Internet is a global public good, why not have services over Internet? Why should the entire community suffer and not be allowed the advantages of technology because of a few deviant people? The solution is to move towards an internationally uniform and harmonized regime: the time for ACTA is now!

## INTELLECTUAL PROPERTY RIGHTS AND INTERMEDIARY LIABILITY

**Moderator: Wendy Seltzer** (Fellow, Berkman Centre of Internet and Society)

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### INTERMEDIARY LIABILITY

SUNIL ABRAHAM

EXECUTIVE DIRECTOR, CENTRE FOR INTERNET AND SOCIETY

Control of the Governments over the use of the Internet is a very real and current phenomenon. Examples are that of child pornography in the USA and censorship of political speech in China. Control over the Internet is not limited to citizens, but between nations as well. For instance, China allegedly compromised the Prime Minister's Office through a cyber attack and gained access to a lot of confidential documents. All these myths serve as 'control' tactics.

U2 shifted its sales office to Netherlands in order to avoid paying tax on their IP. In relation to IP violations, it is not considered very serious and this causes people to shift to trafficking goods that are violative of IP rights as opposed to other contraband. For instance, in Malaysia, marijuana and pirated DVDs cost the same. However, given the varying degree of punishments, drug dealers are now shifting to selling pirated DVDs.

WIPO has been rejected by numerous nations (developed and developing) who are now looking at a plurilateral treaty to replace WIPO. This reduces the effectiveness of a war against counterfeiting. The US Special 301 report on countries that support piracy has India on the list for promoting open source – this hurts US business interests as per the US trade representative. During the negotiation of the ACTOR treaty, freedom of information requests were largely ignored. Laptop search, iPod search by customs officials were discussed but did not end up in the final Treaty.

ISP LIABILITY VIS-À-VIS GOING AFTER FREE-SOFTWARE PROMOTERS ('GEEK' LIABILITY)

The reason why free software is preferred is best illustrated by an example – Windows Media Player sends data of what a user watches to the Microsoft servers to collect meta data on the same and thereby compromise the privacy of the user. A switch to VLC media player would solve this problem.

The impact of greater intermediary liability on free software would imply that sites like sourceforge and other sites promoting free and open source software would be liable for copyright and patent infringement (proprietary companies may sue as source code is freely available). For instance, most video formats are not based on open standards and thus have patents attached to them. If there is indirect liability on sites, then any site making VLC player available could be held liable.

Free software projects (like those of Google) are vital for the social functioning of the Internet. If intermediary liability reduces free software development and projects, this would have a terrible impact on the usability of the Internet.

#### EFFECT OF INTERMEDIARY LIABILITY ON USERS OF THE INTERNET

- Encryption will be used for all web purposes – and this would hamper police surveillance (as in Sweden). For instance, in Burma, Google default setting is searching using SSL.
- Ghost servers run by hackers with no fixed server location (for instance, pirate bay). All kinds of web users would congregate in specific cyber areas and cause potentially dangerous interactions between ordinary citizens and web criminals).
- Users use anonymiser services and this would hamper targeted advertisements on the Internet (which are a huge revenue and very useful to users). Corporations would anonymise logs and records and this would result in fundamental damage to the business model behind numerous web-based services offered to such companies.
- There would be a clamping down on various innovative anonymous speech solutions like chat roulette.

#### CONCLUDING THOUGHTS

Care should be taken to ensure not to force intermediaries to be liable strictly. Social media and peer production should be encouraged. This way, corporate and user agenda would overlap. Google and such huge companies have a corporate responsibility to think of the business environment and the future of the free Internet. Sliding scale principles ought to be used to protect the interests of corporate and individual users as well.

## BALANCE AND COPYRIGHT AND THE FUTURE OF THE INTERNET

RAMAN JIT SINGH CHIMA

GOOGLE PUBLIC POLICY AND GOVERNMENT AFFAIRS

Deep pockets create more problems than they solve. Safe harbour models give intermediaries great power. It involves giving notices to intermediaries by IP right holders. Notices have to be specific and a mere email would not suffice. This can have a negative impact on the freedom of speech. The notice prepares the online service provider to receive a judicial order. Intermediaries can do basic moderation, but cannot function as Courts. In Chile, for instance, intermediaries have a lot of flexibility, while under the DMCA (USA), YouTube etc are given no discretion and videos have to be taken down once a notice is served. Canada and Brazil have bills in drafting and are looking to follow the Chilean model.

The importance of fair use and fair dealing must be recognised. Fair use should be flexible enough to encourage innovation and invention. Fair use was responsible for numerous Internet developments including something that is considered fundamental to most Internet users – search engines. In India, this provision is under Section 52 of the Copyright Act (under the present pre-amendment position). Flexibility of fair use ensures that intermediaries are not made scapegoats merely because they are the easiest and most visible targets. The actual infringers will not be pursued, as a remedy is available against an intermediary.

TAKEDOWN NOTICES V. JUDICIAL ORDERS

Takedown notices should be used with discretion. Only Courts can decide if material should be taken down. When takedown notices are misused and applied indiscriminately, it has a chilling effect on free speech. There should be clear guidelines regarding takedown notices issued by the States' agencies. They should only be last-resorts. Judicial takedowns are therefore greatly preferable.

**“CURBING TRADEMARK INFRINGEMENT IN THE VIRTUAL DOMAIN”**

**ADITYA KUTTY AND SINDHURA CHAKRAVARTY,**

STUDENTS.

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**“INTERMEDIARY LIABILITY AND COPYRIGHT INFRINGEMENT: TOWARDS ESTABLISHING A  
CONTRIBUTORY LIABILITY REGIME IN RESPECT OF PEER TO PEER SOFTWARE  
PROVIDERS IN INDIA”**

**PUNEETH NAGARAJ AND ANEES BACKER,**

STUDENTS.

## **PANEL DISCUSSION**

*on*

### **TECHNOLOGY LITIGATION**

**Moderator:** Sajan Poovayya (Chair of Karnataka State Council, FICCI)

**Panelists:** Justice S. Ravindra Bhatt (Judge, Delhi High Court), Sudhir Krishnaswamy, Sunil Abraham, Wendy Seltzer, Gavin Sutter, Azmul Haque, Pranesh Prakash

The problem of internet and intermediary liability should be analysed from a rights perspective rather than with a view only to regulating it. India has jumped a phenomenal leap than the U.S. in technology because it had a different perspective from the U.S. on technology. But to resolve technology litigation, we are still following U.S. precedents. The technology-related judicial decisions in India has huge socio-cultural bearing as well in view of the disparity in resource allocation among the population, this creating huge disparities in income and purchasing power, as well as accessibility to the Internet and access to litigation. Litigation on internet intermediaries has increased from IT Amendment Act, 2008 and majority of litigation is not on IT Act but on defamation. After this comes the issues of copyright. In India, there is no onus on copyright holder to notify that this is his content.

Indian policies for internet intermediaries should be better formulated and should provide a level playing field. If this fundamental need is not addressed, the country will lose out on technological entry and development, because there exists a high probability that the intermediary will find other platforms in other countries. India is the only country after the E.U. where a keyword search litigation is ongoing. The current case is about whether using a particular trademark term as a keyword to pop up advertisement is violation of trademark law or not. The cases are pending in various high courts about whether particular aspect of technology should be banned in India for (say) geospatial information. Secondly, actions like a search engine is sued for showing a Thai advertisement which detects sex of foetus because it is illegal in India but legal in Thailand. There are various ways of looking at the liability of intermediaries and there is a socio cultural element to it, which has not been noted.

The Internet is quite different from the other broadcast media like press and the difference must be appreciated. Like in case of copyright infringement, first, we have to show primary



liability because we don't have secondary liability, which is additionally quite difficult to prove. An intermediary can be held liable for providing a platform for such infringement. But it should be understood that an intermediary can't judge whether something is copyrighted or not, there should be a balance in between. The issue is whether an internet intermediary should be sued along with the original copyright infringer.

Free speech jurisprudence must become underlying factor regarding intermediary liability. Information technology is power; it has global access and global impact, too. Information is transmitted in seconds. The benefit to an intermediary can be direct or indirect and this is the way to look at its liability too. We have to respect the hardwork that a person puts in a particular work and it takes not more than few seconds in circulating it across the globe and cutting it at the source is most important.

It's also a question of money: India and China are topics of concern globally because of the market that they have. Repercussions on tangential issues – including trade, investment and development – are of many types. Indian IT industry became a global power because of less regulation so that it can have time to grow. Why an intermediary should be held equally liable for something it could not have regulated.

Intellectual agenda of intermediary liability:- Article 19 contains a uniform case law about all types of media. Agenda is that where technology goes, we need to have a fresh agenda about free speech. One area to focus about intellectual agenda of internet liability and internet regulation is what forms of private ordering will work in Indian context.