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THE LIABILITY OF INTERNET SERVICE PROVIDERS FOR COPYRIGHT INFRINGEMENT IN SRI LANKA: A COMPARATIVE ANALYSIS

Ruwan Fernando

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SOUTH CENTRE

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¹ Justice Dr. Ruwan Fernando, is a Judge of the Court of Appeal in Colombo, Sri Lanka. He is holder of a Ph.D., (University of Colombo, Sri Lanka); an LL.M. from the University of Cardiff (UK) and a Post Attorney Diploma in Intellectual Property Law (Sri Lanka).

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Any comments on this paper or the content of this paper will be highly appreciated. Please contact:

South Centre
International Environment House 2
Chemin de Balexert 7–9
POB 228, 1211 Geneva 19
Switzerland
Tel. (41) 022 791 80 50
south@southcentre.int
www.southcentre.int

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ABSTRACT

The exclusive rights enjoyed by a copyright owner to reproduce his protected work in any material form, including any permanent or temporary storage in electronic form will have a direct impact on the lawful activities of an internet service provider (ISP). Any transmission of temporary copies of material protected by copyright law by their subscribers or third parties using the networks provided by an ISP may amount to unauthorised reproduction of such protected material. The exclusive rights granted to a copyright owner may, thus, place an ISP in a difficult position that may seriously affect the legitimate services and facilities provided by an ISP such as transmitting, routing and storing of information on their networks. It would be impracticable however, to equate the position of a person who engages in traditional copyright infringement with that of an ISP who may merely provide access to the internet and various services to its subscribers facilitated by its networks.

The making of temporary copies exception was developed in the copyright law to safeguard the legitimate interests of an ISP, which may under certain conditions, exempt an ISP from liability for copyright infringement on the internet initiated by its subscribers or third parties by using the system provided by an ISP. There are laws in force in many countries to limit the liability of an ISP for the infringement of copyright that takes place on its networks. An ISP in Sri Lanka may not enjoy the same privilege for the infringement of unauthorised material initiated by its users or third parties on their networks. The current law is unlikely to provide adequate protection for the legitimate activities of ISPs in an attempt to minimize the vulnerability against copyright infringement claims.

Los derechos exclusivos de que goza el titular de los derechos de autor para reproducir su obra protegida en cualquier forma material, incluido cualquier almacenamiento permanente o temporal en forma electrónica, tendrán un impacto directo en las actividades legales de un proveedor de servicios de Internet (PSI). Cualquier transmisión de copias temporales de material protegido por la ley de derechos de autor por parte de sus abonados o de terceros que utilicen las redes proporcionadas por un PSI puede equivaler a una reproducción no autorizada de dicho material protegido. Los derechos exclusivos concedidos al propietario de los derechos de autor pueden, por tanto, colocar a un PSI en una posición difícil que puede afectar seriamente a los servicios y facilidades legítimamente proporcionados por el PSI, como la transmisión, el enrutamiento y el almacenamiento de información en sus redes. Sin embargo, sería impracticable equiparar la posición de una persona que comete una infracción tradicional de los derechos de autor con la de un PSI que simplemente proporciona acceso a Internet y a diversos servicios a sus abonados facilitados por sus redes.

La excepción de la realización de copias temporales se desarrolló en la ley de derechos de autor para salvaguardar los intereses legítimamente de un PSI, que puede, bajo ciertas condiciones, eximir a un PSI de la responsabilidad por la infracción de los derechos de autor en Internet iniciada por sus abonados o por terceros utilizando el sistema proporcionado por un PSI. Hay leyes vigentes en muchos países que limitan la responsabilidad de un PSI por la infracción de los derechos de autor que tiene lugar en sus redes. Un PSI en Sri Lanka no puede gozar del mismo privilegio por la infracción de material no autorizado iniciada por sus

usuarios o terceros en sus redes. Es poco probable que la ley actual ofrezca una protección adecuada a las actividades legítimas de los PSI en un intento de minimizar la vulnerabilidad frente a las demandas por infracción de los derechos de autor.

Les droits exclusifs dont jouit un titulaire de droits d'auteur pour reproduire son œuvre protégée sous toute forme matérielle, y compris tout stockage permanent ou temporaire sous forme électronique, auront un impact direct sur les activités légales d'un fournisseur d'accès à Internet (FAI). Toute transmission de copies temporaires de matériel protégé par la loi sur le droit d'auteur par leurs abonnés ou des tiers utilisant les réseaux fournis par un FAI peut constituer une reproduction non autorisée de ce matériel protégé. Les droits exclusifs accordés à un titulaire de droits d'auteur peuvent donc placer un FAI dans une position difficile susceptible d'affecter gravement les services et installations légitimes fournis par le FAI, tels que la transmission, l'acheminement et le stockage d'informations sur leurs réseaux. Il serait toutefois impraticable d'assimiler la position d'une personne qui commet une violation traditionnelle du droit d'auteur à celle d'un FAI qui ne fait que fournir à ses abonnés un accès à Internet et divers services facilités par ses réseaux.

L'exception relative à la réalisation de copies temporaires a été développée dans la loi sur le droit d'auteur afin de sauvegarder les intérêts légitimes d'un fournisseur d'accès à Internet, ce qui peut, dans certaines conditions, exonérer un fournisseur d'accès à Internet de toute responsabilité en cas d'infraction au droit d'auteur sur Internet commise par ses abonnés ou des tiers en utilisant le système fourni par le fournisseur de services Internet. Il existe des lois en vigueur dans de nombreux pays pour limiter la responsabilité d'un FAI pour la violation du droit d'auteur qui a lieu sur ses réseaux. Un FAI au Sri Lanka peut ne pas bénéficier du même privilège pour la violation de matériel non autorisé initié par ses utilisateurs ou des tiers sur leurs réseaux. La loi actuelle n'est pas susceptible de fournir une protection adéquate pour les activités légitimes des FAI dans le but de minimiser la vulnérabilité face aux plaintes pour violation du droit d'auteur.

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1. INTRODUCTION

The rapid increase in online activities in the digital world has posed complex legal issues, inter alia, in the areas of intellectual property law, defamation law and social media law. In the area of intellectual property law, online activities involve works protected by copyright law and among them, the liability of internet service providers (ISP) for copyright infringement that takes place on its networks is an emerging legal problem that challenges the traditional copyright law.

The content that is distributed through the internet includes software, text, pictures, images, music, films that are part of the copyright law. The works protected by the copyright law are easily reproduced and distributed by unauthorised persons via the internet that may allow the users to access the material that is freely available on the web. This may affect the reproduction, distribution and communication rights of copyright owners since “the infringing act may occur when certain files containing copyright material such as text, pictures, or sounds are posted on the web from which they may be downloaded all over the world”.²

In the context of infringement of copyright material on the internet and the tortious liability for the publication of defamatory material on the internet, the main areas of concern are:

1. The liability of direct infringers of copyright material;
2. The liability of direct publishers of defamatory material;
3. The liability of secondary publishers for the infringement of copyright material by using the facilities provided by them;
4. The liability for a secondary publisher such as an ISP and a website proprietor for providing the conduit for such publication and dissemination of such material.

1.1 Purpose of the Paper

The paper will first identify the nature of an ISP and the different types of services rendered by an ISP. Secondly, it will consider the types of liability for the infringement of copyright material on the internet. Thirdly, it will consider the liability of an ISP for copyright infringement in relation to infringing material carried on its networks in Sri Lanka in comparison with the law of the United Kingdom (UK). It will also consider the liability issue in the context of the implementation of the Electronic Commerce Directive in the UK in providing limitations on the liability of information society service providers. This paper, however, examines only, the copyright infringement that takes place on the networks of an ISP and it does not examine the peer-to-peer copyright infringement and the liability of an ISP for the dissemination of defamatory materials on its networks.

² Rosa Julia-Barcelo, “Liability for On-line Intermediaries: A European Perspective”, *European Intellectual Property Review*, vol. 20, Issue 12 (1998) pp. 453, 455.

2. DEFINITION OF AN INTERNET SERVICE PROVIDER

An internet service provider (ISP) is an entity that connects people to the internet and provides other related services such as website building and hosting.³ Some ISPs describe themselves as Online Service Providers (OSPs). However, the terms “Internet Service Provider” and “Online Service Provider” are synonyms.⁴ The term “Internet Service Provider” is “originally referred to a vendor who provided access for customers to the internet and the World Wide Web, as well as e-mail services and other services”.⁵

The term has been significantly expanded over time and presently, encompasses a wide array of different types of service providers. An ISP may provide internet access services on a retail basis to residential and/or business customers.⁶ An ISP may operate only a backbone network and provide access services to that backbone network on a wholesale basis to other ISPs.⁷ Some ISPs provide hosting services or server caching services and other ISPs do not provide any of these services and only operate portals.⁸ An ISP may also provide only a search engine or some other e-commerce tool.⁹

A service provider under the Digital Millennium Copyright Act (DMCA) of the United States (US) is defined in two different ways. The narrow definition is that an ISP is “an entity offering the transmission, routing, or providing connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”¹⁰ The broad definition refers to a provider of online services or network access or the operator of facilities thereof.¹¹ The definition includes network services companies such as an ISP, search engines and bulletin board system operators.¹² The definition is specifically tailored to encompass the basic functions and services needed by users to access the internet and enjoy its benefits.¹³

In the broader sense, the definition includes the owners and operators of corporate intranets, university networks and interactive websites, in addition to more traditional service providers.¹⁴ Since it encompasses merely those persons who perform the tasks that make the internet available to users, it does not encompass any and all persons using the internet.¹⁵ Thus, a person doing business using the internet such as selling books or fresh fruits or providing auction services would not qualify as a service provider by the mere fact that its business uses

³ R.K. Chaubey, *An Introduction to Cyber Crime and Cyber Law*, 2nd ed. (Kolkata, Kamal Law House, 2012), p. 965.

⁴ Ibid.

⁵ Ibid.

⁶ Timothy D. Casey, *ISP Liability Survival Guide*, (Wiley Publications, 2000 ed.) p. 244.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Section 512 (a).

¹¹ DMCA, Sections 512 (k) (1) (A-B).

¹² Chilling Effects, “Frequently Asked Questions) and Answers) about DMCA Safe Harbor Provisions” 4, <http://www.chillingeffects.org/dmca512/faq.cgi>.

¹³ Batur Oktay and Grey Wrenn, “A Look back at the Notice-Takedown Provisions of the U.S. Digital Millennium Copyright Act One Year after Enactment” WIPO Workshop on Service Provider Liability, Geneva, December 9 & 10, 1999. http://www.wipo.int/edocs/mdocs/mdocs/en/osp_lia/osp_2pdf.

¹⁴ Ibid.

¹⁵ Ibid.

the internet to solicit business, conclude transactions and deliver products or services by means of telecommunications networks.¹⁶

The Electronic Commerce (EC Directive) Regulations 2002 in the UK, which gave effect to the European Electronic Commerce Directive, defines the “Service Provider” as “any person providing an information society service”.¹⁷ The “Information Society Service” referred to in this definition is given the same definition as that in Article 1 (2) of the European Directive No.98/34/EC of the European Parliament and of the Council (repealed) as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”.¹⁸

In the Computer Crimes Act, No. 24 of 2007 of Sri Lanka, the term “Service Provider” is defined in section 38 as “(a) a public or private entity which provides the ability for its customers to communicate by means of a computer system; and (b) any other entity that processes or stores computer data or information on behalf of that entity or its customers”.

In the Electronic Transactions Act, No. 19 of 2006 of Sri Lanka, the term “Internet Service Provider” is not specifically defined in the interpretation section. However, the term “Certification Service Provider” is defined as a person providing certification services within the meaning of the Act.¹⁹ Further the term “Network Service Provider” is defined as a person, who owns, possesses, operates, and manages or controls a public switched network or provides telecommunication services.²⁰ However, the term “Intermediary” is defined as a person acting as a service provider on behalf of another person in relation to the sending, receiving, storing or processing of the electronic communications or the provision of other services in relation to it.²¹ Hence, an “Internet Service Provider” is included within the definition of the term “Intermediary” in section 26 of the Electronic Transaction Act No. 19 of 2006 of Sri Lanka.

2.1 Roles of ISPs

In the first place, it is necessary to understand why an ISP is involved in internet transactions. When digital work is transmitted from one place to another or made available for the public to have access, many parties are involved in this process. The principal actors who are involved in the transmitting of information from one place to another are the senders and the recipients of that information.²² However, in the digital world, the internet technology makes it impossible for users to have access and copy the protected works without internet-based intermediaries.

“Intermediaries, in the internet context are organizations whose services are used to facilitate a transaction between communicating parties. In our online software sale, for example, the website host and the download site host are both intermediaries without whom the transaction could not be affected”.²³

¹⁶ Ibid.

¹⁷ The Electronic Commerce (EC Directive) Regulations 2002, Reg. 2 (1).

¹⁸ Ibid.

¹⁹ Electronic Transaction Act, No. 19 of 2006, Section 26.

²⁰ Ibid.

²¹ Ibid.

²² Chris Reed, *Internet Law: Text and Materials*, (2nd ed.) (Cambridge, Cambridge University Press Academic, 2004), p. 22.

²³ Ibid, at 25.

Intermediaries who are involved in facilitating infrastructure of the internet consist of transmission services such as Telecommunications carriers, communication services such as ISPs and transaction facilitation services such as domain name and certification authorities.²⁴

An ISP “provides internet access and other services to its subscribers: subscribers will connect to the ISP through various means, including dial-up connection across the public telecommunications network, and once connected will have access to such internet resources and facilities as the ISP provides”.²⁵ ISPs are therefore actively involved in providing services that facilitate a transaction between the sender and the recipient. Without ISPs, no internet transaction can be affected in the digital world.

ISPs provide a wide range of services through different functional roles. In order to understand the liability, it is necessary to distinguish the different roles they play in the transmission of digital work from one point to another. This distinction is crucial, as the liability will depend in most instances on the different roles of ISPs.

ISPs “in their various roles as hosts, access providers and as well as in their function as mere conduits play a key role as they provide the means to enable the individuals to store, access and transmit the data packages containing unauthorised music files. Hosting ISPs play a considerable role in providing web space in order to upload internet sites offering unauthorised music files: web pages can typically be posted by means of a dial-up connection to the internet (via the local Service Provider (SP)...). The SP issues a username and password at sign-up time, which are used to log on to the directory where the page, graphics and sound files will be placed. In fact, simple websites can be created in minutes”.²⁶ The four major categories of network systems offered by the world-wide ISPs are basically the following:

1. Conduit communications services – This refers ISPs acting as a conduit between the content provider and the user, providing the transmission to the network or routing of information such as email.²⁷
2. System caching services – This refers to automatic, intermediate and temporary storage of material on its network by the ISP for the purpose of efficiently transmitting information to other recipients.²⁸
3. Hosting services – This refers to storage of information on their networks, provided by a recipient of the services.²⁹
4. Information location tools – This refers to services such as search engines, directories or hyperlinks.³⁰

An ISP risks the liability because “by nature of their service, ISPs provide users of the internet with the means for potential infringement of all four of the basic copyrights-right to

²⁴ Ibid, at 25, 29, 33–34.

²⁵ Chris Reed, Internet Law, note 22, 29.

²⁶ Dr. Nils Bortloff and Janet Henderson, “Notice and take-down agreements in practice in Europe. Views from the internet service provider and the telecommunications and the recording Industry” WIPO Workshop on Service Provider Liability, 1999 Geneva at p. 4., https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.wipo.int%2Fdocuments%2Fmdocs%2Fmdocs%2Fen%2Fosp_lia%2Fosp_lia_3.doc&wdOrigin=BROWSELINK.

²⁷ Claus Kohler and Kai Burmeister, “Copyright liability on the Internet today in Europe (Germany, France, Italy and the E.U)”, *E.I.P.R.* vol 21 No. 10 (1999) pp. 485–499.

²⁸ Ibid.

²⁹ Ibid., at pp. 485, 498.

³⁰ Rosa Julia- Barcelo, “Liability for On-line Intermediaries: A European Perspective”, *E.I.P.R.* vol. 20, Issue 12 (1998), pp. 453, 454.

reproductions, transformation, distribution and the right of public communication”.³¹ The nature of the services provided by the ISPs is such that they provide a potential infringer with all the services and facilities such as transmission, routing of information and storing of copyrighted material on their networks. On the other hand, most ISPs provide website space to their subscribers and run web server software which allow other users to gain access to the site’s resources.³²

Activities such as reproduction, distribution and communication by third parties of the services provided by ISPs are likely to infringe the rights of the copyright owners. “The transmission of a work over the internet will normally result in several acts of reproduction. First, the work is copied onto the server of the hosting service provider. Then, it will be temporarily reproduced, in whole or in part and during transmission, digitised packets are repeatedly ‘stored’ and forwarded.”³³

ISPs play various roles in the dissemination of digital works on the internet from one place to another and the work protected by copyright that is copied is easily distributed all over the world using the facilities provided by ISPs. Thus, the dissemination of copyrighted works by unauthorised persons using the facilities provided by ISPs may seriously affect the rights of copyright owners. In this context, the pertinent question is whether the ISPs should be held liable for copyright infringement initiated by a third party using the facilities provided by ISPs and if so, under what circumstances in the context of the copyright law of Sri Lanka?

2.2 Liability of ISPs for Copyright Infringement in Sri Lanka

There are laws in force in many countries to limit the liability of ISPs for the infringement of copyright that takes place on their networks. In Sri Lanka, there is no specific provision in the Intellectual Property Act, No. 36 of 2003 which would address the issue of ISP liability. There is no special law in Sri Lanka to provide adequate protection for the legitimate activities of ISPs in an attempt to minimise the vulnerability against copyright infringement claims.

However, in 2006 Sri Lanka Parliament enacted the Electronic Transactions Act, No. 19 of 2006 and adopted very clear measures aimed at shielding Certification Service Providers from both civil and criminal liability under section 19 of the Electronic Transaction Act. This Act was introduced to:

- (i) recognise and facilitate the formation of contracts;
- (ii) create and exchange data messages, electronic documents, electronic records and other communications in electronic form in Sri Lanka;
- (iii) provide for the appointment of a certification authority and accreditation of certification service providers; and
- (iv) provide for matters connected therewith or incidental thereto.³⁴

³¹ Miriam Yakobson, “Copyright Liability of online service providers. After the Adoption of the E.C. Electronic Commerce Directive. A Comparison to US Law”, *Entertainment Law Review*, 11 (7) (2000), pp. 144, 146.

³² Chris Reed, above 22, at 25, 26.

³³ Kamiel Koelman and Professor Bernt Hugenholtz, “Online Service Provider Liability for Copyright Infringement” (1999) WIPO Workshop on Service Provider Liability, Geneva. OSP/LIA/1 Rev, 9, <https://www.ivir.nl/publicaties/download/wipo99.pdf>

³⁴ Preamble to the Electronic Transactions Act of Sri Lanka No. 19 of 2006.

The main objectives of the Electronic Transactions Act are to (1) facilitate domestic and international electronic commerce by eliminating legal barriers; (2) encourage the use of reliable forms of electronic commerce; (3) facilitate the filing of documents with the Government and to promote efficient delivery of Government services by means of reliable forms of electronic communications; and (4) promote public confidence in the authenticity, integrity and reliability of data messages and electronic communications.

The Electronic Transactions Act shields the Certification Service Providers who provide certificate services within the meaning of the Act. Section 16 of the Act deals with the liability of Certification Service Providers. It reads as follows:

“16 (1) A Certification Service Provider shall not be subject to any civil or criminal liability for any transaction under this Act in respect of third party information in the form of data messages, electronic documents, electronic records or other communications to which he merely provides access, if such liability is founded on- (a) the making, publication, dissemination or distribution of such information or any statement made in such information; or (b) the infringement of any rights subsisting in or in relation to such information.

(2). Nothing in this section shall affect-

- (a) any obligation founded on contract;
- (b) the obligation of a Certification Service Provider providing such services under a licensing or other regulatory regime established under any written law; or
- (c) any obligation imposed under any written law or by a court to remove, block or deny access to any information.”

Section 26 of the Act defines a “Certification Service Provider”. A “Certification Service Provider” means a person providing certification services within the meaning of this Act. “Certification Services” means any service which is provided to the senders or recipients of information in electronic form, or to those storing such information and is designed to facilitate the use of cryptographic techniques for the purpose of ascertaining that confidentiality, authenticity and integrity of such information is secured.

On the other hand, section 26 of the Act defines “Network Service Providers” and “Intermediary” separately. A “Network Service Provider” means a person who owns or possesses, operates, manages or controls a public switched network or provides telecommunication services. Moreover, the term “Intermediary” is defined in the Act as “a person acting as a service provider on behalf of another person in relation to the sending, receiving, storing or processing of the electronic communication or the provision of other services in relation to it”.

The question is whether an ISP that provides various categories of internet services would come within these definitions. It does not seem that all types of intermediaries are given the protection from any civil or criminal liability under the Electronic Transactions Act. Accordingly, section 16 of the Electronic Transaction Act shields only such Certification Service Providers that provide certification services from civil and criminal liability for any transaction under the said Act in respect of third-party information in the electronic medium to which he merely provides access services. However, ISPs that provide backbone services to the internet such

as hosting, conduiting and caching to the users for a monthly fee are left out of the operation of the said Act for the purpose of exemption from liability.

2.3 WIPO Copyright Treaty and Right of Communication to the Public

It is important to refer to the World Intellectual Property Organization (WIPO) Copyright Treaty, which is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works 1886. Under Article 8 of the WIPO Copyright Treaty,³⁵ authors have the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. Thus, Article 8 specifically extends the right of copyright owners to works made available on the internet.³⁶

Section 9 (k) of the Sri Lankan Intellectual Property Act No. 36 of 2003 (IP Act) grants owners of copyright the exclusive right to communicate their work to the public. "Communication to the public" under the Sri Lankan IP Act means the transmission to the public by wire or without wire of the images or sounds or both of a work, a performance or a sound recording, including the making available to the public of a work, performance or sound recording in such a way that members of the public may access them from a place and at a time individually chosen by them.³⁷ It can be argued that this definition may extend the right of copyright owners to protected works made available on the internet as well.

In any event, an ISP may be entitled to argue that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of section 9 (k) of the IP Act. Any ISP whose country is party to the WIPO Copyright Treaty and has implemented Article 8 relating to the right of communication to the public in its national legislation may succeed in this argument in view of the agreed statement concerning Article 8 of the Treaty. The agreed statement concerning Article 8 of the WIPO Copyright Treaty states:

"It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis (2)."

However, Sri Lanka is not a party to the WIPO Copyright Treaty and the definition of "communication to the public" in section 5 of the Sri Lankan IP Act relates to the transmission to the public by wire or without wire relates to images or sounds or both of a work, a performance or a sound recording. Whereas Article 8 of the WIPO Treaty relates to any communication to the public of their work without limiting to images or sounds or both of a work, a performance or a sound recording.

It is submitted, therefore, that the question of whether the works of the ISPs will also be fully covered by the definition of section 5 is yet to be tested in Sri Lanka. Accordingly, the liability of ISPs for copyright infringement that takes place on their networks needs to be decided by other provisions of the IP Act No. 36 of 2003.

³⁵ WIPO Copyright Treaty, 1996.

³⁶ Miriam Yakobson, "Copyright Liability of Online Service Providers After the Adoption of the E.C. Electronic Commerce Directive: A Comparison to U.S. Law", *Entertainment Law Review*, 11 (7) (2000), pp. 145, 146.

³⁷ Intellectual Property Act, s. 5.

2.4 Why ISPs Risk Liability in Sri Lanka

However, unlike the right of communication of the work to the public, the right of reproduction, which has significant relevance to the activities of ISPs will have a direct impact on ISPs in Sri Lanka. Sri Lanka is neither a party to the WIPO Copyright Treaty nor provided an exemption from liability of ISPs for temporary reproductions that are “transient or incidental” in a network between third parties by an intermediary. In Sri Lanka there are no specific legislative safeguards for ISPs to exempt them from liability for copyright infringement for the transmission of infringing material by their subscribers. The introduction of the reproduction right and the right of communication of the work to the public in section 9 of the Act will place ISPs of Sri Lanka in an awkward position. The Sri Lankan Act No. 36 of 2003 defines the word “reproduction” in section 5 of the IP Act:

“reproduction” means the making of one or more copies of a work or sound recording in any material form, including any permanent or temporary storage of a work or sound recording in electronic form.

In view of this definition, the reproduction right may fully apply in the digital environment, in particular to the use of works in the digital form. Therefore, it is argued that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of section 5 of the Sri Lankan IP Act. When the right of reproduction is available to a copyright holder, he will be able to prevent others from reproducing their protected works in digital form in an electronic medium without his consent.

It is submitted that the making of one or more copies of a work or sound recording in the storage of any material form, including any permanent or temporary work or sound recording in electronic form would amount to infringement of copyright in Sri Lanka when carried out without the consent of the author.

It appears that this provision was made to prevent internet users from gaining access to copyright material on restricted websites without authority. Thus, the Sri Lankan Act provides an exclusive right to an owner of the copyrighted work to carry out or authorise or prohibit the making of one or more copies of a work or sound recording in any material form, including any permanent or temporary storage of a work or sound recording in electronic form.

Thus, under the IP Act of Sri Lanka, the making of one or more copies of a work or sound recording in any material form, including any permanent or temporary storage of a work or sound recording in electronic form would amount to infringement of copyright when carried out without the consent of the copyright owner. Thus, it is seen that the Sri Lankan Act includes temporary copies of copyright as described earlier, within the reproduction right and thus the activities of ISPs would be seriously affected by these provisions since the storage of temporary copies are an essential part of a technical process of making or receiving communication in the operation of the internet. Thus, it facilitates and enables transmission of work in a network between third parties by an intermediary.

The transmission of temporary copies of copyrighted material on the networks of ISPs without the consent of copyright owners may amount to unauthorised reproduction of protected work that constitutes an infringement of copyright under the IP Act of Sri Lanka. In the absence of an exemption from liability for making temporary copies from infringement, it can be argued that in Sri Lanka, ISPs are required to obtain the consent of copyright owners or pay for transient copies made on their networks during the course of the transmission. Thus, they

may risk liability for making transient copies on their networks without obtaining prior permission of the copyright owners.

This position is completely different from the position in the UK as regards the intermediate internet carriers where section 28A of the Copyright, Designs and Patents Act 1988³⁸ states that:

28A- Making of temporary copies

“Copyright in a literary work, other than a computer program or database or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technical process and the sole purpose of which is to enable-

- a. a transmission of the work in a network between third parties by an intermediately or
- b. a lawful use of the work;

and which has no independent economic significance”.

Thus, under the IP Act of Sri Lanka, making of one or more copies of a work or sound recording in any material form, including any permanent or temporary storage of a work or sound recording in electronic form would amount to infringement of copyright when carried out without the consent of the author of copyright.

2.5 European Approach for ISP Liability

The European approach to the liability of ISPs and intellectual property rights is reflected in the E-Commerce Directive³⁹ and the Copyright in Information Society Directive.⁴⁰ These directives have ultimately become a part of the domestic law of each Member State of the European Union (EU), which includes the UK. The Copyright in the Information Society Directive was passed by the EU to harmonise certain aspects of copyright and related rights in the information society as they relate to the online environment. The Directive on the harmonisation of certain aspects of copyright and related rights in the information society grants a number of new rights to copyright holders. These rights include:

- 1. the reproduction rights (Article 2)
- 2. the right of communication to the public (article 3)
- 3. the distribution right (Article 4).

In order to implement the Copyright in the Information Society Directive, the UK introduced the Copyright and Related Right Regulations 2003⁴¹ which amended section 20 of the

³⁸ S. 28A inserted (31.10.2003) by The Copyright and Related Rights Regulations 2003 (S.I. 2003/2498), Reg. 8(1) (with regs. 31–40).

³⁹ The Electronic Commerce Directive, 2000/31/EC.

⁴⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of Copyright and related rights in the information society.

⁴¹ The Copyright and Related Rights Regulations 2003 (S.I. 2003/2498), reg. 2(1), Sch. 1 para. 3(1)(b)(c).

Copyright, Designs and Patents Act 1988. New section 20 of the Copyright, Designs and Patents Act reads as follows:

20- Infringement by communication to the public

(1) The communication to the public of the work is an act restricted by the copyright in—

- (a) a literary, dramatic, musical or artistic work,
- (b) a sound recording or film, or
- (c) a broadcast.

(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—

(a) the broadcasting of the work;

(b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

The aforesaid rights granted to copyright holders placed ISPs in a difficult position as these rights would affect the nature of their services including the transmitting routing and storing of information on their networks. These exclusive rights allowed the copyright owners to prevent others from reproducing, distributing or communicating of their works without their consent.

However, the Copyright Directive provides an exception to the reproduction right where the ISP is acting merely as a pass-through provider, passing on or transmitting the information provided by a third party.⁴² The Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society⁴³ in Article 5 (1) states that:

Article 5

Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

⁴² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society Official, Journal L 167, 22/06/2001 P. 0010 – 0019, Article 5.

⁴³ Ibid.

The Copyright, Designs and Patents Act of the UK was amended to implement Article 5 (1) of the Information Society Directive. The new section, 28A,⁴⁴ which comes within acts permitted in relation to copyright works, exempts intermediate internet carriers including ISPs from liability for copyright infringement. It reads as follows:

Section 28A- Making of temporary copies

Copyright in a literary work, other than a computer program or database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable-

- a. a transmission of the work in a network between third parties by an intermediary or
- b. a lawful use of the work and which has no independent economic significance.

Thus, the UK Act in terms of the Directive provides an exemption for copyright liability where the reproduction is transient or incidental in the following situations:⁴⁵

1. the transient copies are an integral and essential part of a technological process whose sole purpose is to enable a transmission in a network between third parties by an intermediary or a lawful use of a work or other subject-matter to be made; and
2. they have no independent economic significance.

Thus, intermediaries such as ISPs and telecommunications operators subject to the conditions set out in Article 5 (1) are not required to seek the consent of copyright holders or pay for transient copying made on their networks during the course of the transmission. This reason is that the information that is transmitted in a network is being carried from one computer to another computer and such information then is temporally stored for a short period of time on any of these computers.⁴⁶ Accordingly, any attempt to impose a liability on the ISPs would make the internet unworkable.

2.6 Electronic Commerce Directive and Defences⁴⁷

Unlike the Copyright Directive, the Electronic Commerce Directive, provides for the civil and criminal liabilities of ISPs acting as intermediaries in a more detailed manner. The Directive provides that ISPs will not be held liable under any field of law where an application of strict

⁴⁴ S. 28A inserted (31.10.2003) by The Copyright and Related Rights Regulations 2003 (S.I. 2003/2498), Reg. 8(1) (with regs. 31–40).

⁴⁵ *Ibid.*, Article 5 (1).

⁴⁶ Taragade Dangnam, Internet Service Provider liability for third-party copyright infringement: A comparative study between US and EU approaches: To what extent should an ISP be held liable for third-party copyright infringement? Master Thesis, 45 <http://arno.uvt.nl/show.cgi?fid=96103>.

⁴⁷ The Electronic Commerce Directive, 2000/31/EC.

liability would impair the expansion of electronic commerce within the EU.⁴⁸ This approach is called “horizontal” because it addresses liability, regardless of the grounds for liability; it therefore applies not only to copyright law, but also to other areas of law, such as defamation and obscenity.⁴⁹ In introducing this Directive, European Commission thought it fit to ensure that ISPs would not be held liable in any legal field applicable to their services, where the application of strict liability standard would damage the expansion of e-commerce within the EU.⁵⁰

This Directive refers to a service provider as “any natural or legal person providing an information society service”.⁵¹ Intermediaries are referred to as “information society services” within the meaning of Article 1 (2) of Directive 98/34/EC as amended by Directive 98/48/EC.⁵² Accordingly, an “information society service” is defined as “any service normally provided for remuneration at a distance by electronic means and at the individual request of a recipient of services”.⁵³

Articles 12 to 15 of the Directive deal with the liability of ISPs when acting as intermediaries for third parties’ transfer of information. They describe the conditions required to exempt ISPs from monetary and criminal liability. The Directive recognises only three categories of services eligible for exemption from liability. They include “mere conduit” (including automatic, intermediate and transient storage), “caching” and “hosting”.

EC Regulations, implementing the EU E-Commerce Directive in the UK law came into force on 31.07.2002.⁵⁴ Resembling the exemptions provided by the E-Commerce Directive, these Regulations identify three activities that are exempted from liability under certain conditions. The relevant parts of the Regulation apply to the “service providers” of the “information society service” dealing with the mere conduit, caching and hosting.

The E-Commerce Directive exempts ISPs from liability arising of the following activities of internet service providers:

1. Mere conduit exception (related article in the UK Regulations is Article 17)

Article 12 provides that when acting as mere conduit an ISP will not be liable for the information transmitted on their networks provided the ISP

- does not initiate the transaction
- does not select the receiver of the transmission and
- does not select or modify the information in the transmission.

This exemption of liability extends to the automatic, intermediate, and transient storage of the information, provided this takes place for the purpose of carrying out the transmission in the

⁴⁸ Robert P. Merges, Seagull Haiyan Song (eds.), *Transnational Intellectual Property Law: Text and Cases* (Elgar Publishing 2018) paragraph 15.2.3.

⁴⁹ Ibid.

⁵⁰ Miriam Yakobson, “Copyright Liability of Online Service Providers after the Adoption of the E.C. Electronic Commerce Directive: A Comparison to U.S. Law”, *Entertainment Law Review*, 11 (7) (2000), pp. 145, 148.

⁵¹ Article 2 (1).

⁵² Directive 98/34/EC as amended by Directive 98/48/EC of the European Parliament of the Council Laying Down a Procedure for the Provision of the Information in the Field of Technical Standards and Regulations and Rules on Information Society Services.

⁵³ Directive 98/34/EC as amended by Directive 98/48/EC, Article 1(2).

⁵⁴ The Electronic Commerce (EC Directive) Regulations 2002.

communication network and it is not stored for any period longer than is reasonably necessary for the transmission.

2. Caching Exception (Related Article in the UK Regulations is Article 18)

Article 13 provides that when caching, an ISP will not be liable for the automatic and temporary storage of the information that is carried out for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that the ISP

- does not modify the information;
- complies with conditions on access to the information;
- complies with rules regarding the updating of the information specified in a manner widely recognised and used by the industry;
- does not interfere with the lawful use of the technology, widely recognised and used by industry, to obtain data on the use of the information;
- acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the initial source of the transmission has been removed from the network, or access to it has been disabled or that a court or an administrative authority has ordered such removal or disablement.

3. Hosting Exception (Related Article in the UK Regulations is Article 19)

Article 14 provides that an ISP will not be liable for the information stored at the request of the recipient of a service, on the condition that the ISP:

- does not have actual knowledge of illegal activity or information; and
- as regards claims for damages is not aware of facts or circumstances from which the illegal activity or information is apparent, or
- upon obtaining such knowledge or awareness, acts expeditiously to disable access to the information.
- the recipient of the service was not acting under the authority or the control of the ISP.

There is no time limit given under the Directive as to how soon the ISP should act upon receiving notice of the unlawful material which is accessible through their service.⁵⁵ It only requires the ISP upon obtaining such knowledge or awareness to act expeditiously or disable access to the information. These provisions will be used by ISPs as defences for copyright liability when sued both for monetary and criminal liability. Since these liability exceptions do not affect the rights of any party from applying for an injunction to prevent infringement of copyright, the effect of liability exceptions is limited to preventive injunctions by a court of law in a Member State.⁵⁶ This is in keeping with the objectives of the Directive that Member States should ensure that court actions by way of interim measures such as injunctions against ISPs are designed to terminate any infringement and to prevent any further impairment of the interests involved.⁵⁷

⁵⁵ Martin J Hayes, "Internet Service Provider Liability", Legal Information Service, 13.

<http://www.jisclegal.ac.uk/ispliability/ispliability.htm>.

⁵⁶ Regulation 20 of UK Regulations clearly provides that liability exceptions do not apply to injunctions. Hence, the liability exceptions in the UK law is subject to Regulation 20.

⁵⁷ The Electronic Commerce (EC Directive) Regulations 2002, Article 18.

This position is in keeping with the logic that imposing liability on the ISP where the ISP does not act as a content provider but plays a passive role of secondary transmitter of third-party information, would seriously affect the legitimate activities of the ISP. Therefore, court actions against ISPs should be limited to the prohibitory injunctions.

Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.⁵⁸ There is no obligation to monitor the exemption that has been included in the Directive for the purpose of protecting the privacy of the customers of the ISP, who play a major role for the development and expansion of E-Commerce in EU. Hence, the obligation to monitor is limited to the conditions for eligibility stated in Article 15 of the Directive.

However, Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and prevent any further impairment of the interests involved.⁵⁹ Although the ISP has no general obligation to monitor, under caching and hosting exceptions, an ISP is obliged to remove or disable access to the infringing material upon knowledge or awareness of such infringing material.

In determining whether an ISP has actual knowledge, for the purpose of Article 13 and 14, a court has to take into account, among other things, any notice which includes the details of the unlawful nature of the activity or information, details of the sender and the location of the information. Under Article 13 and 14, an ISP is required to remove or disable access to the infringing material upon obtaining actual knowledge of illegal activity or infringing material. Therefore, it is arguable that once a copyright owner notifies or a court or administrative body orders such removal or disablement, an ISP obtains actual knowledge of illegal activity or infringing material on its network. Hence, an ISP is obliged to act expeditiously to remove or disable access to such material.

Thus, the Directive has provided Notice and Takedown procedure as a condition to be met before relying on the exemption from liability in relation to Articles 13 and 14. However, the Electronic Commerce Directive does not have specific provisions for a notification system for a Notice and Takedown procedure and counter notice procedure. Thus, considering the cross-border nature of internet access, a harmonised system for notification would facilitate the eradication of copyright infringement and illegal activity on the internet.⁶⁰ As a result, it is left to the legislators of Member States to establish procedures and provide for applicable rules governing the removal and disabling of access to the infringing material and illegal activity on the network of an ISP.

2.7 Copyright Infringement and ISP Liability in Sri Lanka

The Intellectual Property Act makes out two types of copyright infringements, namely, primary and secondary infringements. The liability of an ISP will depend on the type of the copyright infringement and the type of the infringement will depend on the kinds of restricted acts performed by an alleged infringer.

⁵⁸ Ibid., Article 15.

⁵⁹ Ibid.

⁶⁰ Miriam Yakobson, "Copyright Liability of Online Service Providers After the Adoption of the E.C. Electronic Commerce Directive: A Comparison to U.S. Law", *Entertainment Law Review*, 11 (7) (2000) pp. 145, 151.

The Sri Lankan IP Act does not provide for any similar exemption to the right of reproduction in Part 11 of the Act since it was not meant to provide for adequate protection to ISPs to facilitate the development of electronic communication and introduce norms to hold the infringing activity initiated by third parties and facilitated by systems of ISPs. Thus, in the absence of special laws or adequate protective measures to determine the copyright liability of ISPs, the traditional copyright liability criteria set out in the Intellectual Property Act will have to be examined.

3. TYPES OF LIABILITY

It is submitted that the Sri Lankan IP Act makes out two types of copyright infringements, namely, primary and secondary. It is to be observed, however, that the traditional principles of copyright liability in the US are threefold namely, direct infringement, contributory infringement⁶¹ and vicarious infringement. Thus, the liability will depend on the existence of the three types of infringement. These pre-legislation decisions in the US demonstrate the willingness of the US Courts to extend the traditional principles of copyright liability to cases involving the internet with necessary modifications. Unlike in civil law countries, the copyright liability in the UK does not divide the forms of infringement into direct and indirect infringements. However, some elements of direct and indirect infringements may be incorporated into primary or secondary infringement in the English law.

3.1 *Primary Infringement*

3.1.1 Actual Infringement

Primary infringement is the activities of those involved in infringing the copyright owner's exclusive rights.⁶² The primary infringement occurs when the direct infringer (the direct actor) who, with or without a specific intent to infringe, is the primary party that violates one of the copyright owner's exclusive statutory rights. Primary infringement occurs in Sri Lanka when a person carries out or authorises another person to do any of the restricted works set out in section 9 of the IP Act without the consent of the copyright owner. The restricted acts set out in section 9 are:

1. reproduction of the work;
2. translation of the work;
3. adaptation, arrangement or other transformation of the work;
4. the public distribution of the original and each copy of the work by sale, rental, export or otherwise;
5. rental of the original or a copy of an audiovisual work embodied in a sound recording, a computer program, a database or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned;
6. importation of copies of the work, (even where the imported copies were made with the authorisation of the owner of the copyright);
7. public displays of the original or a copy of the work;
8. public performance of the work;
9. broadcasting of the work;
10. other communication to the public of the work.

Thus, with the inclusion of the right of reproduction and the right of communication of the work to the public, ISPs in Sri Lanka may be in an awkward position since these rights have an effect on the legitimate activities of ISPs. An ISP may be liable for actual copyright infringement if the ISP is actually or directly involved in violating any of the exclusive rights given to

⁶¹ Thus, a person is liable for contributory infringement where he with knowledge or reason to know of the infringing activity of another causes or materially contributes to the conduct of the direct infringement.

⁶² Lionel Bently and Brad Sherman, *Intellectual Property Law*, 2nd ed. (Oxford, Oxford University Press, 2004) p. 161.

copyright owners in section 9 of the IP Act. As discussed earlier, however, professional ISPs are only acting as passive carriers of an automatic transmission of works posted by a third party on their networks. Thus, unless they are taking any affirmative steps to cause the copies to be made, they cannot be held liable under section 9 of the Sri Lankan IP Act.

The standard under the primary infringement is strict liability and the strict liability is a general term used to describe forms of liability that do not depend upon proof of fault.⁶³ Thus, factors such as mental element, recklessness or carelessness are not required to constitute the liability. Consequently, innocent and unintentional copying of protected work may be sufficient to hold the infringer liable.

Primary infringement has two main elements, actual or authorising infringement. The issue whether an ISP should be regarded as direct infringers has been addressed in several US cases. Although the cases were decided under the US law, some of the principles set out in these cases are valid under the English law and the Sri Lankan law as well. In *Religious Technology Centre v. Netcom on-line Communication Services Inc.* (Netcom decision),⁶⁴ Netcom, the customer of an ISP had posted infringing copies of the works owned by the Church of Scientology on an internet newsgroup through a newsgroup server controlled by Netcom. The user who placed the files on the internet actually utilised a local Bulletin Board (BBS) that provided internet access through Netcom. The church requested Netcom and the BBS to deny access to the individual involved and remove all documents containing Church materials from the servers.

When Netcom and the BBS refused, the Church filed action against Netcom and the BBS. The court found that neither Netcom nor BBS had directly infringed the Church's copyright since they had not taken any affirmative steps to cause the copies to be made. The court said that "the mere fact that Netcom's system, incidentally, makes temporary copies of plaintiff's works does not mean Netcom has caused the copyright."⁶⁵ It appears, therefore, that an ISP could only be held liable for primary infringement under the Sri Lankan law if the ISP causes an actual infringement by doing any of the restricted acts set out in section 9 of the IP Act.

3.1.2 Authorising Infringement

Section 9 of the Act provides that the owner of the copyright of a work shall have the exclusive right to carry out or to authorise the following acts in relation to the work. The primary infringement under the Sri Lankan Act can also include authorising infringement under section 9 since the copyright in a work is infringed by a person who without the consent of the copyright owner either does or authorises another to do any of the acts restricted by the copyright. Therefore "copyright may be infringed primarily where a person without the permission of the copyright owner authorises another to do a restricted act."⁶⁶ In this context, copyright "authorisation" means "to sanction, countenance or approve, or alternatively, to grant or purport to grant to a third person the right to do an act complained of".⁶⁷

The issue of copyright infringement by authorisation was decided in the Australian Case of *Moorhouse and Angus and Robertson (Publishers) Ltd v. University of New South Wales*.⁶⁸

⁶³ Michael A. Jones, *Textbook on Torts*, 3rd ed. (London, Blackstone Press, 1991) p. 231.

⁶⁴ *Religious Technology Centre v. Netcom on-line Communication Services Inc.* 907 F. Supp. 1361 (N.D Cal 1995).

⁶⁵ *Ibid.*, at. 1368.

⁶⁶ David Bainbridge, *Intellectual Property*, 5th ed. (Pearson/ Longman, 2002) p. 117.

⁶⁷ *Falcon v. Famous Players Film Co.* (1926) 2 K.B.474, 491.

⁶⁸ *Moor house and Angus and Robertson (Publishers) Ltd v. University of New South Wales* (1976) R.P.C. 151.

In this case, Justice Gibbs said “A person who has under his control the means by which an infringement of copyright may be committed- such as a photocopying machine and who makes it available to other person knowing or having reason to suspect that it is likely to be used for the purpose of committing an infringement and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from the use.”⁶⁹

In applying the same control test in *Amstrad Consumer Electronics PLC v. British Phonograph Industry Ltd*,⁷⁰ the House of Lords held that supplying machines which would be likely to be used unlawfully to infringe copyright was insufficient to make the manufacturer or supplier a primary infringer of copyright nor could this be seen as authorising infringement of copyright because the supplier had no control over the way the machines were used once sold. In *CBS Songs Ltd v. Amstrad Consumer PLC*,⁷¹ Lord Templeman said that in the context of copyright, authorisation means “the grant or purported grant which may be express or implied, of the right to do the act complained of”. In this case it was held that Amstrad was not an authorised infringement of copyright by the sale of its twin cassette tape machines since it was merely facilitating copying. Therefore, an ISP is not liable for authorising infringement merely because the ISP provided physical facilities for enabling the infringer to commit the infringement.

The same control test was applied in *Netcom* to hold an ISP for contributory infringement where the ISP with knowledge or reason to know of the infringing activity of another encouraged or facilitated the conduct of the direct infringer. If the *Netcom* test is applied in Sri Lanka, then an ISP may be liable for authorising infringement of copyright provided that it knew or should have known about the presence of the copyrighted material on its network but failed to remove them. In *Netcom*, the Court found that Netcom knew or should have known about the presence of the copyrighted material on its server but failed to remove them and such failure was held to be equivalent to contributory infringement. The Court applied the control element and found that the defendants who were ISPs did have the right, ability and the capacity to control their users. Thus, it can be said that an ISP could be held to authorise infringement if it fails to inform subscribers of copyright law and the importance of not infringing copyright and additionally or alternatively, fails to monitor the material made available through its service.⁷²

In both *Moor House* and *Amstrad* cases, the control test was used to determine the copyright infringement by the authorisation. In *Netcom*, the control test was used to decide the contributory infringement under the US law. Nevertheless, “contributory infringement can be linked to authorising infringement, but it is not so extensive.”⁷³ For example, contributory infringement in the US requires actual knowledge, whereas authorising infringement in the UK can be inferred where a person is indifferent as to whether infringing material is involved.⁷⁴

It is unlikely that the Sri Lankan courts will apply the theory of contributory infringement because the degree of liability is different. It is to be noted that in the case of the primary infringement, the strict liability principle applies where the mental element, such as the degree of knowledge, recklessness or carelessness is not required. However, in the case of contributory infringement, the degree of knowledge or reason to know is required. Therefore,

⁶⁹ Ibid., at p. 40.

⁷⁰ *Amstrad Consumer Electronics Plc. v. British Phonograph Industry Ltd* (1986) F.S.R 159.

⁷¹ *CBS Songs Ltd v. Amstrad Consumer Electronics plc*, (1988) AC 1013.

⁷² Bainbridge, *Intellectual Property*, note 65, p. 241.

⁷³ Ibid.

⁷⁴ Ibid.

a Sri Lankan court may find it difficult to apply the extensive version of contributory infringement theory within the primary infringement.

However, a Sri Lankan Court may be able to apply the degree of control and the degree of indifference exhibited by acts of commission or omission by ISPs to determine whether an ISP is liable for authorising infringement initiated by their subscribers and carried on their networks. Thus, if it can be shown that the ISP had some measure of control over unauthorized material on their networks and the ISP showed indifference and failed in their duty to ascertain as to whether infringing material is involved on their networks, then it is possible to argue that the ISP authorised and encouraged or facilitated infringing posting on its networks by its users. The question whether an ISP can be held liable for authorizing or encouraging infringing acts carried out by its users is, thus, a question of fact in each case.

In *Performing Right Society Limited v. Caryl Theatrical Syndicate Limited*,⁷⁵ it has been held that “indifference, exhibited by acts of commission or omission, may reach a degree from which authorisation or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorised the performance or permitted the use of a place of entertainment for the performance complained of.” For example, the authorisation could be established by applying the degree of exhibiting indifference by turning a blind eye, by allowing to place the infringing material on the network or by using or attempting to use a published material for commercial purposes.

The authorising infringement can also be extended to situations where an ISP has control over the service and has a common design to infringe as a joint infringer. Joint infringers can be described as two or more persons who act in concert pursuant to a common design to infringe.⁷⁶ Thus, an additional liability of authorising infringement can be inferred where an ISP has control over its network acts in concert pursuant to a common design to infringe. Unlike in the case of control over its network where an ISP can check and erase infringing material once notified by a copyright owner, the test of common design may be hard to apply to a professional and efficient ISP. It is common knowledge that a professional ISP may not act with a direct infringer in concert pursuant to a common design. Nevertheless, if an ISP encourages others, even tacitly, to place infringing material on its network, it could be said that there is a common design, being the dissemination of infringing material.⁷⁷

The element of common design was developed on the premise that an ISP in terms of services provided enjoys a greater deal of control over unauthorised material on their networks and therefore it may be in a better position to monitor and limit its use for legitimate purposes. If they fail in their duty and authorise users to use their networks for copyright infringement, they will be liable for authorising infringement under section 9 of the Sri Lankan IP Act.

A Sri Lankan Court can also extend the theory of authorising infringement to situations where an ISP has both the control over the network and a common design to infringe. These two elements are the features of a joint liability of an ISP. The two elements of this liability are the control test and the common design test.⁷⁸ Therefore, if a content provider can satisfy the following two elements:

⁷⁵ *Performing Right Society Limited v. Caryl Theatrical Syndicate Limited* (1924) 1 K.B.1, 9.

⁷⁶ Bainbridge, note 65, p. 241.

⁷⁷ *Ibid*, at p. 242.

⁷⁸ *Ibid*.

1. that the ISP has control over its service or the network. In this situation, the ISP will be able to check the infringing material transmitted through their network and erase the infringing material quickly;
2. that there was a common design between the ISP and the infringer. In this situation, the ISP and the infringer should act in concert pursuant to a common design to infringe, then, it can be shown that the ISP encouraged others, even tacitly, to place infringing material on its network and in such a case, there can be a common design for the dissemination of infringing material on its network.⁷⁹

Therefore, if the Sri Lankan courts are prepared to recognise this broader theory of joint infringement to determine the liability of ISPs in this situation, an additional liability under the primary infringement may be formed. However, the applicability of the element of a common design to internet environment may be hard to prove since professional ISPs are not expected to act in concert pursuant to a common design to infringe copyrights. A professional ISP is only a passive carrier involved in automatic transferring of material posted by third parties. So, in many instances they cannot be said to act in concert pursuant to a common design to infringe copyright of its owners. Nevertheless, if an ISP has encouraged or facilitated others to post infringing material on its network being one of control and having a common design, then, an ISP as a joint infringer may be liable for authorising infringement.

Unlike in the case of control over its network where an ISP can check and erase infringing material once notified by a copyright owner, the test of common design is hard to apply to a professional and efficient ISP. It is common that a professional ISP may not act with a direct infringer in concert pursuant to a common design. Nevertheless, if an ISP encourages others, even tacitly, to place infringing material on its network, it could be said that there is a common design, being the dissemination of infringing material.⁸⁰ In the absence of the strict proof of the element of common design, the ISP can be found to have encouraged or facilitated the infringing material and thus, it may be liable for authorising infringement under the Sri Lankan law if it can be shown that:

1. the ISP had control over the unauthorised material on its network; and
2. the ISP showed indifference to ascertain whether infringing material is involved, but failed to erase them by using an effective system.

However, in both situations, the liability may be subject to the fair use defence recognised in the IP Act or receipt of copyright notices or failure to provide necessary documentation by the copyright holders to show that there is a likely infringement.

3.2 Secondary Infringement

Secondary infringement concerns activities of a commercial nature, such as dealing with infringing copies of a work or facilitating their production without the license of the copyright owner. Where the secondary liability is concerned, one is liable for consciously causing or assisting to cause infringement by other persons.⁸¹ The secondary infringement concerns

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ J. A. L. Sterling, *World Copyright Law: World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts, and Published Editions in National, International, and Regional Law*, (Sweet

people in a commercial context who either deal with infringing copies, facilitates such copying or public performance,⁸² including providing premises or apparatus for such infringement with knowledge or reason to believe that the activities in question are wrongful.

The Copyright, Designs and Patents Act of the UK clearly identifies acts of secondary infringement, such as importing infringing copies, possessing or dealing with the infringing copy, providing means for making infringing copies, permitting use of premises for infringing performances, provision of apparatus for infringing.⁸³ In the Sri Lankan IP Act, acts of secondary infringement are not separately defined. The distinction between primary infringement and secondary infringement is that the former involves making the infringing copy or making the infringing performances, while the latter involves dealing with those copies, providing the premises or apparatus for the performances or making an article for the purpose of making infringing copies.⁸⁴ When a secondary infringement is committed, however, there will almost certainly have been a corresponding infringement of one or more of the acts restricted by copyright⁸⁵ (e.g. acts restricted by section 9 of the IP Act).

For a secondary infringement, the person responsible must have knowledge or reason to believe that the copies are infringing.⁸⁶ The secondary liability depends on the defendant knowing or having reason to believe that the infringing activities are wrongful. Although there is no specific reference in the IP Act as to the acts of secondary infringement, section 23 refers to unlawful activities that amount to secondary infringement of the copyright owner. A copyright in a work may be secondarily infringed by a person who, without the consent of the copyright owner violates the protected rights of the copyright owner under the following circumstances:

1. the manufacture or importation for sale or rental of any device or means specifically designed or adapted to circumvent any device or means intended to prevent or restrict reproduction of a work or to impair the quality of copies made (the latter device or means hereinafter referred to as “copy protection or copy management device or means”);
2. the manufacture or importation for sale or rental of any device or means that is susceptible to enable or assist the reception of an encrypted program, which is broadcast or otherwise communicated to the public, including reception by satellite, by those who are not entitled to receive the program.

The infringing activities of copyright are also recognised under section 23 (3) of the IP Act. Thus, an owner of copyright in a work will have a remedy for infringement of copyright where:

- (a) authorised copies of the work have been made and offered for sale or rental in an electronic form combined with a copy protection or copy management device or means and a device or means specifically designed or adapted to circumvent the said device or means, made or imported for sale or rental;

& Maxwell, 1998); Miriam Yakobson, “Copyright Liability of Online Service Providers After the Adoption of the E.C. Electronic Commerce Directive: A Comparison To U.S. Law”, *Entertainment Law Review*, 11 (7) (2000), pp. 145, 146.

⁸² Bentley & Sherman, above note 61, p. 186.

⁸³ Sections 22–26.

⁸⁴ Bainbridge, note 65, pp. 137–138.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, p. 138.

- (b) the work is authorised for inclusion in an encrypted program, broadcast or otherwise communicated to the public, including by satellite and a device or means enabling or assisting the reception of the program by those who are not entitled to receive the program made or imported for sale or rental.

Thus, the activities mentioned in section 23 (1) (i) of the IP Act refer to the manufacture or importation for sale or rental of any device or means specifically designed to circumvent any copy protection or copy management device or means, whereas, the activities mentioned in section 23 (1) (ii) of the IP Act refer to the manufacture or importation for sale or rental of any device or means that is susceptible to enable or assist the reception of an encrypted program, which is broadcast or otherwise communicated to the public, including the reception by satellite, by those who are not entitled to receive the program. It is most likely that there must have actual knowledge or constructive knowledge on the part of the infringer to believe that the article concerned is an infringing copy to constitute secondary infringement.

However, it is seen that ISPs are not involved in the activities mentioned in section 23 (1) (i) of the IP Act. First, the legitimate activities of an ISP are not involved in manufacturing or importing for sale or rental of any device or means specifically designed or adapted to circumvent any device or means. Secondly, the legitimate activities of an ISP are not intended to prevent or restrict reproduction of a work or to impair the quality of copies made.

Similarly, it can also be seen that ISPs are not involved in activities mentioned in section 23 (1) (ii). The legitimate activities of an ISP are not connected with the manufacture or importation for sale or rental of any device or means that is susceptible to enable or assist the reception of an encrypted program that can be broadcast or otherwise communicated to the public. An ISP acts merely as an intermediary in transmitting information, directed by its subscribers. Thus, it is not possible to hold an ISP for secondary infringement of copyright under section 23 (1) (i) or (ii) of the Sri Lankan IP Act.

Thus, these sections have been specifically designed to overcome the challenges posed by the modern copying technology by way of unauthorised copying of a work that is copy protected. Although section 23 of the Sri Lanka IP Act has introduced some anti-circumvention provisions that are designed to implement the WIPO Copyright and Phonograms Treaty, it does not deal with the extent of liability of intermediate service carriers for copyright infringement in relation to infringing items carried on their networks. These provisions are not intended to deal with the activities of ISPs that act merely as intermediaries in transmitting information directed by their subscribers.

3.3 Defences

In determining whether a service provider has actual knowledge for the purpose of this infringement, a Court shall take into account all matters which appear to it in the particular circumstances to be relevant including any fair use defence in section 12 of the IP Act. In the absence of special legal provisions to exempt an ISP for copyright infringement, the consideration of the following matters is relevant:

- a. whether a service provider has received a notice through a means of contact made available to it by the content provider with regard to the nature and the extent of infringement in question;
- b. the reasonable and effective measures taken by an ISP having received such

- notice to prevent their services being used to infringe copyright on their networks;
- c. contractual agreement, if any, with the subscribers; and
- d. fair use defence in section 12 of the IP Act;
- e. in the case of secondary infringement, whether the ISP had knowledge or reason to believe that the copies are infringing.

The burden shall be on the service provider to demonstrate that he has fulfilled his duties and that he has complied at all material times and in all material respects with the voluntary code of practice being followed by the internet community. An ISP can also demonstrate that the infringement complained of took place despite such compliance, and then the service provider may be deemed to have fulfilled his duty.

4. CONCLUSION

It is submitted that Sri Lanka should afford limited protection to ISPs from liability for providing access to third party copyrighted material on their networks. The limitation of their liability is required to protect the legitimate interests of ISPs and copyright owners and to ensure a fair balance between the copyright holders, ISPs and others involved in the internet technology in a technologically developing country like Sri Lanka.

The first thing is to bring an amendment to section 5 read with section 9 (1) (a) of the IP Act of Sri Lanka and exempt ISPs from copyright infringement within the reproduction right for making temporary copies of copyrighted material, where such copies are an essential part of a technical process of making or receiving a communication in the operation of the internet. This would exempt intermediate internet carriers such as ISPs from liability for copyright infringement provided, however, that this exemption would apply only if such ISPs provided mere access to such materials acting in a passive role.

This would shield ISPs from copyright liability for transmitting copyrighted work for their legitimate work between third parties and an intermediary which is an integral and essential part of a technological process. However, Sri Lanka need not introduce a blanket exemption to ISPs in relation to all temporary copies from liability. Sri Lanka can identify the range of temporary copies that are made as part of the technical process of making or receiving a transmission or communication done by an ISP.

These exemptions should be limited to acts of temporary reproductions that form an integral and essential part of a technical process and take place in a network as part of the lawful work of a transmission process. This means that the ISP should not have received direct financial benefits from the infringing activity, or such infringing activity should not have enhanced the value of the services to subscribers or attracted new subscribers. This shows that even if an ISP has not received a direct financial benefit from the transmission of the infringing activity, if the infringing activity has contributed to enhance the overall commercial activity of the ISP and benefits for the ISP, the exception should have been made not applicable.

Secondly, Sri Lanka can provide defences to copyright liability in the IP Act itself, where temporary reproductions made in the course of acting as a mere conduit, caching or hosting of third-party material online. In this situation, Sri Lanka can also consider whether to limit the exceptions to non-infringing communications such as browsing or viewing copyright material online and in certain types of caching. However, these exceptions can be subjected to certain conditions as recognised in the present UK law.

In order to protect the rights of copyright owners to retain control over the communication and reproduction of their works on the internet and to protect the operation of an ISP, it is necessary to introduce the notice and takedown procedure which obliges an ISP to remove or disable access to the infringing material upon knowledge or awareness of such infringing material. On the other hand, if such ISPs play an active part in the publication, reproduction, dissemination of such material or the infringement of rights which subsisted on such materials, the exemption would be lost. In the process of protecting the interests of ISPs, the legitimate interests of copyright holders should also be safeguarded. Sri Lanka should attempt to strike a balance between the rights of copyright owners and ISPs.

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International Environment House 2
Chemin de Ballexert 7-9
POB 228, 1211 Geneva 19
Switzerland

Telephone: (41) 022 791 8050
E-mail: south@southcentre.int

Website:
<http://www.southcentre.int>

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