

Contributory Copyright Infringement in Music Industry: Technological Implications

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Disruptive technological changes in the ways of music consumption have led to evolution of new methods of piracy, exposing the global music industry to new challenges. One such mechanism is termed “Stream-ripping”. It is the illegitimate process of turning a streaming file on the internet into a downloadable one. Since the issue of stream ripping by software has not been determined by courts, the question of copyright infringement liability remains unanswered. The primary objective of this research paper is to critically analyze the law related to contributory copyright infringement facilitated by stream ripping software, and the implications it has on the global music industry. The paper attempts to achieve the aforementioned objective by comparing the legislative framework in the United States under the Digital Millennium Copyright Act, 1998 (DMCA) and the Indian legal framework under the Indian Copyright Act, 1957 and the Information and Technology Act of 2000. The inference drawn is that the liability for contributory copyright infringement depends on the precise mechanism of how the stream ripping technology involved works. If software rips and downloads copyrighted content itself, it shall be directly liable for copyright infringement. Mere facilitation of stream ripping will entail secondary liability for contributory infringement. The law related to contributory copyright infringement has significant implications for the music industry, as music is primarily consumed digitally and stringent regulatory measures would ensure that artists are fairly paid. It also has implications for the tech industry, as restrictive laws will hamper technological developments. Courts have not addressed the issue of contributory copyright infringement when it comes to online tools that facilitate the same, and this paper tries to elucidate this overlooked area.

Keywords: Digital Millennium Copyright Act, 1998, The Copyright Act, 1957, The Information and Technology Act, 2000, Copyright Treaty, Digital Rights Management, Technological Protection Measures, Audio Home Recording Act, 1992, Stream-Ripping Software, fair use, substantial non-infringing uses

The music industry has gone through a very rapid transition since the 1970s, as disruptive technologies opened the doors for newer modes of consumption of creative content. The music industry started off from the analog vinyls, also known as LPs, to Compact Discs in the 1980s.¹ With the advent of the Internet, music was now available to listeners on demand with iTunes² and other initial players that aggregated the market by leveraging the technological capability of the Internet. Streaming is the latest way through which musicians put out their music directed towards listeners. Streaming services usually operate via a subscription based model, using the *freemium* model as a potent customer acquisition strategy.³ Such disruptive technological changes in the ways of music consumption have led to evolution of new methods of piracy, exposing the global music industry to new challenges. This radical change in the way music is being distributed⁴ and consumed has

led to the rise of one such mechanism; termed “Stream-ripping”.

It is the illegitimate process of turning a streaming file on the internet into a downloadable one. Since the issue of stream ripping by software has not been determined by courts, the question of copyright infringement liability remains unanswered. Stream ripping is essentially facilitated by a program used to save streaming media to a file so that it can be accessed locally.⁵ The practice of recording streaming media is known as “*destreaming*” or stream ripping. When a sound recording is streamed, it is considered a public performance and hence the rights holders are entitled to royalties based on the number of times that particular recording is streamed.⁶ These royalties are collected and distributed by Collection Societies which act as intermediaries enabling songwriters and their publishers to collect royalties when their work is used commercially.⁷ Prominent examples would be the Indian Performing Right Society Limited (IPRS)

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in India and the American Society of Composers, Authors and Publishers (ASCAP) in America. However, Stream-ripping software providers prevent artists from getting the royalty that is due to them by locally storing the file available for streaming. The current legislative framework is not equipped to deal with rapidly advancing technological development,⁸ and internet intermediaries and software providers utilize the loopholes present in the law regarding contributory copyright infringement to drive traffic to their platforms using the intellectual property that someone else rightfully possesses. This paper concentrates on the legislative framework that essentially determines the flow of royalties from the consumers to the creators through Digital Rights Managers, and how Stream ripping software and similar services use the lacunae in the legislative framework to prevent this from happening. The present research is a Doctrinal Study with primary resources which include landmark case laws related to contributory copyright infringement as addressed in the American legal framework and the legal jurisprudence with regards to infringing circumstances specified in the Copyright Act, 1957 in force in India.

Legislative Framework: Contributory Copyright Infringement

The United States

Contributory copyright infringement was first addressed by the American judiciary in *Sony Corp. of America v Universal City Studios*, famously known as the Betamax Case⁹ in 1984. Sony had recently introduced VTR technology that let users record copyrighted content broadcast on the television in order to view it later. There were a few unsubstantiated instances wherein users copied this content and circulated it. In 1976, all of the aforementioned circumstances led MCA, parent company of Universal City Studios and the Walt Disney Corporation to file a suit against Sony, alleging that their Betamax enabled users to copy televised programs and also skip commercials, thereby infringing copyright laws. The allegation was substantiated by putting forth the argument that the studio's production was paid for through revenue from commercial advertisements. By the end of 1977, Video Cassette Recording (VCR) technology was developing rapidly and was also being adopted by users,¹⁰ and Sony was awarded a ruling in its favor by the District Court. However, in 1981 the Ninth Circuit

Court of Appeals reversed the District Court's decision and ruled in favor of Universal and Disney and held Sony liable for contributory copyright infringement. An appeal was filed by Sony and the case went on to the Supreme Court in 1983, where the decision was reversed and was awarded in favor of Sony. In doing so, the court propounded the principle of "substantial non-infringing uses".¹¹

Justice Stevens outlined his argument into three major reasons to reverse the decision:

- (1) *"The privacy interests implicated whenever the law seeks to control conduct within the home;*
- (2) *the principle of fair warning that should counsel hesitation in branding literally millions of persons as lawbreakers; and*
- (3) *the economic interest in not imposing a substantial retroactive penalty on an entrepreneur who has successfully developed and marketed a new and useful product, particularly when the evidence as found by the District Court indicates that the copyright holders have not yet suffered any harm."*

Thus, the Supreme Court dismissed the claims of contributory infringement against Sony on the ground that the product in question had "substantial non-infringing uses" including recording of copyrighted content for 'fair use' purposes.¹² It was held that Sony could not be held liable on the basis of generalized knowledge that the product might be misused for purposes that entail infringement. For the allegation to be legitimate, the court mandated actual knowledge of an infringing act.

The principle of "substantial non-infringing uses" developed in the Betamax case was successfully as well as unsuccessfully relied upon as a defense to liability for contributory infringement, by technologists, in a number of subsequent cases depending on the technology in question.¹³ However, two decades later, there was a significant shift in the contributory infringement jurisprudence in the case of *MGM Studios, Inc. v Grokster, Ltd.*¹⁴ It was a copyright infringement suit instituted by MGM Studios, a major record label against Grokster which came up with a decentralized structure for peer to peer file sharing, offering a platform through which users could transfer files to each other.¹⁵ US Supreme Court denied the defense taken by Grokster that its platform has many lawful uses. In light of a commissioned study submitted before the court which showed that 90% of the shared files were copyrighted works and other evidence showing active steps taken by Grokster

to encourage infringing uses, the court developed the “inducement theory” of contributory infringement and held:¹⁶

“Nothing in Sony requires courts to ignore evidence of intent to promote infringement if such evidence exists. Where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, Sony’s staple-article rule will not preclude liability”

The inducement theory essentially states that if the device, service or technology in question by virtue of its fundamental character induces users to infringe upon someone's copyright, the service provider or technological developer in question shall be liable for contributory copyright infringement.¹⁷ This decision received flak from all quarters of the tech community on the ground that it would stifle innovation. But, a close analysis of the decision would reveal that it is not very much to the prejudice of technologists. It does not per se serve to stall the invention or application of new technologies which have lawful as well as unlawful usages, but essentially targets the bad intent and the infringement fostering marketing behavior of the providers of such technologies.¹⁸

Just like other technologists, stream ripping websites are also seeking the defense of “substantial non infringing uses”. It is sufficiently evident from the Electronic Frontier Foundation’s rebuttal to the recent submission of Recording Industry Association of America¹⁹ with the United States Trade Representative, where the EFF²⁰ states: *“There exists a vast and growing volume of online video that is licensed for free downloading and modification, or contains audio tracks that are not subject to copyright. Providing a service that is capable of extracting audio tracks for these lawful purposes is itself lawful, even if some users infringe.”* While it remains to be seen if “substantial non-infringing uses” principle works in favor of stream ripping websites, it is clear enough from the Grokster decision and other landmark pronouncements on contributory liability including In re Aimster Copyright Litigation,²¹ that American Supreme Court has rejected it as a blanket defense. If the courts apply the Grokster standard, lawful capabilities of the stream ripping tools and software shall not insulate websites from contributory infringement and liability arising there from, provided it is established through evidence that infringing uses

are rampant and the websites are inducing users for infringement to attract traffic and thereby increase advertisement revenues.²² It could be any kind of evidence including promotional materials stimulating infringing acts. Additionally, the websites could also be held liable for facilitating circumvention of effective Technological Protection Measures (TPMs) employed by streaming platforms to prevent copying downloading. Regarding the defense mechanism provided under the safe harbor provision under Digital Millennium Copyright Act (DMCA), it would again be difficult for a website to qualify for this immunity, if it is established that it invites repeat infringement.²³

India

The courts in India have not come across a similar situation till date. However, one may analyze some of the landmark judgments dealing with areas that are proximate to the issue at hand.²⁴ The infringing circumstances specified in Section 51(a)(ii) of the Copyright Act, 1957, which deals with contributory infringement do not expressly cover the modern technology used for piracy including stream ripping software. The role that intermediaries on the internet can play has not been deliberated upon, due to which several challenges arise.²⁵ Though, the Delhi High Court has applied the provision to virtual world of internet in the landmark case of Myspace²⁶ on secondary liability, it would be exceedingly difficult to extend the applicability of the provision to the issue at hand. The court adopted a very technologically liberal interpretation of Section 51(a)(ii), saying that due to the sheer volume of content being uploaded on or via internet intermediaries that deal with User Generated Content (UGC), liability will arise only in factual scenarios where actual knowledge exists, not just general awareness.

Anti-Circumvention Provisions under Section 65A

Platforms have now started implementing effective technological measures to ensure adequate protection to protected works. Circumvention of such technological measures in place to protect the rights conferred by the Copyright Act is punishable under Section 65A, introduced by the 2012 amendment to the Copyright Act. However, there are serious drawbacks in the anti-circumvention provision enshrined under Section 65A. Firstly, no civil liability has been provided. Secondly, unlike DMCA, the provision is silent on the liability of intermediaries, i.e. the manufacturers, providers of software or tools

facilitating circumvention of technological measures for infringement purposes. This was decided by legislators, keeping in mind that a provision to that effect may adversely affect technological innovation. Therefore, secondary liability for intermediaries providing stream ripping tools or software, which are first used to circumvent technological measures applied by streaming platforms and then permanently download protected works, is not possible under Section 65A. In light of a seemingly unfavourable statutory framework, it would be interesting to see how Indian courts rule on the issue and whether they would be pro-active in safeguarding the rights of content owners by filling up the lacunae in law,²⁷ to the extent possible, or take a restricted approach.

MySpace Case: Contributory Copyright Infringement and the Principle of Harmonious Construction

The Information and Technology Act, 2000 also has its own share of ambiguities which have failed to adapt to recent technological advances. Section 79 of the IT Act provides intermediaries with a safe harbor provision and protects them from legal exposure, akin to Section 512 of the DMCA. The definition of intermediaries under the act was amended in 2008, encompassing a broad range of service providers which deal with the exchange of electronic messages on the internet. The amendment was prompted after the case of Avnish Bajaj, CEO of intermediary Baze.com.²⁸ The intermediary permitted user generated content and one of the users had uploaded an obscene MMS. The Supreme Court, while upholding the validity of Section 79, opined that it was provision that encompassed all electronic records as defined by the act and intermediaries cannot be held liable for mere facilitation of illegal activities. Though, this case does not deal with infringing activities as defined under copyright law, it helps us understand the judicial interpretation of the safe harbor provision.

The scope of Section 79 includes protection from most offenses which may be facilitated through intermediaries, provided certain prerequisites under Section 79(2)(b)(iii) are satisfied - The intermediary cannot be involved in the *initiation* of the transmission nor the selection of the receiver. Additionally, they should not play a role in the selection or modification of the transmitted information. However, as is evident from the technology with respect to streaming ripping software, there is a clear selection and modification of

the data so as to facilitate its download and local storage. Therefore their inherent technology does not meet the conditions laid down in Section 79(2)(b)(iii) and they cannot escape liability. In the MySpace case, the courts underscored the need to harmoniously construe provisions of the IT Act and the Copyright Act, proving the urgent need for courts to understand the technical nuances of copyright infringement.

Intermediary Guidelines: Practical Aspects

Almost every stream ripping website falls under the definition of “intermediary” under Section 2(1)(w) of the IT Act. The exemptions under Section 79 are not unconditional: Intermediaries have to exercise *due diligence* as per Section 79(2). Specific conditions have been laid down in the Information Technology (Intermediaries Guidelines) Rules, 2011. Under Rule 3(3) of the guidelines, if a user has specific knowledge that indicates infringement of copyright, he can send a notice to the intermediary, which is mandated to publish contact details of a specifically appointed grievance officer in accordance with Rule 11. However, it is a tedious process for the rights holder to send separate notices for every case of infringement, and companies escape liability since they contend to not have had specific knowledge of each instance. The question that arises at this juncture is whether or not services which facilitate stream ripping can avail the safe harbor provision as envisioned under the IT Act? Specific cases are unavailable under Indian jurisdiction. However, based on precedent set in the United States, companies that offer peer to peer services have attempted to avail this protection in the past.²⁹ Demonstrated in the controversial Napster case,³⁰ we can see how companies that clearly facilitate infringement of copyright can justify their actions under the ambiguous shroud of general awareness. Case law in India has not addressed the inducement theory but we shall have to wait and see how courts deal with this issue.

Comparative Analysis

In 2012, the Indian Copyright Act, 1957 was amended to conform to the guidelines set out in the World Intellectual Property Organization's Copyright Treaty (WCT) with respect to Digital Rights Management (DRM) to tackle the growing menace of piracy in developing countries.³¹ Section 65A was inserted which empowered intermediaries to set up technological protection measures (TPMs) to ensure that no infringement of rights takes place on their platform. It also criminalizes attempts to circumvent

such established measures. The aforementioned provisions try and walk a tightrope, trying to balance freedom when it comes to technological development³² and on the other end, the rightful compensation of rights holders and the prevention of mala fide infringement of copyrights held by them.

Safe Harbour Provisions: A Cross Jurisdictional Analysis

When a comparative analysis is conducted between Section 79 of the IT Act and Section 512 of the DMCA, it is evident that the DMCA provides a clear taxonomy based on different categories of technological applications whereas the IT Act has laid down an all encompassing law which makes it harder to establish liability pertaining to specific technological applications. Under Section 512, there exist four categories of technological applications, of which *Transitory Digital Network Communications* under Section 512(a) is of relevance with respect to stream ripping. It addresses the transmission of data between third parties via an intermediary. The clear categorization of circumstances in which the safe harbour can be availed helps facilitate judicial deliberation, and we have seen that the courts take a progressive stance if the case so demands, as seen in the Napster Case, where *Knowledge, Material Contribution, Financial Benefit*, as well as the *Ability to Supervise* were laid down as the preconditions required to affix liability for copyright infringement.³³

The Information Technology (Intermediaries guidelines) Rules, 2011 issued by the Department of Information Technology has laid down certain guidelines that intermediaries must follow if they wish to avail the exemption of liability provided under Section 79 of the IT Act. Under the guidelines, Rule 3 conducts a detailed dissection by laying down conditions necessary to exercise *due diligence* under Section 79(2). According to said Rule 3(3)(a), any transmission which involves *temporary* or *transient storage*, where there can be no possible exercise of *human editorial control* may absolve the intermediary from liability arising out of offenses such as contributory copyright infringement. Presently, stream ripping platforms are making use of this contention to escape liability under the Copyright Act. Stream ripping software use these safe harbor provisions when it comes to protected musical works and sound recordings, through platforms that allow user generated content as most of the traffic that drives their ad revenues comes from users who access content that is not legally uploaded.³⁴

Section 65B as a Prospective Solution

One additional solution that may be utilized by Indian courts is Section 65B, which lays down provisions that criminalize the act of making changes to the *Right Management Information*³⁵ of any protected work. Metadata is extremely crucial to any work in which copyright subsists; it helps identify the owner or licensee and contains other relevant information pertaining to the protected work. The Copyright Act terms it as *Right Management Information* and it is defined under Section 2(xa). Section 65B of the Act states that the unauthorized alteration or removal of such right management information shall be punishable under the Copyright Act. Moreover, under sub-clause (ii) it also encapsulates circumstances where such information is *manipulated* and *distributed, broadcast* or *communicated* to the public. Stream Ripping Software by their nature manipulate right management information such as the title and information necessary to identify the protected work under Section 2(xa)(i), as well as the terms and conditions associated with the legitimate use of the protected work under Section 2(xa)(iv). If the courts apply the principle of harmonious construction as postulated in the MySpace case, Section 65B may act as a prospective solution to the menace of piracy through stream ripping. Currently, it's very easy for the stream ripping software to change the metadata of a particular file and distribute it illegally. A possible solution in the future might be Block Chain, which will establish a decentralized server where all of recorded music's metadata will be stored and any update or modification made to it to it will notify the legitimate rights holders in real time, so that they can be fairly compensated.³⁶ Different challenges arise at this point, since there is no standardized format for the documentation of metadata, and different stakeholders have their own database.³⁷

Refurbishing the Audio Home Recordings Act

Inspiration can also be drawn from the Audio Home Recording Act, 1992 (AHRA), which was enacted in the United States. It was formulated due to the advent of DAT and other technologies that allowed the reproduction of music without a loss in quality.³⁸ The Act mandated a two percent tax to be levied on manufacturers of "digital audio recording devices" and a three percent tax on manufacturers of "digital audio recording media".³⁹ However, the definitions under the act were so narrowly construed; they essentially included only DAT players.⁴⁰ Should a tax be levied on

online intermediaries who facilitate copyright infringement? Legislators could prospectively use the fundamental ethos around which the AHRA was enacted and successfully adapt it to fit a dynamic online environment.

Conclusion

The digital music industry consists of a complex web of intermediaries that connect content creators and content consumers in the music supply chain. Record Labels, Distributors, Publishers, Performance Rights Organizations act as inefficient pipelines devaluing the actual content being created in the supply process. YouTube has been severely criticized for inducing the "value gap" which essentially means that fair revenue is not being generated for content creators in the music industry. The International Federation of the Phonographic Industry's Global Music Report, 2017 states that the value gap is the music industry's top legislative priority.⁴¹ The value gap prevents content providers from developing financially sustainable business models and content creators from being compensated fairly when their creative works are exploited. The rise of peer to peer (P2P) services spearheaded by Napster in 2000 adds to the ambiguity and further underscores the need for legislation to keep up with technology.⁴² Additionally, one must also keep in mind that intermediaries have enough technological prowess to establish reasonable technological protection measures to prevent stream ripping. YouTube has efficiently deployed technological measures to detect if any pornographic content is being uploaded on their service, but when it comes to illegitimate music, the screening process seems to be too tedious for the company whose distributive control must be reassessed in a digitally dominated industry. To ensure a future where rights holders are compensated fairly, the presence of stream ripping services which take advantage of legislative ambiguity must be curbed. Technology has changed the way we interact with music, and interesting developments lie ahead, however their efficacy depends on the legislative mechanisms we establish to deal with them.

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