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**MEMES, COPYRIGHT, AND INTERMEDIARY'S LIABILITY: WHAT NEEDS
CLARITY IN INDIA'S COPYRIGHT LAW**

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Abstract

Does the clause of Fair dealing mentioned under section 52 of the copyright act 1957 serve as an invitation for infringing someone's copyright under the pretence of trolling? A meme that basically contains images or videos for humorous manifestation is now not only limited to the promotion of ideas. Memes in present days are being extensively used for commercial purposes. This evolution of meme Vis-a-Vis with commercial purposes requires legal dissection in the light of copyright protection. However, one of the major arguments against the regulation of memes under the copyright act is memes constitute fair dealing and therefore exempted from the liabilities of copyright Infringement. Through this paper, we try to examine whether a meme can avail the defence of Fair dealing or not. If, it does not then who can be made responsible for such infringement? In light of this, we examine the liabilities of intermediaries that provide a virtual place for copyright infringement. These are the places where memes containing infringing content are uploaded, watched, and shared. However, In order to maintain the availability of the copyrighted work in the general interest of society, liabilities of intermediaries have not been fixed yet and are open to circumstances of a case. Inadequacy of intermediaries to regulate all the contents uploaded on their platform is also one of the factors that contributed to its ambiguities. Also, Protection of safe harbour though exempt these intermediaries for third party infringement, there are still certain grey areas like liabilities of intermediaries for making monetary gain from infringing contents are still unaddressed and require reconsideration. This paper is an attempt to clear all the ambiguities

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related to the position of copyright law and safe harbour protection for copyright infringement through a meme.

KEY TERMS – Meme, Fair Dealing, Commercial Use, Intermediaries, Safe Harbour

The terminology of Meme was first propounded by evolutionary biologist Richard Dawkins in his book *The Selfish Gene*. He described the term meme as "*a noun that conveys the idea of a unit of cultural transmission, or a unit of imitation.*"³ He conceptualized memes as "*the cultural parallel to biological genes, carrying information, being replicated and transmitted from one person to another through a form of Darwinian selection, and having the ability to evolve through random mutation, regardless of human fitness or survival.*" However, In the internet world, memes have been defined as an "*idea, behaviour, style, or usage that spreads from person to person within a culture,*"⁴ which often go viral in social media where the owner is not known or the person who started the trend is anonymous, where there is no publishing or self-regulation but only broad, insufficient community standards. Because of this anonymity or absence of any regulatory bodies or any person, most people consider the internet as a forum or a space that provides them a free pass to ride over someone else's intellectual labour and make it the source of their income.⁵ We have seen several examples where a memer without authorisation used the contents of the actual author without giving any credit to him. This vast usage and virility have raised a question about the applicability of memes in India's existing copyright regime.

APPLICABILITY OF MEMES UNDER INDIA'S COPYRIGHT REGIME

Copyright is a legal right of an author to control the use of their work. The underlying principle behind granting this protection is to protect the interest of the creator or author who put their intellectual labour to create something. If copyright is not granted then any person may copy such hard-earned work and rides over somebody else's intellectual labour which in result

³ Richard Dawkins, *The Selfish Gene* 192 (1976).

⁴ Thomas F. Cotter, *Memes and Copyright*, 80 Tulane Law Rev. 331–410 (2005), <https://heinonline.org/HOL/P?h=hein.journals/tulr80&i=351> (last visited Aug 30, 2021).

⁵ Paul Gil, *Why Would You Ever Createan Internet Meme?* LIFEWIRE, <https://www.liveabout.com/why-would-you-ever-create-an-intemet-meme-2483710> (last visited Aug 30, 2021).

prevent the actual author or creator from getting recognition as well as monetary compensations.

As per the Indian Copyright Act, 1957, Section 14 talks about the economic rights of the author that says “*copyright means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof*”⁶, While, section 57 talks about the moral rights.⁷ As per section 57, authors of a Copyrightable work have two types of moral rights. The first one is the right to paternity which entitled them to get acknowledged as an author and the second one is the right to integrity which entitled them to protect their work from any tampering or distortion.⁸

Memes have now become one of the prominent channels for the infringement of copyright. Memes that consist of artistic, musical, cinematographic, and literary works are being extensively used to run over the intellectual labours of others and promote copyright infringement.⁹ Upon examining the memes on economic rights, we find most of the memers without authorisation add songs, clips, images of movies to their memes without taking any prior consent and giving any due royalties to the author. Such kind of unauthorized usage affects the author’s exclusive rights to use the work and also prevents them to earn revenue over it. Similarly, if we examine moral rights, most of the memers also do not give any credit to the actual author. Sometimes they even distort the work and portrayed themselves as the real author. These kinds of practices again affect the author’s rights to protect their work and get themselves acknowledged as the author. Sometimes, memers deliberately distort a song or video to bring shame to the actual author. For an instance, we can take the example of Tony Kakkar’s song which was deliberately distorted by some of the meme channels to malign his image in public. In light of the above discussion, we can say memes directly contribute to copyright infringement and it’s high time to regulate it. However, copyright protection is not absolute. One of the major arguments against the regulation of memes under the copyright act is memes constitute fair dealing under section 52(1) of the Copyright Act 1957 and therefore exempted from any liabilities of copyright Infringement.¹⁰

⁶ Copyright Act 1957, Section 14.

⁷ Copyright Act 1957, Section 57.

⁸ *Id.*

⁹ Elena Elmerinda Scialabba, *A Copy of a Copy of a Copy: Internet Mimesis and the Copyrightability of Memes*, 18 Duke Law Technol. Rev. 332–352 (2020), <https://heinonline.org/HOL/P?h=hein.journals/dltr18&i=84> (last visited Aug 30, 2021).

¹⁰ Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA Entertain. Law Rev. 235–256 (2013), <https://heinonline.org/HOL/P?h=hein.journals/uclaetr20&i=247> (last visited Aug 30, 2021).

A meme that basically contains images or videos for humorous manifestation is now not only limited to the promotion of ideas. Memes in present days are being extensively used for commercial purposes. This evolution of meme vis a vis with commercial purposes requires legal dissection in the light of copyright protection.

Memers generally use songs and scenes from movies to make their memes more humorous and funny. Sometimes literary works like poems, stories are also added as a content to increase their reach. Here the question arises, are they entitled to use such copyrighted works? Most people argue that memers are entitled to use such work because they are using it under the concept of Fair dealing.

FAIR DEALING AS A DEFENCE

Fair dealing is one of the holy debatable topics and a widely used defence in the field of copyright. However, it is yet to be discovered when it comes to memes. Fair dealing is basically a statutory protection that provides certain defences to otherwise infringing activities. Section 52¹¹ of the Indian copyright act elucidates certain acts that shall not constitute copyright infringement.

The basic intent behind granting these exceptions is to make the work accessible to the public so that it can be used for the benefit of society. However, granting these exceptions should not be confused with a license to infringe the copyright. Good faith and non-commercial use are the two essentials components of fair dealing that ensure no work is used to pass off the intellectual labour of the actual author. The principle of fair dealing ensures that the objectives of any usage are within the statutorily defined purposes of private use, research, criticism, and review.¹²

The concept of fair dealing is not specifically defined anywhere and derives its notion from the principle of equity.¹³ As we refer to the observations of lord denning in the case of **Hubbard v. Vosper**, He observed, *“It is impossible to define what is fair dealing. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are*

¹¹ Copyright Act 1957, Section 52.

¹² Latha R. Nair, *How Fair Are the Fair Dealing Exceptions under Indian Copyright Law*, 2 Indian J. Intellect. Prop. Law 171–179 (2009), <https://heinonline.org/HOL/P?h=hein.journals/ijipl2&i=190> (last visited Aug 30, 2021).

¹³ *Id.*

*they altogether too many and too long to be fair?”*¹⁴ Therefore, there is no straight-jacket formula to interpret the doctrine of fair dealing and it is widely open to the facts and circumstances of each case. However, Upon analysing the concept of fair use which is a counterpart of fair dealing under US copyright laws, Section 107 of the United States Copyright Act, 1976 lists out four-factor tests to draw a line between bonafide and malafide use of a work. The four-factor tests are:

- *“The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*
- *The nature of the copyrighted work;*
- *The amount and substantiality of the portion used in comparison to the copyrighted work as a whole (de minimus non curat lex); and*
- *The effect of the use upon the potential market value of the copyrighted work.”*¹⁵

❖ HOW FAR DOES MEME STAND ON THE FOUR FACTORS TEST OF FAIR DEALING?

In light of the above discussion, it is clear that the concept of fair dealing does not give license to violate an exclusive right of the copyright owner. One cannot simply copy other’s work and claim refuge under the garb of Fair dealing.

Let us examine the above criteria in terms of memes to find out whether the defence of fair dealing is available to memes or not. First, if we consider the four-factor test.

Purpose of infringing use- The purpose behind infringement serves as one of the important considerations under the concept of fair dealing. The objective behind this factor is to identify the malafide purpose of the infringer to simply cash on the intellectual labour of an author from the fair bonafide use. This factor basically demarcates a line between commercial and non-commercial use of work. As per this factor if any copyrightable work is used on a non-profit basis for personal use or for the benefits of society then that will come under the defence of fair dealing. However, such defence is not available when work is used for commercial purposes.¹⁶

¹⁴ Hubbard v. Vosper, (1972) 2 Q.B. 84.

¹⁵ U.S Copyright Act 1976, Section 107.

¹⁶ Patel, *supra* note 10.

Upon applying this factor to the meme, it is easy to understand, a meme in recent days is not only limited to criticism, review, or joke rather it becomes one of the important tools of commercial advertisements. Everybody is aware about the influence of memes on consumer behaviours. Memes in recent days plays a great role in shaping consumer's minds towards particular products or services. Memers started exploiting this aspect of meme to earn monetary advantages. Nowadays memers started using copyrighted work in memes to promote or advertise one particular product or service.¹⁷ Recently, a meme surfaced into the market where memers used Divine's song "*Meme bana diya*" as content to promote some grooming products like beard oil, cream, etc. Considering such a great influence of memes in the commercial market, corporates also started using memes as a tool for non-competitive practices. They started using memes to defame their competitor's product. Sometimes they also used memes for product disparagement and comparative advertisements.¹⁸ We all have witnessed several memes where KTM's Duke Bike was portrayed less manly than Royal Enfield's Bullet.

Memers at present times do not make such memes only to attract comments or criticism rather they are involved in 'reach war' where they are in a race to add more and more such contents to increase their followers which in turn helps them to commercialize their pages and make them earn through advertisements.¹⁹ Hereby, considering above discussion, it is evident that the first factor of fair dealing is not applicable to memes.

Nature of copyrighted work- The nature of copyrighted work is also one of the important factors of fair dealing. It helps to determine what kind of work is copyrighted as society responds differently to the infringement of different kinds of works. For instance, if we refer to the work of current happenings like news or cricket scores. The nature of work informing current happenings to the public would provide a stronger reason to include it under the concept of fair dealing. On the other hand, the Infringement of creative work, such as a photograph, would be less likely to be excused by the courts. The reasoning behind this concept is to protect

¹⁷ Aidan Cole, *Council Post: More Than A Trend: Meme Marketing Is Here To Stay*, Forbes <https://www.forbes.com/sites/forbesagencycouncil/2018/07/19/more-than-a-trend-meme-marketing-is-here-to-stay/> (last visited Aug 30, 2021).

¹⁸ The good, bad and ugly truth: When ads become memes, Marketing & Advertising News, ET BrandEquity, <https://brandequity.economictimes.indiatimes.com/news/advertising/the-good-bad-and-ugly-truth-when-ads-become-memes/81177476> (last visited Aug 30, 2021).

¹⁹ The Copyright Conundrum of Memes in Social Advertising, Social Media Today <https://www.socialmediatoday.com/content/copyright-conundrum-memes-social-advertising> (last visited Aug 30, 2021).

the dissemination of work which is in the interest of society. This is the reason, there are no copyright subsists in news. However, if we examine meme on this factor, contents are not used in the meme to serve the interest of society. The contents used are driven only by the purpose of entertainment. Hence, discontinuance of any such usage of work in meme would not cause any specific loss to society.

The amount and substantiality of the portion- This factor of fair dealing helps to compare the amount of work copied and the actual work to find out substantial similarities. However, It is not the only size alone that matters, but also the substantive context of the excised portion of the copyrighted work.²⁰

As per this factor, if there are no substantial similarities between the works or there are more dissimilarities between the works or the use of the work is incidental in nature then it would come under the concept of fair dealing. However, it is noteworthy to mention here, this defence will applicable when due credit is given to the author. For an instance, we can say the use of one or two lines of a poem will not constitute infringement. However, irrespective of the amount of work copied, the person who uses that work is bound to protect the moral rights of the author. Defence of fair dealing would only apply when due credit is given to the actual author.²¹ Upon examining meme on this factor, it can be found that there are lots of memes that directly contain a substantial part of musical, artistic, cinematographic, and literary works without giving any credit to the actual authors of such work. Sometimes memers even copy other's work and portray themselves as real authors. There are lots of meme pages that post poems, shayaris of renowned authors under their own names and earn profit over it.

Effect of the use- The fourth factor deals with the effect of the use of copyrightable work in society. The work which is used solely for the purpose of personal use or the benefits of the society, less likely to affect the marketability and value of the original work in the market and hence prevail under the defence of fair dealing. Whereas, the work which has been used for commercial purposes, affects the value and marketability of actual work and hence, is less

²⁰ Timothy C Smith, *Towards A Consistent Test for Substantial Similarity Regarding Infringement of Copyrighted Aspects of Computer Programs*, 22 24 (1992).

²¹ Moral rights: can authors waive their special rights? Lexology (2019), <https://www.lexology.com/commentary/intellectual-property/india/saikrishna-associates/moral-rights-can-authors-waive-their-special-rights> (last visited Aug 30, 2021).

likely to survive the test of fair dealing. In simple terms, when the use of such work poses threat to the actual author in terms of competition then such work cannot constitute fair dealing. Upon applying this factor to memes, most of the memes have been directly copied to use as a substitute for actual work. It is common practice in the meme world to copy the content of other authors and portray it as their own work. Most of the memers also directly share content or meme of one creator without making any substantial change in it. Hereby, it can be said, as long as copyrightable work is used for derivative purposes without being detrimental to the actual work, constitutes fair dealing. Otherwise, it may constitute infringement.²²

❖ INDIAN FAIR DEALING JURISPRUDENCE AND MEMES

In Indian copyright law, the doctrine of fair dealing is mentioned under sec 52 of the copyright act 1957 which is not completely defined and constitutes only the circumstances or the acts where the concept of fair dealing would apply. Since the concept of fair dealing is not clearly defined, it is difficult to identify under which act use of work for meme would constitute fair dealing. One of the schools of thought says since meme usually contains the work for non-commercial purposes like criticism and review, it comes under section 52(1) of the copyright act 1957. The act elucidates “fair dealing with a literary, dramatic, musical or artistic work not being a computer program for the purposes of-

- 1) *private or personal use, including research;*
- 2) *criticism or review, whether of that work or of any other work;*
- 3) *the reporting of current events and current affairs, including the reporting of a lecture delivered in public”.*²³

However, an analysis of the above section indicates that the provisions would apply only to the memes that use the work only for non-commercial purposes. Memes are nowadays not only limited to non-commercial use and are engaged extensively for commercial purposes. As we have discussed earlier, it becomes an important tool of corporates for promotions and advertisements of products and services. Indian copyright act is silent on this aspect of a meme. It is not clear whether the concept of fair dealing would apply if the work is used for criticism

²² Carole A Ellingson, *The Copyright Exception for Derivative Works and the Scope of Utilization*, 56 indiana law j. 43.

²³ Copyright Act 1957, Section 52(1).

or review but for commercial purposes. Also, section 57 of the copyright act bestowed author with moral rights, which cannot be waived off.²⁴ Even if the work is used under the concept of fair dealing, the user is liable to protect the moral rights of an author. No defence of fair dealing would apply if the moral rights of the author are infringed.

However, as we have discussed earlier, most of the memers use the content without giving any credit to the actual author. Sometimes even portray themselves as the real author. These aspects of fair dealing are unclear and require legal dissection.

In order to further refined the concept of fair use, the court in the case of **Civic Chandran v. Ammini Amma**, observed that “*section 52(1)(a) and (b) specifically refers to fair dealing of the work and not to the reproduction of the work. Accordingly, it may be reasonable to hold that the re-production of the whole or a substantial portion of it as such will not normally be permitted and only extracts or quotations from the work will alone be permitted even as fair dealing.*”²⁵ Further, the court framed criteria which a court has to take into consideration in such cases.

- “*the quantum and value of the matter taken in relation to the comments or criticism;*
- *the purpose for which it is taken; and*
- *the likelihood of competition between the two works*”²⁶ ;

similarly, The second case was **Blackwood & Sons Ltd. v. A.N. Parasuraman**, where the court held that: “*In order to constitute a fair dealing, there must be no intention on the part of the alleged infringer, to compete with the copyright holder of the work and to derive profits from such competition and also, the motive of the alleged infringer in dealing with the work must not be improper.*”²⁷

Upon analysing the meme as per the fair use criteria promulgated in Civic Chandran v. Ammini Amma case, quantum and value of content are one of the essential factors. The court is concerned with whether the amount copied is substantial part or incidental in nature. In memes, most of the content is substantially copied from the work without making any further changes. Sometimes memers identically copied the work to portray it as their own work and try to cash on the goodwill of the actual author. We can refer to an instance, where memers use substantial

²⁴ Moral rights, *supra* note 19.

²⁵ Civic Chandran v. Ammini Amma, 1996(1) K.L.T. 608.

²⁶ *Id.*

²⁷ Blackwood & Sons Ltd. v. A.N. Parasuraman, AIR 1959 Mad 410.

parts of songs without giving any credit to actual authors. As we have discussed earlier as well, no matter what amount of work is copied, the person which is copying the work is liable to give credit to actual authors. Under no circumstance, author of copyrighted work shall be devoid of their moral rights in work. The other major factor discussed in this case is the purpose behind such use. As we discussed in the four-factor test as well, when the work is used for the private purpose or for the benefits of society then it would constitute fair dealing. However when work is used solely for commercial purposes to cash on the goodwill and intellectual labour of copyright holder then such defence would not apply. The last factor which was also asserted in the case of *Blackwood & Sons Ltd. v. A.N. Parasuraman* is the likelihood of competition between the copied work and the actual work. The Court says when the work is copied with the intent to compete with the work of actual authors or causing detrimental effects on the market of actual work, defence of fair dealing would not apply.²⁸ Since most of the memers directly share content or meme of one and other creators without making any substantial change in it to engage in reach war, it would also not apply to memes

From the above legal propositions, it can be deduced that Indian jurisprudence of fair use laid more emphasis on the amount of content copied and the intent behind such copying. Unlike the four-factor test, Indian fair dealing jurisprudence is not concerned with the nature of copyrighted work. However, in respect of other factors, it is in the alignment of the four-factor test.

COMMERCIAL AND NON-COMMERCIAL MEMES

Considering factor analysis of both the tests, it is clear that the doctrine of fair dealing is not applicable to all the memes available on social media. Memes that are not giving credit to real authors or using the content of others for commercial purposes are not protected under this concept. However, there are certain memes as well which are being used solely for non-commercial purposes. Therefore restricting the whole memes for copyright violations would vitiate the basic purpose of the principle of fair use and also violates the individual's fundamental rights to freedom of speech and expression. Article 19(1)(a) of the Indian constitution says every person has the right to express "*one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode*".²⁹ Hence, there is need to form a set of guidelines or criteria that demarcates a line between commercial and non-commercial memes. Usually, when we talk about memes, we refer to non-commercial memes

²⁸ *Id.*

²⁹ Constitution of India 1950, Article 19(1) (a).

that consist of reviews, criticism, and joke. But, from the past years, the trajectory of memes has been changed and it is now being used for creating marketing buzz in society which directly or indirectly gives monetary advantages to the meme maker. We have to tap on such memes and meme-makers that are making monetary gains by using the content of others but still devoid them of their economical and moral rights. Recently, we have seen the owner of the Grumpy Cat meme filed a lawsuit against the founders of Grenade, a coffee chain based in the United States, for merchandising the meme. The Grumpy Cat limited was awarded \$710,000 as damages for copyright infringement.³⁰ In light of this, it is the need of the hour to analyse the liabilities of the intermediaries where most of such infringement takes place.

WHETHER INTERMEDIARIES ARE LIABLE FOR COPYRIGHT INFRINGEMENT THROUGH COMMERCIAL MEMES

An intermediary is defined as one "*which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services*".³¹ This implies social media platforms like Facebook, Instagram, etc. will come under this wide ambit of definition as these channels provide a platform to enable interaction between viewers and creators through memes and also allows them to disseminate the contents to a wide public. In recent days these intermediaries have become a prominent platform to facilitate infringement of copyrights. These are the places where memes containing infringing content are uploaded, watched, and shared. However, In order to maintain the availability of the copyrighted work in the general interest of society, liabilities of intermediaries have not been fixed yet and are open to circumstances of a case. Inadequacy of intermediaries to regulate all the contents uploaded on their platform is also one of the factors that contributed to its ambiguities. Therefore, liabilities of intermediaries require legal dissections in light of commercial memes infringing copyrights.

❖ TUSSLE BETWEEN COPYRIGHT ACT AND INFORMATION TECHNOLOGY ACT

As per the Indian copyright act 1957, section 51 defines copyright infringement. The provision elucidates "*when any person, without a license granted by the owner of the copyright or the*

³⁰ Grumpy Cat wins \$710,000 pay out in copyright lawsuit, BBC News, January 24, 2018, <https://www.bbc.com/news/world-us-canada-42808521> (last visited Aug 30, 2021).

³¹ The Social Media Furore - Media, Telecoms, IT, Entertainment - India, , <https://www.mondaq.com/india/social-media/1075986/the-social-media-furore> (last visited Aug 30, 2021).

Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any 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 was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright;".³² Upon analysing the definition, any place which has been used for the communication of infringing work to earn profit will also be liable for copyright infringement. Therefore, intermediaries like Facebook, Instagram that provide a virtual place for the communication of infringing memes to earn profit can also be made liable for copyright infringement. However, knowledge of such infringement to intermediaries is an essential factor of such liabilities. If an intermediary has prior knowledge of such infringing content or had reasonable grounds of believing such content to be infringing, in such case only the intermediary will be liable for copyright infringement otherwise it is not. Just like the copyright act, there are certain other acts as well where knowledge is considered as an essential factor to make intermediaries liable for any illegal act. However, the court had been inconsistent in adopting the criteria of knowledge as a factor to determine the liabilities of intermediaries. When an MMS film of two students in sexual postures was posted on the website, the CEO of baazee.com (now eBay. in) had to face the brunt of it. The CEO was imprisoned as a result of this, despite the fact that he had no knowledge of such content being posted on the website.³³ This created a very hostile market situation for the intermediaries since it made them responsible even when they don't have any knowledge and forced them to check each and every content that is uploaded on their platform. This kind of incidents opened the doors of safe harbour protection.

Section 79 of the IT Act creates a relevant safe harbour for the intermediaries.³⁴ As per this section, intermediaries shall not be liable for any third party information, data, or communication link made available or hosted by him that is in contradiction to the provisions of the IT Act. This is on somewhat similar lines to the safe harbour provisions of Section 512 of Digital Millennium Copyright Act as followed by the US.³⁵ But, such safe harbour has its own chinks in the armour Section 81, states that "*provisions of IT override all other acts except*

³² Copyright Act 1957, Sec 51.

³³ Bajaj: EBay's India CEO Wins Bail In Obscenity Case, Forbes , <https://www.forbes.com/2004/12/21/1221autofacescan01.html> (last visited Aug 30, 2021).

³⁴ Information Technology Act 2000, Sec 79.

³⁵ Copyright Act of India 1957, Sec 51.

the rights under Copyright Act, 1957 and Patent Act, 1970."³⁶ Hence, such safe harbour protection will not be provided to the intermediaries in cases of infringement of copyright or patent act. This makes the provision of safe harbour quite de facto instead of de jure for Indian intermediaries.³⁷

The second point of contention is the magnitude and scope of knowledge required under sections 79 and 81. While copyright law imposes a secondary liability for copyright infringement under section 51(a) (ii) and section 63, the IT act discusses actual knowledge. The phrase "knowingly infringes or aids in the infringement of" is used in section 63.³⁸ At the same time, the phrase "actual knowledge" is used in section 79 (3) of the IT Act. By demonstrating that the intermediary had "reasonable grounds for believing" or was "having knowledge"³⁹ under the Copyright Act, the exception to section 79 (1) would be established. since the section 79(3) i.e. exception to section 79(1) has been proved, the question of whether section 81 can prevail over section 79 is irrelevant, that is to say, whether the Copyright Act's rights would be rendered ineffective in the instance of an intermediary, as the safe harbour exception would not be available to the intermediary in any scenario, in view of section 79(3).

To put it another way, both sections establish a different level of knowledge to hold an intermediary accountable. Section 81 of the IT act entails exceptions in the safe harbour for intermediaries. On one hand, the Copyright act provides for a relatively lower quantum of knowledge with the phrase "knowingly infringes or abets the infringement of". On the other hand, the IT act requires a much higher standard of knowledge as specified in the definition of "actual knowledge" to ascertain liability under section 79 (3). This clash of legislation makes it difficult to decide which standard to apply when establishing the level of knowledge of intermediaries.

Section 3 of the legislation also specifies that, upon receiving knowledge or information of infringement, intermediaries have to expeditiously remove any such content from their platform. This section bestows judicial function to intermediaries to decide about the validity of content upon the criteria of copyright. Nevertheless, there are certain instances happened where even valid content is removed from the platform due to the inadequacy of intermediaries.

³⁶ Information Technology Act 2000, Sec 81.

³⁷ Vishal Vatsalya & Aditya Sharma, *Into the crosshairs - the liability of online intermediaries in case of copyright infringement*, 6 Nirma Univ. Law J. (2018), <https://nulj.in/index.php/nulj/article/view/88> (last visited Aug 30, 2021).

³⁸ Copyright Act 1957, Sec 63.

³⁹ Information Technology Act 2000, Sec 79(3).

Intermediaries are non-judicial bodies therefore do not have enough competency to decide which content comes under copyright infringement and which content comes under fair use or fair dealing. Consequently, they also remove contents that are protected under section 52 of the copyright act 1967.

❖ DOES PROTECTION OF SAFE HARBOUR REQUIRE RECONSIDERATION IN LIGHT OF LIABILITIES OF INTERMEDIARY?

From the above legal propositions, it is clear that intermediaries that provide virtual space to the memes are exempted from the liability of copyright infringement under the concept of safe harbour. However, there are certain arguments that advocate intermediaries facilitating copyright infringement are not entitled to use the concept of the safe harbour as a shield.

The first argument is these intermediaries are not functioning only as a channel of dissemination and have control over the contents uploaded on their platform. The argument is based on the intermediary's abilities to categorize the content, providing advertisements to content, and monitoring the contents.⁴⁰ It is also argued that intermediaries are not completely unaware of the knowledge of an infringement, they have reasonable grounds to believe that some of the content uploaded on their platform might be infringing of copyright. The third major argument is intermediaries are making monetary gains from infringing content through advertisements and the amount of data that people expend watching those infringing contents. The fourth issue is regarding the provision of Due Diligence as per sub-section 2(c) of Section 79 of the IT Act 2000. The section states, "*the provisions of sub-section (1) shall apply if the intermediary observes due diligence while discharging his duties under this Act.*"⁴¹ However, what could amount to due diligence under this section is not completely defined. It is argued that most of the time, infringer's claim that they have taken due diligence but such due diligence is not enough to stop infringement.⁴²

The Delhi High Court in the case of *Myspace Inc. vs. Super Cassettes Industries Ltd.* has attempted to answer all the major arguments. It was the case where the defendant's website

⁴⁰ Aditi Verma Thakur & Anju Srinivasan, *safe harbour immunity for internet intermediaries and ip violations: where we stand today and the way forward?* 13.

⁴¹ Information Technology Act 2000, Sec 79(2)(c).

⁴² *Id.*

stream contents that are infringing to the plaintiff's content. The court in this case analysed the liability of intermediaries for copyright infringement and observed certain points that are:

- *“When the insertion of advertisements and modifications to any content is carried out by Myspace through automated systems, it cannot be said that Myspace had knowledge of infringement. It is not enough that there is suspicion of knowledge of infringement but should be actual knowledge*
- *The infringing content should be removed within 36 hours of receiving the said notice by intermediaries*
- *It cannot be said that Myspace had knowledge of the infringement as it is technically not feasible to identify streaming content that infringes.*
- *Section 79 of The Information Technology Act read along with the Information Technology (Intermediary Guidelines) Rules, 2011, provided an affirmative defence to the intermediary if the associated conditions of due diligence under Section 79 are followed*
- *Section 79, Section 81 of the Information Technology Act has to be read harmoniously with Section 51 (a) (ii) of Copyright Act, 1957.”⁴³*

Further the court observed, “Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously and it was held that Section 81 does not preclude the affirmative defence of safe harbour for an intermediary in case of copyright infringement actions. In the case of internet intermediaries Section 51(a)(ii) of the Copyright Act contemplates actual knowledge and not general awareness. Additionally, to impose liability on an intermediary, conditions under Section 79 of the IT Act have to be fulfilled”.⁴⁴ Similarly in the recent case of **Kent RO Systems Ltd. vs. Amit Kotak & eBay India Pvt. Ltd.**, the Delhi High Court reiterated “the position that the intermediary is not required to make a self-determination of infringing products sold on its website but is required to take down the same only after receipt of a complaint.” The Court further observed that “an intermediary will not be possessed with prowess to detect each case of infringement unless their attention is drawn to a particular instance.”⁴⁵

⁴³ Myspace Inc. vs. Super Cassettes Industries Ltd., 2011 SCC OnLine Del 3131.

⁴⁴ *Id.*

⁴⁵ Kent RO Systems Ltd. vs. Amit Kotak & eBay India Pvt. Ltd, 2017 (69) PTC 551 (Del).

TIME TO SAIL BEYOND THE ‘SAFE HARBOUR’?

From the above legal propositions, it is clear that there are certain criteria that are required to be fulfilled by intermediaries to take the defence of the safe harbour. The criteria are:

- The function of the intermediary is limited only to providing access to communication and must not actively control the contents.
- The intermediary should observe basic due diligence while discharging his duties.
- The intermediary must not abet, induce or aid any such infringement.
- The intermediary must remove the infringing content upon receiving information.

Nevertheless, in actual practices, most of these criteria are not being followed. Let’s examine the copyright policies of the three major intermediaries i.e. Instagram, Facebook, and telegram where copyright infringement through memes takes place majorly.

Upon analysing the copyright policies of Instagram and Facebook, they provide a form to fill out for taking action against infringing content. However, they don’t provide the time duration to remove the infringing content from the platform upon receiving knowledge which is contrary to the criteria of taking down the content within 36 hours from the receipt of knowledge, promulgated in My Space Case.⁴⁶ Similarly, the copyright policy of Instagram only allowed copyright owner or their authorized representative to file a takedown notice. However, if we analyse the definition of S.79 (3) (b) of the I.T Act, it contains “*upon receiving actual knowledge*” without specifying the source of knowledge which indicates knowledge can come from any source i.e. any person. Otherwise, legislators would have directly mentioned the term upon receiving actual knowledge from the copyright owner or his authorized agent. Apart from this, these intermediaries also provide their validation *Blue Tick* mark to some of the infringing commercial meme channels. This validation mark enhances the credibility of meme channels and helps them to gain more followers, which may amount to aiding the meme channels. Similarly, these intermediaries also facilitate the option to share the content and therefore play an important role in inducing copyright infringement.

The telegram that provides a platform to anonymously upload contents, does not even have the specific copyright policies with respect to the Indian copyright act and examines the contents upon the DMCA act only. Most of the time, It also fails to discharge basic due diligence and

⁴⁶ My Space, *Supra* note 43.

does not remove infringing contents even after getting specific knowledge.⁴⁷ Along with this just like Instagram and Facebook, it is also not following the takedown criteria promulgated in the Myspace case.

From the above analysis, it is clear that the copyright policies of these intermediaries have raised numerous concerns worldwide, which are contentious and multifaceted. These intermediaries become very diverse in terms of business models, operations, services, capacity, and income. Not only do they allow their users to post and view content and search for information on platforms, but they also retain huge amounts of data and monitor the behaviour of their users. The perplexities are exacerbated further by the fact that they even make a profit from the illegal content. Some networks go even further and encourage users to violate copyrights, while others publish infringing content directly.⁴⁸ Because of these practices, It becomes evident that a "one-size-fits-all" strait-jacket solution is not possible for intermediary's liability. To deal with the issue of liability, several jurisdictions have developed different methods. While Indian law has attempted to accommodate all these differences, the position of liabilities of intermediaries continues to be riddled with ambiguities and inconsistencies.

In so far now, intermediaries under the Indian legal system are penalized only with the Injunction for copyright infringement. No question has been asked for the commercial gains that these intermediaries are making from user-generated content like copyright infringement.⁴⁹ Big giants like Facebook and Instagram are earning in crores by monetizing the infringing content. So, here the question arises if these intermediaries are making gains from infringing content, should not they be made liable to pay compensation in the event of infringement?

Similarly, if these intermediaries can filter, monitor, and categorize content like they do to regulate pornographic and obscene content, it's also possible for them to do basic due diligence for copyright infringement before allowing any users to upload content on their platform. What they can do is they can make the provision of a freezing period of two days to examine the content before uploading it on their platform. A software requiring people to check the content

⁴⁷ Instagram and Copyright — What Are the Terms of Use?, Copyrightlaws.com: Copyright courses and education in plain English (2021), <https://www.copyrightlaws.com/instagram-and-copyright/> (last visited Aug 30, 2021).

⁴⁸ Sowmya Ramasubramanian, *Instagram, Facebook, and LinkedIn share over 50% user data with third party firms, study says*, The Hindu, March 24, 2021, <https://www.thehindu.com/sci-tech/technology/internet/instagram-facebook-and-linkedin-share-over-50-user-data/article34149150.ece> (last visited Aug 30, 2021).

⁴⁹ Graham JH Smith & Bird & Bird, *Internet Law and Regulation* 2 (2002).

through their application having artificial intelligence of distinguishing infringing content from the work of fair dealing would also work.

In the other countries as well demands of an active role of intermediaries to cater to infringing content have arisen. The European Parliament has passed a bill requiring internet platforms to install an "upload filter" and holding huge commercial entities like Facebook accountable for copyright infringement by their users.⁵⁰ In a similar development, the Austrian Commercial Court has ruled YouTube accountable for substantial copyright infringement. It refused to provide immunity to the platform, citing the company's ability to monitor, filter, and categorize the content.⁵¹

CONCLUSION

Hence in light of the above discussion, it is high time for the government to come up with necessary guidelines to demarcate a line between commercial and non-commercial memes to regulate copyright infringing activity through memes over social media platforms. Intermediaries have to be made responsible to check or verify the content uploaded by members before making it available to the general public. Since a lot of hard work is needed to shoot a picture or make graffiti but it takes a few minutes for someone to make a meme and portray it as their original piece of work. Little due diligence by these intermediaries can prevent lakhs of such copyright infringement. The legislators have to completely overhaul the position of liability of intermediaries in India. The intermediaries played an important role in the internet revolution, and are becoming diverse in their services, business models, and operations extensively. As a result, no straight jacket formula for determining the liability of these intermediaries would work. In the past as well, Indian law has attempted to account for these challenges by establishing certain conditions that must be met. For example, ISPs fall under 79(2) (a), while search engines are under 79(2)(b). However, these efforts are proved to be insufficient in catering all the challenges.

As a result, in line with the trend in the EU and the other countries, the framework of liability of intermediaries in India also requires several reforms. In addition to clarifying the above

⁵⁰ Christopher M. Swartout, *Toward a Regulatory Model of Internet Intermediary Liability*, 31 Nw. J. Int'l L. & Bus. 499 (2011).

⁵¹ Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act*, in Copyright Enforcement and the Internet 183, 183 [Irina A. Stamatoudi (Ed.), (2010).

discussed ambiguities, India also needs to divide intermediaries into several groups and assign various obligations to each. The liabilities of intermediaries must be based on a variety of factors, including editorial control, business operations, and money earned from infringing content. Infringing User-generated content brings in a lot of money for big businesses, either directly or indirectly. They must be made to invest greater resources to preventing infringement and safeguarding the interest of small artists from exploitation, regardless of actual knowledge. While this proposal may result in fewer ambiguities in the law, greater clarity, and speedier dispute resolution. However, a comprehensive model are needs to be developed as well that would ensure greater responsibilities on part of intermediaries does not result in curtailment of freedom of speech and expression.
