

# Unit 3: Rules and Regulations related to Service Provider's Liability

## 3

### UNIT STRUCTURE

- 1.1 Learning Objectives
  - 1.2 Introduction
  - 1.3 Internet Service Provider (ISP)
  - 1.4 Liability of Network Service Providers
  - 1.5 Internet Service Providers Liability in India
  - 1.6 Let's sum up
  - 1.7 Further reading
  - 1.8 Check your progress: Possible Answers
  - 1.9 Activity
- 

#### 1.1 LEARNING OBJECTIVES

After going through this chapter, you should be able to understand:

- Concept of Internet Service Provider
- Intermediaries Liability
- Liability of Service Provider and Section 79 of Information Technology Act
- Copyright Act and Intermediaries

#### 1.2 INTRODUCTION

Origin of internet has raised many atypical issues that do not find an express solution in the existing legal dominion. The atypical power of scattering engendered by the web, a power that ordinary users can utilize, has created a new and grinding challenge to the ability of copyright

holders to enforce their ownership of intellectual property. The chief threat to copyright holders by the internet's untangle information distribution is online piracy. The scope of this problem is hard to define in concrete terms. Though the damage of online piracy is hard to evaluate in monetary terms, a driving motivation to protect the copyright holder remains. The widespread and open copyright abuse is feared and will a systematic cultural disregard for the author's intellectual property rights.

### **1.3 INTERNET SERVICE PROVIDER (ISP)**

One of the salient features and equivocal issue associated with the fast-developing online industry is the liability of services providers are gateway to the world of cyberspace. They provide online access to individuals, educational, institutions, and government agencies. Those entities include online service providers, those who provide content through networks in addition to internet access, which is provided through the same networks and internet service providers who provide direct access to the internet and usually have content provided in direct location. The service providers are commercial and non- commercial entities that connect users to the internet, provided the user has access to the necessary hardware for this interface, namely telephone line and, modern and a personal computer.<sup>127</sup>

The liability of the service provider for copyright infringement can be fixed only when his position, powers and limitations are clearly understood. The Internet began as a closed network between government research laboratories and universities and colleges. As universities and colleges began giving Internet access to their faculty and other employees, ISPs were created to provide Internet access to those employees at home and elsewhere. The first ISP began in 1990 as The World, based in Brookline, Massachusetts.

Individual customers and businesses pay ISPs for Internet Access. ISPs are interconnected to one another at network access points. In turn, ISPs pay other, larger ISPs for their Internet access, which in turn pay still other ISPs. This cascades multiple times until transmissions reach a Tier 1 carrier, which is an ISP capable of reaching every other network on the Internet without

---

<sup>127</sup> B. Rowe, D Wood, D Reeves, and F Braun, "The Role of Internet Service Providers in Cyber Security", Institute for Homeland Security Solutions, Applied research\* Focus result, 2011  
<[http://sites.duke.edu/ihss/files/2011/12/ISPProvided\\_Security-Research-Brief\\_Rowe.pdf](http://sites.duke.edu/ihss/files/2011/12/ISPProvided_Security-Research-Brief_Rowe.pdf)>

purchasing IP transit or paying settlements. However, it is difficult to determine the status of a network because the business agreements to pay settlements are not made public.

#### 1.4 LIABILITY OF NETWORK SERVICE PROVIDERS

*According to section 79, of the IT Act*<sup>128</sup> For the removal of doubts, it is hereby declared that “no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.”

Explanation.—for the purposes of this section,—

- (a) "*network service provider*" means an intermediary; (b) "*third party information*" means any information dealt with by a network service provider in his capacity as an intermediary;
- (b) This section seeks to restrict the liabilities of a network service provider in certain cases. Meaning of the term “network service provider” (NSP): Section 79 says that an NSP is an intermediary.

#### *The IT Act has defined the term “intermediary” -*

According to *Section 2(1)(w) of the IT Act* "*intermediary*" with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message;

An NSP, in respect of a particular electronic message, therefore has the following characteristics:

1. It receives the message on behalf of another person, or
2. It stores the message on behalf of another person, or
3. It transmits the message on behalf of another person, or
4. It provides any service with respect to that message

---

<sup>128</sup> (Cc.iitd.ernet.in, 2020)

<<http://www.cc.iitd.ernet.in/misc/liability-network-service-providers.pdf>> accessed 24 April 2020.

The term “*electronic message*” has not been defined in the IT Act. The UNCITRAL Model Law on E-commerce defines a data message as “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”.<sup>129</sup>

Note: The IT Act has been based largely on the UNCITRAL Model Law on Ecommerce.

The IT Act has inserted *section 88A into the Indian Evidence Act*. This section relates to an electronic message forwarded through an electronic mail server. After considering the definition of data message under the UNCITRAL Model Law and the context of electronic message under section 88A of the Indian Evidence Act, it may be concluded that the term NSP is a narrow term that relates to electronic message service providers only (such as email service providers). It does not apply to other service providers such as search engines, auction websites etc. Even for Internet Service Providers (ISP), the benefits of this section would extend only to the email, voicemail, telephony etc services provided by them and not to the Internet connection services offered by them. However, this section must be read in conjunction with *section 85 of the IT Act* that relates to liabilities of companies. This is discussed in the next chapter of this book.

The restrictions on the liabilities of NSPs. An NSP is not liable for any third party information or data made available by him if:

1. The NSP proves that the offence or contravention was committed without his knowledge, or
2. The NSP proves that he had exercised all due diligence to prevent the commission of such offence or contravention.

The important terms used in this section are: Knowledge implies “clear perception of a fact” or “*specific information*”. Liability of ISPs in India In respect to ISPs in India, their liabilities are also determined by the License for Internet Services based on guidelines dated 24th August, 2007. The license as applicable on 30th October 2007 is provided in the CD ROM accompanying the ASCL publication titled “*Fundamentals of Cyber Law*”.

*According to clause 33 of this license:*

---

<sup>129</sup> H E Pearson, “Liability of Internet Service Providers”, 1996  
<<http://www.leginetcy.com/articles/Liability%20of%20Internet%20Service%20Providers.pdf>>

1. ISPs must prevent unlawful content, messages or communications from being carried on their network. This includes objectionable, obscene, unauthorized and other content.<sup>130</sup>
2. Once specific instances of such content are reported to the ISP by the enforcement agencies, they must immediately prevent the carriage of such material on their network.
3. ISPs must ensure that content carried by them does not infringe “international and domestic cyber laws”.
4. The use of ISP networks for anti-national activities would be construed as an offence punishable under the Indian Penal Code or other laws.
5. ISPs are required to comply with the IT Act provisions. They are responsible for any damages arising out of default in this compliance.
6. ISPs must ensure that their networks cannot be used to endanger or make vulnerable a networked infrastructure.
7. ISPs must ensure that their services are not used to break-in or attempt to break-in to Indian networks.
8. ISPs must provide, without any delay, all the tracing facilities to trace nuisance, obnoxious or malicious calls, messages or communications transported through their equipment and network. These tracing facilities are to be provided to authorized officers of Government of India including Police, Customs, Excise, Intelligence Department officers etc.
9. ISPs must provide necessary facilities to the Government to counteract espionage, subversive acts, sabotage or any other unlawful activity.

### **1.5 INTERNET SERVICE PROVIDERS LIABILITY IN INDIA**

In India, the law applicable to the infringer swing upon which part of law deals with that certain infringement. Therefore, due to the lack of such law, the Copyright Act and the Information Technology Act includes the liability of ISP's:<sup>131</sup>

---

<sup>130</sup> What is an Internet Service Provider (ISP)? - Definition  
<<https://www.techopedia.com/definition/2510/internet-service-provider-isp>>

- ***Copyright act 1957***

As per ***Section 51(a) (ii) of the Copyright Act;***

“the Indian Copyright Act, the act of infringement is when, a person without any license by the registrar or the owner of the particular copyright, does an act that is in the contravention of the conditions of a that license or condition imposed by a competent authority under this Act permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he is unaware as and had no reason to believe that the particular communication to the general public would result in copyright infringement.”

Nowadays the Internet service providers, instruct their servers transmit and store their users' data across the network. This act of ISP's helps them to hold any third party liable in case of any infringement. In order to be liable for the infringement, it is very necessary that the ISP should benefit financially from it. The ISP's earn even if they offer some copyrighted illegal material because of the advertisements that come along with it. Therefore, an ISP can be held liable not only when they transmit such infringed material but they are liable even if they store it.

- ***Criminal Liability***

An ISP can be held criminally liable when he does an act of infringement or abets infringement of:

(a) the copyright in a work, or

(b) any other right conferred by this Act, If a person does such an act than the Copyrights Act provides for the punishment to be given to him, i.e of imprisonment which may extend to one year, or with fine, or with both.[1]

However, the Copyright Act clearly states that the ISP can be held liable only in the case he was unaware infringing material stored or being transmitted through their servers. This provides an exception to the liability.

- ***Information Technology Act, 2000***

---

<sup>131</sup> Liability of Network Service Providers

<<http://www.cc.iitd.ernet.in/misc/liability-network-service-providers.pdf>>

**Section 79 of the Information Technology Act** states the ISP (a Network service provider in the case of this act) as an “Intermediary”, which is defined as “ any person who on behalf of any other person receives, transmits or stores any message or provides any service with respect to any message.”[2] This section also provides that, no ISP can be held liable if he proves that he was unaware of the infringement that was caused by the third party that he had exercised all due diligence to prevent the commission of such offence.<sup>132</sup>

Therefore, the ISP can get away from being liable for the copyright infringement if it is proved under this section[3]

- (a) That the ISP was unaware of the infringement,
- (b) That he took all the due diligence to prevent such infringement.

However, data has passed through an ISP’s servers or stored in them, that is likely to infringe the copyright of another, it is considered that such ISP had to have ‘knowledge’ of such data and he has the duty to take appropriate measures to prevent such infringement. In such a case, the ISP cannot take a defence that he was unaware of such infringement.

A person is said to have done an act with due diligence when in the layman’s terms he had done that act or prevented an act by reasonable standards expected out of a prudent person who is said to have the knowledge about such illegal activity.[4]

#### **- Drawbacks of Copyright Act**

- (a) The IT Act provides wider scope to the authorities to harass ISPs in matters where their liability is the question.
- (b) Which actions can be termed as done with ‘due diligence’ is not defined anywhere in the act.
- (c) Who is an ISP? The answer to this question is not given under the IT Act. Also, the IT Act does not provide for the liability of the ISP. The liability of ISP is as same as for anyone who is simply a communication carrier.

---

<sup>132</sup> Network Service Providers Not to be Liable  
<<https://meity.gov.in/content/network-service-providers-not-be-liable-certain-cases>>

There is an urgent need to incorporate certain laws or bring amendments in the acts because the absence of specific laws regarding the liability of the ISP in the Indian Law results in the ISP's escaping the liability in case of infringement. In order to make way for resonant legislation with regard to ISP liability in India, it is essential to label some of the key subjects mentioned hereunder;

- a) There is an acute need to provide a definition of Internet Service Provider. Unless it is done, it would always create confusion as to who can be put under the liability. It is also important to define “due diligence”
- b) Effective tools like DCMA can be used. Various effective measures should be adopted so that the liabilities of ISP's are clearly identified.<sup>133</sup>
- c) It should be made sure that, the Information Technology Act makes it obligatory for ISPs to terminate services of subscribers who frequently violate.

## 1.6 LET'S SUM UP

In this chapter, we have studied the concept of Internet Service Provider along with the liability of network service provider and provisions pertaining to it. Finally, we have ended our discussion with Internet Service Provider's liability in India and the relation between intermediaries and Copyright Act.

## 1.7 FURTHER READING

- Suresh.T.Vishwanathan., “*The Indian Cyber Law*”, 1<sup>st</sup> Edition, 2000, Bharat Law House, New Delhi, p.96.
- Prof.S.R. Bhansali., “*Information Technology Act, 2000*”, 1<sup>st</sup> Edition, 2003, University Book House Pvt. Ltd, Jaipur, p. 218.
- Nandan Kamath., “*Law Relating to Computers, Internet and E-Commerce*”, 2<sup>nd</sup> Edition, 2000, Universal Law Publishing Co.Pvt.Ltd, Delhi, p. 2.

---

<sup>133</sup> Copyright Infringement And The Liability Of Internet  
<<https://blog.ipleaders.in/copyright-infringement-liability-internet-service-providers/>>



- Rahul Matthan., “*The Law Relating to Computers and the Internet*”, 2000, Butterworths India, Delhi, pp. 428-429.
- Raman Mittal., “*Online Copyright Infringement Liability of Internet Service Providers*”, 46 JILI (2004), p. 289.

<b>1.8 CHECK YOUR PROGRESS: POSSIBLE ANSWERS</b>
--

### **1. What is Internet Service Provider?**

They provide online access to individuals, educational, institutions, and government agencies. The service providers are commercial and non- commercial entities that connect users to the internet, provided the user has access to the necessary hardware for this interface, namely telephone line and, modem and a personal computer.

### **2. Define ‘Intermediary’ under IT Act?**

According to section 2(1)(w) of the IT Act "intermediary" with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.

### **3. What are the characteristics of NSP?**

An NSP, in respect of a particular electronic message, therefore has the following characteristics:

- It receives the message on behalf of another person, or
- It stores the message on behalf of another person, or
- It transmits the message on behalf of another person, or
- It provides any service with respect to that message.

### **4. What is the liability of the ISP under Copyright act?**

As per Section 51(a) (ii) of the Copyright Act, “the Indian Copyright Act, the act of infringement is when, a person without any licence by the registrar or the owner of the particular copyright, does an act that is in the contravention of the conditions of a that licence or condition imposed by a competent authority under this Act permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement

of the copyright in the work, unless he is unaware as and had no reason to believe that the particular communication to the general public would result in copyright infringement.”

### **1.9 ACTIVITY**

Explain the liability of Internet service providers in India with an illustration or case study. (800-1000 words)