

## Copyright Infringement Liability of the Intermediaries and the Immunity Therefrom- A Comparative Asian Perspective

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The intermediaries are the entities that work as the connecting path between the users, content creators and the content disseminators. It would be no exaggeration to say that the Internet would become a dull and meaningless place without the services now being provided by the Internet intermediaries. The intermediaries, by their activities, play a crucial role in contributing to a burgeoning digital environment and market. However, under different theories of law, the intermediaries run the risk of attracting liability, including copyright infringement liability for wrongful acts of other actors in the Internet environment. This paper focuses on the liability for copyright infringement by intermediaries and the escape route therefrom in Asian countries such as China, India, Japan, Singapore, Vietnam, and Thailand. Drawing insights from this comparative analysis, the authors explore what model of intermediary immunity would best suit the social, cultural and economic ground reality of Asia. In the entire study, the authors use the two prevailing alternative models, the prior due diligence model of the United States of America and the prior authorisation model of the European Union, as the measuring standard for assessing the Asian intermediary immunity regime. The paper ends with the suggestion of a uniform Asian approach for dealing with intermediary safe harbour.

**Keywords:** Information and Communication Technology, Intermediaries, Copyright Infringement

The Internet significantly influences the quality of human life.<sup>1</sup> Global internet usage has been expanding at an exponential rate in recent years. According to recent statistical data, the approximate global user count is 5.44 billion, and most of them are from China and India.<sup>2</sup> The intermediaries performing diversified but crucial roles are the most important players in the Internet environment.<sup>3</sup> It would not be an exaggeration to say that the Internet would be a meaningless place without the services provided by the intermediaries.

The rapid development of ICT has made it extremely simple for the copyright holders to distribute their works and contents. However, there is no denying that this has also increased the risk of copyright infringement. Apart from the other actors operating in the Information and Communication Technology (ICT) environment, the intermediaries also run the risk of becoming liable for copyright infringement under different theoretical paradigms.

This paper endeavours to analyse the provisions concerning copyright infringement liability of the intermediaries and the escape route therefrom in China, India, Japan, Singapore, Vietnam, and

Thailand. From that analysis, the authors then ascertain the commonality and differences in the legal provisions. Finally, the authors explore the possibility of creating a uniform Asian approach for dealing with the intermediary liability and immunity.

### The Term Intermediary- Definitional Diversity and Uniformity

Before delving into the nuances of intermediary liability for copyright infringement and their escape route, it would be worth looking at the definitional diversity of the term intermediary. As per the OECD report

“Internet intermediaries' bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.”<sup>3</sup>

Usually, the intermediary refers to online service providers, but depending on the different jurisdictional perspectives, the term has broader and narrower connotations. In general, the terms online service provider and internet service provider broadly refer to almost similar categories of services and are often used interchangeably. In the U.S.A, Section 230

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of the Communication Decency Act, 1996 defines an intermediary as an Interactive Computer Service which means

“any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”

Though U.S. Copyright Act, 1976 does not define the term intermediary, however, it extends immunity to certain categories of intermediary from copyright infringement action.

According to Article 1(2) of the E-commerce Directive, 98/34/E.C. (as amended by Directive 98/48/E.C), Information Society Services means “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

The definition contemplates that the service should be normally provided for remuneration. According to Oxford Dictionary, the word “normal” means typical, usual or ordinary.<sup>4</sup> There is no doubt in most cases, a service is expected to be provided against payment, but today, the world is witnessing a model where most service providers provide their non-premium services free of cost. As such, those unpaid services clearly fall under the category of Information Society Services.

There is no uniform definition of intermediary in China as different laws look at it from different legal and social perspectives.<sup>5</sup> The Administrative Measures for Online Trading defines an intermediary in the context of third-party trading platforms as Information Network Services.<sup>5</sup> The Chinese E-Commerce law considers E-Commerce platform operators as intermediaries.<sup>5</sup> The Chinese Copyright law does not contain any definition of the intermediary, but it provides immunity to the intermediaries.

In India, the definition of an intermediary was changed after the 2009 amendment of the Information Technology Act in 2000. After the amendment, the definition became broader and now includes a list of intermediaries. Section 2(1)(w) of the Information Technology Act, 2000 states that

“ “intermediary”, with respect to any particular electronic records, 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”

In India, the Copyright Act, 1957 does not provide any definition of the term intermediary or internet service provider, but it extends immunity to the intermediaries providing link, access and integration in certain cases.<sup>6</sup>

In Singapore, under the Copyright Act, 2021 intermediaries come under the category of Network Content Providers (NCP) and Network Service Providers (NSP). NCP is defined as

“a person who provides services relating to, or provides connections for, the transmission or routing of data”<sup>7</sup>

And NSP means

“a person who provides, or operates facilities for, online services or network access; and it includes a network connection provider”<sup>7</sup>

Clause 1 of Article 198b of the Intellectual Property Law in Vietnam defines the concept of intermediary service provider. It states that-

“An enterprise providing intermediary services means an enterprise which provides technical means for organisations and individuals to use the service to post digital information into the telecommunications network and the Internet; provides online connectivity for the public to access and use digital information content on the telecommunications network and the Internet environment.”

By scrutinising the aforementioned definitions of the intermediaries, it appears that they intend to refer to the basic and usual services that make the Internet work, though the nomenclature used is different. For example, the U.S. uses the term “Interactive Computer Services” under the Communication Decency Act, 1996; in the E.U. as an “Information Society Service” under the E-Commerce Directive, 2000; and in India as an “intermediary” under the Information Technology Act, 2000. In China, the definition of a third-party trading platform somehow lacks the type of intermediaries providing hosting and network access.<sup>5</sup> The definition of intermediary under the Indian legal regime seems quite satisfactory as it encompasses a broader list of actors operating in the internet environment. The Singaporean definition distinguishes intermediaries under two broad heads, NCP and NSP, which are again categorised into

subheads. In the case of NCP, it is in the form of transmission, and NSP is in the form of system caching, storage or locating information. Thus, the definitions are getting diversified in different jurisdictions in many aspects, but they are becoming unified in providing internet service.

### **Copyright Infringement Liability of Intermediaries- A Brief Cross-Jurisdictional Perspective**

Before undertaking the comparative analysis of copyright infringement liability and immunity of the intermediaries in the United States of America, the European Union and different Asian countries, it is necessary to have a quick look at the theories of copyright infringement under which the intermediaries are likely to be held liable. An intermediary may violate copyright under two theories: primary infringement and secondary infringement. Primary infringement happens when any person, without authorisation from the copyright holder, does anything exclusively reserved for the copyright holder.<sup>8</sup> Secondary copyright infringement occurs when the person or platform does not directly participate in the infringing activity but indirectly assists, helps or provides means to the primary infringer.<sup>8</sup> In the U.S.A., the Secondary copyright infringement regime is developed by judicial pronouncements. This can arise in three ways: contributory infringement, vicarious liability, and inducement liability. Contributory infringement requires the presence of knowledge of the infringement and substantial participation.<sup>9</sup> To impose vicarious liability, the plaintiff is required to prove that the defendant had the right and ability to control the infringing activities and gained from such activities.<sup>10</sup> When the defendant “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps”, he becomes liable under the inducement theory.<sup>11</sup> Jurisdictions like the U.K. have statutory provisions on secondary liability for infringement.<sup>12</sup> In Asian countries, for example, in India, the secondary infringement of copyright is stated in section 51(ii)(a) of the Copyright Act, 1957, which embodies knowledge-based liability.

Apart from copyright, most jurisdictions have separate ICT laws to regulate the liability and immunity of the intermediaries. In many cases, these ICT laws are independent of copyright, but in jurisdictions like India, this law is interconnected with copyright law. A survey of the global immunity

regime of intermediaries from copyright infringement liability shows the existence of two distinct models: the *a priori due diligence model* of the U.S.A.<sup>13</sup> and the *a priori authorisation model* of the European Union.<sup>14</sup> The U.S. model of intermediary immunity from copyright infringement requires the intermediary to comply with the optional due diligence measures to avail exemptions from liability.

On the other hand, the European model casts an ex-ante obligation on the intermediaries to obtain appropriate authorisation before dealing with the copyrighted contents.<sup>14</sup>

### **The Position in the United States of America and the European Union Concerning Copyright Infringement Liability of Intermediaries**

The purpose of granting immunity to Internet intermediaries is to facilitate e-commerce operations, maintain the effectiveness of the Internet, and boost the continued growth of Internet technology. The U.S.A.’s intermediary laws are contained in two different legislations. The Communication Decency Act of 1996 controls the uploading of “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” materials. The Act expressly excludes intellectual property from its scope. Section 230 of the Act states that -

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

In the U.S.A., an intermediary enjoys immunity from copyright infringement liability when it undertakes due diligence measures and responds appropriately to take-down notices. In the U.S.A., since these measures are not mandatory, an intermediary may choose not to carry out any of these compliances. In that event, when sued, the intermediary would be required to safeguard itself under other theories of copyright law. If the intermediaries choose not to adhere to the due diligence measures, in such cases, a copyright infringement claim against that intermediary could take due course wherein one can very well advance the defence of fair use under Section 107 of the U.S. Copyright Act, 1976.

Section 512 of the U.S. Copyright Act, 1976 is a comprehensive code that deals with due diligence and immunity framework in the U.S.A. The following activities are exempted from the copyright infringement liability.

- (i) Transitory Digital network communication [Section 512(a)]
- (ii) System Caching [Section 512(b)]
- (iii) Information residing on system or networks at the direction of users [Section 512(c)]
- (iv) Information Location Tools [Section 512(d)]

However, the intermediaries do not enjoy immunity in the following cases.<sup>15</sup>

- (i) The intermediary has content-specific knowledge regarding infringement but fails to remove the content as soon as it receives the notification. [§ 512(c)(1)(A)]
- (ii) The intermediary is aware of the circumstances from which the knowledge of the infringement is apparent. This can also be expressed as a “red flag” test where the online service provider is cognizant of the red flags indicating possible infringing activity. [§ 512(c)(1)(A)(ii)]
- (iii) The intermediary has the right or ability to control the infringing activity. [§ 512(c)(1)(B)]
- (iv) The intermediary receives the “notice of claimed infringement” and fails to remove it. [§ 512(c)(1)(C)]
- (v) The intermediary fails to remove the infringing content posted by the repeated infringer. [§ 512(i)]

Under the DMCA, the intermediary is required to remove the allegedly infringing content after receiving the take-down notice from the copyright holder. Any person affected by such a takedown has the option to send a counter-notice. While removing content, the intermediary must appropriately look into a fair use angle of the content so removed.<sup>16</sup>

In the European Union, the liability of the intermediary is determined by the domestic laws of the member countries. The legal framework with regard to the protection of the intermediaries from copyright infringement liability is determined by the European Union law spread across a number of directives. The first, in terms of date of enactment, is the E-Commerce Directive, which states that intermediaries shall not be liable when

- (i) the intermediaries work as mere-conduit<sup>17</sup>,
- (ii) automatic and temporary storage in the form of caching<sup>17</sup> happens and
- (iii) the intermediary provides storage of information requested by the users of the service.<sup>17</sup>

To avail of the exemption from the liability for hosting illegal content, the intermediary is required to establish that it does not have knowledge of

illegality and, upon gaining such knowledge, it has expeditiously disabled access to the content. This particular provision applies to the posting of any illegal information, including copyright-infringing content. Thus, when the content allegedly violates third-party copyright, the E-commerce Directive requires the intermediary to show that it lacked actual knowledge and acted expeditiously by disabling access after gaining knowledge.<sup>17</sup> To determine the liability of an intermediary a distinction is required to be drawn between actual knowledge and mere knowledge. In general, an intermediary attracts no legal liability where it has mere knowledge of infringement.<sup>18</sup> Furthermore, to impose liability on an intermediary providing hosting services, active hosting is distinguished from passive hosting. An intermediary is absolved from liability when it provides passive hosting. Clarifying the position, the Grand Chamber in YouTube/Cyando (C-682/18) and (C- 683/18). has stated that

“Article 14(1) of Directive 2000/31/E.C. 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 (‘Directive on electronic commerce’) must be interpreted as meaning that the activity of the operator of a video-sharing platform or a file-hosting and -sharing platform falls within the scope of that provision, provided that that operator does not play an active role of such a kind as to give it knowledge of or control over the content uploaded to its platform.”

Following the E-Commerce Directive, the European Union enacted a comprehensive law that harmonises the different aspects of copyright. The directive titled - DIRECTIVE 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (herein referred to as Infosoc Directive) contemplates that temporary reproduction of a work by an intermediary shall not be construed as an infringement of copyright where such reproduction is transient or incidental in nature and forms an integral and essential part of the technological process of transmission. This immunity shall be available if it has no independent economic significance.<sup>19</sup>

In 2019 the European Union came out with the latest directive, namely the Copyright in the Digital Single Market Directive (DIRECTIVE 2019/790) (CDSM), *prima facie* Article 17 insists the intermediaries to obtain a prior authorisation before

communicating any copyrighted content. Non-compliance with this norm will make an intermediary liable for infringement of the right of communication to the public (including the right to make the content available to the public) belonging to the copyright owner unless the following measures are taken.<sup>14</sup>

- (i) It must establish that it had made the best endeavour to obtain prior authorisation but failed.
- (ii) It undertook a filtering measure in accordance with the high industry standard to keep unauthorised copyrighted content from being communicated to the public. Notably, this provision imposes a filtering obligation on the intermediary.<sup>20</sup>
- (iii) Lastly, the intermediary is required to act expeditiously to disable access to copyrighted content after receiving appropriate notice from the right holder.

An analysis of Article 17 of the CDSM shows that it has derogated the liberty that intermediaries enjoyed under the E-commerce Directive by requiring a priori authorisation or, in the absence of such authorisation, a strict filtration obligation. The filtration of legitimate content from illegitimate content requires the use of expensive technological measures that small market players may not be able to afford.<sup>20</sup> The filtering obligation might affect the Fundamental Rights available under the European Union as while filtering, the technology may innocuously remove legitimate content. This issue was raised in the *Republic of Poland v European Parliament and Council of the European Union*.<sup>21</sup> However, the court opined that the protections enumerated in Article 17 are enough to uphold fundamental rights and freedoms while maintaining a balance between the private rights of the copyright holder and the rights of the public.

### **Copyright Infringement Liability and Immunity of Intermediaries in Asian Countries- A Snippet View**

In the last decade, Asian countries witnessed a sharp rise in Internet usage. This growth of internet usage needed the enactment of a sound and robust regulatory regime. This necessitated countries like China, India, Japan, Thailand, Singapore, Taiwan, etc., to adopt legal norms to deal with intermediary liability and safe harbour under respective Information Technology and Copyright laws. This part of the paper undertakes a critical scrutiny of the domestic laws of various Asian countries to assess

their strength and weaknesses in light of the benchmark available in the U.S. and E.U.

### **China**

In China, the concept of joint and several liabilities is followed concerning intermediary liability. The provision that entails the above-noted position in China is Article 36 paragraph 3 of the law of Tort Liabilities. The provision is apparent while mentioning the extent of liability of intermediaries is that here, the intermediaries will be treated as the direct infringer if they fail to remove any infringing content immediately after obtaining the notification from any right holder whose rights have been infringed for the availability of the same in the platform. In China, there is no distinction between primary and secondary infringement regarding fixing liability on the intermediary. Therefore, the intermediaries must be vigilant so that no infringing content can be uploaded to their sites, thereby facilitating copyright infringement.

After a judicial interpretation in China, there was a lot of confusion, which stated that if the intermediary fails to remove the infringing material from the site after getting a notification, the intermediaries will be liable for the infringement.<sup>22</sup> Some lower courts failed to comprehend the interpretation. To address the issue, the State Council in China brought the Regulation on the Protection of the Right of Communication through the Information Network of the People's Republic of China, which deals with the safe harbour provision of intermediaries. The safe harbour provisions are provided in Articles 20,21,22 and 23, respectively. Article 20 immunises the internet service provider from liability in situations like the service of automatic access at the direction of the service recipient or if the internet provider provides the automatic transmission of work, performances and audio-visual recordings. Article 21 states that in uplifting the effectiveness of the internet transmission, the internet service provider obtains relevant work, performances, and audio-visual works; in that event, the internet service provider is also immunised from liability. Article 22 states that granting a safe harbour to the intermediary is necessary while providing information memory space, and Article 23 immunises the service provider who runs an Information Location Service. The above-noted safe harbour provisions are subject to certain conditions that need to be complied with by the internet service provider to avail of the safe harbour.

In 2022, the Hangzhou Internet Court delivered a judgment on the liability of the trading platform with regard to copyright infringement liability. The case usually involves the sale of NFT that contains copyright-protected art through a platform named BigVerse. It is observed in the judgement that the trading platform should be aware of and take reasonable measures to identify the authentication of the digital art that is the subject matter of the transaction. The Court held that the Safe harbour will not be granted to the E-Commerce platform BigVerse.<sup>23</sup>

It appears that China adopted DMCA-like provisions in the laws with the exception that when the infringer possesses knowledge, he or she becomes liable for direct copyright infringement. The Chinese liability regime appears to be a departure when examined from the U.S. position. In general, under U.S. copyright law, an intermediary, if at all, becomes liable, and the liability is for secondary copyright infringement. This unique Chinese position is also a remarkable departure from the other Asian countries where liability is imposed on the intermediaries under the theories of secondary copyright infringement.

### India

In India, the Information Technology Act, 2000 (IT Act, 2000) primarily states the provision of exemption from liability of intermediaries. Apart from this, the Copyright Act, 1957 also deals with intermediary liability concerning copyright infringement. Section 79 of the IT Act, 2000 states that an intermediary shall not be liable for any third-party information, data or communication link made or hosted by the third parties. The intermediary will only provide access to a communication system. The feature of only mere-conduit is evident from Section 79, where it has been stated that 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

Apart from the safe harbour provision, there are two exceptions. First, if the intermediary has conspired, abetted or induced, whether by threats or promise or otherwise, in committing the unlawful act, they will not be absolved from the liability.<sup>24</sup> Secondly, there is a provision on takedown notice, which states that if the intermediary fails to remove any information, data, or communication link after getting notice in the form of government notification

or court order, the intermediary will become liable.<sup>24</sup>

The Copyright Act, 1957 contains two provisions that exempt the intermediaries from liability in case of copyright infringement in the form of sections 52(1)(b) and 52(1)(c). The two provisions were inserted into the Copyright Act, 1957 by the Copyright (Amendment) Act, 2012. The provision states that "transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public" and "transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration" shall not amount to copyright infringement.

Proviso to Section 81 of the Information Technology Act, 2000 states that the Information Technology Act, 2000 does not apply to the Copyright Act, 1957 in terms of not affecting the rights of the copyright holders.<sup>25</sup> However, in *Super Cassettes Industries Ltd v My Space Inc*, it was held that the Copyright Act, 1957 and the Information Technology Act, 2000 are standalone statutes after considering the proviso to Section 81.<sup>26</sup> Afterwards, the division bench made a harmonious interpretation of the two pieces of legislation.<sup>27</sup>

In India, the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rule, 2021 (IT Rules, 2021) contains the due-diligence provisions that an intermediary will follow to get a safe harbour. This subordinate piece of legislation also contains rules concerning copyright infringement. It states that a court order or a notification from the Government or other agencies is required to remove the infringed element. How far these rules can apply to the Copyright Act is a doubtful question because, being a subordinate legislation, IT Rules, 2021 might *ultravires* the Information Technology Act, 2000, considering it from the angle of proviso to section 81 of the Information Technology Act, 2000.<sup>28</sup> At the same time, Section 52(1)(c) of the Copyright Act, 1957, read with Rule 75 of the Copyright Rules, 2013, contains an express provision on the filing of the complaint by the right holder directly to the intermediary.<sup>28</sup>

### Japan

In Japan, the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (the "Act")

was enacted in 2001.<sup>29</sup> It deals with various kinds of liabilities of intermediaries in various circumstances, including copyright infringement. The Act applies to specified telecommunication service providers, including bulletin boards, hosting and access providers. The intermediaries in Japan cannot be held liable for copyright infringement unless the intermediary knows the same, knows the situation in which information has been distributed, and has reasonable grounds to obtain information on infringement. So, there is a knowledge-based liability for intermediaries in Japan. It is the duty of the service provider if it receives any information about the harmful content to send a notice to the allegedly infringing user immediately, and if the allegedly infringing user fails to give a reply as to why the content should not be removed, within seven days, then the intermediary will immediately remove the content from their site.<sup>30</sup>

Interestingly, Japanese law has a unique feature. Upon receipt of a takedown notice from the copyright holder, the alleged infringer is provided with seven days to put forward his or her explanation. If the internet service provider feels that the justifications of the alleged infringers are not sound, then it can block access to the website. When compared with the Indian position, it can be found that the responsibility lies with the copyright holder to obtain an interlocutory injunction order from the court within 21 days, impleading the alleged infringer as a defendant. In the event the restraint order is not obtained within the stipulated 21 days, the service provider can restore access to the blocked website. In Japan, the initial responsibility is on the alleged infringer, possibly due to Japan's inquisitorial legal culture. Conversely, in India, an adversarial system is followed.

### **Singapore**

The recent statute, Copyright Act, 2021 of Singapore, broadly discusses the safe harbour provisions available to intermediaries in case of copyright infringement. As per the Act, there will be limitations on the remedies available to the Network Content Provider (NCP) or Network Service Provider (NSP) in case of rights violation, provided that certain requirements are met.<sup>31</sup> The Court may issue an order to remove the specific infringing copy from the platform in question and to prevent access to it, provided that the prerequisites have been met.<sup>31</sup> An order to terminate the designated account from which the illegal copy was uploaded will also be sent to the

NCP or NSP.<sup>31</sup> If a problem occurs, one may impose onerous remedies, but the service or content suppliers could not get monetary relief.<sup>31</sup> In Singapore, NCP is in the form of transmission, and NSP is in the form of system caching, storage or locating information.<sup>31</sup> For every kind of NCP and NSP, detailed conditions have been provided under the law that need to be observed to get an exemption from the liabilities. When it comes to transmission, the NCP should not be the one to initiate it.<sup>32</sup> There should be an automated mechanism in place for the whole procedure.<sup>32</sup> The NCP will not choose the receivers of the copy, and the copy's contents should not be modified.<sup>32</sup>

Regarding system caching, the NSP does not significantly alter the content of the cached copy.<sup>33</sup> Instead, it responds to take-down requests by promptly taking appropriate action to delete or block access to the cached copy.<sup>35</sup> When it comes to storing and locating information, the NSP will be granted safe harbour if it can control any right infringement, does not profit from such violations, and acts quickly to remove or restrict access to the specific stored copy or locating information after receiving the take-down notice.<sup>33</sup>

The survey of the Singapore legal provision is very similar to the US DMCA provisions. NSP and NCP have almost the same conditions for availing of a safe harbour, which is more or less similar to India and some other Asian countries.

### **Vietnam**

The Vietnamese Government issued Decree No. 17/2023/ND-CP,<sup>34</sup> commonly known as the copyright decree, which mainly consists of 8 chapters with a total of 116 articles. It is a very lengthy decree on copyright in Vietnam. It has addressed many issues under the copyright law. Among them, one of the most important issues is the ISP protocols, which are there by which these ISPs can be protected under the safe harbour doctrine. The Vietnamese Copyright Decree requires the ISP to use technological means for copyright enforcement. ISPs are entitled to safe harbour in the following situations: hosting, caching, mere conduit, and other situations specified by the Government. An ISP must adhere to certain requirements to provide caching services. The most important requirement is that no information should be modified beyond what is required for the technological process. There are other requirements as well, such as the ISP operating in accordance with digital information access. Also, they should abide by

the rules mentioned in accordance with the manner followed by the industries. The ISP shouldn't be able to interfere illegally. After acquiring that the information at the initial source of the transmission has been deleted, they should delete or block any stored information. One requirement in the hosting scenario is that the ISP must be unaware of any material that violates copyright. It should immediately delete the material after it comes to its attention. If the ISP fails to observe the above-mentioned requirements, the ISP will not get any safe harbour protection under the Vietnamese Copyright Decree.

The Vietnamese Safe Harbour law is more akin to E-Commerce Directive 2000 in terms of having provisions on mere-conduit, catching service providers and imposing knowledge-based liability in hosting. However, Vietnamese law has no similar provision, such as taking a prior license as contemplated in Article 17 of the Copyright in the Digital Single Market Directive (DIRECTIVE 2019/790).

### Thailand

Section 32/3 of the Copyright Act of Thailand<sup>35</sup> states that a court order is required to remove the infringing material from the site in case of copyright infringement. The most important factor to be considered while filing for the petition by the copyright owner for getting the court order is that there should be reasonable evidence to believe that there is an infringement of copyright in the computer system of a service provider. Section 32/3 of the Copyright Act of Thailand embodies the detailed provision regarding the information that needs to be mentioned in the plaint. If the Court is satisfied with the information mentioned in the plaint after proper inquiry, then the Court shall immediately order the service provider to remove the alleged infringing activity. In the meantime, the copyright owner shall immediately take legal proceedings to suspend the infringing material from the service provider's computer system. Safe harbour protection will be available to the service provider if the service provider has played no role in controlling, initiating or ordering the copyright infringement and if the service provider has acted accordingly after receiving the court order.

Like India, Thailand requires a court order to enable the permanent blocking of the alleged infringing website.

This survey of the Asian regime of intermediary immunity for copyright infringement shows that the

DMCA and the E-Commerce Directives played a vital role in shaping the substantive and procedural framework. All the above Asian countries prefer granting immunity to the intermediaries. However, there are minute procedural differences in their approach. Interestingly, India has two separate legislations- The Copyright Act, 1957 and the Information Technology Act, 2000, and there exists an ambiguity as to the interplay and implication of these two legislations.

### U.S.- Prior due Diligence Model vis-à-vis European Union- Prior Authorisation Model- Which One is Ideal for Asian Countries?

The DMCA provisions concerning the safe harbour have influenced many Asian countries to adopt similar standards in their domestic copyright regime. The Asian countries that entered into a Free Trade Agreement with the U.S.A. had, as a part of their obligation, put in place safe harbour provisions in DMCA-like fashion to safeguard the intermediaries from possible copyright infringement liabilities. A survey of the Asian intermediary immunity regime shows that most Asian countries preferred the U.S. *a priori* due diligence model rather than the European Union's *a priori* authorisation model.

Compliance with due diligence measures by an intermediary provides an advantage in the event that it gets sued for copyright infringement by the right holder. Nothing in this U.S. model prevents the right holder from suing an intermediary, even if the intermediary has complied with the due diligence measure. In such a case, a compliant intermediary gets absolved from its responsibility after a protracted and expensive court case. It is needless to mention that the cost of litigation is normally higher than the cost of a priori license fees. By obtaining a license, an intermediary can protect itself from getting dragged into the court. Moreover, in the modern copyright world, the licenses are usually granted by the copyright societies and collective organisations, making it easier and convenient for the license seekers to obtain a legally valid authorisation. Undoubtedly, the transaction cost in such *a priori* license is much less than the risk of getting sued by a copyright owner and proving fair use.

The Internet is burgeoning with copyrighted content coming from both economically powerful as well as not so powerful creators. The big players in the copyright content market can afford to take the internet users and the intermediaries violating

copyright to the court, whereas the individual content creators are less likely to initiate copyright infringement action against the violators. In the prior licensing model, even these underprivileged individual content creators would get their due royalty revenue. Culturally speaking, in Asia, creative endeavours mostly come from solo authors and artists rather than organised corporate content creators. Undoubtedly, the prior licensing model of the European Union is compatible with the economic, cultural and historical matrix of Asia. In this context, it would not be illogical for Asian countries to adopt the *a priori* European licensing model to empower the underprivileged creators, foster creativity, and create a vibrant and robust competitive copyright content market.

The U.S. model has its own element of surprise and uncertainty as it lacks predictability and foreseeability as to the outcome that emerges from the copyright infringement litigations filed by the copyright owner against the intermediaries advancing the fair use defence. This prevailing ambiguity and unpredictability create hesitation for the intermediaries as well as the content owners. This has the serious consequence of possible market failure. Undoubtedly, the European Union- prior authorisation model stands on a better footing than the U.S. model in terms of economic and legal foreseeability.

Therefore, the Asian countries, in order to provide immunity to the intermediaries hosting and sharing copyrighted content, may adopt the following principles -

First, the intermediaries should take prior authorisation from the right holders for enabling them to reproduce, distribute and communicate the work to the public. Such authorisation must also provide appropriate permission to the users of those intermediaries to make lawful use of the copyrighted content for private and personal use.

Secondly, if the right holder is a member of the Collective Management Organisation (CMO), then the authorisation should be taken from the CMO.

Thirdly, when the copyright holder is not identifiable, the licensing regime for orphan works may be followed.

Fourthly, in exceptional situations, if it is impossible to obtain an authorisation either by the normal route or by the orphan work licensing route, the intermediaries may share copyright-protected content. However, they should comply with the take-

down notice immediately after receiving such notice. The intermediaries should employ filtering technologies compatible with the current industry standards to filter out unauthorised content.

### Conclusion

It is worth examining whether the Asian countries can develop a uniform approach for dealing with intermediary liability and immunity. Such an approach is desirable as Asian countries are emerging as the economic powerhouse of the world with matching technological advancements, including ICT. In Asia, strong economic cooperation through a conglomerate of states like the European Union does not exist, but the idea of forming Pan-Asian cooperation is not new.<sup>36</sup> Such attempts failed during the Second World War due to internal discord between the Asian countries, like in the case of Japan's proposal of the "Greater East Asia Co-Prosperty Sphere" and the Asian solidarity movements led by Netaji Subhas Chandra Bose and others.<sup>37</sup> The world has witnessed perhaps the worst conflicts, loss of human life and economic destruction among the European nations during the two World Wars. Despite such differences, the European countries realised the need for peaceful co-existence and mutual economic cooperation. Contrarily, in Asia, such a Pan Asian economic conglomerate has not come into being, though at the regional level, such organisations exist to foster economic cooperation and trade. The most successful regional organisations, such as ASEAN, BIMSTEC, SAARC, and SCO (Russia and Belarus are also part of this), are impacting the quality of life and economic power of millions of Asians. In Africa, there are regional societies concerning intellectual property rights like ARIPO (African Regional Intellectual Property Organisation) and OAPI (Organisation Africaine de la Propriété Intellectuelle) that are facilitating cooperation among the member states and also offer a unified Intellectual Property regime which results in innovation, economic growth and development. Practically, no real predicament exists in forming a Pan-Asian conglomerate in the model of the E.U. What is required is a change in the political mindset. As such, adopting a uniform Asian approach to deal with copyright issues in the ICT era is not a utopian proposition. Asian countries must come together to harmonise their business and trade laws, including intellectual property laws, and that would bestow the

Asian block with a strong bargaining power in the world platform. Few initiatives were taken on harmonizing the Intellectual Property law of the Asian countries, like the Association of Southeast Asian countries developed the ASEAN IPR Action Plan, which aims to harmonise Intellectual Property, RECP (Regional Comprehensive Economic Partnership), which consists of 15 Asian countries that address digital copyright issues; and certain bilateral treaties between the Asian countries that address IP issues. Despite all of these, there are still several disparities found in the substantive as well as procedural laws in different Asian countries. A substantive harmonised IP regime concerning the intermediary liability with regard to copyright infringement liability will bring legal certainty, and also the Asian region can equally compete in the global market.

The broad principles which can form the foundation of the uniform Asian approach have been elaborated in this paper. With necessary modifications to suit the domestic laws of the respective jurisdictions, these principles can be translated into a legislative framework to create a robust intermediary liability and immunity law. Harmonising the intermediary liability and immunity norms for copyright infringement in Asia is crucial for the smooth functioning of Internet usage, which surpasses the rest of the world's usage in all respects.

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