

ONLINE INFRINGEMENT OF COPYRIGHT AND INTERMEDIARY LIABILITY

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Abstract

The interrelationship of information and communication technology has made it possible to convert all phenomena into digitalized information which can be shared and exchanged by people all over the world. New developments taking place are often just seen as innovations for bringing people together with ever improving means of communication and in common parlance much of it is lost various jargons. The ability to distribute copyrighted work and content in digital form through internet enabled transmissions has brought new challenges to the protection of such content and information from unauthorized from use and copying.

Keywords: Communication Technology, Infringement, Copyright, Intermediary Liability, IPR

1. Introduction

Of all the achievements made in the twentieth century the development in information and Communication Technology and its subsequent proliferation to nearly all aspects of our lives remain most marked out and truly mesmerizing. It has not only created electronic market places with new opportunities and incentives for the users and non-users alike; but it has also sparked of new wave of apprehensions and challenges such as data protection, digital rights management and protection of intellectual property etc. The rapid developments taking place in ICT (Information and Communication Technology) has made it possible to convert all phenomena into digitalized information which can be shared and exchanged by people all over the world by means of computer network. All as this use of computer networks (inclusive of internet) proliferates further, a somber realization downs upon all that 'Technology is copyright industry's best friend and worst enemy.' Much depends on the way new facilities and technological innovations are used.

The widespread use of computer networks especially the post-to-technology (P2P) have made it feasible for recorded musical works and video files to be transferred over telephone lines from one computer to another. Today sitting in the comfort zone of their homes and offices a person of any age group can easily listen to, watch and download any music, movies or software and that too- remuneration. There developments have alarmed many copyright owners who fear their works will be freely disseminated over the so-called information Superhighway or Internet. Today there is no universally compatible, standard means of ensuring that the people who bring about the creative works-the artists, the musicians, the producers, and the distributors-get fair share of user's every time a user obtains their piece of their work.

The matter and mass of the internet is growing just like that of our universe by each passing day. Each new technology that has taken a new shape gives rise to a new set of legal discourse, leading to a flux in our laws. The digital platform like that of the internet is a place where we encounter a never-before-seen interface of various facets of our lives, like that of privacy etc. and all of it ultimately poses us with questions like what rights are available to us and what aren't. Internet undoubtedly has been a free space, nurturing ideas since its inception. So, with ideas come the notions of protection of them.

2. File Sharing Network: The Evolution of Peer-To-Peer Technology

Online file distribution was first effectuated through the client server model and then through three types of key P2P platforms: centralized indexing, local indexing and super node indexing.ⁱ Attempts at creating file sharing networks began in mid-1990s when programmers first began to toy with the idea of creating networks to handle mass distribution of copyrighted materials. The original networks were based on a pure "client-server" model, used most commonly to facilitate basics internet applications.ⁱⁱ Similar to the information available by accessing website a client server file sharing program simply allows the client to retrieve the result date of from the network. No data flows back put on network from the client however it was soon realized that such models were vulnerable to heavy traffic inflows and would collapse under mounting request to the server.

When the user subsequently runs the program, the software connects to other logged-in users and allows the user to search though other user's shared file for ones the user would like to copy. In this manner, members of the network are able to access and share files from another user all over the world. And this is the modern face of 'P2P Networking'. This hybrid scheme tries to capitalize on the performance advantages of the centralized indexing model without succumbing to some of the pitfalls to total decentralization.

The convergence of technological innovations such as MP3 audio compression high-speed internet connections: and peer-to-peer technology has changed the way music and other information is distributed in the digital age. Millions of users are now enabled to connect, share, and transfer make the sharing and downloading of music, film, and other media files so simple that even those with little Internet savvy have quickly adapted. But despite the obvious benefits, the fact remains that the copyright holders did not grant legal permission for the media to be shared. In file sharing, while users may have initially legitimately purchased media they are sharing; their rights in that work do not extend beyond their own personal use and certainly do not allow the user to keep a copy and also sell or otherwise transfer the file.

What makes the 'file sharing' so popular and yet so hated at the same is the acceptability it has amongst the new generation of net users. The argument that these networks only facilitate the piracy often overlooks one simple fact that –it is people's actions that constitute the piracy. Piracy requires pirates. Large numbers of people see file-sharing as permissible. Piracy would

drop off dramatically if enough people came to see file-sharing as morally wrong and acted on that belief. But the catch remains that would' enough people see file-sharing as morally wrong. At the end of the day the proponents of anti-piracy manures must remember that if file-sharers do not see the benefit of compliance, they do see the cost: By complying they lose the ability to use music in a way the seems natural to Internet users. The Internet after all, was originally meant as a tool designed precisely for this purpose. The gap between the legal and the social norm means that a large percentage of Internet users have not, and are unlikely to, internalize the prohibition that the music industry is trying to enforce. And in majority of cases enforcement will actually further reduce the perceived benefit of compliance.

It was possible to express this belief credibly in the early Napster days. Since record industry sales began their nosedive in 2001, however, one hears this viewpoint expressed. It is nevertheless worth motioning here because even if the rationale is now discredited, it may nevertheless have been formative in bringing about the permissive norm. This attitude transfers norms property applicable to physical objects to the realm of intellectual property. There are a sizeable lot who still feel that the concept of intellectual property rights actually dilutes real property rights, in that an intellectual property owner can actually limit.

3. Infringement of Copyright Laws

We have just seen that illegal digital file sharing is difficult to store because of this social norm held by the people that file sharing acceptable despite the existence of copyright laws. The Internet is unregulated and that is lack of regulation make the copyright industry vulnerable to the problems created by digital technology.

4. Copyright Problems Caused by Digital File Sharing

The widespread popularity of digital file swapping with its small cost of replication and distribution, has caused an uproar from the copyright industry. Today no other substantive area of law is faced with a greater challenge than copyright of musical composition and sound recordings in the modern age. It needs to be analyzed whether under the existing legal regime the rights of the copyright holders are effectively protected or not whether or current system of corporate law is capable to deal with the onslaught of file sharing. The question is important because file sharing technology may undermine the effective protection offered by copyright.

5. Legal Regime in USA

Article I, Section 8 of the U.S. Constitution gives Congress the power to grant exclusive rights to inventors and artists for the purpose of advancing science and the arts.ⁱⁱⁱ Federal copyright law is codified in Title 17 of the United State Codes.^{iv} The substantive law and federal judicial decisions are designed to protect the exclusive rights copyright owners have in their works and to provide remedies when the rights are infringed. These exclusive rights are enumerated in Section

10⁶ of the Copyright Act^v and the limitations on these exclusive rights are covered in the Sections 106. There are three principal ways to establish liability for copyright infringement.

- 1) Direct Liability
- 2) Contributory Liability
- 3) Vicarious Liability

Direct copyright infringement is covered in Section 50 of the Copyright Act.^{vi} A person directly infringes when, by his own actions, he violates one of the exclusive rights enumerated in Section 106 of the Copyright Act. A prima facie case of direct infringement requires a showing of ownership of the allegedly infringed material and “a demonstrated violation of at least one exclusive right granted to copyright holder under 17 U.S.C. 106.

Another potent legislation to deal with the challenges of digital technology in Digital Millennium Copyright Act (DMCA) passed in 1998, the DMCA addresses the liability of the online service and Internet access providers for copyright infringements occurring online. Sub-Section 512(a) of the DMCA exempts qualifying “service providers” from monetary liability for direct, vicarious, and contributory infringement and limits injunction relief.^{vii} Sub-Section 512(a) limits liability “for infringement of copyright by reason of the service providers transmitting routing or providing connections for material through a system or network controlled or operated by or for the service provider” if five conditions are met. These are what are called as the ‘safe harbor provision’ of the Digital Millennium Copyright Act (DMCA) are one possible argument for legality of P2P networks. The claim, therefore, is that Sub-Section 512(a) protects their core function of “transmitting, routing and providing connections for sharing of the files its user choose.” Although the DMCA is certainly a step in the right direction in terms of updating American copyright law in order to better address the piracy issues that will exist as technology continues to improve, it still does not solve the problems that the file sharing on are diffuse, private level presents. Furthermore, while the DMCA takes aim at digital piracy, it does not focus on the issue of individuals who are infringing on a copyright without using unique circumvention technology to reach that goal.

6. Legal Regime In UK

The CDPA (Copyright, Designs and Patents Act 1988) creates a statutory property right with respect to various work of authorship. The property interest granted by the Act gives owners certain exclusive rights that differ depending on the type of work at issue. These include the right to copy the work; issue copies to the public perform, show or play the work in the public, broadcast the work or include it in a cable program service, make an adaptation of the work or do any of the above in relation to an adaptation.^{viii} The Act explicitly labels as an “infringement” the situation in which a person directly or indirectly does^{ix} or authorizes anyone to do that which the Act recognizes as the exclusive right of the owner.

The CDPA provides for a number of defenses under Chapter III that serve to exculpate uses of works that would otherwise represent infringements these exceptions include fair dealing for the purpose of research, private study, criticism, review and news reporting (Section 29-30); various educational uses (Section 32-36A) Jews in connection with library archives Section 37 to 44 or public administration Section 45 to 50. Thus, unless one of the available defenses is engaged, both parties involved in the sharing of a copyrighted file through a P2P network will be found to be infringing the applicable copyright interests at the very moment that the file is “shared” or that is, made available for download.

7. Legal Regime in India

The sharing of a file on a digital platform can lead up to two-way liability as we have seen above. In India the two liabilities i.e., liability of a sharer and the liability of an intermediary is dealt with two separate statutes. The former liability is dealt with by The Copyright Act^x and the latter by The Information Technology Act,^{xi} thus creating an interface of the two. The liability of the person who uploads the content would be in the direct contravention of The Copyright Act and the liability of the intermediary who provided the platform for such upload should be dealt with the provision of Information Technology Act. Just like the provisions in DMCA,^{xii} Section 79 of the Information Technology Act also provides some safe zones for the intermediaries, such as:

- A) the function of the intermediary is limited to providing access to a communication system over which information made available by 3rd parties is transmitted or temporarily stored or hosted; or
- B) 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
- C) see the intermediary observes due diligence while discharging his duties under this act and also observes such other guidelines as the central government may prescribe in this behalf.

8. Conclusion

One of the common proposals for how to end problems of online infringement off by sharing file is too user technology called ‘digital rights management’. Digital rights management allows entertainment industry to package their products in the ways that prevent purchasers, and subsequently third parties, from making undesirable use of the products. The advanced technology contained in the product allows the copyright owner to take control over how the purchaser handles the property. Although this type of programming may help decrease the problems associated with digital file sharing, digital rights management infringes on fair use and is too limiting as the solution to digital file sharing. In a more practical sense, digital rights management also is not the optimal solution to the file-sharing problem because of these reasons:

- 1) it is likely that there will be someone who can hack the protective fans and
- 2) it is likely that the public reaction towards digital right management strong arm tactics will ultimately harm the industry more than help it

Furthermore, the public is vocal in its aversion to digital rights management, and it cannot continue to make money by alienating its own customers. However, digital rights management still remains a viable model to be tried out to make blatant and cheap violation less attractive. The copyright infringement issues of the digital age know no borders. Because in infringing activity does not stop add jurisdictional boundaries, any agreement must be reached with an eye on the world as a whole. An international licensing body would serve this purpose. Once implemented, it would create a new environment for the planet's creative minds, and would foster artistic achievement to an extent never before reached. Educational initiatives, aimed at educating the public as a whole of the risks associated with infringing behavior, also serve as the practical solution to piracy. To be successful, the music industry must overcome the current consumer mind-set that there is nothing wrong with downloading music files-that is a victimless crime. The record industry should argue that fairness dictates that artist receive compensation for their work: the simplicity and general appeal of this argument should make the educational aspect effective.

End notes

ⁱ Andrew J. Lee, *MGM Studios, Inc. v. Grokster, Ltd. & In re Aimster Litigation* : A Study of Secondary Copyright Liability in The Peer-To-Peer Context 20 Berkely Tech, L.J 485, 491 (2005).

ⁱⁱ Quang Hieu Vu, Mihai Lupu, et.al., *Peer-to-Peer Computing- Principles and Applications* 11 (Springer, Berlin, 2010)

ⁱⁱⁱ The Constitution of United States. Article I Section 8 Cl. 8.

^{iv} The Copyright Act, 1976 17 U.S.C. 101-810 (2003).

^v *Ibid.*

^{vi} The Copyright Act, 1976 17 U.S.C. 101-810 (2003). S.501.

^{vii} 17 U.S.C. 107

^{viii} Copyright, Designs and Patents Act, 1988 (1988 c. 48) ss. 16,17.

^{ix} *Ibid.*

^x The Copyright Act, 1957 (Act14 of 1957)

^{xi} The Information Technology Act, 2000 (Act 21 of 2000).

^{xii} 17 U.S.C. 107.