

# **Critical Analysis of the Liability of Internet Service Providers for Copyright Infringement-Study of Us & Indian Position**

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## **ABSTRACT**

*“The changing facet of technology gives birth to various complicated issues in copyright law regarding online copyright infringement. The major issue is to strike a balance between the rights of the copyright holders and the liability of Internet Service Providers. The tension that exists between copyright holders and Internet Service Providers concerning the issue of online copyright infringement liability has been a subject of extensive debates worldwide. The major problem is the lack of clarity of law regarding the secondary liability of Internet Service Providers for online copyright infringement in various jurisdictions across the world. The object of the present paper is to comprehensively analyse the existing position on secondary liability in US and India.”*

## **INTRODUCTION**

Internet is a large network of linked computers whose operators co-operate to allow passing information among them.<sup>19</sup> Internet Service Providers (ISPs) are basically intermediaries which facilitate access to internet or worldwide web and related facilities in accessing various services available on the internet. Internet is one of the major innovations of the 20<sup>th</sup> century. Internet provides easy worldwide access through its facilities like e-mail, file transfer, file sharing, chatting, downloading etc. These capabilities of internet have made it very easy for everyone to receive or disseminate text, images, sound, software or data from any corner of the world, with accuracy and without any substantial loss in the quality of work and allows to make multiple copies of a work available on the internet.

The internet has revolutionized the dissemination of information by digitalizing the form of information. However, the same in some situations results in violation of copyrights. Copyright laws relate to electronic communications, that ‘there will be a copyright infringement when an individual copies a work held in electronic format without the authority of the copyright holder’.<sup>20</sup> Then the issue comes whether a service provider can be held liable for merely providing a platform to the primary infringer to infringe the copyright. As it is difficult to enforce the copyrights against individual internet users, now a days the copyright owners start filing suits against the Internet Service Providers on the basis of doctrine of secondary liability.<sup>21</sup> There are various issues involved in ascertaining the liability of ISPs for the activities done by its users.

The present paper broadly seeks to address the following issues:

- What is the nature and scope of secondary liability of ISPs for the copyright infringement by third parties or subscribers?
- Whether lack of knowledge of infringement and absence of intention to infringe can be used as a valid defence by an ISP to escape from liability?
- Whether degree of control and ability to prevent the infringement can affect the quantum of liability?

1. See more about Internet in- Chris Reed & John Angel, ‘Computer Law’, Blackstone Press Limited, 4th ed. 2000, London, p-362-364.

2. Chris Reed & John Angel, ‘Computer Law’, Blackstone Press Limited, 4th ed. 2000, London, p-362.

3. See- ‘Is Betamax Obsolete? Sony Corp. of America v. Universal City Studios, Inc. in the age of Napster’, by Jesse M. Feder. What is the existing legal position in India and US regarding the secondary liability of Internet Service Providers?

The existing legislations are not able to cope up with the fast-growing internet issues and this massive growth of online-copyright needs to be regularized properly. The present paper is broadly divided into five parts; The first part is the Introduction which gives a brief background about Internet, ISPs and interface with copyright issues. The second part deals with nature and scope of secondary liability, part three covers the existing legal scenario in the United States and India. Part four of the paper deals with the application of the principles of secondary liability. Finally, the last part is the conclusion wherein findings and suggestions are recorded.

## **NATURE AND SCOPE OF SECONDARY LIABILITY**

There are basically two theories of secondary liability under which ISP may face liability for their subscriber's copyright infringement: Vicarious liability and Contributory liability. Direct liability is no more an issue because in most of the cases court held that an ISP cannot be held liable directly for the infringing acts by its user, unless and until the ISP is directly involved in the infringing activity<sup>22</sup>. Now the controversies are regarding the nature and quantum of secondary liability. Let discuss the concept of vicarious liability and contributory liability in brief.

## **THEORIES OF SECONDARY LIABILITY**

### **Vicarious Liability**

Vicarious liability refers to liability where a person is not directly involved in the infringing activity but still can be held liable as an infringer for the infringing act of another. Such a liability may arise vicariously through the relationship between the infringer and the person sought to be liable. Although copyright law does not expressly provide for vicarious liability, but courts have been consistently imposing vicarious liability when there exist two factors: "the right and ability to supervise" the primary infringer and a "direct financial interest in the exploitation of the copyrighted material".<sup>23</sup>

### **Contributory Liability**

Contributory liability refers to liability where a person may be liable for contributory infringement where, with knowledge of the infringing activity, it induces, causes or materially contributes to the infringing activity of another.<sup>24</sup> In contributory liability, the element of knowledge and participation are key elements of contributory infringement. To invoke the liability of contributory infringement, there must be a direct infringement to which the contributory infringer has knowledge and encourages the facilities. So, for a person to be liable for infringing copying by a third party, the person must (a) have knowledge of the infringement and (b) have induced, caused or materially contributed to the third party's infringing conduct. The concept of contributory liability stems from law of torts. It is based on the principle that one who directly contributes to another's infringement should be held liable.<sup>25</sup>

## **LEGAL SCENARIO IN US AND INDIA**

### ***US -Digital Millennium Copyright Act, 1998***

In 1998, the United States enacted its Digital Millennium Copyright Act (DMCA) which limits the liability of the online service providers if they adhere to and qualify for certain prescribed safe harbour guidelines. Sec 512 of the Act basically provides for limitations on the liability relating to material online.<sup>26</sup> The DMCA provides for '**Notice and Take down regime**' under which a copyright owner can request ISP to remove or otherwise disable access to a website where his copyrighted work is appearing without his permission.<sup>27</sup> The DMCA with the purpose to create limitations on the liability of ISPs classifies the ISPs into four different categories on the basis of their functions.<sup>28</sup>

4. See- *RTC v. Netcom* (907 F. Supp. at 1361), where the court refused to hold an ISP directly liable for automatic pass through of allegedly infringing messages posted to use net by subscribers, *Sega Enterprises Inc. v. Maphia* 857 F Supp 679 (ND Cal, 1994)

5. See- *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1964) (holding departmental store vicariously liable for copyright infringement of record sales concessionaire), see- *Gershwin Publ'g Corp. v. Columbia Artists*

6. *Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971) (holding manager liable for infringing performances by musician). *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971).

Knowledge and participation are key elements of contributory infringement. To invoke the liability of contributory infringement, there must be a direct infringement to which the contributory infringer has knowledge and encourages the facilities. So, for a person to be liable for infringing copying by a third party, the person must (a) have knowledge of the infringement and (b) have induced, caused or materially contributed to the third party's infringing conduct. The concept of contributory liability stems from law of torts. It is based on the principle that one who directly contributes to another's infringement should be held liable.<sup>25</sup>

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### **Indian Position**

#### *Copyright Act, 1957*

The Copyright Act, 1957 does not provide for any express provisions related to liability of the ISPs for the copyright infringement by a third party or its subscribers. Sec 51(a) (ii) of the Act provides general clause relating to secondary liability not specifically for ISPs.<sup>29</sup> The scope of

"Copyright in a work shall be deemed to be infringed, when any person, without a license granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act - permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright."

The present section can be extended to ISPs as well because the term used in the section is '**any place**' used for the communication, and therefore it includes internet also. Under this section, in order to hold the ISP(s) liable, the following conditions must be met: a) **Permits for profit**: That the ISP is getting financial benefits out of those infringing activities. b) **Knowledge**: That ISP was aware and had reasonable grounds for believing that such communication to the public would be an infringement of copyright.

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7. Jha & Jha: 'An analysis of the theory of the contributory infringement', Journal of Intellectual Property Rights, vol. 11, sep. 2006, pp 319.26 DMCA § 512(c)(1):

[a] service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider-

8. Does not have actual knowledge that the material or an activity using the material on the system or network is infringing; In the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or Upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

9. Upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

10. See – Richard A. Spinello & Herman T. Tavani, "IPR's in a Networked World: Theory & Practices", Information Science Publishing, London, 2005, p-181-185.28 Ibid. Sec 51(a) (ii), Copyright Act, 1957:-

### **Copyright Amendment Act, 2012**

The Copyright Amendment Act, 2012 brought in certain amendments to limit the liability of ISP in certain cases. The amended sections 52(1)(a) and 52(1)(b) provides for mechanism of “notice takedown”, where an intermediary or ISP is providing for “incidental storage or transient”. This is based on the principle that “if the intermediary is passive and takes down the content when it is notified about the infringement of a copyright, it will not be held liable.” However, these provisions set the highbrow principles of exemption of liability for intermediaries but do not spell out the procedure and the specifics. These details are fleshed out in Rule 75 of the Copyright Rules, 2013.

### **Rule 75 - “Takedown Notice”**

Rule 75 of the Copyright Rules, 2013 contemplates that the Copyright owner may give a written notice to the Intermediary who has facilitated transient or incidental storage of work for providing electronic links, access or integration to restrain from such storage of work, after which the Intermediary has to take measures within 36 hours to refrain from facilitating such access for next 21 days. It is important to stress that the written notice should contain adequate information to identify the work such as location, i.e. the specific URL where the work is being made accessible from, details to establish that complainant holds a copyright on the content, details that alleged infringing act is not covered by section 52 of the Act or is not otherwise permitted by the Act etc.

Thereafter, the complainant needs to obtain a restraint order within 21 days from the competent court and if the complainant fails to procure such a court order then the Intermediary may:

- i. Restore access to the content which was taken down.
- ii. Not respond to such further takedown notices for the same work at a same location.

### **Information Technology Act 2000**

Section 79 of the Information Technology Act 2000 specifically deals with the liability of ISPs and provides for certain circumstances under which network service provider cannot be held liable. It reads as:

Network service provider not to be liable in certain cases-

*For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made there under for any third party information or data made available by him if he proves 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>30</sup>*

According to the explanation attached to the section, Network service provider means an intermediary. Section 2(1)(w) of the Act defined intermediary as: “Intermediary with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message”.<sup>31</sup> So under the Act, no distinction or classification has been made with respect to types of ISP. So, it can be applied to all kinds of ISPs irrespective of their different functions.

Under section 79, an ISP can qualify for exemption from liability for copyright infringement if he proves that he did not have any knowledge of infringement and he had exercised all due diligence to prevent the infringement which means he has taken due care to investigate further whether material he hosts or refers to is unlawful and, where found to be so, to block access. But nowhere the term ‘*due-diligence*’ has been defined in the Act and it is a major issue that what are the standards to be adopted to ascertain whether ‘*due-diligence*’ has been exercised or not. Here the role of courts is very important because it all depends how they interpret the term due diligence and that is to be interpreted according to the facts and circumstances of each case.

### **Information Technology (Intermediaries guidelines) Rules, 2011<sup>32</sup>**

These rules prescribe guidelines to be followed by the intermediaries in order to avail protection under the Act. Rule 3(2)(7) mandates intermediaries to place restrictions on the kind of content that a user can post by enumerating broad categories of information, which may be considered unlawful. The rules further mandate users not to host information included in a broad list that includes information that is grossly harmful. For example, if the work is licensed, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatsoever etc.

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11. Section 79, Information Technology Act, 2000.

**Sub-rule (3) of Rule 3:**

Apart from listing the kinds of content which should not be published by users, the rules further provide in Rule 3(3): 'The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and selector modify the information contained in the transmission as specified in sub-rule (2)' although unmanned 'temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource for onward transmission or communication to another computer resource' is an exception to the general rule contained in Rule 3(2). Further, if an intermediary was to remove access to illegal content (as contemplated by Rule 3(2)) after it came to the actual knowledge of the intermediary, the intermediary would not be deemed to have flouted the Rules as per Rule 3(3).

**Sub-rule (4) of rule 3:**

This rule mandates that the intermediary, upon obtaining knowledge by itself or being brought to the actual knowledge by an affected person about any such information as mentioned above, shall act within thirty-six hours to disable such information. If the intermediary fails to act within the stipulated time, then it may not be able to avail the protection. However, considering the short span of 36 hours, a clarification was issued by the Government of India on 18.03.2013 clarifying that the intermediary has to respond or acknowledge the complaint within 36 hours and it has 30 days' time to resolve such grievances. However, the aforesaid provision of 36 hours was criticised as it may not provide for an opportunity to the user who has posted the content to reply to the complaint and to justify his case.

**APPLICATION OF PRINCIPLES OF SECONDARY LIABILITY**

***Element of Knowledge & Intention***

The element of knowledge plays a significant role in ascertaining the secondary liability<sup>33</sup> and the issue here is that whether lack of knowledge of infringement and absence of intention to infringe can be used as a valid defence to escape from liability? Many a times have the courts gone in favour of ISPs where they did not contribute knowingly to the infringement activities.

***SONY CORP. VS. UNIVERSAL CITY STUDIOS 34***

In the said case the petitioner, *i.e.*, Sony Corp. manufactures home videotape recorders (VTR's), and markets them through retail establishments. The special feature of these Betamax VTR's was inbuilt television tuner which enables its users to record television broadcast. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Respondents brought an action against petitioners in Federal District Court, alleging that VTR consumers had been recording some of respondents' copyrighted works that had been exhibited on commercially sponsored television, and thereby infringed respondents' copyrights.

In the present case the court borrows the '*staple article of commerce*' doctrine of patent law, the court held that contributory infringement liability could not be imposed solely on the basis that the defendant sold equipment with constructive knowledge that customers may use that equipment to make unauthorized copies of the copyrighted material; there must be closer relationship between the direct infringer and the alleged 'contributory' infringer and some ability to control the activity. Contributory infringement is not found without actual knowledge if the article at issue is '*capable of substantial non-infringing uses*'.<sup>35</sup> According to court "Selling a staple article of commerce — *e.g.*, a typewriter, a recorder, a camera, a photocopying machine — technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management."<sup>36</sup> ". . . Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they 'constructively' knew that some purchasers on some occasions would use their product for a purpose which a court later deemed, as a matter of first impression, to be an infringement."<sup>37</sup>

So, in the above case the court did not find elements of neither vicarious infringement, as there was no sufficient control of Sony on the product after sale and with respect to contributory infringement there was no actual knowledge as product was capable of substantial non- infringing use.

12. Section 2(1)(w), Information Technology Act, 2000.

13. <https://iltb.net/copyright-rules-2013-and-internet-intermediaries-974f9de5f037>

***Shreya Singhal vs. Union of India***<sup>38</sup>

The Supreme Court of India while dealing with the case in the context of Article 19 (2) of the Constitution of India viz. situation in which the right to Freedom of Speech could be regulated, held that under Section 79 of the Information Technology Act, intermediaries are exempt from liability if they fulfil conditions of the section. The Court refrained from striking down Section 79 by reading down Section 79 (3) (b) and Rule 3 of the Information Technology (Intermediary Guidelines) Rules, 2011 to hold that the knowledge of infringement referred to in this section must be only through the medium of a court order or through an agency established by the Government. The Court observed that it would be otherwise very difficult for intermediaries to go through all the requests they receive and judge which requests are legitimate and which are not.

***In Eros International Media Limited v Bharat Sanchar Nigam Limited***<sup>39</sup>

Eros sought for a John Doe order to protect rights of the movie “Dishoom” from being uploaded online. The Indian courts have used “John Doe” orders or “Ashok Kumar” orders against unidentified persons by passing restraining orders time after time against unknown defendants distributing, displaying, duplicating, uploading, downloading or exhibiting copyrighted work in any manner. In this case, the petitioners had submitted a list of 134 URLs and web links to the Bombay High Court, with a prayer to grant an injunction directing Internet Service Providers to block access to the 134 URLs/web links. On receiving such links from the Plaintiffs, the defendants were directed to restrict access to those URLs or web links as required by section 52(1)(c) of the Copyright Act, 1957 for the 21 days as mentioned in the section.

**APPLYING SONY TO PEER-TO-PEER FILE DISTRIBUTION SYSTEMS**

***A & M Records, Inc. v. Napster, Inc.***<sup>40</sup>

In the present case Ninth Circuit Court analysed the issues of contributory liability in the context of an online service that facilitated peer-to-peer sharing of copyrighted sound recordings and musical works. The brief facts of the case were that, Napster was a program which facilitates upload and download of MP3 files by its users and allowed its users to exchange the music files through P2P networks. The plaintiff (group of copyright owners) sued Napster alleging that Napster was liable for contributory infringement along with other allegations of vicarious infringement.

That all or some part of the activities was fair use as a number of public domain works were shared and many copyright holders had authorised the sharing of their files. That SONY’s doctrine of staple article of commerce would be applicable as the product was capable of substantial non-infringing uses and he did not have knowledge of infringement.

**Findings by Court:**

***Substantial Participation of Napster.***

The court rejected all the arguments asserted by Napster and found that the elements of contributory infringement being established as Napster’s users engaged in widespread, unauthorized uploading and downloading of copyrighted music files, to which Napster was materially contributing. The court considered following factors which proves that there was substantial and active participation by Napster in contributory infringement:

Napster provided free software ‘MusicShare’ to its users which enabled the users to 1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users, 2) search for MP3 music files stored on other user’s computers, and 3) transfer exact copies of the contents of the other users’ MP3 files from one computer to another via Internet.<sup>41</sup>

Napster further provided technical support to its users for the indexing and searching of MP3 files, as well as for other functions including a chat room, where users could meet to discuss music and a directory where participating artists could provide information about their music.<sup>42</sup> So, on the basis of the following grounds the court held that, Napster had both actual and constructive knowledge of its users’ infringing activity.<sup>15</sup>

14. Unlike direct infringement, where knowledge of infringement or intent to infringe is irrelevant. See- Nandan Kamath, “Law Relating to Computers, Internet & E-Commerce”, Universal Law Publishers, New Delhi, 2000. P-176-178.

15. 464 U. S. 417 (1984)

16. Id at 439.

17. 480 F. Supp. at 461.

***Sony defence rejected:***

***Degree of control and ability to prevent***

The court on the basis of degree of control and ability to prevent, refused to grant the Sony defence of ‘*staple article of commerce*’ claimed by Napster by making a distinction between present case and Sony case, broadly on the basis of two factors: That the type of technology involved in Sony case was totally different from the present P2P software’s because . . . Napster exercises ongoing control over its service whereas there was no such control in case of Sony.<sup>16</sup>

That the type of relationship between the parties was also different in Sony case in which the only contact between Sony and its customer was at the point of sale only and there was no ongoing relationship like Napster.<sup>17</sup> So, on the basis of above findings court held that staple article of commerce doctrine cannot be applied here and held Napster liable for contributory infringement as well as vicariously, since both the elements, *i.e.*, supervision and financial benefits were established.

***In re: Aimster Copyright Litigation***<sup>46</sup>

The facts of the present case are similar to Napster case but with slight modifications in the technology which had been used to exchange and other digital files over instant messaging services such as AOL instant messenger, as well as over the Internet. Copyright owners of popular music filed suit against owners and operators of Aimster system for vicarious and contributory infringement.

Aimster argued that *Sony* doctrine would be applicable because Aimster system is capable of substantial non-infringing uses. The court addressed the contention of Aimster and held that where a product is capable of both infringing and non-infringing uses, it would be necessary to examine the magnitude of both because every product is capable in some way of non-infringing use. In that case, the primary use of the product is to be considered. The court rejected the contentions of Aimster and found that elements of contributory liability are satisfied. Aimster had both actual and constructive knowledge of the infringing activities and Aimster contributes to the infringement by providing software, tutorial explaining to share copyrighted music and support services to use its system. The court also held that Aimster’s “*wilful blindness*” of infringement could be deemed to be knowledge, if there is no evidence that it had knowledge of specific instances of infringement.<sup>47</sup>

***MGM Studios, Inc. v. Grokster Ltd.***<sup>48</sup>

In the present case defendants, Grokster & Streamcast were companies that use two different peer-to-peer file distribution systems: FastTrack and Gnutella. The defendants distributed free software which enabled its users to share electronic files through P2P network. The users of P2P network were involved in downloading copyrighted material through the network. These systems were not similar to Napster as they did not use a central indexing server. The petitioner MGM filed a suit against defendants alleging that P2P software distributed by respondents were used to transfer the files which held the copyright.

The court refused to hold the defendants liable for contributory infringement. The reasoning by court was that the defendants distributed products but did not provide services the same as Napster and Aimster. The court further stated that where a product is capable of both infringing as well as non-infringing uses, *Sony* doctrine would apply even if the maximum use of product is infringing. According to the court, to the extent that the defendants distributed products rather than providing services, they were in the same position as the companies which sell home video recorders or copy machines and an action for contributory infringement could not lie because there was no evidence of defendants “active and substantial contribution to the infringement itself”.<sup>20</sup>

Main Arguments by Napster:

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18. Ibid.

19. AIR 2015 SC 1523

20. 2016 SCC 6948

21. 239 F.3d 1004 (9th Cir. 2001).

### ***Element of Intention in Contributory Infringement.***

The decision of Ninth Circuit court went in appeal to Supreme Court, where the court propounded a new theory i.e. “**inducement theory**”. According to the theory, “one, who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative step taken to foster infringement, is liable for the resulting act of infringement by third parties.” And on the basis of the inducement theory, court held that

Defendants are liable for contributory copyright infringement. The Supreme Court basically considered following factors in arriving at the decision:

*Absence of Safety Filters:* That if there was no intention to foster infringement on the part of defendants, they could have used safety filters to filter out contents of infringing works.

*Substituting Napster:* according to the opinion of the court, the aim of respondents was to satisfy the rise in demand due to closure of Napster.

*Profit Motive:* The business model of the two companies was such that the companies, by selling advertising space, would gain more revenue. According to the court, where a product is good for nothing, but to foster infringement and there is no legitimate public interest in availability of that product, there is no injustice in presuming the intent to infringe. So accordingly, court holds the defendants liable for fostering copyright infringement.

### ***Does Sony survive Grokster?***

After discussing various cases the issue comes, whether Sony survives Grokster? With the advent of changes in the technology, whether the Sony’s staple article of commerce doctrine is inadequate? The answer to the first issue is affirmative, Sony survives Grokster and it will continue to be relevant even after Grokster’s decision. The substantial non-infringing use of a product still holds well in the case of Grokster also. In Grokster case, with reference to the Sony doctrine, the court held that the doctrine was still good in law, however, it would not apply to cases where the object of promoting infringement was manifest.<sup>50</sup>

### ***Conclusion & Suggestions***

The Internet has successfully brought revolution in our Copyright law. After analysing the legal provisions and by making various case studies, the author comes to the conclusion that the law regarding the liability of ISPs is needed to be exemplified because it is still not clear that what should be the standards to be adopted by ISPs to avoid the liability. The fear of unknown liability may affect the growth of internet. If we compare the position in US & India, the law in India is vaguer and more unclear and there are no specific provisions to deal with the problem except Sec 79 of the IT Act 2000 in which certain terms need to be elaborated properly like ‘due diligence’ which is not defined anywhere in the Act. The courts in US also played a significant role in the substantial development of principles of secondary liability of ISPs whereas there is no such case history before Indian courts. From *Sony* to *Grokster*, courts added further substance to the principles but many times while applying those principles it differs on its own opinion, like Sony doctrine of ‘staple article of commerce’ in which many times courts were in doubt as to application of the doctrine. According to the opinion of the author, the Sony doctrine is still relevant, but the need is of modification in doctrine according to the changes in technology. Later in *Grokster & Napster* the court did not apply the Sony doctrine for the reason that it is no more adequate but because of difference of P2P software and the VTR and also the ongoing relationship between the parties and if the court would have applied the Sony doctrine it would cause injustice to copyright owners. So finally, there is a need to strike a balance between the interests of both ISP’s and Copyright owner. The approach should be that there should not be any unnecessary fear in the mind of ISP’s regarding the secondary liability, but also economic interest of copyright owners should not be ignored. The role of courts is more important in case of internet because we cannot make law everyday according to the changes in technology, therefore it all depends on court to interpret the law very carefully, keeping in mind the purpose and object behind enacting a law.

22. A & M Records, Inc. v. Napster, Inc, 239 F 3d 1004 at 1011.42 Ibid.

23. Id. at 918-19

24. Id. at 916-17.

25. Ibid.

26. 334 F.3d 643 (7th Cir.2003).

27. See Generally- ‘*Is Betamax Obsolete? Sony Corp. of America v. Universal City Studios, Inc. in the age of Napster*’, by Jesse M. Feder.

28. Ibid at 650.