

Liability of ISPS for Content Hosted by Them

Article by: Nasir Ayyaz

Our society has now evolved as an Information Society. Now the paper based newspapers are being replaced by the dynamic websites, which are sometimes being managed by intelligent agents. Where at one hand where this evolution has brought us the knowledge explosion and now access to information is easier than ever before, on the other hand new issues have also emerged and legislator is confronted with new challenges. One of these issues is the question regarding liability of intermediaries (ISPs) for the infringements over the internet.

There are no boundaries and anything which is published on internet becomes worldly public the next moment. This ease of worldwide publication has invoked new threats to the society as well. It has disturbed the whole system of copyrights, civil liberties, protection against ethnic and religious exploitation, law of defamation, child pornography and cyber-terrorism. In such a situation it may not be easy to let ISPs go without any liability for the material hosted on them. However, at the same time it may also not be an easy task for the ISPs (even if they want to do so) to keep a check on all the materials hosted with them. The situation becomes even more trivial when it comes to territoriality of law. The situation is yet to be addressed by the legislator in Pakistan. This article is an attempt to highlight the issues concerning the liability of ISPs consequent to the material hosted by them and remedies adopted by the Europe and America.

What is an ISP: In general Internet Service Providers (ISP) perform various functions and offer a variety of services like access to internet, hosting of information on internet, network services etc. EU Directive 2000/31/EC has defined service providers as any natural or legal person providing information society services. The term "information society services" is further elaborated in Article 1(2) of the Directive 98/34/EC as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. However, for the purposes of this article only the aspect regarding hosting of information on the internet will be discussed.

Nature of Liability of ISPs:

It is important to understand that ISPs are usually not a direct beneficiary of the crimes/civil wrongs committed by their subscribers. They are usually remunerated for their services regardless of the content published over the internet.

There can be two instances of liabilities for the material hosted on internet: i. Criminal Liability:

Criminal liability of ISPs may arise out of the crimes committed over the internet. These may include child pornography, cyber-terrorism, infringement of copyrights etc.

ii. Civil Liability:

Civil liability refers to instances where ISPs may be sued by private persons or organizations for infringements of their civil rights. Instances of civil liability may include an action for defamation, copyright infringement etc.

Both criminal and civil liabilities have their own requisites, which sometimes also vary in a great deal for specific wrongs.

In order to constitute criminal liability two elements are very necessary to be there:

i. "Mens Rea" : Mens rea refers to a guilty mind. In order to constitute a person liable for a criminal wrong it is important to establish that the act was done with an intent to do it in a harmful way. However, the requirements to establish "mens rea" vary according to the definition of wrong. It purely depends on the ingredients of a specific crime that what may constitute mens rea. It ranges from an act done recklessly to the clear dishonest intentions.

ii. Actus Rea: Along with a guilty mind the presence of actual act is also necessary. This act can be an act of abetment or helping and aiding a crime or can be actual commission of the crime.

Unlike a criminal act, a tort does not require the presence of guilty mind and it may be a tort may sufficiently be proved if the commission of an act falling under the definition of a tort (or a civil wrong) has been proved.

Of course, there always exist the exception to both criminal and civil wrongs and one has the defenses warranted by law. Like an act done in self-defence or contributory negligence etc.

A detailed discussion of each wrong is necessary as to decide the question of imposition of liability on ISP in each respective case. However, this is not the aim of this article and the author shall endeavor to discuss the question of holding ISP liable from its jurisprudential point of view. During the discussion reference will also be made to the EU and American laws on the subject.

Requisite for Imposing a Liability on an ISP:

Responsibility follows liability and liability arises out of responsibility. In order to impose a liability, it is necessary to

decide whether ISPs can be assigned the responsibility of checking the material hosting with them. Where means are not within reach of the subject, the responsibility automatically gets frustrated. Therefore, this responsibility is to be within the powers and limitations of ISPs.

The question implies a consideration of economical, technological as well as social aspects of the same.

Economical Aspects: Information over the internet is very dynamic and the owner of websites are at liberty to change the contents every moment and in most of the cases it also happens so. Secondly the size of the information hosted with the ISP is in terra bytes and it may scrutinize several months. Even if the ISPs higher enough human resource to keep a track of ever changing information over the internet (although it is next to impossible), the cost of the same is going to touch sky. The burden will automatically going to be shifted to the consumer and thus ultimately resulting in an obstruction to free flow of information.

Technological Aspects: ISPs are not yet equipped with requisite technology to avoid the violations over the internet. This requires high-tech language and image processing and surely the technology is so far not that advanced to cop with the problem by embedding technological measures in the servers of ISPs.

Social Aspects: By assigning a responsibility to ISPs to monitor the content hosted with them, we may empower ISPs with an unjustified power of censorship and ISPs may ultimately get into a position from where they can regulate the information over the internet according to their own wishes and whims. These ISPs may become judicial institutions while deciding which information is to be published and which is not. Secondly, the flow of information over the internet may become very slow and ultimately result internet as a static world and society thereby lose its interest in the same causing the whole web to fall down. It is important to note here that the internet is totally different from paper world where publishers can easily scrutinize the contents of publication. Internet is meant to be a dynamic world where information is updated every next moment. Without this ability internet will no more be of interest.

In view of the above discussion it is very clear that we cannot assign this responsibility to ISPs in this regard and we have to find different solutions while compromising with the situation.

What is the Basic Idea: One point to start the process of thinking can be with the question, what we really want. Is this the imposition of liability on ISP what we really want. Is this a goal or a mean to achieve some other more specific goal?

This question maybe differently answered by different stakeholders. From the perspective of copyright owners, the answer is simply a "YES". Because they want to be compensated for the damage caused to them by the unauthorized publication of copyrighted material over the internet where copying is just a matter to on click. Usually the person actually publishing the copyrighted material over the internet is an ordinary person who is not so wealthy to compensate the loss done to the owner of copyrighted material and therefore, the copyright owner will be more interested in suing the respective ISP who is usually a rich company and much can be recovered from it.

However, the idea is not to hold ISPs liable but to avoid commission of offences/wrongs over the internet. Holding ISPs liable is not an end to achieve but a mean to achieve other ends. So in this situation we must have to consider other possible solutions to the problem as well and if we fail to find any other possible solutions then it may be our final resort because law has to provide protection to the rights granted by it. However, in author's opinion there exist certain solutions to this problem, which may provide adequate level of security to all the stakeholders without adversely affecting the freedom of expression and the ultimate theme of internet.

Possible Types of Liability of ISPs:

In view of the above discussion following can be the possible options before us. These options were considered in during the passing of Digital Millennium Copyrights Act. This article is focused only few main points of the discussion in this regard.

i. **Strict Liability:** According to Strict Liability criteria, ISPs may be held responsible for all the material hosted with them irrespective of their level of knowledge. One argument in support of imposition of strict liability can be that the ISPs are remunerated for the services provided by them and therefore, like all the other big publishers and distributors are under a responsibility to review the material hosted on them. However, the argument against the imposition of strict liability can be that the situation of ISPs is very different from the distribution companies as ISPs are dealing with the electronic environment where information is changing every second and it is not possible to review this changing information.

ii. **Vicarious Liability:** Vicarious liability can be defined as the liability imposed on a defendant in the circumstances when he had the right and ability to supervise the infringing activity and had direct financial gain from the same. The imposition of vicarious liability is hit by the argument that there does not exist any employer servant relationship between the subscribers and ISPs and furthermore, that the ISPs are remunerated for their services irrespective of the content of the service i.e. ISPs are not directly benefited (besides those special cases where an ISP is itself owns a particular website) from the activities performed by the subscribers.

iii. **With Fault Liability:** This is an instance where an ISP has the knowledge about the infringing material. There are mainly two different standards of knowledge constructive knowledge and actual knowledge. ISPs being the host of the

infringing material are presumed to have constructive knowledge of the material so hosted. Therefore, ISPs argue that the standard of knowledge to be applied must be "actual knowledge".

iv. No Liability: The fourth option in this regard can be no liability. In such case, ISPs may not be held responsible for an infringing activity even if they have the actual and informed knowledge of the same.

EU Law:

Article 14 of the said Directive regulates the liability of the service provider for the information stored on them as under:

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Information Society Services are defined in Directive 98/34/EC as: 2). "service": any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition: - at a distance": means that the service is provided without the parties being simultaneously present, - by electronic means": means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means, - "at the individual request of a recipient of services": means that the service is provided through the transmission of data on individual re

It is interesting to note here that even if the service provider may have the knowledge of the illegal activity or defamatory material, it may not be held responsible if the illegal activity has been removed or access to information has been disabled.

Furthermore, under Article 15 of the same directive, the member States are also debarred from imposing any general liability on ISPs to monitor the content hosted with them.

American Law-Digital Millenium Copyright Act:

In America, the liability of intermediaries over the internet is regulated by Digital Millenium Copyright Act of 1998

Section 512(c) limits the liability of service providers for infringing material on websites (or other information repositories) hosted on their systems. It applies to storage at the direction of a user. In order to be eligible for the limitation, the following conditions must be met:

o The provider must not have the requisite level of knowledge of the infringing activity. o If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity. o Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.

In addition, a service provider must have filed with the Copyright Office a designation of an agent to receive notifications of claimed infringement. The Office provides a suggested form for the purpose of designating an agent (<http://www.loc.gov/copyright/onlinesp/>) and maintains a list of agents on the Copyright Office website (<http://www.loc.gov/copyright/onlinesp/list/>).

The terms "actual knowledge", "information society services" and "expeditiously" have their own judicial meanings and require separate and detailed elaboration. However, the space does not allow author to go into the details of these terms. But it is note worthy that the idea behind both the legislations is same and that is to hold ISPs liable only if they have the "actual knowledge" of the infringing material and fail to disable access to same expeditiously.

The actual knowledge criterion as opposed to constructive knowledge does not generate much ambiguity, as it is a well-established principle within the member states that actual knowledge means that the defendant actually knew about the infringing material. It is also pertinent to mention here that the actual knowledge criteria may also shift the burden of prove on the plaintiff, where plaintiff may be required to prove the actual knowledge of the ISP about the infringing activity or information.

While concluding the above discussion it can be said that the limited liability imposed on ISPs is well-justified and

serves the purpose without obstructing the free flow of information and damaging the theme of internet. However, one must not forget that nothing is permanent in this dynamic world except change, and therefore, as the technology emerges new solution to the said problem may be proposed. One aspect of which can be embedding of technology into the ISPs servers in order to detect the copyrights infringements by the material being hosted on them and therefore, restricting the publication of the same. The digital certificates may also be considered as a useful mean to avoid infringements in this regard.

Reference:

Please see "Liability of Intermediaries for Copyright Infringement in the Case of Hosting on the Internet" by Jonina S. Larusdottir published in Scandinavian Studies in Law Vol.47 IT Law.

www.copyright.gov/legislation/dmca.pdf

<http://europa.eu.int/eur-lex/lex/en/index.htm>The Author is a law graduate presently studying LL.M. (IT Laws) at Stockholm University, Sweden. In addition to legal education author has also done M.Sc. in computer sciences. He is also a practicing lawyer in Pakistan and can be contacted at nasirayyaz@yahoo.com.