INTERMEDIARY LIABILITY UNDER THE INFORMATION TECHNOLOGY ACT, 2000: A COMPARATIVE ANALYSIS WITH THE UNITED STATES DMCA FRAMEWORK

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ABSTRACT

The proliferation of digital platforms has shifted the architecture of copyright enforcement and the role of online intermediaries in the global information order. At the heart of this shift are the principles of intermediary liability and safe harbour. In the Indian context, Section 79 of the Information Technology Act, 2000 provides conditional immunity to online intermediaries for third-party content, provided they exercise due diligence and have no actual knowledge of the content. However, judicial pronouncements and delegated legislation, especially the Intermediary Guidelines Rules, have had a major impact on the scope of this immunity. Cases such as Shreya Singhal vs. Union of India, Myspace Inc. vs. Super Cassettes Industries Ltd., and Kunal Kamra vs. Union of India indicate a continuous process of constitutional balancing of free speech, platform accountability, and copyright enforcement.

This research paper conducts a doctrinal and comparative examination of the safe harbour provisions of the United States' Digital Millennium Copyright Act, 1998 (DMCA) and the regime of intermediary liability in Indian law. The notice-and-takedown system of the DMCA and its statute-centric approach are contrasted with the relatively indeterminate regime of intermediary liability in Indian law. The research paper points out that regulatory fragmentation, executive overreach in expanding intermediary liability, and the lack of a notice-and-takedown system are the weaknesses in the Indian regime.

The research paper concludes that although safe harbour provisions are essential for innovation and freedom of expression in the digital age, a notice-and-takedown system should be introduced in Indian law through legislation. Based on the comparative analysis, the research paper recommends a revised framework of intermediary liability that balances copyright enforcement with freedom of expression.

Keywords: Intermediary Liability; Safe Harbour; Section 79; Notice-and-Takedown; Copyright Infringement; Platform Governance; Free Speech; Comparative Intellectual Property Law.

1. INTRODUCTION

The Information Technology Act[1] It was passed in the year 2000 with the primary objective of regulating and providing legal recognition to e-commerce, and to give effect to the Model Law on Electronic Commerce as adopted by the United Nations Commission on International Trade Law.[2] However, with new technologies emerging in the market and the exponential growth of the internet and digital platforms, the way content is created, disseminated, and consumed has undergone a significant revolution. Online intermediaries, including social media platforms, content-hosting websites, e-commerce marketplaces, and internet service providers, play a central role in facilitating communication and commerce within the digital ecosystem. While these intermediaries have enabled unprecedented levels of expression, they also provide a medium through which unlawful activities, including but not limited to IP infringement, can proliferate. This raises a crucial legal question: ***to what extent should intermediaries be held liable for unlawful content generated by third parties?***

The question can be answered by understanding the intermediary liability regime, which aims to balance the competing interests of the state, intermediaries, and consumers. In this regard, one might argue that over-compliance may prompt intermediaries to engage in excessive content censorship, ultimately affecting freedom of expression and innovation. On the other hand, a lack of compliance may result in the weakening of intellectual property rights enforcement, including copyright, in the digital environment. In this regard, the solution to the situation would be the creation of a *"safe harbour."*

In India, the statutory basis for safe harbour protection is found in Section 79[3] of the Information Technology Act, 2000. This provision provides conditional immunity to intermediaries for third-party information that they host or transmit, provided that they exercise due diligence and do not actively participate in the creation or modification of unlawful content. However, over the years, the ambit of such protection has been progressively shaped and, in

[1] Information Technology Act, No. 21 of 2000, Acts of Parliament 2000, (India).
[2] U.N. Gen. Assembly, Model Law on Electronic Commerce, G.A. Res. 51/162, U.N. Doc. A/RES/51/162 (Jan. 30, 1997).
[3] Information Technology Act, No. 21 of 2000, § 79, India (2000).

some instances, constrained by judicial decisions as well as secondary laws such as the Intermediary Guidelines Rules of 2011, 2021 & 2023. This has created a degree of ambiguity regarding the extent of such liability in certain situations, such as copyright infringement. The issue came into the limelight when famous comedian Kunal Kamra challenged the intermediary rules of 2023 in the Bombay High Court, which resulted in the court striking down several provisions of the 2023 rules.[4]

In contrast, the United States has adopted a more structured and statute-driven approach through the Digital Millennium Copyright Act of 1998 (DMCA).[5] The DMCA establishes specific categories of safe harbour under Section 512 and introduces a formalised notice and takedown mechanism, which aims to balance the interests of copyright owners, intermediaries, and users through various procedural safeguards and judicial oversight.

Against this backdrop, this paper undertakes a comparative analysis of intermediary liability and safe harbour protections under Section 79 of the Information Technology Act, 2000, and the DMCA framework in the United States. It examines whether India's regime has provided clear legal clarity and an effective balance between promoting innovation, safeguarding freedom of expression, and enforcing copyright, and to what extent India's intermediary liability regime can learn from the experience in the United States. The paper adopts a doctrinal approach. First, it conducts a comprehensive literature review, then proceeds to identify intermediary liability under Indian law, comparing it with the safe harbour provisions in the US. Finally, the paper concludes by providing a critical comparative analysis of both jurisdictions, ultimately culminating in the findings and conclusions.

2. LITERATURE REVIEW

Scholarly interest in intermediary liability and safe harbour regimes has grown in recent years due to the ever-increasing regulatory focus on online platforms and the perceived inadequacy of traditional liability doctrines in tackling digital copyright infringement. The literature reviewed for this study jointly discusses the doctrinal foundations of intermediary liability, the evolution of statutory safe harbour privileges, and the conflicts between platform responsibility, intellectual property protection, and fundamental rights.

[4] Kunal Kamra v. Union of India, 2024 SCC OnLine Bom 3025.
[5] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

A common thread running through the literature is the conceptual mooring of safe harbour in the principle of secondary liability.[6] Devadasan argues that intermediary liability under Indian law is inextricably linked to common-law principles of secondary liability, wherein the law imposes liability not for creating unlawful content but based on a functional link between the intermediary and such content.[7] The safe harbour principle ascribes legality to such a regime by limiting liability to those who knowingly, control, or materially contribute to infringement. Likewise, Ryder and Madhavan emphasise that intermediaries, such as social media platforms, are typically passive conduits and do not become co-wrongdoers simply by providing the means for communication.[8]

However, this doctrinal clarity is increasingly undermined by subordinate legislation and the expansion of regulation. As Dedhia points out, although Section 79 of the Information Technology Act, 2000, ensures statutory immunity in itself, its intersection with the Copyright Act, 1957, creates ambiguity in cases of online copyright infringement.[9] The absence of a codified notice-and-takedown system, such as the DMCA in the United States, leads to reliance on judicial discretion and inconsistent standards of "actual knowledge." Singh also criticises this regime, contending that Indian courts have at times given safe harbour protection to large e-commerce platforms with insufficient scrutiny of their commercial involvement, thereby allowing intermediaries to claim near-blanket immunity.[10]

A related divide in the literature is on whether safe harbour acts as an overprotective shield or an essential shelter. Singh describes safe harbour as a kind of "umbrella immunity" which unduly benefits powerful intermediaries at the expense of consumers, competition, and intellectual property enforcement.[11] In contrast, Devadasan warns against any dilution of safe harbour protection because increased liability incentivises intermediaries to over-remove content, resulting in collateral censorship and a chilling effect on free expression.[12] This tension

[6] Anjali Singh, Safe Harbour Protection: A Blanket Immunity to the E-Commerce Intermediary, 5 Indian J.L. & Legal Rsch. 1 (2023).
[7] Vasudev Devadasan, Conceptualising India's Safe Harbour in the Era of Platform Governance, 19 Indian J. L. & Tech. 1 (2023).
[8] Rodney D. Ryder & Ashwin Madhavan, Intermediary Liability under Indian Law: Twitter, 2013 Convergence [1] (2013).
[9] Priyal Dedhia, A Critical Analysis of the Safe Harbour Provisions Protecting Internet Service Providers from Copyright Infringement, 5 Indian J.L. & Legal Rsch. 1 (2023).
[10] Anjali Singh, Safe Harbour Protection: A Blanket Immunity to the E-Commerce Intermediary, 5 Indian J.L. & Legal Rsch. 1 (2023).
[11] Ibid.
[12] Supra, 6.

forms part of the broader normative debate about whether intermediary liability regimes should prioritise the efficiency of enforcement or the systemic protection of speech and innovation.

Some insights from comparative scholarship are also presented in this section. Safe harbour in the context of the DMCA is framed within a regulatory regime where the interplay between technology and the law determines the enforcement practices, according to Wagner's critique of the DMCA.[13] Although it must be admitted that the DMCA has faced criticism for supporting rights holders to the detriment of those intermediaries, at the same time, according to a critique presented here, the framework designed by the DMCA's notice and takedown features provides for rule-governed and not arbitrary enforcement practices, unlike in the Indian regime.

In this regard, the concern expressed by Belli and Sappa is extended to consider the role transition of the intermediary as a private regulation agent or 'cyber-police' due to the obligation to monitor proactively in light of the liability regimes.[14] The authors state that the ex-ante filtering obligation and the vague takedown notice require intermediaries to take on a role akin to that of law enforcement officers. As a result, there are significant implications for the values of freedom of expression, proportionality, and due process. This aligns with Devadasan's concern that the blurring of lines between intermediary liability and platform governance results in doctrinal confusion and regulatory overreach.[15]

Within the scholarly community, there is a consensus on the need for a "sounder" statutory design, but divergent opinions on the means to implement it. Dedhia argues for the implementation of "optimal" takedown practices and "technological measures" to ensure effective enforcement of rights while maintaining the vitality of intermediary immunity.[16] Singh argues for critical judicial oversight regarding the "economic roles" of intermediaries in e-commerce to remove risks associated with the abuse of safe-harbour rights.[17] In a move to strike a balance between the specificity of laws and the need to maintain internal consistency in the framework, Devadasan suggests that "transparency obligations and platform

[13] R. Polk Wagner, Reconsidering the DMCA, 42 Hous. L. Rev. 1107 (Symposium 2005).
[14] Luca Belli & Cristiana Sappa, The Intermediary Conundrum: Cyber-Regulators, Cyber-Police or Both, 8 J. Intell. Prop. Info. Tech. & Elec. Com. L. 183 (November 2017).
[15] Supra, 6.
[16] Supra, 8.
[17] Supra, 5.

governance" should become mandatory obligations in their own right, rather than merely conditions for obtaining the benefits of safe harbour.[18]

3. RESEARCH GAPS AND OBJECTIVES

Despite a considerable body of literature on this topic, three essential research gaps remain. Firstly, no comparative analysis has been conducted regarding Section 79 of the IT Act and Section 512(d) of the DMCA's safe harbour provisions. This will enable a determination of how well-defined safe harbours regarding copyright and enforcement are. Secondly, research continues to reflect concerns regarding over-regulation and blanket immunity, without sufficient attention being given to legislative-based solutions. Thirdly, the research literature appears to be concerned with intermediary liability in relation to intellectual property enforcement or free speech concerns, with no research utilising both concepts within a single framework.

This paper aims to fill these research gaps by carrying out an in-depth comparative study of intermediary liability and safe harbour provisions in both Indian and United States law. While critically analysing the jurisprudential developments that have happened in India.

4. RESEARCH METHODOLOGY

The given research utilises a **doctrinal and comparative** approach. It is based on the review of primary legal materials, including statutes, subordinate legislation, and judicial rulings of India and the United States. Scholarly journal articles, commentaries and reports constitute secondary sources that were used in order to analyse scholarly views and define the possible gaps of the research. Statutory design, enforcement and policy consequences differences between the Indian intermediary liability regime and the DMCA regime were determined using a comparative methodology.

The comparative approach helped in assessing differences in statutory design, implementation mechanisms and policy outcomes between the Indian intermediary liability regime and the DMCA regime in the United States.

[18] Supra, 6.

5. INTERMEDIARY LIABILITY UNDER INDIAN LAW

The statutory framework of intermediary liability in India is outlined under Section 79 of the Act of 2000, which offers conditional immunity to intermediaries against liability arising out of content hosted by third parties. The section was heavily amended by the Information Technology (Amendment) Act, 2008, to bring Indian law into conformity with global principles of liability for intermediaries and to facilitate the development of the digital economy.[19] Section 79(1) gives immunity to the intermediaries for any third-party information, data, and communication links made available/hosted on the intermediary's platform or servers. However, immunity is not absolute. Section 79(2) specifies cumulative conditions to be fulfilled, which an intermediary must satisfy to enjoy protection under the safe harbour provision, which are: (i) the role of an intermediary is limited to facilitating access to a communication system, (ii) the intermediary does not initiate the transmission, select the receiver, or alter the message; and (iii) the intermediary exercises "due diligence" in performing its obligations under the Act.[20]

The immunity granted, however, is not absolute and can be withdrawn under Section 79(3) where the intermediary has conspired, abetted, aided, or induced the commission of an unlawful act, or where it fails to expeditiously remove or restrict access to illegal content upon obtaining actual knowledge.[21] However, the statute does not define "actual knowledge." The definition of "intermediary" under section 2(1)(w) is extensive. It encompasses telecom service providers, network service providers, internet service providers, web-hosting services, search engines, online marketplaces, and social media sites.[22] The broad definition of an intermediary has allowed the Courts to expand the scope of entities that fall under Section 79, thereby making judicial interpretation more significant.

6. JUDICIAL INTERPRETATION

SHREYA SINGHAL V. UNION OF INDIA

The Supreme Court, in the landmark case of Shreya Singhal v. Union of India, while adjudicating the constitutionality of specific provisions, struck down Section 66A of the

[19] *Information Technology (Amendment) Act*, No. 10 of 2009, (India).
[20] *Information Technology Act*, No. 21 of 2000, § 79(2), (India).
[21] *Information Technology Act*, No. 21 of 2000, § 79(3), (India).
[22] *Information Technology Act*, No. 21 of 2000, § 2 (1) (w), (India).

Information Technology Act, 2000, as being ultra vires the Constitution. The Court also undertook a detailed analysis of Section 79 and upheld it as constitutional. However, it read down Section 79 (3) (b), which was a watershed moment for the interpretation of intermediary liability.

The Court declared that "actual knowledge" for Section 79(3)(b) cannot be established through private complaints or user notifications. On the contrary, actual knowledge occurs when a court order or a valid government notice is received, mandating the removal of the contested content.[23] It is worth noting that this decision was made with caution regarding the issue of over-censorship and the chilling effect that could result from intermediaries being asked to determine the legality of content.

By limiting takedown obligations to judicial or executive directions, Shreya Singhal considerably strengthened safe harbour protection and aligned Indian law with constitutional free speech guarantees under Article 19(1)(a). At the same time, the judgment implicitly acknowledged that copyright enforcement in the digital sphere would require procedural safeguards rather than ad hoc private enforcement.

The Court also analysed Section 79 of the Information Technology Act, 2000, along with the Information Technology (Intermediary Guidelines) Rules, 2011[24], and sustained the constitutional validity of Section 79 and Rules 3 and 3(4) only after construing them strictly in favour of freedom of expression. The court held that to attract Section 79(3)(b), which mandates the intermediary to remove content upon acquiring "actual knowledge," such actual knowledge can be acquired only through an order of the court or a lawful government action, in accordance with the limitations imposed under Article 19(2) of the Constitution. Thus, the court repelled the privatisation of censorship and upheld the safe harbour provision, concluding that no intermediary can be made a proactive censorship agency for internet content. Such a restrictive interpretation was crucial for having an adequate equilibrium between freedom of expression and intermediary immunity in Indian jurisdictions.[25]

MYSPACE INC. V. SUPER CASSETTES INDUSTRIES LTD.

In this case, the Delhi High Court, while overruling a single-judge bench judgment, elucidated

[23] *Shreya Singhal v. Union of India*, (2015) 5 SCC 1 (India).
[24] *Information Technology (Intermediaries Guidelines) Rules*, G.S.R. 314(E), India (Apr. 11, 2011).
[25] Supra, 22.

a detailed analysis of intermediary liability in the context of copyright infringement.[26] The Court rejected the suggestion that intermediaries were expected to proactively monitor content and filter infringements, stating that the requirement would not only be impossible due to the current state of technological development, but would also violate Section 79 of the Act.

The Court explained that the knowledge required under Section 79 must be specific and ascertainable, rather than merely general knowledge of possible infringements on the platform.[27] Furthermore, it stated that such blanket requirements for monitoring would be antithetical to the safe harbour function and would effectively compel intermediaries to act as private censors.

Significantly, MySpace differentiated between knowledge of infringement per se and knowledge of the specific infringement on the site, thus supporting the proposition that liability cannot be non-content-based. In concept, the above analogy to the DMCA notice-and-takedown provisions bears similarities to the idea of notice-and-takedown provisions in Indian copyright laws.

CHRISTIAN LOUBOUTIN SAS V. NAKUL BAJAJ

In the case of Christian Louboutin SAS v. Nakul Bajaj, a significant judicial effort was made in categorising intermediaries into "passive" or "active."[28] According to the court, active intermediaries with control over e-commerce transactions face a possibility of losing protection under Section 79.

Although the decision was intended to forestall the abuse of immunity by commercially active platforms, it has been assessed as generating ambiguity within the statutory structure. Moreover, the Act does not purport to establish or define the "active/passive" binary distinction, which rests mainly on judicial discretion as determined through the test enunciated by the Court. Recent scholarship has suggested that judicially defined distinctions have contributed to the weakening of statutory clarity through liability extensions.[29]

[26] *MySpace Inc. v. Super Cassettes Indus. Ltd.*, 2017 SCC OnLine Del 6382 (India).
[27] Ibid.
[28] Christian Louboutin SAS v. Nakul Bajaj, 2018 SCC OnLine Del 12215 (India).
[29] Supra, 6.

KUNAL KAMRA V. UNION OF INDIA

The Bombay High Court, in Kunal Kamra v. Union of India[30], analysed and struck down the contours of intermediary obligations arising under Rule 3(1)(b)(v) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, as amended by the Union Cabinet in 2023, indicating that the loss of "safe harbour" would follow if "content relating to the business of the Central Government" was found to be "fake and/or false and/or misleading" by a nominally appointed Fact Check Unit selected by the government. The Court pointed out that intermediary liability can neither be created by delegated legislation, as it would mandatorily force the intermediary to remove content based on an executive assessment of content being "fake, false, and/or misleading," potentially reviving the chilling effect that the Supreme Court had strived to exclude in the Shreya Singhal case as unconstitutional. Though the Division Bench decided with a split verdict, it remains essential to emphasise that the loss of immunity can in no way stray beyond Article 19(2) and therefore cannot be grounded in terms that are too broad and standard-driven by executives mandating intermediaries to take down content as if they are umpires for the content being legal or factual. The decision thus underscores the constitutional limits on rule-making under the IT Act. It highlights the growing tension between platform regulation through the Intermediary Rules and the safe harbour framework under Section 79 as judicially interpreted.

Three major flaws can be identified in the Indian intermediary liability regime. First, the absence of a notice-and-takedown provision under the Indian Copyright Act creates an area of uncertainty for both intermediaries and rights holders. Secondly, there lies an increased threat to an already delicately poised provision under section 79. Finally, judicial initiatives to curb its misuse through various judicial doctrines, such as active/passive classification, are in turn giving rise to an area of ambiguity. These weaknesses serve to illustrate the need for a comparative analysis of more structured regimes of intermediary liability, particularly the United States DMCA regime, which will be discussed in the next chapter.

These doctrinal uncertainties and constitutional constraints within the Indian intermediary liability framework make a comparative examination of the United States DMCA safe harbour regime, which adopts a more structured and statute-centric approach, both necessary and

[30] *Kunal Kamra v. Union of India*, 2024 SCC OnLine Bom 3025 (India).

instructive.

7. SAFE HARBOUR UNDER THE DMCA AND FINDINGS AND CONCLUSIONS OF THE COMPARATIVE ANALYSIS

The United States has an intermediary liability regime for online copyright infringement under the Digital Millennium Copyright Act of 1998, which is among the most sophisticated safe harbour regimes in the world. The DMCA was enacted to address the challenges posed by the online dissemination of copyrighted material and to strike a balance between the enforcement of copyrights and the operational needs of online intermediaries.[31]

Section 512 of the DMCA outlines the safe harbour provisions, which fall into four distinct categories: transitory digital network communications, caching, the posting of user-generated content, and information location tools, including search engines.[32] The granting of safe harbour depends on compliance with specific mandatory provisions, primarily the lack of actual or 'red flag' knowledge of any infringement, the absence of financial benefit where the infringer has control over it, and expeditious action to remove infringing materials after receiving notice.[33]

A hallmark of the DMCA is that it codifies notice-and-takedown provisions in a statute, establishing a predictable procedure for enforcing copyright. Rightsholders must create proper notifications, parties must take prompt action, and parties have an opportunity to file notices.[34] The notice-and-takedown procedure established by the DMCA incorporates due process mechanisms into the statute to prevent the imposition of general monitoring requirements on parties such as ISPs.

However, the intermediary liability regime provided by Indian law, under Section 79 of the Information Technology Act, 2000, is marked by broad statutory provisions and judicial cognisance. Although the Indian judiciary has rejected the requirement of proactive monitoring and private censorship, as seen in the Shreya Singhal v. Union of India case, the lack of a statutorily defined notice-and-takedown regime has led to regulatory fragmentation.

[31] *Digital Millennium Copyright Act of 1998*, Pub. L. No. 105-304, 112 Stat. 2860 (1998).
[32] 17 U.S.C. § 512(a)–(d) (2018).
[33] Ibid.
[34] Ibid.

Doctrinally distinctive constructs, such as the active and passive nature of an intermediary, even if notionally sound, have led to uncertainty regarding the safe harbour provisions.

Furthermore, the entire extent of India's reliance on executive rule-making through the Intermediary Guidelines Rules, particularly those notified in 2021, has raised constitutional concerns regarding overbreadth and excessive delegation, as argued in Kunal Kamra v. Union of India. In contrast, the DMCA places intermediary obligations squarely within the ambit of primary legislation, ensuring greater clarity of statute and democratic legitimacy.

The comparison shows that though both jurisdictions recognise the indispensability of safe harbour protection, the statute-centric and procedurally defined approach under the DMCA provides more legal certainty. The Indian framework, although constitutionally informed and speech-protective, requires legislative reform to introduce a codified notice-and-takedown system for copyright infringement, incorporating prima facie user and intermediary safeguards. It would ensure a better IP enforcement without disturbing the constitutional balance drawn by the courts of India.