

TOWARDS AN EFFECTIVE REGIME  
AGAINST ONLINE COPYRIGHT INFRINGEMENT IN INDIA

by

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## Abstract

With Internet usage on the rise, it is important for India to establish an effective regulatory regime to combat piracy and mass copyright infringement online. This thesis argues that, in the face of unique legal and cultural challenges specific to India, present laws in the country have failed to do so. Unless and until these challenges are met it will be difficult to have an effective mechanism that deals with online copyright infringement.

Countries like the United States, Canada, Ireland, and France have all adopted different regulatory models. However, this thesis argues that each not only have significant limitations on their own, but would also fail to address challenges unique to India's online copyright context. Through a comparative analysis, this thesis argues for a new regulatory model for policing copyright infringement in India, one that combines features from these models, addresses unique Indian challenges, and achieves a fairer balance between the interests of copyright holders and Internet-based copyright users.

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# Chapter I: Introduction

A fair and balanced copyright regime that is suitable for the 21st century is an absolute necessity to remain competitive in a global economy that is built upon ideas and innovation. Copyright should give artists and innovators then chance to make money from their work; however, that needs to be balanced with the rights of society as a whole.<sup>1</sup>

## 1.1 Background

Copyright law plays an important role in the creation and protection of new ideas.<sup>2</sup> A person may not be motivated to create something new if his efforts are not rewarded and protected.<sup>3</sup> It is necessary to have strong legislation that protects the interest of copyright owners without harming the interest of Internet users. The Internet<sup>4</sup> has evolved significantly since the turn of the century,<sup>5</sup> thus making it easier for a work to get copied and even distributed. In the real world distributing a copyrighted work on a large scale is not that easy, but in a cyber-world it is very much possible to distribute a copyrighted work to almost every country.<sup>6</sup> Therefore, it is not easy to make laws for

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<sup>1</sup> MA Gunn, “Peer-to-Peer File Sharing as User Rights Activism” (2015) 15:3 Western Journal of Legal Studies 1 at 12.

<sup>2</sup> James D. Torr, ed, *Introduction* (United States of America: Greenhaven Press, 2005) at 4.

<sup>3</sup> Phil Galdston, *Internet Piracy Harms Artists*, ed by James D. Torr ( United States of America: Greenhaven Press,, 2005) at 26-27.

<sup>4</sup> The Internet is a global system of interconnected networks that communicate and transport data. See, *American Civil Union v Reno* [(929 F) (Supp. 824): (1996) US District Court of Pennsylvania Report.]

<sup>5</sup> Annemarie Bridy, “Is Online Copyright Enforcement Scalable?”(2011) 13:4 Vanderbilt Journal of Entertainment and Technology Law 695 at 697. Also, See “Internet World Stats” online: <<http://www.Internetworldstats.com/stats.html>> .

<sup>6</sup> MA Gunn, *supra* note 1 at 4.

the Internet that are fully effective as the copyright work can be distributed more easily and quickly.

Online infringement occurs in different ways, such as through illegal downloading of contents (songs and movies), illegal uploading of contents and facilitating illegal streaming of live contents<sup>7</sup>. Most of the countries have their own legal regime for eliminating unlawful file sharing. One of the first procedures created to control such infringements and protect the interests of copyright holders was the procedure of “Notice and Takedown (NTD)”<sup>8</sup>. India is one country that adopted this procedure and through this thesis I shall critically evaluate NTD copyright enforcement systems in India and analyse whether present laws are effective or not.

India is one of the fastest developing countries and Internet usage in India has been drastically rising with each year.<sup>9</sup> As such, it is important to have an effective regime to protect the work of copyright holders on Internet. In order to advance an efficient solution, I will be doing a comparative study of India’s NTD system with reference to NTD systems in the United States’ DMCA (DMCA),<sup>10</sup> Notice and Notice system<sup>11</sup> created under Canada’s Copyright Modernisation Act,<sup>12</sup> and the “three strike rule” or “Graduated Response” approach adopted in France and Ireland.

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<sup>7</sup> *Ibid* at 14.

<sup>8</sup> MA Gunn, *supra* note 1 at 7.

<sup>9</sup> Chinmayi Arun and Sarvjeet Singh “NoC Online Intermediaries Case Studies Series: Online Intermediaries in India” (2015) National Law University 1 at 2.

<sup>10</sup> 17, USC (1998).

<sup>11</sup> SC 2012 s.41.25, 41.26 and 41.27(3).

<sup>12</sup> Bill C-11, *Copyright Modernization Act*, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, 2012.



None of the legal provisions mentioned above are completely flawless and there may be difficulty enacting an absolutely perfect law, but this thesis tries to attain a workable law that can be adopted in India. The thesis also highlights more general flaws of other models analysed in the paper, beyond the unique legal and cultural challenges in India.

In this thesis, I methodically establish ways the Indian “Take Down” system can be modified in order to arrive at an even more effective regime that can curb illegal online piracy. The present chapter highlights the general problem of online copyright infringement in brief. It will also discuss new technologies that are facilitating these and other online infringements, the impact this has on copyright owners and how these infringements are affecting various sectors worldwide. This chapter focuses on the nature of online infringement in the form of illegal uploading and downloading of contents.

In the second chapter, the focus is on India’s unique legal and cultural landscape in the context of copyright online, including regulatory methods they have adopted to combat online infringement. The chapter evaluates the provisions prescribed in the Indian Technology Act, 2000<sup>13</sup> and Indian Copyright Act, 1957<sup>14</sup> regarding the taking down of websites. This chapter analyses how the Indian laws have responded to the advancing technologies that are discussed in chapter one of the paper. This chapter also looks into the role of government in blocking and taking down websites, while also touching upon the issue of online intermediaries in India. Ultimately, the chapter looks into the unique challenges in India that are present before the lawmakers to enact a law for the Internet.

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<sup>13</sup> *Information Technology Act*, Indian Parliament (No.21) of 2000.

<sup>14</sup> *Indian Copyright Act*, 1957.

Chapter 3 will examine and compare the advantages and disadvantages of three international copyright regulatory models—the DMCA’s “notice and take down” in the U.S., Canada’s “Notice and Notice” system, and the “three strike rule” present in France and Ireland— and ultimately argues that none of these models can address the unique problems and challenges facing copyright and piracy online in India. The NTD system under DMCA was first of its kind and has been quite effective but with the evolving technologies the regulations under DMCA is failing to provide an effective solution<sup>15</sup>. Canada’s Notice and Notice procedure was enacted keeping in mind the criticism of DMCA’s NTD system. The Notice and Notice system focuses on balance between protecting the interest of copyright holder and Internet users. The three strike rule or the graduated response is one of the recent methods and is a combination of “Notice and Notice” and NTD.<sup>16</sup> The “six strike rule” is the latest regime started in the United States. This rule can be said as a part of Graduated Responses and the working is similar to the “three strike rule”, with the only difference being it provides six opportunities to the infringers compared to the three provided in “three strikes rule”. The methods examined in this chapter are different to each other, thus exploring different models that can be adopted by a country. Further, this chapter highlights pros and cons of each method.

Chapter 4 of the paper builds on the work done in chapter 3 by having a comparative study between the four different mechanism and the Indian Takedown system. Further, this chapter highlights the role of copyright owners in promoting their product and how it can reduce the online piracy. Chapter 4 demonstrate the workable options that may be adopted by Indian laws keeping in mind

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<sup>15</sup> Annemarie Bridy, *supra* note 5.

<sup>16</sup> Vikrant Narayan Vasudeva, “The NTD Procedure under Copyright Law: Developing a Measured Approach” (2011) 13 University of Notre Dame Australia Law Review 193 at 218.

the unique challenges discussed in chapter 2. This chapter discusses the modifications that can be made to the present laws and will also evaluate the cases that were dealt by Indian courts regarding the take down system. This law is comparatively new and has scope for modification. Through this paper I highlight modifications that are possible to make the present law even more effective.

With technology advancing at a very quick pace, it is important for each nation to have an effective mechanism that can fight online infringement. It is very important for those laws to have effective mechanisms through which the websites that facilitate infringements may be removed instantly, without harming the interests of service providers or Internet users. The objective of the thesis is to analyse effective changes that can be brought to existing Indian laws pertaining to the “take down” system. The two important goals are to spread awareness among Indian people regarding the subject of copyright and second to bring a fair balance between protecting the rights of Internet users and copyright holder.

## 1.2 Methodology

The methodology adopted is a comparative study of law and policy relating to the “takedown” or removal of online contents in India and other major jurisdictions of the world including the United States, Canada, and the European Law. This comparative study attempts to review the takedown laws and safe harbor provision of India with the NTD in the DMCA, Canada’s Notice and Notice system, Graduated Responses (three strike rules) of France and Ireland and the “six strikes rule”.

### 1.3 The Challenge: An Overview

The Internet has expanded extensively in the last two decades. The number of Internet users has grown by 676.3% since the turn of the century.<sup>17</sup> The growth in Internet use has led to increase in illegal streaming activities. The Internet has become the largest copying machine, used to transform and download digital material for reference and research but often it is misused for unauthorized use, downloading, or publishing of copyrighted information.<sup>18</sup>

Growth in technology especially the Internet has made it tougher for copyright owners to protect their content. The problem of piracy is not new; it has been present for decades but the rise of the digital era has given birth to online piracy.<sup>19</sup> Before the advancement of digital technology, bootlegging was among the most common forms of piracy.<sup>20</sup> Then in the late 1990s Internet access made it easier for people to access songs and movies online.<sup>21</sup> The real breakthrough for online piracy took place with the birth of Napster. Napster was a website that provided unlawful sharing of music for people around the world.<sup>22</sup> In a short period of time, Napster became very famous among all music lovers and the downloading of music increased drastically.<sup>23</sup> Napster was ultimately taken down by the court as it was held liable for contributory infringement as they

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<sup>17</sup> “Internet World Stats” online: <<http://www.Internetworldstats.com/stats.html>> .

<sup>18</sup> Singh and Associates, “Internet Service Provider Liability For Copyright Infringement” <http://singhassociates.in/intello-property/2.html>

<sup>19</sup> Gustav Guldberg & Johannes Sundén, “Pirates & merchants – An ongoing struggle on the hightech seas”(2004) School of Mathematics and Systems Engineering, Växjö University 1. at 6

<sup>20</sup> Ibid at 12.

<sup>21</sup> Ibid at 13.

<sup>22</sup> James, *supra* note 2 at 5.

<sup>23</sup> “A short history of file sharing”, online: (August 2003) <<http://www.sean.co.uk/a/musicjournalism/var/historyoffilesharing.shtm>> .

purposely contributed to infringing activity.<sup>24</sup> The death of Napster did not end the issue of online piracy; instead it paved the way for websites similar to Napster like Grokster, Piratebay, and Torrents to name a few and online piracy since the mid 2000's has been on the rise.<sup>25</sup> Websites like Piratebay and Torrents have become platforms where illegal movies and songs can be downloaded. In recent years, the effect of piracy has also spread to the sports industry in the form of live streaming.<sup>26</sup>

Though, many countries have adopted laws to fight against these online piracies but so far none of them have been absolutely effective. The reason for that is primarily because laws often have difficulty keeping pace technological change.<sup>27</sup> The next subsection focuses on various technologies that have emerged more recently.

#### 1.4 Technologies Facilitating Online Infringement

Modern day technology has become so advanced that content can be distributed online very swiftly. A person sitting in one part of the world can put a content online which can be accessed by other person sitting in different part of the world. The unauthorized transfer of copyrighted

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<sup>24</sup> *A&M Records, Inc. v Napster, Inc.*, 239 F.3d 1004 (2001). Also, see MA Gunn, *supra* note 1 at 8.

<sup>25</sup> Bridy, *supra* note 5 at 699-700.

<sup>26</sup> Bari Solomon, "Friend or Foe-The Impact of Technology on Professional Sports" (2011) 20 Common Law Conspectus 253 at 253.

<sup>27</sup> Bridy, *supra* note 5 at 703-706. The growth in P2P software is a prime example of how quickly a technology can develop.

digital files via the Internet infringes on the control of the distribution of a copyright owner's intellectual property (IP).<sup>28</sup>

There are many software programs that make it easier for the infringer to distribute copyrighted work of others. Among the most common innovations facilitating copyright infringement online is P2P networking. This has facilitated a great deal of online software piracy.<sup>29</sup> The nature of such piracy can be better understood by analysing P2P networking, which is discussed below.

### *The Nature of P2P*

P2P is the transfer of a digital file from one "peer" to another. In simple terms, transfer from one computer to another.<sup>30</sup> The peers can be classified into two types: a *seed* and a *leecher*.<sup>31</sup> A seed is a client that has a complete copy of the file and remains in the torrent to serve other peers and a leecher is a client that is still downloading the file.<sup>32</sup> P2P software is one of the most commonly used software programs for facilitating illegal downloading or illegal streaming of live content. The general rule of P2P technology is, the greater the number of users, the greater the efficiency of the P2P network.<sup>33</sup>

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<sup>28</sup> MA Gunn, *supra* note 1 at 3.

<sup>29</sup> Gustav, *supra* note 19 at 6.

<sup>30</sup> MA Gunn, *supra* note 1 at 3.

<sup>31</sup> Raymond Lei Xia & Jogesh K. Muppala, *A Survey of Bit Torrent Performance*, 12 IEEE Communications & Tutorials 12:2 140, 141 (2010).

<sup>32</sup> *Ibid.*

<sup>33</sup> Annemarie Bridy, *supra* note 5 at 699.

When a file is uploaded to a BitTorrent network that is referred to as “seeding”. Other P2P network users, called “peers,” can then connect to the user seeding the file.<sup>34</sup> BitTorrent breaks a file into numerous small data packets, each of which is identifiable by a unique hash number created using a hash algorithm.<sup>35</sup> Once the file is broken into packets, other peers are able to download different sections of the same file from different users.<sup>36</sup> Each new peer is directed to the most readily available packet they wish to download.<sup>37</sup> Peers copy files from multiple users who may have the file available on the BitTorrent network.<sup>38</sup> The peer then becomes a seeder as the data packet is distributed to other peers connected to the BitTorrent network.<sup>39</sup> Once a packet is downloaded it is then available to other users who are also connected to the BitTorrent network.”<sup>40</sup> Though P2P mechanism has increased copyright infringements some artists have come in defence of people getting free access of their content.<sup>41</sup> The more peer nodes there are on a P2P network at any given time, the greater the network's total capacity.<sup>42</sup> BitTorrent was introduced in 2001 and is a hybrid

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<sup>34</sup> *Voltage Pictures LLD v Jane Doe*, 2014 FC 161 at para 12 [Voltage].

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> MA Gunn, *supra* note 1 at 9.

<sup>42</sup> Bridy, *supra* note 5 at 699.

P2P model.<sup>43</sup> As, it requires peers to organize themselves into an overlay network (Torrent), with connections among the peers, for each file being distributed.<sup>44</sup>

Apart from P2P there is other common software like Unicast and User Generated Content (UGC) which promotes copyright infringement online. Unicast is also commonly referred to as a traditional form of streaming, especially used to facilitate live content illegally. This software presents a unique challenge to not only copyright owners but also law makers as website run through Unicast software is difficult to distinguish from a legitimate.<sup>45</sup>

User-generated content is starting to be addressed in the global community as UGC becomes more prevalent on the Internet. In UGC, the user is allowed to create his own website, which facilitates infringement to original contents. Some of the example of UGC are: Blogs, Podcasts, News Sites and Video Sharing Sites like YouTube. UGC has become the biggest threat to the copyright holders.<sup>46</sup>

These new technologies along with the evolution of Internet has allowed Internet users to post and share their ideas about the original work. Further, the Internet has put pressure on the copyright holders to provide better access to the fans. If used correctly, copyright holders can use these technologies in a positive way by connecting to the general audience and thereby making their customers satisfied.

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<sup>43</sup> *Ibid* at 701.

<sup>44</sup> Raymond, *supra* note 31.

<sup>45</sup> NetResult, Update on Digital Piracy of Sporting Events (London: NetResult Solutions Ltd 2011) at 14 online : < [www.wipo.int/export/sites/www/ip-sport/en/pdf/piracy\\_report\\_2011.pdf](http://www.wipo.int/export/sites/www/ip-sport/en/pdf/piracy_report_2011.pdf)>.

<sup>46</sup> *Ibid* at 17.



## 1.5 Online Infringement: A Universal Problem

The advancement of technology is a good thing but it also increases the means through which a person can use somebody else's work illegally. Technologies like P2P have led to a steady increase in copyright infringement in the digital world.<sup>47</sup> The copyright infringement committed on the Internet is not a problem for any one particular country, but is a global issue which is present in almost every part of the world.<sup>48</sup> This part explains the common problems faced by the law makers, judges, and parties to the suit while dealing with online infringement cases.

### a. Multiple Jurisdictions

One of the most complex challenges facing efforts to deter or constrain copyright infringement online is legal jurisdiction. Jurisdiction in general term means "The ability of the state to exercise some form of power, coercive or otherwise, over persons, places, things (including property) and events."<sup>49</sup> It can be said that the borderlessness of the Internet is one of many advantages, because it presents new opportunities to online users. However, it also leads Internet users to engage in cross-border activities over which asserting jurisdiction is much more difficult than in a physical world.<sup>50</sup>

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<sup>47</sup> MA Gunn, *supra* note 1 at 6.

<sup>48</sup> Teresa Scassa and Robert J. Currie, "New First Principles? Assessing the Internet's Challenges to Jurisdiction" (2011) 42 *Georgetown Journal of International Law* 1020.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Cricket Australia v Swan (Swan I)* ScotCS (Sess. Feb. 3, 2006) (R.G. McEwan). In this case It was difficult to determine where a court can exercise its jurisdiction in such cases where the parties to the suit do their business from more than one place. In the *Cricket Australia* case the location of parties involved were found to be in different places around the world.

One of the best ways to understand why infringement done on the Internet is different from real space is by looking at the working of the biggest search engine, Google.

Google operates the Google search engine that makes internet search results available through dedicated websites for each country around the world. For example, Google provides internet search services to users in Canada through [www.google.ca](http://www.google.ca), to users in the United States through [www.google.com](http://www.google.com), and to users in France through [www.google.fr](http://www.google.fr). Despite providing country specific search websites, Google acknowledges that internet users are not restricted to using the website dedicated to their particular country. Thus users in Canada can search through [www.google.fr](http://www.google.fr), and vice versa.<sup>51</sup>

This example from Google shows how a person sitting in one country can access content owned by a citizen of another country, thus creating jurisdiction problems. In most of the infringement cases, there can be more than two places where jurisdiction may lie: a) the place where the infringement occurred; b) the place where the infringer is domiciled; c) the place of the copyright owner.<sup>52</sup> This makes the issue of multiple jurisdiction one of the biggest problems in online infringement cases.

## b. Conflict of Laws

Conflict of laws is similar to the problem of asserting jurisdiction over online acts of copyright infringement. The concept of conflicts of law is not new. The issue of conflict of laws can also be seen in the law of torts, family law, contracts, etc.<sup>53</sup> However, Internet presents a unique problem as the events on the Internet occur everywhere, but not in any particular place.<sup>54</sup> The problem of

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<sup>51</sup> *Equustek Solutions Inc. v Jack*, 2014 BCSC 1063 at Para 31.

<sup>52</sup> *Cricket Australia v Swan (Swan II)*, ScotCS (Sess. Nov. 21, 2006).

<sup>53</sup> David McClean, and Kisch Beevers, *The Conflict of Laws* (London:Thomson Reuters Limited, 2009).

<sup>54</sup> David Post and David Johnson, "Law and Borders the Rise of Law in Cyberspace"(1996) 48 *Stanford Law Review* 1367 at 1368.

multiple jurisdiction leads to conflicts as to which laws apply. The issue of conflict of laws is more common in online copyright infringement cases. Google is the most accessed search engine, as there are more than 1 billion users of Google.<sup>55</sup> Google search can be accessed in most countries. Moreover, an online user can access or share any information through it. If a user uploads a copyrighted work illegally sitting in one part of the world and the copyright holder belongs to some other country there is a conflict as to what country's copyright law would apply. Because of these features and characteristics of online platforms like Google, conflict of laws arises often between two or more countries regarding whose laws to be applied.<sup>56</sup>

Conflicts of laws on the Internet was also prominent in the case of *Sarl Louis Feraud International v. Viewfinder, Inc.*<sup>57</sup> In that case, the French courts applied their country's law in a copyright infringement matter, even though the infringement occurred in multiple countries simultaneously, including in the United States. It is clear that the activities done online lead to conflict of laws making it difficult for courts to assert jurisdiction. The only solution for this is to formulate one single copyright law for all online contexts.

### c. Identifying the Infringer

The other common problem in cases of infringement occurring on the Internet is identifying the location of a particular user over the Internet. This has proven extremely difficult, and many Internet users compound this problem by intentionally hiding their location by the help of virtual

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<sup>55</sup> See, online: < <http://www.statista.com/chart/899/unique-users-of-search-engines-in-december-2012/>>.

<sup>56</sup> *Equustek supra* note 51.

<sup>57</sup> *Sarl Louis Feraud International v Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007).

private network and proxy servers.<sup>58</sup> User anonymity creates an added layer of difficulty, especially when there are more than one accused and making it difficult to determine the accused person.

In light of these complex challenges, solutions for online piracy are neither easy nor straightforward, especially as technologies like P2P networking, which help facilitate copyright infringement, continue to evolve. However, there are also challenges for addressing online privacy that are specifically unique to India. They are set out in the next chapter.

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<sup>58</sup> Kevin A. Meehan, “The Continuing Conundrum of International Internet Jurisdiction” (2008) 31:2 Boston College International & Comparative Law Review 345 at 349.

# Chapter II: India's Regulatory Regime for Online Usage

As noted above the borderless and distributed architecture of the Internet substantially differentiates Internet Governance from traditional governance, challenging the established dominant role of nation-states in policy-making.<sup>59</sup> In developing countries like India, policymakers are just now beginning to confront the issue and to enact rules that specify what steps intermediaries must take to avoid liability for user generated content that is allegedly obscene, infringing, defamatory, or otherwise illegal. Indeed, this thesis ultimately aims to set out and defend a balanced regulatory model to address online infringement (while respecting Internet user rights) in India; one that not only addresses these more general Internet-related challenges discussed in the previous chapter, but also the unique regulatory challenges specific to India. This chapter analyzes existing laws aimed at curbing online piracy.

## 2.1 Internet in India

Internet usage is rapidly increasing in India with each year.<sup>60</sup> As the world's largest democracy, India trails only the U.S. and China in the number of Internet users, despite an Internet penetration rate of only 10 per cent.<sup>61</sup> Hundreds of millions of Indians are on the verge of gaining Internet

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<sup>59</sup> Rekha Jain, "A Model for Internet Governance and Implications for India" (2015) Indian Institute of Management Ahmedabad, Research and Publication Department 1 at 14.

<sup>60</sup> Chinmayi Arun, *supra* note 9 at 2.

<sup>61</sup> *Ibid.*

access, particularly via mobile devices, with huge opportunities for users.<sup>62</sup> Further, in recent times government have started to provide free Wi-Fi Internet access in public places.

However, despite India being one of the countries with highest number of Internet users, the penetration remains low and a large number of citizens remain excluded as there is no proper Internet access for them and in addition to that the quality of Internet and Broadband experience is relatively poor. India faces numerous obstacles to Internet access, from infrastructural limitations to costs and language restrictions.<sup>63</sup>

This chapter does not address the solutions that can be adopted to improve the Internet and Broadband coverage but focuses solely on existing relevant laws and the challenges faced by the government. However, these obstacles makes it even more difficult for the legislators to attain a balance between protecting the interest of copyright holder and Internet user, especially those who face such obstacles. Later in this chapter I will expand these obstacles under the section “Unique Indian Challenges”.

## 2.2 History of Indian Copyright Act

Given its rich cultural heritage, India has always remained a powerful force in the field of copyright. India protects free speech in its laws and constitution.<sup>64</sup> The activities that come under

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<sup>62</sup> Jermyn Brooks, “Closing the gap, Indian Online Intermediaries and a Liability System Not Yet Fit for Purpose”(2014) Copenhagen Economics 7 at 10.

<sup>63</sup> Freedom House, “Freedom on the net” online: (2013), <<http://www.freedomhouse.org/report/freedom-net/2013/india>>.

<sup>64</sup> Article 19 of the Indian Constitution protects freedom of speech and expression. Government of India, ‘The Constitution of India,’ as modified up to the 1st December 2007, Article 19. (1)(a) ‘All citizens shall have the right to freedom of speech and expression’.

the subject of copyright are largely prevalent in the country and they are growing. India is counted among the top seven publishing nations of the world with a sizeable portion of her publications being in English<sup>65</sup>. It constitutes the largest market for audio cassettes and films produced in the country, exceeding 600 million per annum.<sup>66</sup>

In India the first Copyright Act was passed in the year 1914 and was largely a copy of the British act of 1911.<sup>67</sup> It codified and consolidated the earlier acts different work to make it applicable to British. On 4th June 1957 the copyright Act 1957 was passed by both the houses of parliament and ratified with the assent of the president.<sup>68</sup> At present, the Copyright Act, 1957 governs copyright law in India. The original Act of 1957 has been amended six times in the years with the latest amendment being made in 2012. The term of protection for the copyright work is the life of the author plus sixty years<sup>69</sup>.

### *2.2.1 Overview of Indian Copyright Act*

Indian copyright laws protect creative works such as books, movies, music, paintings, photographs, and software and give copyright holders exclusive right to control reproduction or adaptation of such works for a certain period of time.<sup>70</sup> It protects the labor, skill, and judgment of someone author, artist or some other creator, expended in the creation of original piece of work.

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<sup>65</sup> Megha Gupta, "Role of Executive Machinery in Combating Literary and Musical Piracy" (2014)9 9:2 VIDHIGYA: The Journal of Legal Awareness 1 at 4.

<sup>66</sup> Online: (2015) < <http://copyright.gov.in/documents/study%20on%20copyright%20piracy%20in%20india.pdf.s>>.

<sup>67</sup> *Indian Copyright Act 1914*.

<sup>68</sup> Priya Rai et al, *Transforming dimension of IPR: Challenge for new age libraries* (Delhi: National Law University Delhi Press, 2014) at 137.

<sup>69</sup> s22-29 *Indian Copyright Act 1957*.

<sup>70</sup> *Indian Copyright Act 1957*.

Copyright protection is given for creators of literary; dramatic, musical and other artistic work and producers of cinematographs and sound recordings.<sup>71</sup>

### *2.2.2 Term of Copyright*

The statutory provisions related to terms of copyright are been contained under sections 22-29 of the Copyright Act, 1957. It is worth mentioning at the very outset that the term of copyright varies according to the nature of the work and whether the author is a natural person or legal person, e.g. a corporation, government, institution etc. or whether the work is anonymous or pseudonymous<sup>72</sup>. The general term for copyright protection in literary, dramatic musical and artistic works is the author's life and 60 years thereafter.<sup>73</sup> The computation of the 60 years starts from the beginning of calendar year next following the year in which the author dies.<sup>74</sup>

### *2.2.3 Fair Use Doctrine*

One of the broadest exceptions to the exclusive rights of copyright owners is the fair use doctrine.<sup>75</sup> The fair use doctrine in India is based on "fairness". The relevant question to be asked is "whether it is fair in certain circumstances to copy the works of an author without his or her permission?" The copyright law recognizes certain uses of copyrighted works that are considered "fair" and not against the rights of the authors. The doctrine of fair use is explained in section 52 of the Indian

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<sup>71</sup> s13 *Indian Copyright Act 1957*.

<sup>72</sup> s22-29 *Indian Copyright Act 1957*.

<sup>73</sup> s22, *Indian Copyright Act 1957*.

<sup>74</sup> Section 22 says "Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until [sixty] years from the beginning of the calendar year next following the year in which the author dies."

<sup>75</sup> s52, *Indian Copyright Act 1957*.



Copyright Act, with new provisions added after the recent amendment in 2012.<sup>76</sup> The new provision allows fair dealing with any work that is not a computer program under section 52(1)(a) for three purposes:

1. Private or personal use including research;
2. Criticism or review; and
3. Reporting current events<sup>77</sup>

"Fair dealing" is a necessary doctrine, not only in the copyright laws but also in strengthening the protection given to citizens under Article 19 of the Constitution of India.<sup>78</sup> With the emergence of new technologies, the Indian Copyright Act, 1957 has incorporated section 65A which is titled "protection against circumvention of technological measures". Under this provision, tampering with Digital Rights Management (DRM), that is, measures taken to enforce copyrights digitally, is a punishable offence. Digital Rights Management (DRM) also restricts the scope of fair use possibilities for libraries and academic community.<sup>79</sup>

### 2.3 Liability of the Infringer

In the cases pertaining to online infringement it is difficult to ascertain the liability of an infringer. As discussed in the first chapter of the thesis, infringement of any copyrighted work in the cyber world presents a unique problem to the copyright owner but it also becomes difficult to determine

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<sup>76</sup> *Ibid.*

<sup>77</sup> s52(1)(a), *Indian Copyright Act*, 2012.

<sup>78</sup> Ayush Sharma, "Indian Perspective of Fair Dealing under Copyright Law" (2009) 14 *Journal of Intellectual Property Rights* 523.

<sup>79</sup> Post, *Supra* note 54 at 132.

liability of an infringer. The Indian Copyright Act divides infringement into primary and secondary infringement.

The concept of primary Infringement can be found in section 51(a)(1) of Indian Copyright Act<sup>80</sup>. Primary infringement is the most basic or direct type of copyright infringement: a person copies, reproduces, or distributes a copyrighted work without the owner's permission. The act of reproduction without permission is the (primary) infringing act.

Sections 51(a)(ii) and 51(b) deal with secondary infringement. Section 51(a)(ii) makes intermediary and all illegal profit-making websites liable for copyright infringement. The alleged infringer can be exempted if he proves "he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyrights"<sup>81</sup>

#### 2.4 Takedown Provision: Indian Copyright Act (Amendment 2012)

India's copyright "takedown" system was first introduced after the Amendment of Indian Copyright Act in 2012. With online infringement cases rapidly increasing and many copyright infringers crying foul, it was clear that Indian Copyright was ready for some modification and it was to have a legal regime that not only provided protection to the copyright holders in the Internet but also prohibited infringers from committing such infringement again in future<sup>82</sup>. Takedown

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<sup>80</sup> s51(A)(i), *Indian Copyright Act*, 2012.

<sup>81</sup> s51(A)(i) and s51(b), *Indian Copyright Act*, 2012.

<sup>82</sup> Ayush, *supra* note 78 at 530.

provisions similar to the DMCA's NTD copyright enforcement scheme were adopted. Section 52(1)(b) and (c) are newly inserted into the Copyright Act via its 2012 Amendment:

(b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

(c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.<sup>83</sup>

The newly added provision clearly states that if any person storing a work of others receives a written complaint from the copyright owner of that work, then such person shall not distribute or facilitate the work to others. Section 52 (1)(c) explicitly states in its main body that it would not apply in those cases where the person responsible (presumably for the storage) was aware or had reasonable grounds for believing that such storage was of an infringing copy.<sup>84</sup> Once a Copyright owner sends a notice, he has a window period of twenty-one days within which he should ideally obtain a court order for continued takedown, and within which he should provide a copy of the order to the intermediary. The procedure further states that if no such order is received by the intermediary or service provider before the expiry of the twenty-one-day period, then the service provider may continue to provide the facility of access to the relevant content.

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<sup>83</sup> *Ibid* s. 52.

<sup>84</sup> Nandita Saikia, "ISP/OSP Safe Harbours and Takedown Laws: Copyright and Information Technology" *online*: (2012) <<http://copyright.lawmatters.in/2012/06/safe-harbour-for-osps-and-isps-in-2012.html>>.

This provision can be applied to many online infringement cases. For example, if a person is facilitating illegal streaming of a live event to the general public and he has received a written complaint, then he shall not provide the access of the event.

The two key points that are to be noted are

- The rights owner is not explicitly required to send a written complaint of infringement to the intermediary in the first place; and
- The intermediary is not required to put content back up once the twenty-one day period is over in those cases where a court order for continued take down has not been obtained.<sup>85</sup>

The other key thing to be noted is section 52(1)(c), as opposed to section 52(1)(b), permits the issuance of notice to the file-sharing website to remove infringing content. This is indeed a healthy practice and can result in a culture of self-regulation. This is an effective kind of regulation when it comes to the Internet.

#### *2.4.1 NTD regime under the Copyright Rules, 2013*

This NTD regime is even more clearly mapped out in Rule 75 of the Copyright Rules of 2013.<sup>86</sup> Rule 75 of the rule is continuation of section 52(1)(c) of Copyright Act. The rule 75(2) of the copyright rules says that the copyright holder must send a written complaint to the intermediary

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<sup>85</sup> *Ibid.*

<sup>86</sup> MA Gunn, *supra* note 1 at.19.

containing all details of the infringement<sup>87</sup> and the infringers<sup>88</sup>, if known. The complainant shall establish that he or she is the owner of the copyright in work.<sup>89</sup> The complainant after providing all the details as required in rule 75 shall give an undertaking that he would file a suit for copyright infringement within a period of twenty one days from the date of receipt of the notice.<sup>90</sup> If not, the intermediary is permitted to restore the content after 21 days if no court order is received to endorse its removal.<sup>91</sup> The primary job of the intermediary is to disable the access to such content within 36 hours of receiving the notice.<sup>92</sup> There has to be a valid reason given by intermediary before taking down the content.<sup>93</sup>

A key part of the 2013 copyright rules is, that unlike the safe harbour provisions under the Indian Copyright Act, rule 75 gives the intermediary more precise power in taking down content.

#### *2.4.2 Problems with this Regulatory Regime*

There have been concerns raised by both content providers and online service providers. Music production houses like Saregama RPG Enterprises and other Indian music companies were of an opinion that such a model can easily be misused and abused by the intermediaries and service providers. The specific worry was that illegal downloaders and suppliers of copyrighted content (in the form of illegal streaming) would rely upon this provision to plead that their storage was

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<sup>87</sup> The *Copyright Rules* 2013, rule 75 (2).

<sup>88</sup> The *Copyright Rules* 2013, rule 75 (2) (a).

<sup>89</sup> The *Copyright Rules* 2013, rule 75 (2) (b).

<sup>90</sup> The *Copyright Rules* 2013, rule 75 (2) (f).

<sup>91</sup> MA Gunn, *supra* note 1 at 20.

<sup>92</sup> The *Copyright Rules* 2013, rule 75(3).

<sup>93</sup> The *Copyright Rules* 2013, rule 75(4).

incidentally made, in the process of transmission and thereby making it even more difficult for the content providers to prove otherwise.<sup>94</sup>

On the other hand, even the service providers like Yahoo and Google were highly critical of the new provisions. Yahoo India incisively analysed the wording of the Bill and submitted that the loose language employed therein could result in problems while carrying out various operations such as search, hosting, information retrieval and caching.<sup>95</sup>

There was also an issue of the duration of the prescribed period. Prior to the change to 21 days, the prescribed period in which the service provider shall refrain from providing access was 14 days but this period was too little time for content providers to obtain a judicial order to ensure continued restriction on access. The Parliamentary Standing Committee in its Standing Committee report<sup>96</sup> accepted some of the above suggestions and recommended that the 14-day period be changed it to 21 days in order to achieve a more harmonious balance between the rights of content owners and that of a service provider to do business.<sup>97</sup>

The 2012 amendment of the Copyright Act has brought new hope for the copyright owners. The new provisions give extra protection to the works of copyright owners on the Internet by offering more protection to their content. The courts have been quick in providing temporary injunction to the copyright holders by taking down the illegal content and even the websites facilitating such

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<sup>94</sup> Ananth Padmanabhan, "Give Me My Space and Take down His" Indian Journal of Law and Technology (2014) 1 at 3.

<sup>95</sup> *Ibid* at 4.

<sup>96</sup> Department Related Parliamentary Standing Comm. On Human Res. Dev., Two Hundred Twenty-Seventh Report On The Copyright (Amendment) Bill, 2010.

<sup>97</sup> Padmanabhan, *supra* note 94 at 4.

contents.<sup>98</sup> Many countries are moving in this direction, and therefore it was time for the Indian legal system to introduce a provision which would be able to tackle the online infringements. As observed, the takedown regime has its own flaws, and these need to be modified keeping the interest of every party involved. Purpose of this part was to set out existing Indian laws applicable for the online infringement matters. The provision in the Indian Copyright Act and Copyright Rules, 2013 showcases the nature of the copyright NTD system (NTD) in India. I will argue that modifications are required to make the laws more effective, as discussed later in Chapters 4 and 5.

## 2.5 Information Technology ACT, 2000

### 2.5.1 Overview

In the latter part of the 20<sup>th</sup> century, international trade started to be done through electronic communication and with the scope of Internet also advancing, an urgent and imminent need was felt for an establishment of a new act which would govern people of India on the Internet.<sup>99</sup>

The IT Act 2000 attempts to change outdated laws and provide ways to deal with cyber-crimes.<sup>100</sup> The whole purpose of IT Act is to tackle the criminal activity and stop cyber-crimes<sup>101</sup>. The Act gives power to the Police to enter and search, without any warrant, any public place for the purpose

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<sup>98</sup> Chinmayi Arun, *supra* note 9 at 21.

<sup>99</sup> Audi Shanoor Pandurang, “Salient features of the Information Technology Act,2000” (2014) Govind Ramnath Kare College of Law at 6.

<sup>100</sup> Chinmayi Arun *supra* note 9 at 8.

<sup>101</sup> *Ibid.*

of nabbing cyber criminals and preventing cyber-crime.<sup>102</sup> The Act goes on to define and describe some of the well-known cyber-crimes and lays down the punishments for the same.

### *2.5.2 History of IT Act*

The Government of India realized the need for introducing a new law and for making suitable amendments to existing laws to facilitate e-commerce and give legal recognition to electronic records and digital signatures.<sup>103</sup> The Parliament of India passed the Information Technology Act-2000, which provides the legal infrastructure for e-commerce in India. The Bill received the assent of the President in August 2000 and came to be known as the Information Technology Act, 2000. Cyber laws are contained in the IT Act, 2000<sup>104</sup>. This Act aims to provide the legal infrastructure for e-commerce in India and would have a major impact for e-businesses and the new economy in India.<sup>105</sup>

## 2.6 Role of Intermediaries in the IT Act, 2000

### *2.6.1 Definitions*

Section 2(w) of IT ACT defines intermediary as any person who on behalf of another person receives, stores or transmits record or provides any service with respect to record and includes telecom service providers, network service providers, Internet service providers (ISPs), web hosting service providers, search engines, online payment sites, online-auction sites, online market

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<sup>102</sup> s 80 *The Information Technology Act, 2000*.

<sup>103</sup> Audi, *supra* note 99 at 7.

<sup>104</sup> *The Information Technology Act, 2000*.

<sup>105</sup> *The Information Technology (Amended) Act, 2008*.



places and cyber cafes.<sup>106</sup> This definition would mean an intermediary would include all ISPs, all telecom service providers and all the search engines like Yahoo, Google etc.<sup>107</sup>

Intermediaries play an important role in online infringement cases. Intermediaries, such as hosts, transitory communication systems, and information location tools are widely recognised as essential cogs in the wheel of exercising the right to freedom of expression on the Internet.<sup>108</sup>

The big question is whether it is right to make the intermediary liable for the infringement even though they are not directly involved. The IT Act clearly mentions the role of intermediaries including the protection given to them in section 79 of the Act. The intermediary liability regime in India is defined under section 79, while intermediary liability policy in India are derived from the European Union E-Commerce Directive (2000/31/EC).<sup>109</sup>

### 2.6.2 Exemption from liability of Intermediary (Analysis of Section 79)

Intermediary liability was first acknowledged as a serious issue in India in *Avnish Bajaj v. State* (“the Baze.com case<sup>110</sup>”). The primary question in the case was whether an intermediary can be held responsible when it unknowingly and unintentionally facilitates the distribution of obscene content like pornography. The IT Act, prior to amendment, offered very little immunity from liability to intermediaries. There was no exemption from liability in any other legislation for contents they hosted. Many legal researchers heavily criticised the Act and were in favour of

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<sup>106</sup> *The Information Technology Act, 2000. Sec 2 (w).*

<sup>107</sup> Some even term them as the online gatekeepers. See, Chinmayi Arun, “Gatekeeper Liability And Article 19(1)(A) Of The Constitution Of India” (2015) National Law University Press 1 at 5.

<sup>108</sup> Rishabh Dara, “Intermediary liability in India: Chilling Effect on Free Expression on the Internet” (2011) 1 at 3.

<sup>109</sup> Article 12-15, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000.

<sup>110</sup> *Avnish Bajaj v State, (2005) 3 Comp LJ 364 Del, 116 (2005) DLT 427.*

providing more protection to the intermediaries.<sup>111</sup> The Baze.com case prompted legislators to amend the IT Act and provide immunity to intermediaries. The 2008 amendment ensured that intermediaries received protection from liability “under any law for the time being in force”.<sup>112</sup>

Section 79 (1) and (2) explains when the intermediary will be exempted from liability:

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or

(b) the intermediary does not-

- (i) initiate the transmission,
- (ii) select the receiver of the transmission, and
- (iii) select or modify the information contained in the transmission

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

Section 79 clearly explains the situations when an intermediary is exempted from liability. Under section 79(1), an intermediary shall not be liable for any third party information, data, or communication link *made available* or *hosted* by him. To be granted immunity under section 79, the intermediary must merely provide access to a communication system over which information

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<sup>111</sup> Arun, *supra* note 107 at 4.

<sup>112</sup> *Ibid* at.7.

made available by third parties is transmitted or temporarily stored or hosted; or not initiate the transmission, select its receiver, or select or modify the information contained in the transmission. Also, further examination of section 79 discloses that to be eligible for immunity, the intermediary has to confine itself to transmission of information and not initiate transmission, select the receiver, or modify the information.<sup>113</sup>

Prior to amendment, the intermediary had to prove that “the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention”<sup>114</sup> to avail of the safe harbour protection. However, the amendment of the Act in 2008 has ensured that the intermediary receives safe harbour protection as long as it does not initiate transmission, select the receiver of the transmission and select or modify information contained in the transmission, and it observes “due diligence” while discharging its duties.<sup>115</sup>

The Baze.com case was a classic instance where the question of liability of online intermediary arose. Avnish Bajaj was the CEO of a website named Baazee.com which was owned by eBay, the online platform. In 2004, a 17 year old school student of Delhi filmed a sexual act featuring himself and his minor classmate and later on circulated the video which was ultimately listed on sale on Baazee.com.<sup>116</sup> The police immediately arrested the person who put the content on sale.

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<sup>113</sup> Chinmayi Arun *supra* note 9 at 11.

<sup>114</sup> Arun, *supra* note 107 at 7.

<sup>115</sup> *The Information Technology Act*, s79(2)(b)

<sup>116</sup> “Indian Express, Sex scandal: Boy who shot MMS clip held”, online: (December 19, 2004) < <http://expressindia.indianexpress.com/news/fullstory.php?newsid=39787> > .

However, the most surprising act was when Avnish Bajaj was also arrested.<sup>117</sup> The decision to punish the intermediary (Avnish Bajaj) was heavily questioned and criticised. A Standing Committee comprised of judges was established for examination of the new amendment of the IT Act. The standing committee on its 50<sup>th</sup> report in 2007, with the Baazee.com case in mind, were of an opinion that there must be minimum obligations for intermediaries whose platforms were being used to transmit obscene or objectionable content.<sup>118</sup>

Though the amendment of the IT Act provided a safe harbour provision, thus giving protection to intermediaries, the term “due diligence” in section 79(2)(c) was very unclear. It was difficult to ascertain when an intermediary will possess an actual knowledge of any unlawful content posted in a website.

In 2011 Information Technology (Intermediaries Guidelines) Rules were passed and the phrase “due diligence” was further explained. Rule 3(4) of Information Technology rules, 2011 explains that the intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2).<sup>119</sup> Further the intermediary shall preserve such information and associated records for at least ninety

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<sup>117</sup> *Ibid.*

<sup>118</sup> Standing Committee on Information Technology, Fiftieth Report, 54 (2007-2008)

<sup>119</sup> Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(4).

days for investigation purposes.<sup>120</sup> Rule 3(4) imposes an extra duty on the intermediary to remove unlawful content immediately within 36 hours after receiving “actual knowledge” of it and such knowledge communicated to them by “an affected party in writing” or through an email signed by an electronic signature.

ISPs are often the main parties in online infringement lawsuits brought in Indian courts and even have been held liable in many cases.<sup>121</sup> The general principle should be if you cannot control the illegalities done in cyberspace by getting hold of primary infringer, you have to regulate the conduct through intermediaries.<sup>122</sup> As Per section 79(3) of IT ACT, no immunity will be granted if

...a)... the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act.

b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.<sup>123</sup>

This means that if the intermediary is involved in the commission of offence in any way then it cannot claim exemption from liability. The provisions for exemption laid down in section 79 do not apply when they receive “actual knowledge” of illegal content under section 79(3)(b). Further,

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<sup>120</sup> *Ibid.*

<sup>121</sup> See *R.K. Productions Pvt. Ltd. v B.S.N.L. (R.K. Productions)*, (2012) 5 LW 626. Also, *Super Cassettes Industries Ltd. v Myspace Inc [IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008]*. In both the cases the court concluded that the ISPs are liable for infringement.

<sup>122</sup> RJ Mann & SR Belzley, “the Promise of Internet Intermediary Liability”, (2005) 47 Wm. & Mary L. Rev. 239 at 259.

<sup>123</sup> s79(3) *The Information Technology Act.*

the intermediary shall observe due diligence as provided by rules promulgated by the government in 2011. The intermediary who finally fails to comply with the directions issued is punishable under sub-section (3) of 69A for the period of seven years imprisonment.

In *Google India v. Vishaka Industries Ltd.*<sup>124</sup>, the court held that the safe harbour provision under section 79 cannot be used if the article is not removed even after being aware of the content, in accordance with the notice and take down regime.<sup>125</sup> By reading down section 79(3)(b) the court has addressed the issue of intermediaries complying with takedown requests from non-government entities and has made government notifications and court orders consistent with reasonable restrictions in Article 19(2) of Indian Constitution.<sup>126</sup>

To summarize, section 79(3) provides that the intermediary shall not be entitled to the benefit of the exemption in section 79(1) in a situation where the intermediary, upon receiving actual knowledge that any information, data, or communication link residing in or connected to a computer resource controlled by the intermediary, is being used to commit an unlawful act, fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.<sup>127</sup> In cyberspace, intermediary liability controls online content by leveraging the position of the gatekeepers to the flow of information online.<sup>128</sup>

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<sup>124</sup> *Google India v. Vishaka Industries Ltd*, CrI.P.No. 7207 of 2009.

<sup>125</sup> *Ibid.*

<sup>126</sup> Jyoti Pandey, “The SC Judgment in Shreya Singhal and What It Means for Intermediary Liability in India”,(2015) 3:4 OFR Cyber Monitor 1 at .9.

<sup>127</sup> Padmanabhan, *supra* note 94 at 13.

<sup>128</sup> Jonathan Zittrain, “History of Online Gatekeeping”, (2006) 19:2 Harvard Journal of Law & Technology 253 at 256.

## 2.7 NTD under India's IT Act

In addition to the Copyright Act, the procedure of takedown has also been mentioned in the IT Act. In fact, the concept of blocking of websites addressed by the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 which authorizes the Department of Information and Technology (DIT) to block websites. It was in the 2008 amendment of IT Act where the NTD was first brought into Indian legal system. Section 79(2) read with section 87(2)(zg) of the Act prescribe a privately administered NTD regime for limiting intermediary liability in India.<sup>129</sup> In the 2008 amendments to the IT Act, the government acted to limit intermediary liability and standardise NTD procedures under section 79 of the IT Act.

### 2.7.1 Analysis of Section 69A

Section 69A of the IT ACT is a vital section as it explains the situation when a website can be blocked and thus gives better understand of takedown provision in Indian legal system. Section 69A grants central government the power to issue directions to block public access through any computer resources.<sup>130</sup> This section gives power to the central government to block any webpage hosted in India if the central government finds it necessary to do so for the protection of or, in the interest of:

- Sovereignty and integrity of India,
- Defense of India,
- Security of the State,

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<sup>129</sup> Rishabh, *Supra* note 108 at 3.

<sup>130</sup> Jyoti, *supra* note 126 at 8.

- Friendly relations with foreign states,
- Public order,
- Preventing incitement to the commission of any cognizable offence relating to above.<sup>131</sup>

In cases where the Central Government or any of its officers is satisfied that it is necessary or expedient to protect the interest of any of the above six provision it may in writing block any such information generated, transmitted, received, stored or hosted in any computer resource. The intermediary who fails to comply with the direction issued shall be punished with an imprisonment for a term which may extend to seven years and also be liable to a fine.<sup>132</sup> The procedure for blocking is analysed in detail in the next part.

### 2.7.2 Blocking Procedure

If any individual has to issue a complaint for blocking, they have to send their complaints to the “nodal officer”.<sup>133</sup> After examining the complaint and being satisfied with the need to block the website, the nodal officer of the “organization”<sup>134</sup> in question may forward the complaint to the “Designated officer”.<sup>135</sup> The designated officer is the only person under the Act, apart from the court, who can issue directions for blocking. The said officer is appointed by the central

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<sup>131</sup> s69A(1), *The Information Technology Act, 2000*.

<sup>132</sup> *Ibid.*

<sup>133</sup> *The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009*, rule 4.

<sup>134</sup> “Organisation” means – (i) Ministries/Departments of Government of India; (ii) State Governments and Union Territories; (iii) Any other entity as may be notified in Official Gazette by the Central Government. See, *The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009*, r. 2(g).

<sup>135</sup> *The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009*, rule 3.



government. A committee consisting of the designated officer and representatives from the Ministries of Law and Justice, Home Affairs, Information and Broadcasting, and the Indian Computer Emergency Response Team examines all the requests received by the designated officer within seven days.<sup>136</sup>

The committee will first examine the request and decide whether such request falls under section 69A of the IT Act and if it does not, the request to block is not granted. If it does, then the designated officer tries to identify the person to whom the information in the complaint belongs or the intermediary who has hosted the information. The accused after being intimated by the designated officer about the complaint shall receive opportunity to present his defence.<sup>137</sup> If the Review Committee is of the opinion that the orders issued are not in conformity with section 69A(1), it may set aside the blocking order and ask for the information to be unblocked.<sup>138</sup> In cases of emergency, the secretary can pass an interim decision to block access through a written and reasoned order.<sup>139</sup> The reasons for the blocking must be recorded in writing.<sup>140</sup> Intermediaries who do not comply with the requests can be punished with imprisonment of up to seven years and are also liable to pay a fine.<sup>141</sup> The Constitutional validity of section 69A has been analysed later in this chapter.

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<sup>136</sup> *The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009*, rule 11.

<sup>137</sup> *The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009*, rule 8 (1) (2) (3).

<sup>138</sup> *Ibid* rule 14.

<sup>139</sup> *Ibid* rule 2.

<sup>140</sup> s69A(1), *The Information Technology Act, 2000*.

<sup>141</sup> s69A(3), *The Information Technology Act, 2000*.

In one of the reports presented by Indian Parliament it was found that provisions of section 69A of the Information Technology Act 2000 have been invoked during the calendar year 2012 and 2013. A total of 362 Uniform Resource Locators (URLs) were blocked in the year 2012, out of which 312 URLs were blocked in a single instance at the time of exodus of North East people from different parts of the country. Further, a total of 62 URLs were blocked invoking process of the Government under section 69A during 2013.<sup>142</sup> Section 69A does not contribute to immunity for the intermediary, instead it places additional obligations on the intermediary who fails to comply with the directions issued is punishable under sub-section (3) of 69A.<sup>143</sup>

The one noteworthy difference in the takedown provision of IT Act and the Copyright Act is that the copyright Act explicitly authorizes the restoration of content in cases where a court has not endorsed the complaint. This becomes one of the big flaws of the takedown provision in the IT Act. The next part looks at the challenges and problems for this existing regulatory regime.

## 2.8 Challenges for this Regulatory Regime

### a) Piracy Remains on the Rise

The biggest challenge for the legal system is the drastic rise in piracy. In the first chapter I highlighted the emergence of new network protocols and sharing technologies like P2P, which has made online piracy faster and easier. According to the research by Motion Pictures Association

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<sup>142</sup> “Objectionable contents on websites” See online : <http://164.100.47.132/LssNew/psearch/QResult15.aspx?qref=151935> .

<sup>143</sup> Jyoti, *supra* note 126 at 9.

(MPA), Indians are the largest group of visitors to the Indian content-focused torrent sites.<sup>144</sup> The impact of piracy has become so significant in recent years to the point where producers have given up fighting against it.<sup>145</sup> Moreover, broadband Internet in India is on the rise<sup>146</sup>, and hence piracy will likely only increase further, to the detriment of the rights and interests of copyright holders.

#### b) Undermines Rights and Freedoms Online

One of the biggest challenge regarding the takedown law, not only in India but also in other countries, is to make sure the legal powers it confers are not abused by private users and public authorities. In fact, there have been various instances in India where citizens were arrested for expressing their views on the Internet.<sup>147</sup> This not only violates the fundamental rights of an individual, but is an example of a higher authority abusing its legal powers.

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<sup>144</sup> Envisional & Motion Pictures Association, India: Internet Piracy Landscape Audit (2009).

<sup>145</sup> Arul George Scaria, *Piracy in the Indian Film Industry: Copyright and Cultural Consonance* (Delhi: Cambridge University Press, 2014) at 45.

<sup>146</sup> Nikita Hemmige, "Piracy in the Internet Age" (2013) 18 *The Journal of Intellectual Property Rights* 457 at 461.

<sup>147</sup> Indian Express, "Now Palghar police detain 19-year-old for Facebook post on Raj Thackeray "online: (28 November

2012)< <http://www.indianexpress.com/news/now-palghar-police-detain-19yroid-for-facebook-post-on-rajthackeray/1037462/>>.

In 2012, two women were arrested for their use of Facebook, one for criticising disruptions in Mumbai during a politician’s funeral and the other for “liking” her friend’s comment.<sup>148</sup> This led to a huge criticism and a public outrage as it was clear case of abuse of law by the authority.<sup>149</sup>

Moreover, India’s takedown procedure has also led to over-compliance, with content being arbitrarily removed to the detriment of online expression. The takedown procedure prescribes a limited timeframe of 36 hours for the intermediary to disable the content.<sup>150</sup> In 2011, the Bangalore-based Centre for Internet and Society (CIS) ran a series of tests to see how intermediaries responded to bogus takedown request within the 36-hour timeframe. Six of seven intermediaries over-complied with requests, meaning they restricted more content than legally required. Hundreds of pages were taken down at the expense of legitimate expressions.<sup>151</sup> These are more general concerns about user rights to creativity and expression, but there are more legal and regulatory challenges unique to India as well.

## 2.9 Unique Indian Challenges for Copyright Enforcement

Apart from the general challenges a legal system of any country shall face, there are some unique challenges that a country like India would face while dealing with online piracy. The country’s

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<sup>148</sup> Times of India, “Shame: 2 girls arrested for harmless online comment”, online: (20 November 2012) <[http://articles.timesofindia.indiatimes.com/202-11-20/mumbai/35227016\\_1\\_police-station-shiv-sainiks-police-action](http://articles.timesofindia.indiatimes.com/202-11-20/mumbai/35227016_1_police-station-shiv-sainiks-police-action)>.

<sup>149</sup> *Ibid.*

<sup>150</sup> *The Information Technology (Intermediaries Guidelines) Rules*, 2011, Rule 3(4).

<sup>151</sup> Jyoti, *supra* note 126.

huge population in itself represents a unique challenge. India is the second most populated country in the world after China.<sup>152</sup>

#### a) Constitutional Constraints

India's Constitution places important constraints on how laws and authorities might enforce legal interests like copyrights. Both the NTD process set out under the IT Act and the Copyright Act are controversial especially in terms of the chilling effect that they have on speech. Article 19 of the Indian Constitution states that "All citizens shall have the right to freedom of speech and expression"<sup>153</sup> It thus can be argued that all these new copyright-related laws and provisions arguably violate the rights to free speech and expression online.

First, there is always an added pressure on the intermediary to comply with the order given by the government to block the websites. This leads to a big problem, noted above, of over compliance because it creates incentives for Internet intermediaries to take down content whenever they receive notice thus indirectly violating Article 19(1)(a) of Indian Constitution (freedom of speech and expression).

As well, the reasons for blocking a website are unknown both to the originator of material or as those trying to access the blocked URL. Hence, the general public gets no information about the nature and scale of censorship unlike offline censorship where the court orders banning books and movies are usually part of public discourse.<sup>154</sup> This general confusion around intermediary liability

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<sup>152</sup>Online: (2016) <<http://www.internetworldstats.com/stats8.htm>>.

<sup>153</sup> *The Constitution of India*, Art 19 (1)(a)

<sup>154</sup> Sunil Abraham, "Shreya Singhal and 66A A Cup Half Full and Half Empty" (2015) 15 Economic and political weekly 12 at 14.

law encourages privatisation of censorship and causes a great deal of uncertainty for businesses hindering their innovation.<sup>155</sup> This hindrance can be argued to be a violation of Article 19 of Indian Constitution.

On paper, the takedown system looks reasonable because it gives much needed protection to copyright owners but because the procedure is not clearly defined it becomes difficult to implement such provisions, raising the question whether such takedown brings unconstitutional restrictions on speech and expression.

Moreover, the law's criminalisation of online speech and social media usage is a serious threat to freedom of expression in the country. India is considered as world's largest democracy but curtailing the freedom of expression of citizens is an insult to the word democracy. Government requests for the removal of illegal or offensive content is steadily on the rise around the world, but this is especially the case in India. The Google Transparency Report shows that India ranks second—after the United States—in the number of government requests for users' data.<sup>156</sup>

Beyond freedom of expression and over-compliance, privacy rights are also at stake too. In 1996, the Indian Supreme Court held that the citizen's privacy has to be protected from abuse by the authorities.<sup>157</sup> Yet section 69 of the IT Act gives the state surveillance powers in the interest of national security or "friendly relations with foreign states",<sup>158</sup> which could mean that authorities

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<sup>155</sup> Melody Patry, *India: Digital Freedom under threat* (2013) 1 at 6.

<sup>156</sup> Google, "Google Transparency Report" online : (2016) <<http://www.google.com/transparencyreport/userdatarequests/IN/>>.

<sup>157</sup> Pranesh Prakash, "How Surveillance Works in India" online: (10 July 2013) <[http://india.blogs.nytimes.com/2013/07/10/how-surveillance-works-in-india/?\\_r=0](http://india.blogs.nytimes.com/2013/07/10/how-surveillance-works-in-india/?_r=0)>.

<sup>158</sup> *The Information Technology (Amendment) Act*, 2008, s69.

will monitor citizens to enforce the copyrights of foreign citizens and companies (to maintain friendly relations).

In the landmark case of *Shreya Singhal vs Union of India*,<sup>159</sup> the Indian Supreme Court ruled section 69A of the IT Act<sup>160</sup> was constitutional on the basis that blocking orders are issued when the executive has sufficiently established that it is absolutely necessary to do so, and that the necessity is relatable to only some subjects set out in Article 19(2).<sup>161</sup> In upholding the constitutionality of Section 69A (procedure for blocking websites), the judgement raised crucial questions regarding transparency, accountability, and under what circumstances may reasonable restrictions be placed on free speech on the Internet. The Supreme Court in this case further clarified that Internet users must give intermediaries notice of a court order requiring removal of content to obligate intermediaries to comply.<sup>162</sup> So, while section 69A was held constitutional in this case, there were doubts over the validity of section 69A in different circumstances.

Constitutional challenges, under India's unique constitutional provisions, thus remain a serious problem for laws attempting to address online infringement. But there are other judicial and enforcement constraints as well.

#### b) Judicial Constraints / Limits on Enforcement

Pre-emptive injunctive orders, where courts order ISPs to block certain websites before damage has occurred, could be an effective tool to battle piracy in India. However, courts have placed

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<sup>159</sup> *Shreya Singhal v Union of India* SC Writ Petition (Criminal) No.167 Of 2012.

<sup>160</sup> *The Information Technology (Amendment) Act*, 2008, s69A.

<sup>161</sup> Art 19(2), *Indian Constitution Act* 1949.

<sup>162</sup> *Shreya*, *supra* note 159.

important limits on their scope and application, thus limiting their effectiveness. The “Ashok Kumar Order case”<sup>163</sup> is also referred to as the John Doe order. The producers of the film “3” wanted an omnibus order against all websites that hosted torrents or links facilitating access to or download of the film, apprehending that such electronic access would be made available immediately after the film’s release due to the pre-release popularity. A plain reading of this order by the Madras High Court made it clear that the known defendants, i.e., the ISPs, and the unknown Ashok Kumars, were restrained only from infringing the copyright in the specific cinematographic film/motion picture “3” through different means.<sup>164</sup> Thus, an *ex parte* order was granted.<sup>165</sup> The court further added “ISPs are necessary parties to the suit as the act of piracy occurs through the channel or network provided by them.”<sup>166</sup> This statement by the court makes ISP liable for most of the online infringement cases. The term “John Doe” is a general American term used to refer to anonymous or unknown individual. This order is famous in the U.S., U.K. and Canada but still emerging in India.<sup>167</sup> In this case the court banned anybody from illegally downloading, offering to download, or selling VCDs or DVDs of the movie.<sup>168</sup>

Courts have placed significant legal constraints on these orders. A “John Doe order” to block a website falls within reasonable restrictions because refusal to do so would be a “contempt of court”, a ground under Article 19(2). Therefore, unless there is an express direction from the Court,

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<sup>163</sup> *R.K. Productions Pvt. Ltd. v. B.S.N.L. (R.K. Productions)*, (2012) 5 LW 626.

<sup>164</sup> Padmanabhan, *supra* note 94 at 10.

<sup>165</sup> *R.K. Productions Pvt. Ltd. v. B.S.N.L. (R.K. Productions)*, (2012) 5 LW 626.

<sup>166</sup> *Ibid.*

<sup>167</sup> Priya et al, *supra* note 68 at 147.

<sup>168</sup> *Ibid* at 151.



the ISPs are not bound to block any Internet source. The rights holders can use John Doe orders as a tool for forcing the ISP to block entire websites but the court has clearly stated that a John Doe order only permits a copyright owner to seek action against any errant website by the ISPs upon authorization of the Department of Information and Technology (DIT) and not to bypass the authority under the law.<sup>169</sup>

Moreover, injunctions must be very specific or they will not be granted. The first instance of John Doe orders being passed in India was by the High Court of Delhi in the case of *Taj Television v. Rajan Mandal*.<sup>170</sup> In that case, the Plaintiff had filed suit against six known cable-operators and another fourteen unknown cable-operators and had sought injunctions against not only the twenty cable operators but also against all other un-named cable-operators who possibly were violating the broadcast rights of the Defendants. The plaintiff in this case was granted an interim injunction. The condition placed by the court was that a vague injunction can be an abuse of the process of the court and such a vague and general injunction of anticipatory nature can never be granted.<sup>171</sup> In *Super Cassettes Industries Ltd. v. Myspace Inc.*,<sup>172</sup> the court held that due diligence must be present from the infringer at the time of infringement and not when the infringement has already occurred so that the infringement can be prevented at the threshold and not when the same has already occurred. The interim stay order was granted in favour of *Super Cassettes Industries Ltd*

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<sup>169</sup> Arul George Scaria, "Online Piracy Of Indian Movies: Is The Film Industry Firing At The Wrong Target?"(2013) 21:3 Michigan State International Law Review 647 at 657.

<sup>170</sup>*Taj Television v Rajan Mandal* CS (OS) No. 1072 of 2002 before the High Court of Delhi.

<sup>171</sup> *Indian Performing Right v Mr. Badal Dhar Chowdhry* CS (OS) 1014/2004 before the High Court of Delhi.

<sup>172</sup> *Super Cassettes Industries Ltd. v Myspace Inc* [IA Nos.15781/2008 & 3085/2009 in CS(OS) No. 2682/2008.]

(SCIL) restraining Myspace and other websites from streaming the videos like songs and movies whose rights were owned by SCIL.

In the absence of a comprehensive law and lack of precedents, guidance has been taken from foreign courts in evaluating these orders and building a strong basis for future reference of Indian Courts.<sup>173</sup> The John Doe order has been made the focal point in most of the judgments given by Indian courts relating to online copyright infringement.<sup>174</sup> A John Doe order was passed in favour of film Production Company, Reliance Communications, restraining websites, cable operators, and ISPs illegally screening the film *Bodyguard*.<sup>175</sup>

John Doe/Ashok Kumar orders are an effective tool to prevent further losses to broadcasters. However, the ability to fully identify the websites in violation of the broadcasting rights enjoyed cannot be guaranteed. Even if identified, the extent to which such websites may be able to pay damages may be limited. In businesses like this, where the investment amount is big but the period in which the broadcaster can make its money is rather short, obtaining an injunction before damage actually occurs is important. A John Doe injunction is best served as a *quia timet* action rather than taking steps after the commencement of an act.<sup>176</sup> Demand for watching anything live will always be more rather than watching after it's finished. This supports the notion that "prevention is better than cure".

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<sup>173</sup> *ESPN Software India Pvt. Ltd. v Tudu Enterprise and Others* CS (OS) No. 384 of 2011 before the High Court of Delhi.

<sup>174</sup> Priya et al., *supra* note 68 at 147.

<sup>175</sup> *Reliance Big Entertainment v Multivision Network & Ors.*, CS (OS) No. 2066/2011.

<sup>176</sup> Nitish Desai, Online: (2013) <[http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/streaming-websites-caught-off-side-mid-way-through-the-2014-fifa-world-cup.html?no\\_cache=1&cHash=7f1906fe691e41d1676c187e8b196a7f](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/streaming-websites-caught-off-side-mid-way-through-the-2014-fifa-world-cup.html?no_cache=1&cHash=7f1906fe691e41d1676c187e8b196a7f)>.

As the foregoing discussion illustrates, India's regulatory landscape is showing signs of growing maturity with respect to Internet technology and online copyright infringement, with the Indian judiciary and legislatures having taken reasonable efforts to combat the threat of online infringement. However, issues remain. Present laws contain loopholes and are narrowly tailored, limiting their effectiveness. And there are constitutional constraints on regulation as well, as highlighted by the Supreme Court's recent judgement in Shreya Signal's case striking down a much-criticised provision of India's Information Technology Act in section 66A. That said, whether the John Doe injunction is the way forward is debatable but the fact that Indian courts have taken such decisions shows online infringement cases cannot be ignored. In short, as the foregoing discussion illustrates, the Indian judiciary and legislatures have taken reasonable efforts to combat the threat of online infringement but present laws contain loopholes and, in addition, are narrowly tailored, limiting their effectiveness.

### c) Institutional Challenges

Apart from the constitutional problem there are also institutional challenges for copyright enforcement in India. One of the major problems is the lack of confidence for the citizens in the legal system. It takes years for some legal matters to come to a conclusion which would mean delay for justice. The Indian legal system has the most pending cases in the world.<sup>177</sup>

Ultimately it is the poor who suffer the most as most lack financial resource to hire good lawyers and therefore most avoid the court process. Similarly, many copyright owners in India would prefer not to get involved in court proceedings and waste their time and energy as it may take many

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<sup>177</sup> Ankit Panda, "30 Million Pending Cases: Fixing India's Overburdened Judiciary" online: (2016) <<http://thediplomat.com/2016/04/30-million-pending-cases-fixing-indias-overburdened-judiciary/>>.

years for them to get compensated. Furthermore, smaller media companies that are newer to the business would not feel comfortable taking their matter to court because of financial constraints and lack of trust in the judiciary to provide timely adjudication.

#### d) Unique Indian Cultural and Legal Norms

There are also unique Indian cultural and legal norms that pose a special challenge to police online infringement and enforce copyright in India. The concept of IP is still new and not as important compared to the other laws in India. In rural areas people would not understand the importance of copyright or its infringement and it becomes extremely difficult to make people aware of it<sup>178</sup>. There are disparities between people of urban and rural areas. For example, property disputes, matrimonial issues, and criminal law issues are more common than copyright infringement issue in a rural area. Many individuals in rural areas might not even be aware of copyright law and IP more generally. It is not only in rural parts but also in urban areas where IP law is not as important as other laws.<sup>179</sup> Hence, it becomes very important to first spread an importance of the concept of IP laws.

The other major concern is the general attitude among Indian citizens towards the law in general. If we take into consideration how copyright notice-and-takedown legislative schemes work then it can be argued that the notices sent to a copyright infringers might have a very little impact. The best example can be observed with the Income Tax Act 1961. Although a law, people still violate it.<sup>180</sup> Even if people are aware about the laws the general attitude is very casual towards those

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<sup>178</sup> Priya et al, *supra* note 68.

<sup>179</sup> Arul, *supra* note 145 at 135.

<sup>180</sup> Tushar Dara, "In India, Tax Evasion is a National Sport" online: (2011) <<https://www.bloomberg.com/news/articles/2011-07-28/in-india-tax-evasion-is-a-national-sport> />.

laws as many feel it is difficult to enforce such laws. It would not be wrong to say there is a lack of respect for the law in society.<sup>181</sup> Reports suggest people in India don't find downloading or streaming as a serious crime.<sup>182</sup> In addition, most of the youth have little idea about online piracy and therefore they continue to download movies. Because of a very weak act, many accused get away easily even after breaching the law.<sup>183</sup> For a model like an NTD system to work, it has to the Internet users must take the notices seriously. A mere takedown would only provide a temporary relief to the copyright holders.

#### e) Indian Infrastructure Challenges

Apart from the legal and cultural challenges, there are challenges that ISPs and online service providers (OSPs) face while dealing with online infringement cases. ISPs provide individual and institutional subscribers with access to Internet while OSPs offer access to certain online services.<sup>184</sup> ISP's play an instrumental role in transmitting or disseminating third party content, but neither initiates nor takes any part in a decision to disseminate any particular material.<sup>185</sup>

The NTD copyright enforcement system in India's Information Technology (Intermediaries Guidelines) Rules prescribes a limited timeframe of 36 hours for the intermediary<sup>186</sup> to disable the

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<sup>181</sup> *Ibid.*

<sup>182</sup> Arul,*supra* note 145 at 128.

<sup>183</sup> *Ibid.*

<sup>184</sup> Mark. F. Grady and Francesco Parisi., "*The Law of Economics of Cyber Security*", 1<sup>st</sup> Edition (New York: Cambridge University Press, 2006) at 226.

<sup>185</sup> Raman Mittal., "Online Copyright Infringement Liability of Internet Service Providers", (2016) 46 *Journal of Indian Law Institute* 289.

<sup>186</sup> Intermediary includes both Internet service providers and online service providers like Google.

content.<sup>187</sup> Many medium and small Internet businesses have been vocal in criticising the impact of these rules,<sup>188</sup> a piece of secondary legislation linked to the IT Act.<sup>189</sup> It often becomes impossible for an ISP to address the takedown situation in 36 hours. Many intermediaries are overwhelmed with requests and do not have the legal expertise to properly handle them in a manner that protects freedom of expression.<sup>190</sup> Multiple takedown requests it puts huge burdens on the ISPs/OSPs. Further, intermediaries are liable for content which they did not author on websites and platforms which they may not control and NTD systems encourage them to monitor and preemptively censor online content, which leads to the excessive censorship.<sup>191</sup> Because of this, the intermediaries are more worried about their interest and are forced to remove content after receiving notice, thus putting extra pressure on the ISPs.

As of 2015, a total of 138 ISPs are authorized to provide Internet access in India.<sup>192</sup> It would not be wrong to say 138 ISPs is a small number for a highly populated country like India. Only a few are large ISPs.<sup>193</sup> It is time to either increase the number of ISPs or implement a mechanism which makes the job easier for ISPs.

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<sup>187</sup> *Information Technology (Intermediaries Guidelines) Rules*, 2011, Rule 3(4).

<sup>188</sup> *Ibid.*

<sup>189</sup> Government of India, Ministry of Communications and Information Technology, “The Information Technology (Electronic Service Delivery) Rules, 2011”, online: (2011) <[http://deity.gov.in/sites/upload\\_files/dit/fies/RNUS\\_CyberLaw\\_15411](http://deity.gov.in/sites/upload_files/dit/fies/RNUS_CyberLaw_15411)>.

<sup>190</sup> Raman, *supra* note 185.

<sup>191</sup> Melody, *supra* note 155 at 6.

<sup>192</sup> Telecom Regulatory Authority of India, “The Indian Telecom Services Performance Indicators” (Jan-Mar 2016).

<sup>193</sup> ISP’s in India have been ranked as one of the worst, which shows how much improvement is requirement and having mere four or five big ISPs will just increase the burden on them. See, “India Ranks Below Bhutan, Sri Lanka in Broadband Reach: Trai” online: (2015) <<http://gadgets.ndtv.com/internet/news/india-ranks-below-bhutan-sri-lanka-in-broadband-reach-trai-682586>>.

It is clear that the current NTD system in India has many problems and challenges. A new regulatory regime, aiming to address these challenges, will be set out later in this thesis. For now, it is important to understand that the present NTD system in India is inadequate and, among other things, fails not only to curtail copyright infringement, but also infringes on other Indian constitutional rights like freedom of expression online.

## 2.10 Conclusion

The emergence of new Internet technologies has made it easier for Internet users to infringe copyright material online. With the Internet usage in India increasing with each year, there has also been an increase in copyright infringement in online world. Provisions in the Copyright Act and IT Act offer protections to copyright holders and Indian lawmakers have acted swiftly in implementing an NTD system in order to combat the online piracy. Though it has been a positive step to deter and penalize infringers, there has also been a criticism regarding the takedown and blocking of websites. Critics have found that the takedown concept, and the existing copyright enforcement regime, are detrimental to the rights of Internet users and raise questions of violation of fundamental rights online.<sup>194</sup> The key is to find a balance between the interest of copyright holders, online intermediaries and Internet users. The NTD system in India as observed has failed to bring an adequate balance in protecting the interest of parties involved.

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<sup>194</sup> Chinmayi Arun, *supra* note 9 at 27.

The next chapter introduces and comparatively examines different mechanisms adopted elsewhere to address online piracy. A solution, set out in chapter 4, is derived based on this comparative discussion.



# Chapter III: Controlling Online Copyright Infringement: Different Mechanisms

The previous chapter showcased how Indian lawmakers and courts are struggling to find an effective and feasible mechanism to curb online copyright infringement in the face of a range of legal, cultural, and infrastructure challenges. The biggest problem observed with the Indian system was failure to find a right balance between the interests of copyright owners, ISP's and internet users. In order to find an effective balance, this chapter explores the laws of different countries and also examines some of the measures taken by the ISPs in the U.S. to control online copyright infringement.

The laws discussed in this chapter are: 1) the U.S.'s Digital Millennium Copyright Act (DMCA);<sup>195</sup> 2) The Notice and Notice adopted by Canada's Copyright Modernization Act;<sup>196</sup> and 3) the Graduated Response systems (GRS), including the "three strike rule" versions found in France and Ireland and the "six strike rule" version found in the U.S.<sup>197</sup> The first three models are administered by legislative body whereas the "six strikes rule" is a private system formed under a Memorandum of Understanding for punishing infringers. All the models discussed in this chapter are different to one another, providing different options that can be applied to the Indian copyright system.

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<sup>195</sup> 17, USC (1998).

<sup>196</sup> SC 2012. c. 20.

<sup>197</sup> *Copyright and Related Rights Act*, 2000.

The chapter begins by analysing the DMCA's NTD online copyright enforcement scheme adopted in the U.S., including relevant cases to assess its application. Apart from the DMCA, there is also a privately formed measure to control online file sharing in the U.S. namely, the "six strike" Graduate Response system (GRS) also known as the "Copyright Alert System a measure implemented by five major ISPs in America.

The "three strike" GRS system is the other copyright enforcement mechanism assessed in this chapter.<sup>198</sup> This GRS adopts a "three strikes" mechanism, which is different from the classical NTD system. Unlike in NTD system, in GRS there are three notices sent to the infringer before taking his content down. In this chapter I discuss the GRS systems of France and Ireland. The former is governed by law whereas the latter is governed by a private entity, which is first of its kind.

### 3.1 Copyright Law in the U.S: The Digital Millennium Copyright Act (DMCA)

The U.S. was arguably the first country to enact an Internet-related copyright law. The challenges posed by the emergence and evolution of the Internet compelled the U.S. to implement the DMCA in 1998.<sup>199</sup>

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<sup>198</sup> Irini A. Stamatoudi, *Copyright Enforcement and the Internet* ( The Netherlands: Kluwer Law International, 2010) at 149.

<sup>199</sup> 17, USC (1998).

### 3.1.1 History

During the 1980s and early 1990s, the main focus of preventing piracy from copy protection was to educate people that piracy was unlawful.<sup>200</sup> Some software had the slogan “piracy is theft” written with skulls and crossbones in the manual.<sup>201</sup> Because the Internet was not that developed, software piracy was not considered a big issue back in early 1990. Development of new software that facilitated sharing and distribution increased online piracy.

The first law enacted to regulate the use of cyberspace was the U.S. Communication Decency Act (CDA) of 1996.<sup>202</sup> Many considered this as an attack against rights online, as the Act imposed a restriction on Internet users. The Act prohibits all transmissions considered indecent on the Internet, whether sexual communications or indecent images.<sup>203</sup> One of the crimes on the rise on the Internet was online piracy.

Copyright’s importance is affirmed by a clause inserted to the U.S. Constitution which states that Congress shall have the power “to promote the Progress of Science and useful Arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”.<sup>204</sup> Thus, it is no surprise the U.S. enacted one of the first laws to regulate copyright online, with the DMCA passed in 1998 to comply with World Intellectual Property Organization (WIPO) standards and account for changing technology. Congress designed the DMCA to further

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<sup>200</sup> Gustav, *supra* note 19.

<sup>201</sup> *Ibid.*

<sup>202</sup> 47 USC s.230 (1996).

<sup>203</sup> *Ibid.*

<sup>204</sup> U.S Constitution Art 1, Sec 8 (8).

codify the rights of copyright holders in the digital world.<sup>205</sup> The DMCA addressed infringing activities that the 1976 Act could not have foreseen. The Online Copyright Infringement Liability Limitation Act (OCILLA), codified at section 512 of the DMCA, was passed as part of the (DMCA) on October 28, 1998.<sup>206</sup> While there are many important implications of the DMCA, one of particular salience derives from the section commonly referred to as its NTD system or model.<sup>207</sup>

### *3.1.2 The DMCA's NTD System*

Section 512 of DMCA sets out the provision of NTD of an illegal content online.<sup>208</sup> The copyright owner sends takedown notice regarding infringement to the service provider.<sup>209</sup> The notice need not be sent by the owner personally, but can also be sent by any person who is authorized to act on behalf of the owner.<sup>210</sup> The notice shall contain the signature (Electronic or Physical) of the person whose copyrighted work has been claimed to be infringed, along with his personal contact details.<sup>211</sup> The service providers after analysing the takedown notice must act expeditiously to

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<sup>205</sup> Jeffrey Cobia, "The DMCA Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process"(2009) 10:1 Minnesota Journal of Law, Science & Technology 388.

<sup>206</sup> *DMCA*, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>207</sup> 17 USC S 512.

<sup>208</sup> 17 USC S 512(b)(2)(E).

<sup>209</sup> *Ibid*(c)(3)(A)

<sup>210</sup> *Ibid* (c)(vi).

<sup>211</sup> *Ibid* (c)(3)(A)(i)-(vi)

remove or prevent access to the allegedly infringing material<sup>212</sup> by immediately taking down the online content.<sup>213</sup>

The Act gives a fair chance to the other party to defend themselves and prove their innocence. The accused party in his defence sends a counter notification to the copyright holder in which he claims his innocence.<sup>214</sup> The counter notification shall have the necessary details in accordance with the DMCA provision.<sup>215</sup> The service provider delivers a copy of the counter notification to the copyright owner along with an information stating the taken down content shall be restored in ten business days,<sup>216</sup> unless the service provider receives a notice from the owner that he has filed a suit to prohibit the user from "engaging in infringing activity relating to the material on the service provider's system or network."<sup>217</sup> There have been instances when the website containing the content has been taken down all together.<sup>218</sup> This whole provision is also called the "safe harbour" provision. To qualify for the statutory safe harbor, search engines and user generated content platforms are required to comply with the notice-and-takedown protocol in Section 512(c)<sup>219</sup> and with the obligation to terminate access for repeat infringers in Section 512(i)<sup>220</sup>.

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<sup>212</sup> *Ibid* (c)(1)(C).

<sup>213</sup> *Ibid* (b)(2)(E).

<sup>214</sup> *Ibid* (g)(2)(B).

<sup>215</sup> *Ibid* (3)(A)-(D).

<sup>216</sup> *Ibid* (g)(2)(B)(C).

<sup>217</sup> *Ibid* (g)(2)(C).

<sup>218</sup> Bari, *supra* note 26.

<sup>219</sup> 17 USC s.512(c).

<sup>220</sup> *Ibid*.

Under the safe harbour provision, apart from the protection given to the copyright holders, there are protections also granted to the ISPs and OSPs. Under Section 512(c),<sup>221</sup> ISPs are not liable for hosting or storing material that is posted by or at the direction of users. An ISP is immune from liability, however, only if it (1) has no actual knowledge that the material is infringing; (2) when the ISP is not aware of any facts or circumstances from which infringing activity is apparent; (3) when the ISP removes infringing material when it becomes aware of the infringement.<sup>222</sup> The ISP/OSP plays a crucial role in acting as a medium between the copyright holder and the subscriber hence, it becomes important to grant them a proper protection.

### *3.1.3 Advantages*

The biggest positive aspect of DMCA's NTD system is that it actually gives protection to the copyright holders. Though some may call the provision of takedown an extreme measure taken against infringers, the best way to stop piracy is by taking deterrent action against the regular infringers.<sup>223</sup> There are only a few instances where a person commits online infringement without knowing, whereas in most cases, a person has full knowledge of his act and intentionally commits the copyright infringement again and again.<sup>224</sup>

Another concern with this NTD system is the potential for abuse and misrepresentation in notices sent to remove content online. The NTD system encourages copyright trolls to make false claims

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<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> Irini, *supra* note 198.

<sup>224</sup> *Scott v Scribd, Inc.*, No. 4:09-CV- 03039 (S.D.Tex. Sep. 18, 2009). The website, Scribd, who are accused in this case, knowingly profits from the stolen copyrighted work. The CEO of the website himself admits of facilitating illegal sharing of documents (See para 18-19 of the case)

and issue a notice for takedown.<sup>225</sup> However, section 512(f) has been added to the Act to discourage such misrepresentations by any individual as that would cause harm to all parties involved.<sup>226</sup> Section 512(f) is very important as it brings a much required balance in protecting the rights of copyright holder and Internet user.

### *3.1.4 Disadvantages / Problems*

The NTD copyright enforcement system under DMCA is the one of the oldest methods dealing with online infringement but since its inception it has been criticised for many reasons. The biggest complaint with DMCA was it has not changed since adoption.<sup>227</sup> The safe harbour provision has not undergone many changes since its beginning and thus fails to match the ever growing technology. The Internet, since 1998, has evolved not only in size but also technologically and, with its growth and the failure of law to catch up with technology, some have said the features of DMCA “are hopelessly out of date”.<sup>228</sup> Failure to forecast the development of the Internet proved to be the biggest downfall for the takedown system.

One of the other major problems with the DMCA’s NTD model is that it fails to provide adequate protections for the rights of Internet users. There is a lack of desired balance between copyright

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<sup>225</sup> *Lenz v Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

<sup>226</sup> 17 USC S 512(f).

<sup>227</sup> *Cobia*, *supra* note 205 at 390.

<sup>228</sup> *Ibid* at 391.

holders and hosts.<sup>229</sup> The NTD procedures have been misused and in some cases the content of innocent Internet users inappropriately removed.<sup>230</sup>

One clear aspect to this lack of balance in the DMCA's regulatory scheme is the unclear role for fair use. The fair use doctrine is an important concept in copyright law as it encourages creative work. It acts as a defence for the Internet users against copyright infringement cases.<sup>231</sup> Section 107 of the Act provides for this doctrine.<sup>232</sup> Fair use provides a defense for copyright infringement and applies when the purpose and character of the use is of a commercial nature or is for non-profit educational purposes, and this thus "fair".<sup>233</sup> The Internet has provided a global platform for people to exhibit their creative works and websites like YouTube and other user generated content (UGC) sites encourage Internet users to create, transform, and even distribute work, highlighting the importance of the fair use doctrine.<sup>234</sup>

Though very effective and important in copyright infringement cases, the growth of the Internet and Internet-related technologies have made the fair use doctrine more complicated.<sup>235</sup> And the DMCA has made application of fair use even more unclear and complicated in practice, leading

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<sup>229</sup> *Ibid.*

<sup>230</sup> *Infra* 235.

<sup>231</sup> Cobia, *supra* note 205 at 389.

<sup>232</sup> 17 USC S 107.

<sup>233</sup> *Ibid.*

<sup>234</sup> James, *supra* note 2 at 5.

<sup>235</sup> *Lenz v Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).



to uncertainty and abuse.<sup>236</sup> A classic case where the DMCA takedown notice was abused and undermined fair use rights is *Lenz v Universal Music Corp.*<sup>237</sup> A home video uploaded on YouTube by Lenz of her son dancing to music was the subject of a takedown notice by Universal for infringement of copyright in the song being played. Lenz had the video reinstated following the counter notification procedure. Lenz sued Universal for misrepresentation and sought a declaration from the court that her use of the copyrighted song was non-infringing fair use. Universal argued that the copyright owners could not be required to evaluate fair use at all prior to sending a takedown notice, as fair use was an excused infringement, rather than a use authorized by the copyright owner or by law.<sup>238</sup> Another case involving abuse of DMCA notices and fair use rights is found in the well-known case *Viacom International Inc. v. YouTube, Inc.*<sup>239</sup>, where the National Football League sent a takedown notice to YouTube over a video posted by Wendy Seltzer, a law professor.<sup>240</sup> The video in question was a short clip of the NFL's copyright and broadcast policy.

Ultimately, the fair use doctrine was applied and the takedown was deemed illegitimate, but only after significant litigation costs were incurred.<sup>241</sup> Another noteworthy example where copyright owners misused the DMCA's takedown system was in 2007 when Viacom sent 100,000 takedown

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<sup>236</sup> *Ibid.* Also, see Vikrant Narayan Vasudeva, "The NTD Procedure under Copyright Law: Developing a Measured Approach" (2011) 13 University of Notre Dame Australia Law Review 193 at 202-203.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> *Viacom Int'l Inc. v YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

<sup>240</sup> Wendy.Seltzer.org: Legal Tags, The Blog, *NFL Clip Down Again*, online: (2007)

<[http://wendy.seltzer.org/blog/archives/2007/03/18/nfl\\_clip\\_down\\_again.html](http://wendy.seltzer.org/blog/archives/2007/03/18/nfl_clip_down_again.html)>.

<sup>241</sup> Cobia, *supra* note 205 at 391.

notices to YouTube, including takedown notices for materials to which it did not own the copyright.<sup>242</sup> Clearly, the DMCA is subject to abuse and overreach.

A second significant problem with the takedown regime is the pressure put on the search engines to take down content. In January 2015, Google received over 33.5 million takedown requests that month just for links on its search engine.<sup>243</sup> In one such notice, Google was pressured to remove an offensive anti-Muslim movie from its YouTube platform. Google refused to comply with a request of the U.S. Government to remove the video from the Internet, arguing that no policies were violated. At the same time, it arbitrarily decided to block access to the video from certain countries. As a result, Google was accused of paternalism and moral policing of free expression.<sup>244</sup>

A third drawback is that Internet users also face a massive disadvantage in terms of the lack of fair opportunity to present their defence under the DMCA. If the Internet user files a counter notification in response to a takedown request, the service provider must wait at least ten business days before restoring the content.<sup>245</sup> The Internet user suffers financial damage during this period as his content is taken down and cannot be restored even if he is innocent. The provision increases the risk of wrongful takedown and never gives a full chance to the accused to explain themselves.

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<sup>242</sup> Anne Broache & Greg Sandoval, *Viacom Sues Google Over YouTube*

Clips, online: (March 13, 2007) <[http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030\\_3-6166668.html](http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030_3-6166668.html)>.

<sup>243</sup> Google “Copyright Removal Requests”, online: (2016) <<http://www.google.com/transparencyreport/removals/copyright>>.

<sup>244</sup> “YouTube under new pressure over anti-Muslim film” online: (2012) <<http://www.bbc.com/news/technology-19648808>>.

<sup>245</sup> 17 USC S 512(g)(2)(C).

Moreover, takedowns can be devastating to art online.<sup>246</sup> No creative person would like his work to be taken down. For Example, a person who has many subscribers in his YouTube channel may be suddenly accused of copying and his content may be taken down wrongly. Such person would surely lose credibility in the eyes of his subscribers. Therefore, such takedown damages the artist's legitimacy, integrity, and reputation.

Fourth, courts have had difficulty consistently and effectively adjudicating copyright under the DMCA due to evidentiary and related challenges. For example, it is very difficult for courts to determine whether a person uploading content (that may be targeted by a DMCA takedown notice for removal) has knowledge about his or her infringing act. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*,<sup>247</sup> the court said “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties”. This was considered a landmark decision as it established that service providers like Grokster could be liable for inducing or facilitating the infringing activities of its users.<sup>248</sup>

The landmark decision *Viacom v. YouTube*<sup>249</sup> likewise illustrates the complications with proving knowledge of infringement. Viacom sued YouTube and claimed that YouTube users upload and make thousands of YouTube videos that contain copyrighted material, constituting copyright infringement not only by the users, but also by YouTube, because YouTube is generally aware of

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<sup>246</sup> Cobia, *supra* note 205.

<sup>247</sup> *MGM Studios, Inc. v Grokster* (2005) 545 U.S. 913, 919-20.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Viacom Int'l Inc. v YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

and takes no action to prevent the infringement.<sup>250</sup> Viacom alleged that it was losing hundreds of millions of dollars because of this infringement.<sup>251</sup> YouTube defended the claims on the ground that the DMCA immunized YouTube from the infringing activities of its subscribers. YouTube also took a defence that it becomes difficult to monitor all the activities done on YouTube.

The U.S. Federal District Court in its 2010 decision ultimately held that Google and YouTube cannot be held liable as they were deemed to be protected under the safe harbour provision of DMCA because Viacom was not able to prove whether YouTube was influencing or participating in the infringement.<sup>252</sup> The District Court further held that the software used by YouTube falls under the safe harbour provision and it could not be held for indirect copyright infringement.<sup>253</sup> The court added that though YouTube certainly knew that copyrighted material had been uploaded to its site, it did not know the clips that had been uploaded with permission and those which had not.<sup>254</sup> Though the decision was hailed as a victory for not only YouTube but also for all the Internet users, it offers another demonstration of the challenges and complexities of online infringement.

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<sup>250</sup> *Ibid.*

<sup>251</sup> *Viacom, supra* note 249.

<sup>252</sup> *Ibid* at 118.

<sup>253</sup> Miguel Helft, “Judge Sides with Google in Viacom Video Suit” online: (June,2010)

<[http://www.nytimes.com/2010/06/24/technology/24google.html?\\_r=0](http://www.nytimes.com/2010/06/24/technology/24google.html?_r=0)>.

<sup>254</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

DMCA, though effective in many aspects, has failed to manage P2P file sharing networks.<sup>255</sup> P2P, since the Napster era, has caused a major problem to the copyright holders.<sup>256</sup> Further, the takedown provision in DMCA has not been that effective in the case of repeated infringers which further validates the view that the provision of “Takedown” in DMCA is outdated.<sup>257</sup> So, the DMCA has many problems, as a model for enforcing copyright online, and finding a balance between the interests of copyright holders and users. But there are also unique Indian issues that render it even more problematic as a solution for policing copyright online in India.

### *3.1.5 Implementing the DMCA’s NTD System in India*

The Indian takedown model has been inspired by the DMCA’s takedown system. This section argues that the DMCA’s takedown system cannot work in India due to the several unique legal and cultural challenges discussed in chapter 2.

First, there are constitutional concerns. Article 19 of the Indian Constitution states that “All citizens shall have the right to freedom of speech and expression”<sup>258</sup> and by having an online content taken down, the right to freedom of speech and expression is violated of an individual. Moreover, the takedown provision also encourages higher authorities to misuse the powers ordering ISPs to takedown any content. ISPs because of the pressure, may be forced to remove the content. In the unique challenges part in chapter 2, instances were highlighted where people having higher political power influenced their dominance by punishing citizens from expressing their

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<sup>255</sup> Bridy, *supra* note 5 at 699.

<sup>256</sup> James, *supra* note 2 at 7.

<sup>257</sup> Donald P. Harris, “Time To Reboot?: DMCA 2.0” (2015) 47:0003 Arizona State Law Journal at 14.

<sup>258</sup> *The Constitution of India*, Art 19 (1)(a).

opinion in social media platforms.<sup>259</sup> The takedown provision gives these higher authorities an unfair advantage by which they can put pressure on the ISPs to takedown any content which they feel is harmful to their reputation.

Second, the DMCA, as noted, arguably fails to achieve balance in the U.S. This is exacerbated in the Indian context. The DMCA's takedown, if adopted, would present a similar problem. There is no fair chance given to Internet users to defend themselves before the content is taken down. This method would be very unfair for poor people who would not be able to defend themselves because of the lack of knowledge. Also, lack of awareness about the copyright laws for the people living in rural areas would make the NTD rule very unfair for them.

Third, the DMCA fails to adequately educate users about copyright law (including rights, obligations, and liabilities), something increasingly important in India. In Chapter 2, it was observed that concept of copyright is not that important compared to the other laws in India; it is not a legal norm taken seriously by most citizens.<sup>260</sup> Although India needs a strict and effective copyright system which can punish the infringers,<sup>261</sup> and the DMCA arguably fits that description, it is arguably more important, in the Indian context, to educate people about the subject of copyright and its infringement. The DMCA scheme is focused on rapid removal of infringing content and not educating users about their rights and obligations<sup>262</sup> (sufficient reasons are not

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<sup>259</sup> Times of India, "Shame: 2 girls arrested for harmless online comment", online: (20 November 2012) <[http://articles.timesofindia.indiatimes.com/2012-11-20/mumbai/35227016\\_1\\_police-station-shiv-sainiks-police-action](http://articles.timesofindia.indiatimes.com/2012-11-20/mumbai/35227016_1_police-station-shiv-sainiks-police-action)>.

<sup>260</sup> Priya et al, *supra* note 68.

<sup>261</sup> Arul, *supra* note 145 at 128.

<sup>262</sup> Cobia, *supra* note 205 at 387.

always given for why content is removed). Many people in India are not familiar with what constitutes infringement and what does not.<sup>263</sup> Just removing the content, with little more than a sparse DMCA notice in many cases, will not solve the problem as the most important thing needed to be done is to spread an importance of the concept of online copyright infringement and educate people about it.

If the DMCA's NTD model is adopted it will face the same problems that are being faced by the present takedown system of India. The constitutional problem, the lack of fair balance in protecting the interest of copyright holder and Internet user, and the lack of educating the citizens about the online copyright infringement will still prevail.

The fulcrum of the DMCA's NTD system is the safe harbour protections for intermediaries under section 512. The safe harbour provision brings a much needed balance in the takedown regime.<sup>264</sup> Although NTD regime has been much criticised around the globe, the Viacom case has brought a new light to it and proved, if used with more care, a "takedown" system can be an effective solution to curbing online piracies while balancing the interests of other parties involved (like copyright users). The next section analyzes the notice and notice (NAN) system adopted by Canada to curb online piracy.

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<sup>263</sup> Priya et al, *supra* note 68.

<sup>264</sup> Donald, *supra* note 257 at 4.

## 3.2 The Canadian Alternative: Copyright Modernization Act

The DMCA's NTD system does not offer a convincing solution. Many countries adopted versions of the DMCA's NTD model or system only to be left disappointed or unsatisfied.<sup>265</sup> This section shall look at the NAN<sup>266</sup> system adopted by Canada.

### 3.2.1 History of Copyright Law in Canada

Copyright law in Canada is considered to be a balance between promoting the public interest in the encouragement and dissemination of works of art and intellect and obtaining a just reward for the creators of those works when they are used.<sup>267</sup> Canada, since the late 19<sup>th</sup> century has always taken an active participation in various international copyright treaties. Canada joined the Berne Convention under Great Britain's signature as a British colony in 1886.<sup>268</sup> Canada's first Copyright Act came into force in 1924, but it was not until 1988 when a major reform was done to the Copyright Act. Bill C-32, introduced in June 2010, marked Canada's third attempt since 2005 to revise its copyright legislation in order to implement the WIPO Internet treaties.

The dissolving of Bill C-32 led to the passing of Bill C-11 on June 29<sup>th</sup>, 2012.<sup>269</sup> This was the first update to the *Copyright Act* in Canada since 1997. The primary focus of the amended Act was to

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<sup>265</sup> *Ibid.*

<sup>266</sup> SC 2012 s.41.25, 41.26 and 41.27(3).

<sup>267</sup> Sara Bannerman, "Canadian Copyright: History, Change, and Potential" (2011) 36:1 Canadian Journal of Communication at 30.

<sup>268</sup> *Ibid* at 33.

<sup>269</sup> Bill C-11, *Copyright Modernization Act*, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, 2012.



deal with the challenges posed by the modern technologies. Bill C-11 was said to be a better version of its predecessor Bill C-32<sup>270</sup>.

This new amendment to the Canadian *Copyright Act* addressed the problem posed by user generated content. The new provision states that content incorporating existing publicly disseminated works is not infringing if it is solely done for non-commercial purposes, or if the source of the original work is mentioned, or if the person creating the content has reasonable grounds to believe that the original work is not infringing any copyrights, and such use does not significantly negatively impact current or potential exploitation of the original work or the market for it.<sup>271</sup> Canada, through its 2012 amendment became the first country to address the threat posed by User Generated Content. With the increase in online piracy and the emergence of illegal streaming, it was important for the Canadian Government to update its previous Act.

### 3.2.2 Canada's Notice and Notice (NAN) System

When most countries were adopting the United States NTD model, Canada decided to create its own solution to curb online piracy in “Notice and Notice” or NAN system that requires an ISP to pass along more than one notice of alleged copyright infringement from rights holders (hence it is called notice and notice).<sup>272</sup> The Canadian “notice and notice” system is significantly different from the “notice and take down” regime established by the DMCA which requires an Internet

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<sup>270</sup> Bill C-32, *Copyright Modernization Act*, 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament, 2014.

<sup>271</sup> *Copyright Act*, R.S.C. 1985, c. C-42, S 29.21(1), amended by S.C. 2012, c. 20 (Can.); Frank Guzman, “The Tension between Derivative Works Online Protected by Fair Use and the Takedown Provisions of the Online Copyright Infringement Liability Limitation Act”(2015) 13:2 *Northwestern Journal of Technology and Intellectual Property* 181 at 191.

<sup>272</sup> Meghan Sali, “Did Canadian downloaders just get new rules?” online: (2016) <<https://openmedia.org/en/did-canadian-downloaders-just-get-new-rules>>.

intermediary who receives notice of alleged infringing material to expeditiously remove or disable access to the material.

The NAN legislative scheme in the *Copyright Modernization Act* came into force on January 2, 2015, but it has been used on an informal basis for many years<sup>273</sup>. The foundation of the system was laid out in Bill C-32 where it was proposed that the Internet providers would relay warnings on behalf of copyright holders to customers who are infringing, thereby allowing copyright holders to take legal action against such infringement.

Sections 41.25, 41.26, and 41.27(3) of the *Copyright Modernization Act* set out the process to be followed under the NAN regime. Under the NAN system, copyright owners are entitled to send infringement notices to Internet providers<sup>274</sup> who are legally required to forward the notifications to their subscribers. The Internet providers must also inform the copyright owner once the notice has been sent or the reason for not forwarding the notice. The notices must include details like name and address of the sender, specify the electronic location, and date and time of the commission of the alleged infringement.<sup>275</sup> The important feature to note is that Internet providers shall not disclose the subscribers' personal information as part of the notice-and-notice process.<sup>276</sup>

The Act now makes it mandatory for intermediaries to forward copyright infringement notices to their customers and users. If the Internet provider fails to forward the notification without any good

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<sup>273</sup> Bradley J. Freedman & Kalie McCrystal “ Canada’s New Notice And Notice Regime For Internet Copyright Infringement” (2014) Borden Ladner Gervais.

<sup>274</sup> SC 2012 c s 41.25(1).

<sup>275</sup> *Ibid* s 41.25 (2).

<sup>276</sup> Michael Geist “Notice the Difference? New Canadian Internet Copyright Rules for ISPs Set to Launch” online : (December, 2014) <<http://www.michaelgeist.ca/2014/12/notice-difference-new-canadian-internet-copyright-rules-isps-set-launch/>>.

reason, it shall face the prospect of damages that run as high as C\$10,000. Internet providers must also retain information on the subscriber for six months (or twelve months if court proceedings are launched).<sup>277</sup>

### 3.2.3 Advantage

This NAN system has proven to be an effective model for copyright owners in terms of deterring Internet users from conducting unauthorized downloading and sharing of proprietary content. There have been reports which suggest people have stopped infringing after receiving the first notice,<sup>278</sup> which would suggest the notice brings a deterrent value with it. More importantly in NAN systems the work is done without taking down user's content. Thus, there is no violation of freedom of speech and expression of an individual.

The NAN system has proven effective in educating users to refrain from illegally downloading and sharing copyrighted files.<sup>279</sup> The notices serve as a warning that the copyright holder is aware of the downloading activities done by an individual and that legal action could follow by sending a notice (complaint) to the service provider. The other advantage is it protects the privacy interests of the user by involving no disclosure of his/her personal information at the time of sending the notice. The identities are disclosed only if the accused is sued and the ISPs are forced to disclose their details.<sup>280</sup> No individual would like to have his name disclosed just because he might have

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<sup>277</sup> Bradley *supra* note 273 at 2.

<sup>278</sup> Michael Geist, "Canadian Piracy Rates Plummet as Industry Points to Effectiveness of Copyright Notice-and-Notice System" online: ( May, 2015) <<http://www.michaelgeist.ca/2015/05/canadian-piracy-rates-plummet-as-industry-points-to-effectiveness-of-copyright-notice-and-notice-system/>>.

<sup>279</sup> Bridy, *supra* note 5 at 726.

<sup>280</sup> *Voltage Pictures LLC v John Doe and TekSavvy Solutions Inc.* 2015 FC 339.

unknowingly infringed a copyrighted work on the Internet. It is not important for a copyright holder to know personal information of a subscriber.

### *3.2.4 Disadvantages / Problems*

The NAN regime puts extra pressure on ISPs/OSPs. It can be too harsh on the ISPs as their failure to forward the notice to the Internet users will result in a monetary fine placed on them.<sup>281</sup>

The other problem is the service providers may receive abundant notice from various copyright owners for every minute reason. Certain anti-piracy groups have already been using the regime questionably by forcing ISPs into relaying notices containing inaccurate legal information and threatening users with fines higher than possible under the Act, without proof that the user is responsible for the alleged copyright infringement.<sup>282</sup>

Another drawback to this NAN system is the danger posed by “copyright trolls”, owners who threaten Internet subscribers with costly legal proceedings and hefty statutory damages based on ill-founded infringement claims that stand no real chance of success.<sup>283</sup> The “copyright troll” sends out letters to people who are alleged to have illegally downloaded content, and threaten to sue them in court for a hefty amount but offering to settle for several thousand dollars. The problem arises when these threats become severe because of the constant pressure put by the copyright holders. They also start to misuse their power by sending notices consisting of false claims. This

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<sup>281</sup> Bradley, *supra* note 273 at 3.

<sup>282</sup> Michael Geist, “Canada’s Copyright Notice Fiasco: Why Industry Minister James Moore Bears Some Responsibility”, Michael Geist’s website, January 12, 2015, <<http://www.michaelgeist.ca/2015/01/canadas-copyright-notice-fiasco-industry-ministerjames-moore-bears-responsibility/>>.

<sup>283</sup> PC Collins Hoffman, “Non-commercial online copyright infringement in Canada: The challenge of balancing the copyright owners’ interests against those of internet users” (2015) 16:1 Internet and E-Commerce Law 1 at 1

ultimately affects innocent parties and they are forced to pay the settlement fees rather than going to trial and risking payment of huge amounts.

The concept of “copyright trolls” was addressed in detail in the recent Canadian copyright case *Voltage Pictures LLC v John Doe and TekSavvy Solutions Inc.*<sup>284</sup> A film production company called Voltage Pictures LLC (Voltage), commenced an action against unidentified defendants “Joe” and TekSavvy Solutions Inc. (TekSavvy), a relatively small ISP and telecommunications provider based in Ontario. Voltage alleged the anonymous defendants were engaged in illegal file sharing over the Internet and thereby infringed on their rights in certain cinematic works.<sup>285</sup> Voltage approached the ISP, TekSavvy, to obtain their names and addresses in order to pursue litigation. TekSavvy refused to give the names to Voltage and wanted the film company to first obtain a court order.<sup>286</sup> The plaintiff alleged the subscribers used BitTorrent software to illegally download movies for which it held production rights.<sup>287</sup>

The order in this case was termed a “Norwich” order<sup>288</sup> which sets out the test for discovery of non-parties (in this case, in order to ascertain the identity of unknown defendants). The Federal

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<sup>284</sup> *Voltage Pictures LLC v John Doe and TekSavvy Solutions Inc.* 2015 FC 339.

<sup>285</sup> *Ibid* at Para 1.

<sup>286</sup> *Ibid*.

<sup>287</sup> *Ibid* at Para 127.

<sup>288</sup> *Norwich Pharmacal Co v Customs & Excise Commissioners*, [1974] AC 133 (Norwich Pharmacal). In online copyright infringement cases, Norwich order effectively means that if obtained, such an order can compel ISPs to provide information identifying their subscribers whose IP addresses are alleged to have been used to download infringing material. See Pierre-Christian Collins Hoffman McMillan LLP, “Non-commercial online copyright infringement in Canada: The challenge of balancing the copyright owners’ interests against those of internet users” 16:1 Internet and E-Commerce Law in Canada (2015) at p.5.

Court of Canada issued the Norwich order and compelled TekSavvy to disclose the subscriber information.

TekSavvy claimed recovery of a total of \$346,480.68 on a full indemnity basis for the costs it says it incurred as a result of Voltage's motion. The court disagreed with both sides, settling on costs of \$21,557.50 or roughly \$11 per subscriber name and address.<sup>289</sup> The question was whether Voltage would proceed with the case and pay the cost to Teksavvy for acquiring the names of infringing party or would they refuse to pay the costs. The court made it clear that merely sending threats would be viewed as copyright trolling for future claims. The Federal Court told the ISP that it will have to hand over subscriber information, but without causing harm to the interest of Internet users.<sup>290</sup> TekSavvy was ultimately able to recoup only \$21,557.50 out of a total sum of \$346,480.68 claimed on a full indemnity basis to cover the costs incurred in connection with Voltage Pictures' motion.<sup>291</sup>

Judge Aalto in *Voltage Pictures* acknowledged that the misuse of powers by copyright holders should be kept under check and should not affect the innocent Internet users.<sup>292</sup> The "copyright trolls", in the past, used U.S. courts to gain access to the identity of Internet users accused of illegally sharing work.<sup>293</sup> This case also shows how NAN create an unwanted burden on the ISPs. It is very important to maintain fair balance by protecting the interest of ISPs and also the Internet

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<sup>289</sup> *Voltage*, *supra* note 284.

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.*

<sup>292</sup> *Ibid.*

<sup>293</sup> Christine Dobby, "How the TekSavvy court decision will help shut out copyright trolls in Canada" online: (2014) <[http://business.financialpost.com/fp-tech-desk/how-the-teksavvy-court-decision-will-help-shut-out-copyright-trolls-in-canada?\\_\\_lsa=761c-6f73](http://business.financialpost.com/fp-tech-desk/how-the-teksavvy-court-decision-will-help-shut-out-copyright-trolls-in-canada?__lsa=761c-6f73)>.

users, who in some case may be falsely charged. The fact that the service providers have to bear the expenses in finding the personal details of Internet users makes it necessary to address the loopholes of the NAN. Further, the Internet users would have to incur huge cost orders to defend themselves in court against potentially false claims. This is where the order made by the judges in the *Voltage* case has proved to be very important in bringing a fair balance. The Federal Court allowed the ISP to claim the indirect costs endured by them in notifying the subscribers.<sup>294</sup> It is important for the Canadian Government to address the issue of copyright trolls for a better working of the NAN system.

### *3.2.5 Challenges for a NAN System in India*

The NAN system like the DMCA's scheme, would also fail to address unique legal and cultural challenges for enforcing copyright in India.

First, the NAN system would not sufficiently deter piracy in India. As earlier noted, one of the major challenges is the attitude of general public towards the law. Although NAN has proven to be very effective in Canada,<sup>295</sup> it has to be kept in mind there is a huge cultural difference between India and Canada. Though piracy in Canada (and thus respect for copyright law) remains a challenge, there are even more significant challenges on this point in India.<sup>296</sup> For a NAN system to work effectively it is important the notice sent is respected. A notice will have no effective penalty to deter such activities.

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<sup>294</sup> *Voltage*, *supra* note 284.

<sup>295</sup> Bridy, *supra* note 5 at 726.

<sup>296</sup> "7 Routinely Broken Laws in Every Indian City" online: <<http://economydecoded.com/2015/05/7-routinely-broken-laws-in-every-indian-city/>>.

Second, this NAN system would place too much of a burden on the court system in India, which is already under resourced. Under a NAN system like this, workloads on the judiciary will not decrease but will only rise. Although there is no direct role of the court in NAN system, if the Internet user refuses to obey the notices the copyright holder would have no choice but to go to court for compensation and this is where the NAN system may have difficulty. As observed in the previous point, it would not be a huge surprise if most of the Internet users in India just ignore the notices and copyright holder would have to start from the scratch and would have to wait long to get compensated.<sup>297</sup>

Third, the barriers to court access in India would render the NAN system far less effective. If the infringer fails to comply with notices in this NAN regulatory model, then for a copyright owner filing a suit remains the only option. It is highly unlikely that copyright owners in India would prefer to get involved in court proceedings and waste their time and energy as it may take many years for them to get compensated.<sup>298</sup> Internet users would take advantage of the NAN method knowing there are no repercussions involved and would intentionally ignore the notices<sup>299</sup> making it difficult for the model to work effectively.

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<sup>297</sup> Priya et al, *supra* note 68 at 492-497.

<sup>298</sup> Ankit Panda, “30 Million Pending Cases: Fixing India's Overburdened Judiciary” online: (2016) <<http://thediplomat.com/2016/04/30-million-pending-cases-fixing-indias-overburdened-judiciary/>>.

<sup>299</sup> Arul, *supra* note 145 at 130.



### 3.2.6 Impact of the NAN System

NAN is far from perfect but it has been fairly successful in reducing online piracy.<sup>300</sup> Different ISPs like Rogers, Bell, SaskTel, and Access Communications have already supported the law and have confirmed that they will abide by the legislation.<sup>301</sup> In 2011, Rogers stated 67% of recipients of a single notice stopped downloading copyrighted material, and that this number increased to 89% after a second notice. In May 2015, Bell Canada reported 69.6% decrease, Telus Communications reported 54.0% decrease, Shaw Communications reported 52.1% decrease, TekSavvy Solutions reported 38.3% decrease in piracy and Rogers Cable reported 14.9% decrease in piracy rate.<sup>302</sup> This does show the system is actually effective in contrast to what many feared.

Statistically the NAN regulatory system may be doing wonders for the copyright holders but it has also given initiatives to the “copyright trolls”. There has been a growing concern over how the notices in NAN system can be misused.<sup>303</sup> Many are advocating for new regulations that would forbid copyright holders from demanding money in their notices.<sup>304</sup> Unlike other legal solutions for online piracy, NAN systems do not provide for any takedown or suspension of Internet access

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<sup>300</sup> Daniel Tencer, “Massive Drop In Canadian Online Piracy Under New Law, Copyright Firm Says”, online: (2015) <[http://www.huffingtonpost.ca/2015/05/21/online-piracy-canada-ceg-tek\\_n\\_7372626.html](http://www.huffingtonpost.ca/2015/05/21/online-piracy-canada-ceg-tek_n_7372626.html)>.

<sup>301</sup> Patrick O'Rourke, “Why illegal downloading just became riskier for Canadians” online: (2015) <<http://o.canada.com/technology/internet/canadian-downloaders-will-begin-receiving-more-copyright-infringement-notices>>.

<sup>302</sup> Michael Geist, “Canadian Piracy Rates Plummet as Industry Points to Effectiveness of Copyright Notice-and-Notice System” online: (May, 2015) <<http://www.michaelgeist.ca/2015/05/canadian-piracy-rates-plummet-as-industry-points-to-effectiveness-of-copyright-notice-and-notice-system/>>.

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.*

and that has been praised by many.<sup>305</sup> The content will only be taken down in the circumstances when the copyright owner goes to court and wins his case, but it would not be taken down before that.

Canada is a home to some of the world's most popular websites for unauthorized downloading like Torrentz.eu and Kickass.to, and therefore needs a strong law that can control online piracy.<sup>306</sup> There is evidence that Canada's NAN system is an effective mechanism, but it has problems too, as noted, and would also have particular problems in India. The next part examines the GR model, which aims to police online infringement through "graduated" (such as increasingly punitive or complex) regulatory responses.

### 3.3 Graduated Response Models

Having observed the working of NTD and NAN systems in the U.S and Canada respectively, the third system that is discussed is the Graduated Responses (GR) legislative model. The GR system or model is a new approach to regulate online copyright infringement, primarily enacted to deal with online copyright infringement, normally P2P music or movie sharing. The most common form of graduated responses is the "three strikes rule".

Since the adoption of the World Trade Organization TRIPS agreement in 1994, IP has gradually emerged as a deeply contentious issue across the globe, but especially in the European Union. The domestic roots of graduated response can be traced to the DMCA and its "repeat infringer"

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<sup>305</sup> Sara, *supra* note 267 at 35.

<sup>306</sup> Canada A Piracy 'Haven,' Hosts Some of World's Biggest Illegal Sites, IIPA Says. online : (2015)<[http://www.huffingtonpost.ca/2015/02/13/piracy-canada-copyright-law\\_n\\_6680746.html](http://www.huffingtonpost.ca/2015/02/13/piracy-canada-copyright-law_n_6680746.html)> .

provision.<sup>307</sup> Former President of France, Nicolas Sarkozy, was a big supporter of the graduated responses. In the European campaign to promote graduated response, the French took the lead in what then President Nicolas Sarkozy characterized as a crusade to “civilize” the Internet.<sup>308</sup>

### *3.3.1 How Graduated Response Systems Work*

Before analysing the model adopted by France or Ireland, it is important to know how graduated responses operate. In the first step, a copyright owner monitors online illegal downloading activities. Then the copyright owner reports any problem to the ISP and gives brief details of the infringements, along with the IP address of the infringer. After that, an email is sent by the ISP to the account holder, informing him or her regarding the infringements and the consequences if further infringement is found.<sup>309</sup> In addition, a certified letter is sent to the offending subscriber to inform him/her about the sanctions he/she might face.<sup>310</sup> If the account holder repeatedly ignores the notices, a tribunal may then take deterrent action. The ISP will be given the power to suspend the Internet access of the infringer for a specified period of time.<sup>311</sup> In some cases, the Tribunal may ask the service providers to reduce the infringer’s Internet speed before suspending his/her Internet access.<sup>312</sup>

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<sup>307</sup> Annemarie Bridy, “Graduated Response American Style: “Six Strikes” Measured Against Five Norms”(2013) 23:1 Fordham Intellectual Property Media & Entertainment. Law Journal *at* 7.

<sup>308</sup> *Ibid* at 11.

<sup>309</sup> Vikrant, *supra* note 16 at 218

<sup>310</sup> *Ibid*.

<sup>311</sup> *Ibid*.

<sup>312</sup> Bridy, *supra* note 307 at 24.

### 3.4 Three Strikes Rule

The general operation of graduated response legislative systems for enforcing copyright online, involves three notices being sent to the alleged infringing subscriber as a warning to stop the infringement before taking a strict action. This is why the approach is also known as the “three strikes system”.<sup>313</sup>

The graduated response system can be administered by both a private entity and government. Some of the publicly operated graduated responses systems can be found in France, Taiwan, New Zealand and South Korea.<sup>314</sup> The UK also favours a graduate response administered by the public.<sup>315</sup> There are two types of graduated responses under three strike rules that are briefly discussed: The High Authority for the Dissemination of Works and the Protection of Rights on the Internet (HADOPI)<sup>316</sup> and the Irish system. For the better analysis of the three strike rule the paper shall specifically discuss the working of France’s HADOPI law which is administered by a government entity and Irish’s system of EICROM Protocol which is run by a private body.

#### *3.4.1 The Nature of the HADOPI*

The HADOPI law, also known as Creation and Internet Law, has been operational since 2010, but the work for its development started from 2004. Under the HADOPI law, a government entity (High Authority) is responsible for implementing a GR system in France, in which three warning letters would be followed by a suspension of the accused subscriber’s Internet access for a

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<sup>313</sup> *Ibid* at 7.

<sup>314</sup> Rebecca Giblin, “Evaluating Graduated Response” (2014) *Columbia Journal of Law & The Arts* at 148.

<sup>315</sup> *Ibid* at 153.

<sup>316</sup> Haute Autorite Pour La Diffusion Des Oeuvres Et La Protection Des Droits sur Internet <http://www.hadopi.fr/en>

maximum of one year.<sup>317</sup> Almost the entire cost of enforcing the law has been borne by the French Government and ISPs with the government spending tens of millions of Euros so far.<sup>318</sup>

The notice is forwarded from the security company to the copyright owner, which then refers the incident to the High Authority, pursuant to the HADOPI law. To protect the accused subscriber's privacy, the High Authority forwards the notice to the subscriber without disclosing his or her identity to the copyright owner. If a subscriber is alleged to have infringed on a second occasion within six months of receiving the first notice, the High Authority forwards a second notice. If a third infringement is alleged within a year of the second notice, the High Authority refers the matter to a prosecutor, and a judge can order the subscriber's Internet access to be suspended.<sup>319</sup> Possible penalties include suspension of Internet access for up to twelve months and a fine of up to 1500€.<sup>320</sup>

The provision for suspending Internet connectivity under the HADOPI law faced immense criticism.<sup>321</sup> The general feeling was instead of suspending the Internet, the suspected individuals should be fined. Consequently, on July 8, 2013, the French Government passed a decree introducing "HADOPI-3".<sup>322</sup> The decree abolished suspension as a possible penalty for a

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<sup>317</sup> Thierry Rayna & Laura Barbier, *Fighting Consumer Piracy with Graduated Response: An Evaluation of the French and British Implementations*, (2010) 6 International Journal of Foresight & Innovation Policy 294 at 301.

<sup>318</sup> Rebecca, *supra* note 314 at 156.

<sup>319</sup> Bridy, *supra* note 307 at 19.

<sup>320</sup> Rebecca, *supra* note 314 at 154.

<sup>321</sup> *Ibid* at 156.

<sup>322</sup> *Ibid*.

subscriber's failure to secure its connections, but retained the maximum fine of 1500€. <sup>323</sup> The establishment of the HADOPI law turned out to have a positive effect on the sale of music albums. <sup>324</sup> Though some improvements need to be done to make the HADOPI law more effective, it has been well received.

#### *3.4.2 Graduate Response in Ireland: Eircom Protocol*

Ireland may not be highly populated but its capital Dublin is a major research center for many international high tech companies, including Microsoft, Apple etc. The Irish copyright law, like those of other countries, has faced some big challenges in dealing with online copyright infringement. This discussion does not analyse the Irish Copyright law, but instead analyses the “three strikes rule” adopted by a private body. The GR system in Ireland is very unique as it is the first time the policy is administered by a private entity.

Eircom, one of Ireland's main ISPs, became the first ISP in Europe to voluntarily introduce a “graduated response” procedure under which clients who download music illegally could end up losing their Internet connection. <sup>325</sup> The Eircom protocol was implemented on a preliminary basis, beginning in June 2010, and on a permanent basis the following October. <sup>326</sup> The Eircom Protocol was established after the landmark case between EMI, a music company, and Eircom. <sup>327</sup> The case

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<sup>323</sup> *Ibid.*

<sup>324</sup> Brett Danaher et al, “The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France” (2012) 62:3 Journal of Industrial Economics 541.

<sup>325</sup> ISP Introduces “Graduated Response” Leading to Disconnection for Illegal Downloaders, online: (May, 2010) <<http://en.rs.f.org/ireland-isp-introduces-graduated-response-28-05-2010,37583.html>>.

<sup>326</sup> John Collins, Three Strikes Rule Aims to Knock Out Music Sharing, IRISH TIMES, June 4, 2010.

<sup>327</sup> *EMI Records (Ireland) Limited v Eircom Limited* (High Court Case No. 2008/1601P).

challenged some of the provisions in The Irish Copyright and Related Rights Act 2000 regarding the liability of ISPs. There was no conclusive judgement by the court because both parties opted for settlement. However, this led Eircom to adopt a “three strikes policy”.

The GRS in Ireland does not require any participation from the Government. It is fully administered by a private body. The ISPs, using a tracking method developed by DtecNet (a global anti-piracy company), will identify the IP addresses of people who use P2P networks to illegally share copyrighted music online. The information will then be passed to Eircom, which will then have to identify and take the necessary action against them.<sup>328</sup>

Eircom, after identifying the infringer, sends a notification to the ISP containing details of the allegation. Eircom passes it on to the relevant subscriber with the subscriber’s regular bill. If the same subscriber is detected a second time, Eircom sends a second warning in a formal letter. If a third notice is received, the High Court held in *EMI Records (Ireland) Limited v Eircom Limited*<sup>329</sup> that Eircom employees would have to manually “review all the evidence” and then give the customer notice that his access will be terminated.<sup>330</sup> The first two notices are generated automatically; the third notice, however, triggers a human review. Following the human review, a notice of termination is sent to the subscriber, who has fourteen days to respond.

Like the HADOPI law, the suspension of Internet under the Irish Law was also heavily criticised for violating the fundamental right of an individual. The law was subsequently amended and under

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<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.* at para 13.

<sup>330</sup> *Ibid.*

the revised scheme, a seven-day account suspension is to be imposed after a third notification, and a twelve-month suspension after a fourth.<sup>331</sup>

Eircom issued 29,000 individual letters leading to 100 customers potentially losing their access for one week and 12 customers permanently cut off. However, an Eircom representative stated in September 2012 that the ISP had not suspended any user for longer than a week.<sup>332</sup> The privately administered model turned out to be a very successful model for music companies like EMI and Sony. EMI was so encouraged after the Eircom case that it wanted other ISPs in Ireland to implement the “three strike rule”.<sup>333</sup>

### 3.4.3 Drawbacks of Three Strike Rules

The rule to suspend Internet access after three warnings is said to be harmful and contrary to the fundamental right of an individual. Critics argue that suspension of Internet access is wrong because the right to Internet connectivity is a basic right.<sup>334</sup> In this day and age Internet is important for almost everyone. Right to Internet access has been linked to many other rights like right to freedom of speech, right to freedom of assembly and right to development. The Internet is a platform where anyone is allowed to express his or her opinion and suspension of Internet access denies such right.<sup>335</sup> Taiwan’s political leader, Ma Ying-Jeou, criticised the concept of graduated

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<sup>331</sup> Rebecca, *supra* note 314 at 174.

<sup>332</sup> Eamonn Laird, “Note of Minister Sherlock’s Meeting with the Irish Recorded Music Association” online: (5th December 2011) <[www.scribd.com/doc/83984745/EMI-Briefing-001](http://www.scribd.com/doc/83984745/EMI-Briefing-001)>.

<sup>333</sup> *EMI Records (Ireland) Limited, Sony Music Entertainment Ireland Limited, Universal Music Ireland Limited, Warner Music Ireland Limited and WEA International Incorporated v UPC Communications Ireland Limited* (High Court Case No. 2009/5472P, Unreported decision of Mr. Justice Charlton on 11th of October 2010).

<sup>334</sup> John M. Owen, “Graduated Response Systems and the Market for Copyrighted Works” (2012) 27:4 Berkeley Technology Law Journal at 602.

<sup>335</sup> John Perry Barlow, “A declaration of Independence of Cyberspace” (1996).



responses because he thinks no person can be denied access to the Internet.<sup>336</sup> The UN also recently condemned the internet access disruption as a human rights violation.<sup>337</sup>

The other criticism for this system has been that ISPs have borne most of the cost for enforcing the laws but unfortunately they have not been yet reimbursed.<sup>338</sup> ISPs, predictably, are vocally opposed to graduated response to the extent that it requires them to sit in judgment over their customers.

#### *3.4.4 Implementation of Three Strikes GRS in India*

The operation of graduated responses is very complex.<sup>339</sup> All the countries that have adopted the GRS have not been able to implement it without hindrance. France's GRS or legislative model, the HADOPI law, had to be updated three times to get a proper balance and the French Government had to spend a huge amount of money.<sup>340</sup> It also would encounter even more difficulties in India as there are constitutional and infrastructural concerns.

First, there are constitutional concerns. Criminalisation of online speech and social media usage is a serious threat to freedom of expression. Suspending the Internet access of any citizens would

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<sup>336</sup> Lou Hong, Gu Hongfei "ISPs' graduated response system for copyright infringement -Global experience and China's feasibility" online: (2014) <[http://ipr.chinadaily.com.cn/2014-10/29/content\\_18819386.html](http://ipr.chinadaily.com.cn/2014-10/29/content_18819386.html)>.

<sup>337</sup> James Vincent "UN condemns internet access disruption as a human rights violation" online: (2016) <<http://www.theverge.com/2016/7/4/12092740/un-resolution-condemns-disrupting-internet-access>>.

<sup>338</sup> French ISPs Demand Compensation for Hadopi Cooperation, TELECOMPAPER online: (Aug. 12, 2010), <<http://www.telecompaper.com/news/french-isps-demand-compensation-for-hadopi-cooperation>>.

<sup>339</sup> Owen, *supra* note 334 at 602-604.

<sup>340</sup> French ISPs Demand Compensation for Hadopi Cooperation, TELECOMPAPER online: (Aug. 12, 2010), <<http://www.telecompaper.com/news/french-isps-demand-compensation-for-hadopi-cooperation>>.

be violate the fundamental right of an individual under the Indian constitution.<sup>341</sup> A person may be wrongly accused of infringement and consequently his Internet connection could be suspended. In India the more important issue should be helping people understand the concept of copyright infringement. The overall impact of three strikes would not be much different to that of the present takedown model of India. It will only make matter worse for the ISPs as they would have to deal with all the complaints and that to in a quick time.

### Educational Challenge

The three strikes rule, if implemented, would fail to educate people and make them understand about the concept of copyright infringement. As the three strikes rule permits Internet suspension of the Internet users, this would cut off their ability to learn about the infringement. Rather than punishing the Internet user, it is important to spread awareness about the rules.

### Infrastructure challenges

The graduated response system also places additional burdens on Indian technological infrastructure, which is under-resourced and still developing. With the three strikes rule there will be immense burden on the ISPs, even more so than in NAN or NTD system, as it is the ISPs who have to monitor the infringer's action in the three strikes model.<sup>342</sup> At present in India there are only close to 300 ISPs<sup>343</sup> and by implementing a three strikes rule it will just make the matter

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<sup>341</sup> Sunil, *supra* note 154 at 15.

<sup>342</sup> Rebecca, *supra* note 314 at 157.

<sup>343</sup> Melody, *supra* note 155 at 6.

worse. In a country like Ireland or France such system can work as the population is less but India is highly populated and it would need great cooperation from citizens for an effective working.

### 3.4.5 Impact of Three Strikes Rule

GRS, from its inception, brought high hopes of reducing online piracy. When governments around the world were lobbying to find a solution, the GRS “three strikes rule” model was thought as a perfect solution.<sup>344</sup> The three strikes law in France did not have a great beginning as it was not able to reduce online piracy instead, the piracy rate increased in 2010.<sup>345</sup> Even so, the HADOPI law started to show positive effect when an official report cited a 43% drop in illegal file sharing in France in 2011. Further, iTunes has seen a 20-25 percent increase in sales of French music because of the public awareness of the HADOPI law.<sup>346</sup> This further proves that in spite of the early criticism faced by the HADOPI law, it has had a positive impact eventually.<sup>347</sup>

A study in the U.K. found that by virtue of the graduated response system, 70% of customers stopped infringing in the sixth month after receiving the first notice, with a further 16% stopping after the second notice.<sup>348</sup>

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<sup>344</sup> Bridy, *supra* note 5 at 727.

<sup>345</sup> Ernesto, “Piracy Rises in France despite Three Strikes Law” online:(2010)  
<<https://torrentfreak.com/piracy-rises-in-france-despite-three-strikes-law-100609/>>.

<sup>346</sup> Bridy, *supra* note 307 at 22.

<sup>347</sup> “Study of French “three strikes” piracy law finds no deterrent effect” online: (Jan 2014)  
<<http://arstechnica.com/tech-policy/2014/01/study-of-french-three-strikes-piracy-law-finds-no-deterrent-effect/>>.

<sup>348</sup> Barry Sookman and Dan Glover, Graduated response and copyright: an idea that is right for the times online: (2010)  
<<http://www.barrysookman.com/2010/01/20/graduated-response-and-copyright-an-idea-that-is-right-for-the-times/>>.

It is not fair to conclude that the three strike rule has been a total success, even though it has been criticised heavily in various countries. Some statistics suggest it has had a positive impact in reducing online piracy. As observed, the privately administered “three strike rule” system seems to yield a better result as compared to the HADOPI law in France. The main concern with the “three strikes rule” model is that it fails to bring an appropriate balance in protecting the rights of Internet users.

### 3.6 Conclusion

It is a difficult task to find a perfect solution that brings an appropriate balance between the rights of copyright holders and Internet users more generally, but also, in particular, in India, with its unique legal, cultural, and technological infrastructure challenges. Analysis of each model gives a better understanding of the pros and cons each model brings with it. The analysis proves that the “Notice and Notice” regime is the most effective model for online infringement matters. The GRS scheme which is considered as an alternative to NTD system has also attracted criticism.

Overall this chapter focussed on different regimes and their impact. The next chapter offers a synthesized model that can be applied to the current Indian copyright system.

# Chapter IV: Creating an Effective Regime against Online Infringement in Indian Law

The previous chapters I examined the different models adopted by various countries to fight against the online copyright infringements. In this chapter, I present my solution that can be adopted to fight the online copyright infringement issue in India. This solution has been made with consideration to the challenges discussed in chapter 2. The challenges highlight the difficulties that India faces in the regulation of online copyright infringement. Before setting out and assessing this new synthesized model, it is important to analyse why the different models adopted by other countries cannot work in India.

## 4.1 Application of these Models to the Indian System

Some of the prominent challenges in India, earlier discussed, are lack of respect for the law, lack or minimal awareness of the copyright system, and over burden on service providers.

### *4.1.1 Notice and Notice*

The previous chapter pointed out that the notice and notice mechanism has proven to be very effective in Canada. But notice and notice alone may not be an effective mechanism in a country like India.

### Challenges

One of the biggest challenges for the NAN system is a notice would cease to have an effective impact. The whole purpose of the NAN system is to deter an individual who is involved in an online infringement but if the Internet user chose to completely ignore the notice, the NAN system

would prove to be ineffective. It has been observed that that many in Indian society lack respect towards the law.<sup>349</sup> For this reason, people commonly act without regard for copyright law and related norms.<sup>350</sup> One primary reason for this habit is lack of fear and respect for the law. For this model to work, full citizen cooperation is necessary which can be hard to be found in a country like India. Moreover, the general lack of confidence in legal system and the governance makes it even more difficult to have a notice and notice system<sup>351</sup> as the copyright holder would have to ultimately depend on the courts to receive compensation in case of any infringement. Therefore, NAN system alone will have very little impact in Indian society.

#### *4.1.2 Graduated Responses: Six Strikes Over Three*

GRS, which often employ a three strike system, offers a different dimension compared to the NAN and NTD systems. ISPs can take a series of escalating actions against holders of accounts on which copyright infringement has been detected. The six strikes rule is fairer to Internet users and gives them proper opportunity to present their defence. It is only in the fifth and sixth notice where mitigation measures are taken against the infringer whereas in three strikes, the infringer is given three chances before his or her content is taken down. The fifth notice alerts the infringer for one last time, warning that if they continue to infringe, a final action shall be taken, though service providers do not have the right to suspend internet access even after the fifth notice.<sup>352</sup> Even if the

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<sup>349</sup> Arul, *supra* note 145 at 135.

<sup>350</sup> “7 Routinely Broken Laws in Every Indian City” online: (2015) <http://economydecoded.com/2015/05/7-routinely-broken-laws-in-every-indian-city/>.

<sup>351</sup> Arul, *supra* note 145.

<sup>352</sup> “Memorandum of Understanding” online: (July,2011) <http://www.copyrightinformation.org/wpcontent/uploads/2013/02/Memorandum-of-Understanding.pdf> at 12.

subscriber accidentally downloaded something illegal, or was unsure if he was using copyrighted material, he could be made aware of it without any punitive actions.

The White House praised the joining of ISPs and entertainment companies in a cooperative effort to combat online infringement.<sup>353</sup> Since the establishment of the “six strike rule”, Comcast has sent out at least 625,000 such warnings.<sup>354</sup> Overall, a total of 1.3 million notifications were sent to infringers during the first year of its operation itself.<sup>355</sup>

### Challenges

It is already discussed in chapter 2, that there is little awareness about, and thus little respect or concern for, copyright law in India and giving six chances to an infringer would only encourage the infringer even more to commit online infringement. It is highly unlikely that a six strike rule model would work in a country like India in an effective way. Copyright owners have argued that giving six chances to an infringer fails to reduce piracy, but instead encourages the infringers to take advantage of the “six strikes” provision. The provision of the “six strikes rule” focuses more on educating internet users than curbing online piracy. The copyright holders complained that “[w]e've always known the Copyright Alert System was ineffective, as it allows people to steal six

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<sup>353</sup> Victoria Espinel, “Working Together to Stop Internet Piracy” online: (July 2011) <https://www.whitehouse.gov/blog/2011/07/07/working-together-stop-internet-piracy>.

<sup>354</sup> Report: Comcast Sends Out Around 1,800 Copyright Alert Notices Each Day (Feb, 2014)

<http://consumerist.com/2014/02/07/report-comcast-sends-out-around-1800-copyright-alert-notices-each-day/>.

<sup>355</sup> Jacob Kastrenakes, “US internet providers sent over 1.3 million piracy warnings in system's first year” (May,2014)

<http://www.theverge.com/2014/5/28/5758494/copyright-warning-system-sent-over-1-million-alerts-in-first-year>.

movies from us before they get an educational leaflet. But now we have the data to prove that it's a sham."<sup>356</sup>

The three strikes rule model, it attracts similar criticism to the NTD model of violating fundamental rights of a citizen. It is very important to spread awareness about the copyright law and not just punish the Internet user and by solely adopting a three strikes model it will just be another way to punish the Internet users without spreading any proper awareness about the system, which at this present time is very much needed for the Indian copyright system.

Although both NAN and GR systems have a different regulatory approaches to NTD systems, neither of the systems alone would be a viable solution as there needs to be a fair balance between protecting the rights of Internet user and copyright holder.

## 4.2 Solution for India: A Synthesized System

Some might argue that NAN system can prove to be an effective mechanism and some might say GRS has all the tools to be very effective in Indian system. A central concern is finding a fair balance between protecting the interest of copyright holder and Internet user. The most efficient way to achieve such balance is by adopting both the models in an appropriate way.

### *4.2.1 Combined NAN and Graduated Response (GNAN) System*

As highlighted in the previous section, the Notice and Notice (NAN) model alone will not be effective to address online piracy in India. Similarly, the GRS, if applied to the Indian system will

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<sup>356</sup> “Six Strikes and You're (Not Even Close To) Out; Internet Security Task Force Calls for End of Copyright Alert System” online: (Nov 2015) < <http://www.prnewswire.com/news-releases/six-strikes-and-youre-not-even-close-to-out-internet-security-task-force-calls-for-end-of-copyright-alert-system-300082007.html>>.



also not yield a positive result. The best way to go forward is adopting the key principles from each models that will give an appropriate balance in protecting the rights of copyright holders as well as the Internet user. As it is a combination of both the model will be called the GNAN method.

The solution presented in this paper would primarily focus on dealing with the users uploading illegal content more than dealing with those illegally downloading such content. It is more reasonable to target the uploaders than focus on each individual downloading. The next section explains the working of GNAN model.

### How the Regulatory Model Works

The model will primarily be similar to the NAN system along with some features take from the “three strikes rule” but unlike the GR three strikes model, the ISPs would not have the right to suspend the Internet access of the Internet user. The only exception would be a case of national interest, where ISPs would have a right to suspend or take down the content as provided in Section 69A of the Information Technology Act.<sup>357</sup> How the model operates is discussed below.

Through the GNAN method, the copyright owner shall send a notice to the ISPs which shall contain the basic details of the sender as provided in the Rule 75 of Copyright Rules (2013).<sup>358</sup> It shall have the details of the infringed work, the name of the website that is causing the infringement and also details of infringers.<sup>359</sup>

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<sup>357</sup> s69A(1), *Information Technology Act*, 2000.

<sup>358</sup> *The Copyright Rules*, 2013, rule 75.

<sup>359</sup> *Ibid* rule 75 (2) (a).

The first notice to the Internet user will be an educational warning. This notice is very important as the purpose should not only be to punish but also to spread awareness. The Internet user through the medium of this notice shall also be informed about the consequence of his act. The Internet user would have 14 days to reply to the notice and if he fails to provide any reply and still continues to infringe, ISPs must send a second notice to the Internet user. The second notice shall act as the first strict warning and the third the final warning. After the third warning the copyright holder has a right to file a suit against the Internet user and claim his compensation. The Internet user, if he does not reply to the first notice within 14 days, will receive 7 days to respond to the second notice and if even then the ISP does not receive any reply from the Internet user, a third notice shall be sent as a final warning and the infringer would be informed within 24-48 hours that he shall be facing a legal action against them.

If the Internet user still continues to commit copyright infringement, the ISPs are under an obligation to prepare a report of the infringement and forward the report to the copyright holder who now has the right to file a suit against the infringers. If the Internet user repeatedly ignores the notices and continues to upload videos or provides access to copyrighted content, the court may then take deterrent action, similar to the “three strikes rule”.

#### Provision of Sec 69A of Information Technology Act should remain

The provision of section 69A should not be confused with the GNAN model proposed here as the latter solely deals with online copyright infringement while section 69A focuses more on blocking of content for the safeguard of the nation. Some might argue that section 69A violates fundamental rights but it has to be said that section 69A does not permit blocking orders to be issued arbitrarily as it is clearly provided that only when the central government feels it is “necessary or expedient”

will it direct any authority to block any webpage.<sup>360</sup> For the purpose of the paper, it has to be made clear that the concept of section 69A is beyond the scope of my topic and does not directly involve online infringement cases.

### Role of the Court

Although the new model tries to minimise the role of courts and judges, they have a crucial duty in providing compensation to the copyright holder. Unlike in other laws, the judges need not invest much of their time in analysing the matter, but can take decision on the basis of the ISPs report. ISPs would have a duty to present a fair report which should include reasons for whatever actions they take. They should not be influenced by the higher authorities and should not entertain the notices received by the copyright trolls. By following this procedure, the court can save their precious time and also the victim receives speedy justice. If the GNAN model is adopted many copyright holders will be confident with this law and would avoid going to the court straight away.

The purpose of this model is to ensure a proper balance is maintained. If the Internet user is found to be infringing then the copyright holder is compensated for his losses. The important thing to be noted is the “takedown” provision should be removed, and spreading awareness should be the primary goal.

### 4.3 Addressing the unique challenges: *Benefits of the GNAN model*

In chapter 2 it was demonstrated how the law makers of India face a unique challenge while enacting a copyright law for online contexts and in chapter 3 it was examined how other systems

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<sup>360</sup> *Shreya Singhal v Union of India* WRIT PETITION (CRIMINAL) NO.167 OF 2012 before Supreme Court of India.

alone would not help in addressing those challenges. The biggest criticism with the present takedown system in India was its violation of fundamental rights of the Internet users. The GNAN model suggested in this paper addresses this challenge by presenting a better balance by providing ample time for the Internet users to present their arguments thus creating no scope for violation of fundamental rights.

### Improved Balance

The biggest challenge for any law enacted to curb online piracy is maintaining a balance between the interests of the copyright holder and the Internet user. The GNAN model, if adopted, will provide a fairer and more effective balance for the rights of these two parties. Unlike NTD systems, which is too harsh on the Internet users (by having content removed or disabled), the GNAN legislative method gives enough notices for the Internet users. This system also protects copyright holders by giving them a right to file a suit against the infringer if the user does not remove the content, or cease infringing activities, after three notices. The court has to order the accused to grant compensation if he continues to infringe. There would be no delay in compensating the copyright holder for his work. An advantageous aspect of this model is both the parties interests are taken into account. By having three notices instead of two like in NAN, the system does a better job of educating the citizens and also creating awareness about the concept of online copyright infringement.

### Ample Time For Users

One of the major complaint with Indian takedown system is the lack of time provided to the Internet users to present their defence.<sup>361</sup> The Internet user, after receiving each notice, gets enough days to respond and present his defence. After the first notice the user would get a 14 day period to respond and after the second notice will get 7 days to respond and he will be given 48 hours after the third notice to prove his innocence or even takedown the content himself. This approach will also bring awareness to Internet users about the concept of copyright. As observed in chapter 2, the subject of IP law is new and still emerging. It is necessary to spread public knowledge and awareness about copyright law and related legal norms and concepts.

### No Rights Violations

One of the most significant challenges discussed in chapter 2 was constitutional constraints on copyright enforcement, with the most high profile criticism of the Indian takedown system being its violation of the fundamental rights of an individual. Building on the previous advantages the GNAN model ensures a fairer balance in protecting the rights of copyright holder and Internet users, reducing concerns about constitutionality. The suggested model prohibits takedown of content and provides a fairer system for Internet users, a significant change from the takedown system. In the constitutional challenge discussed in chapter 2 it was seen how the takedown system can create confusion in the minds of not only the parties but also in the minds of ISPs and they are pressured to takedown the content. In the GNAN model, such problem will not arise as there is no scope for ISPs to takedown the content.

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<sup>361</sup> *supra* note Chapter 2.

This model has other noteworthy advantages. First, it does not empower or mandate ISPs to suspend Internet access as with three strikes GRS. Suspending Internet access of any individual can be said to be even worse than removing a content because it takes away a basic right to access the Internet itself, thus heightening constitutional concerns. Second, the GNAN is very transparent creating no doubts or confusion in the minds of the parties or intermediaries. An important complaint with the present NTD systems is there is no transparency in its operation. This brings a great deal of uncertainty creating unwanted pressure on the intermediaries to remove the content thus causing violation of fundamental right. The GNAN model is much more transparent as it does not involve any unfair takedown process and it also provides a great help to courts in taking swift decision.

#### Less Burden on the Courts

Chapter 2 describes how the Indian judiciary is already tied up with many pending cases.<sup>362</sup> One of the biggest advantages of this model is copyright holders need not depend on the courts immediately. Rule 75 of the Copyright Rules (2013), forces a copyright holder to file a suit within 21 days from the date of receipt of the notice.<sup>363</sup> This rule not only puts pressure on the copyright holder but also adds burden on the judges and courts.

In the present suggested model, the notices provided to the infringer are like a warning to not continue to infringe but even if the infringer keeps on infringing, the judge need not prolong the matter, and the judge, by looking at the report presented by ISPs, shall give a final order against

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<sup>362</sup> *Ibid.*

<sup>363</sup> *The Copyright Rules, 2013, rule 75 (2) (f).*

the infringer to provide compensation to the copyright holder. This is why the notices provided by the ISP to the Internet user are very important, as that makes it easier for the court to make a quick decision and provide compensation to copyright owner. The whole purpose of this system is to take the burden off the courts. Although there might be a concern of copyright trolls making unwarranted complaint regarding the infringements, in India the copyright trolls are not yet a major problem. An annual audit for ISPs should be conducted to ensure transparent working of the system.

This method would also encourage the victims to go to court for compensation. There will be no delay and copyright holders can go to the courts with full confidence. The lack of trust barrier towards the judiciary will also be removed, which is a very important challenge that needs to be addressed. The GNAN model can also pave the way for the lawmakers in India to make a similar law for other areas where people are not hesitant to go to court.

### Less Opportunity for Abuse

Some of the other major challenges discussed in chapter 2 were instances where higher authorities like government or police use (or abuse) copyright takedown methods to their advantage and force service providers to block or takedown the content. In this GNAN model, there is no “takedown” procedure that government actors can use or abuse. Section 69A of IT Act still permits takedown of a content but that is only in cases of national concerns and not in online infringement cases. The GNAN model advanced here will also offer more transparent operations, which was an issue in the previous model as the ISPs used to takedown the content without giving any explanation. In the Indian context, where corruption is common, the GNAN model will work well considering it

does not give higher authority any chance to misuse their power.<sup>364</sup> The GNAN model will help promote trust, of not only copyright holders but also Internet users, towards the law. This goes back to the previous point where it was suggested how bringing the trust of citizens towards the judiciary is very important in a similar way it is important the individuals trust the law too.

### Less Pressure on ISPs

Unlike in NTD systems there is enough time granted to the ISPs to prepare their report and take action. In India's NTD model the ISPs have to respond within 36 hours. It is almost impossible for ISPs to go through each notice and then make an efficient response to a notice. It is important to not only have a balance in protecting the interest of copyright holders and Internet users but also to give protection to the online intermediaries. The role of ISPs in online infringement cases is perhaps the most important. In India there are only close to 100 ISPs. For a country like India which is highly populated, this is a small number.<sup>365</sup> Moreover, with the copyright law enforcement in India dealing with online infringement still not that old, the ISPs would require time to get used to their duty. This is why they need to be given ample time to do their work with minimal pressure and interference. The other big advantage for the ISPs in the GNAN model is there is no need for them to worry about removing any content or suspending any Internet access of Internet users. ISPs need not send each and every complaint forwarded by the copyright holders to the Internet users. They have the power to analyse the complaint before forwarding it to the Internet user.

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<sup>364</sup> Corruption in India: a cause of instability & inequalities (2016) online: <<http://www.poverties.org/blog/corruption-in-india>>.

<sup>365</sup> Telecom Regulatory Authority of India, "The Indian Telecom Services Performance Indicators" (Jan-Mar 2016).



The GNAN model will be a fairer and more effective answer to the online infringement crisis. It will not only address the unique challenges but it will be less complex to implement such a model. But as always every model has some challenges.

#### 4.4 Challenges

The role of service providers have significant responsibilities in this GNAN model. ISPs and OSPs would need to be quick to react to the notices and take necessary actions. Their role starts from the moment copyright owner sends a complaint notice to ISPs. It is their job to investigate whether the notice sent by copyright owner is worth considering or not. Also, if the Internet user fails to comply with the notices, service providers shall prepare a report that shall be sent to the court as well as to the copyright holder.

The other challenge is to make people aware of the model. Such a model will be a new procedure for the Internet users across India and it will be important for the people to be aware about it. The copyright holder also needs to cooperate and should comply with the GNAN procedure rather than just filing the suit straight away as that would defeat the whole purpose of this model.

#### Constitutional Concerns Remain

The constitutional and institutional problems discussed in chapter 2 make it tough for law makers in India to enact a copyright enforcement for the Internet. The existence of section 69A, which allows ISPs to block content shall always remain controversial but it is not section 69A that should be in focus but the GNAN model. Unlike in the current Indian NTD system, the Internet user has far better opportunity to present her defence in the GNAN model thus reducing constitutional concerns.

## Annual Audit of the ISPs

To ensure accountability and transparency, there must be annual audits of ISPs. It is very important to have a transparency in the operations of the GNAN model, otherwise there might not be a smooth working of this system. ISPs need to be monitored regularly by government authority so that they do not misuse their power. As noted above, ISPs play a very important role in the smooth running of this model. For this reason, it becomes important to have a regular check on their work— audits to ensure they are respecting user rights as well as copyrights. Having an annual audit would also help authorities to know whether there is excess burden on ISPs. There may be a need to increase the number of service providers. This might be the way forward for a more effective copyright enforcement system in India.

## 4.5 Additional Suggestions

Beyond implementing the GNAN model, there are other steps that can be taken to battle piracy in India for a comprehensive solution. Some measures are discussed here.

A key factor in the rise of online piracy is technology.<sup>366</sup> Many people today, for example, do not wait for the release of official DVD to watch their favourite movie. Instead they catch the movie sitting in home and watching it online. This is not only on the case of music and movies but also live telecast of sports. Today, anyone with a good Internet connection can stream a live telecast through illegal means.<sup>367</sup> The best way to challenge the growing technology challenge in piracy is

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<sup>366</sup> Gustav, *supra* note 19 at 6.

<sup>367</sup> Aditya Pisharody, “Will broadcast and cable television networks survive the emergence of online streaming?” (2005) New York University.

by harnessing it to provide content to potential users and customers. The new advanced technology offers unprecedented capacity for film producers and broadcasters to deliver faster and higher quality content and coverage to their consumers.<sup>368</sup> For example, a person who lives abroad may not be able to watch all Indian movies and hence he chooses to watch the movie by illegal means. It can be argued that most people who prefer to watch their favourite movies or want to watch live sports action are forced to watch through illegal means. This can be attributed to two main reasons: high price to view the content and limited access to the content on the Internet.<sup>369</sup>

Online platforms like Netflix, YouTube, iTunes, and Spotify are some of the media that India can adopt to fight against online piracy.<sup>370</sup> YouTube has been a very attractive platform for Internet users to watch sports, music, educational lectures and other content. It is mostly popular among younger audiences.<sup>371</sup> The popularity of YouTube has grown greatly: more than 1 billion users visit YouTube every month. YouTube was founded in 2005 but within a year of its inception, due to its growing popularity Google bought it for US\$1.65 billion.<sup>372</sup> Many music companies have started their own official YouTube channels and many music artists have followed that path by having their own YouTube channel. It is very difficult now for the film and music production companies

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<sup>368</sup> *Ibid* at 3.

<sup>369</sup> Arul, *supra* note 145 at 135.

<sup>370</sup> Aditya, *supra* note 367.

<sup>371</sup> According to Nielsen, "YouTube reaches more US adults ages 18-34 than any cable network." Online: (18 November 2014) < YouTube (website), online: <<https://www.youtube.com/yt/press/statistics.html>>.

<sup>372</sup> *Ibid*.

and sports broadcasters to fight against online platforms like YouTube.<sup>373</sup> Therefore, it is sensible to utilise YouTube to one's own advantage.

Many people do not like to wait to watch their favourite TV shows at a specific time but would prefer to watch it by paying nominal fee and view the program whenever they like without any advertisement.<sup>374</sup> Netflix is one such online streaming platform which has proved to be a huge success across the globe.<sup>375</sup> Recently, Netflix has been launched in India and it will be interesting to see how much impact it has in reducing online infringement.<sup>376</sup>

Spotify is an audio streaming company that curates music for its customer at a nominal fee. A person can get access to different music and he can listen whenever he wishes; he does not need to download songs or buy music CDs. Spotify is available in many countries but only limited Asian countries have access to it.<sup>377</sup> It is important that the content producers start implementing such models which would provide legitimate ways for the consumers to access the content and thereby reduce the piracy.

With respect to finding solutions to stop illegal streaming, the sports broadcasters need to start providing legitimate online access for their fans all over the world. Many sports broadcasters have

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<sup>373</sup> Aditya, *supra* note 367 at 23.

<sup>374</sup> Wagner, Robert. "Why House of Cards is the best show on TV. Hint: It's the technology." Metro Blogs. Metro - Associated Newspapers Limited, online: (12 Mar. 2013.)<<http://blogs.metro.co.uk/tv/why-house-cards-best-show-tv-hint-its-technology/>>.

<sup>375</sup> Jacqui Moore, "Why is Netflix so successful even without many updated TV shows?" online: (2015) <<https://www.quora.com/Why-is-Netflix-so-successful-even-without-many-updated-TV-shows>>.

<sup>376</sup> Nandagopal Rajan, "Netflix in India: Here's everything you need to know" online: (2016)<<http://indianexpress.com/article/technology/tech-news-technology/netflix-in-india-here-is-how-it-will-work/>>.

<sup>377</sup> Online: (May 16<sup>th</sup>, 2016) <<https://www.spotify.com/us/select-your-country/>>.

started providing subscription based offers to their customers<sup>378</sup> but it has not always yielded a successful result.<sup>379</sup>

There were many instances in the past where YouTube provided free live streaming of sports telecasts.<sup>380</sup> The 2010 season of Indian Premier League was broadcast on YouTube.<sup>381</sup> Similarly YouTube was chosen to broadcast the 2011 Copa America.<sup>382</sup> This encourages fans to view the content through legitimate means rather than resorting to illegal streams. Recently one of Britain's primary television sports channels, BT Sport, made a deal with YouTube to telecast live action of the Finals of the Europa league and the Uefa Champions league.<sup>383</sup> TV rights still represent one of the biggest revenue sources for any major sport, but with the constant evolution of online digital platforms and their growing reach, it looks as if TV channels will have to find new ways to remain relevant.

Merely having a strict law and strong judiciary is not enough to fight against online piracy. It is very important for these copyright owners to adapt to the changing demands of their customers.

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<sup>378</sup> David Shoalts, "TV broadcasters look for a happy medium to keep sports fans engaged" online:(2016)<<http://www.theglobeandmail.com/sports/tv-broadcasters-look-for-a-happy-medium-to-keep-sports-fans-engaged/article29302445/>>.

<sup>379</sup> Rowena Mason, "Setanta collapse leaves millions of sports fans in dark"online: (2009) <<http://www.telegraph.co.uk/culture/tvandradio/5614557/Setanta-collapse-leaves-millions-of-sports-fans-in-dark.html>>.

<sup>380</sup> Victor Luckerson, "Youtube throws a curveball by becoming a sports broadcaster", online: (2013) <<http://business.time.com/2013/06/07/youtube-throws-a-curveball-by-becoming-a-sports-broadcaster/>>.

<sup>381</sup> Mark Sweney, "YouTube confirms worldwide deal for live Indian Premier League cricket", online: (2010) <<http://www.theguardian.com/media/2010/jan/20/youtube-live-indian-premier-league>>.

<sup>382</sup> David Gilbert, "Youtube will broadcast copa America live", online: (2011) <<http://www.trustedreviews.com/news/youtube-will-broadcast-copa-america-live>>.

<sup>383</sup> Fadi Seikaly, "Champions League and Europa League Finals Will Be Streamed Free On YouTube" online: (2016) <<http://www.sporttechie.com/2016/05/16/youtube-secures-rights-stream-champions-league-final/>>.

Thus, it is, important for copyright owners to look for other effective means to reduce online piracy.

#### 4.6 Overview

The NAN model adopted by Canada might not be sufficient alone but with minor tweaks and some features taken from GRS models can become a very efficient working model in India. The GNAN approach would bring about a fairer balance in protecting the interest of copyright holder and also Internet users. In most of the models, it was observed how Internet users' interests are sacrificed at the cost of rewarding the copyright holder. It is very crucial not to follow the same path and also give equal protection for Internet users. The GNAN model also acts as a learning tool for citizens. Through multiple notices, it helps promote public knowledge and awareness of copyright infringement and thus ultimately greater respect for copyright law and its aims.

The GNAN model provides ample time for Internet users to defend themselves and it also gives equal protection to copyright holders to receive compensation from the infringer. The other big advantage of adopting such model is it lessens the burden on the courts. Unnecessary trials and confusing laws will only add more burden on the judiciary, therefore it becomes very important to also limit their role in online infringement matters. Although it cannot be denied the GNAN approach will also attract some criticism it has to be understood that no model can be perfect and in a country like India where the concept of online infringement is developing it is crucial to make people aware of it. This chapter showcased that making a law for the Internet directed at controlling online copyright infringement might be very tough in India, but it is far from impossible. To this end, the lawmakers and the government can study other models and adopt important features from

them. The GNAN model that I suggested would bring about an effective solution for online copyright infringement in India.

There is a clear need to address piracy in India. As discussed in this chapter, a legal solution might not be enough to curtail online piracy. Copyright owners must also take initiatives to provide more options for consumers by which they can legally access their favourite content online. In a country like India where Internet usage is on the rise, it is important for the copyright owners to take advantage of emerging and innovative Internet platforms and technologies. Online platforms like YouTube should be more widely used as a platform through which individuals can gain access in a legitimate way.

# Chapter V: Conclusion

“Copyright must be developed to meet the development of new technologies otherwise it will become irrelevant on the theory and practice. The central issue is how to maintain a balance between availability of cultural works at affordable prices while assuring a dignified economic existence for creators and performers”.<sup>384</sup>

Intellectual Property is related to original and real work of the author or creator. With the ever-increasing volume of digital media in the Internet age, the legislature and the courts face the daunting task of striking a balance among the interests of copyright owners, internet users, and ISPs.

The challenges mentioned in chapter 2 highlighted the difficulties a law maker would have while making a copyright law for the Internet and it also examined the drawbacks of the present copyright laws in India. Apart from the obvious challenges like population and government corruption, the constitutional and judicial constraint makes it tougher to have effective copyright laws. Cultural and legal norms pose a special challenge to policing online infringement and enforcement copyright in India.

It was argued that it would be difficult to implement one sole model for the Indian copyright system. Spreading awareness among the Internet users in the country and, offering a fairer and

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<sup>384</sup> WIPO, Francis Gurry spoke for the future of copyright at a conference, held at the Queensland University of Technology, Australia, March 3, 2011.



more effective balance between the rights of copyright holders and Internet users are important consideration.

The growth of Internet use has been on a rise at a steady rate in India. In April 2013, the Indian government set up the Central Monitoring System (CMS) that allows the government to access all digital communications and telecommunications including all the online activities, phone calls and text messages of an individual in the country.<sup>385</sup> For example, mobile banking, using the Internet platform, gives access to banking services in rural areas where physical branches are scarce or unavailable.

ISPs are required to have a valid licence and need to understand the importance of their role in bringing a fairer balance between the rights of copyright holders and Internet users. ISPs should be required to alert authors and provide them a means of appeal when their content is flagged for takedown, a process that can often take longer than 36 hours as prescribed in India's IT Act, 2000. The time frame for intermediaries to respond should be more than 36 hours. Proper opportunity should be given to the Internet users as it is very important to reach a fair balance between copyright holders and Internet users. It is very important to stop issuing takedown requests without court orders, an increasingly common procedure.<sup>386</sup> As seen in chapter 2 the vagueness of the law has led to people being arrested and charged for innocuous posts and tweets.<sup>387</sup> It is important to revise the current takedown procedure, so that demands for online content to be removed do not

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<sup>385</sup> Melody, *supra* note 155 at 16.

<sup>386</sup> *Ibid* at 23.

<sup>387</sup> Times of India, "Shame: 2 girls arrested for harmless online comment", online: (20 November 2012) <[http://articles.timesofindia.indiatimes.com/202-11-20/mumbai/35227016\\_1\\_police-station-shiv-sainiks-police-action](http://articles.timesofindia.indiatimes.com/202-11-20/mumbai/35227016_1_police-station-shiv-sainiks-police-action)>.

apply to legitimate expression of opinions or content in the public interest. Lack of transparency in regard to the decisions to take down content, leading to a lack of accountability of private intermediaries for over-broad blocking is also a problem. The GNAN model would be a vast improvement over the existing NTD system on all of these counts.

The thesis concludes that the law alone may also not be effective in combating online piracy. The duty also lies with the music and film producers and also with the sports broadcasters to provide better access to their product. Ultimately, this will turn the fans away from downloading or streaming illegally. Fighting against technology or stopping it from growing will be futile. Therefore it is better for the copyright holders to provide better alternatives to their consumers.

To conclude, copyright is an emerging subject in a country like India and the only way to create a strong copyright enforcement is by creating awareness. People must be made aware of copyright and its infringement, and by adopting a model like GNAN that goal could be achieved.

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