

# Liability of Internet Intermediaries in Copyright Infringement: Comparison between the United States and India

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**Abstract.** The internet has changed the behavior of society and human civilization as a whole. While it has led to many positive developments, it has also resulted in the copyright infringement of intellectual property distributed on the internet. As it would be almost impossible to hold internet users responsible for copyright infringement, it is more effective to hold internet intermediaries responsible instead. Internet intermediaries are parties or companies that provide access for internet users to copyrighted content, for example, internet service providers, social media platforms, marketplaces, and websites. This research analyzes the responsibility of internet intermediaries in copyright infringement in Indonesia and comparing the results to the United States and India. The objective of the research was to find out the liability of internet intermediaries on online copyright infringement through the criminal and civil law. This is normative research that is analyzed qualitatively using descriptive methods. Based on the results of the discussion and analysis, it is concluded that it is highly necessary to have laws regulating the liability of internet intermediaries in order to provide legal protection for copyright holders and legal certainty for business actors, especially those engaged in the digital sector.

**Keywords:** Copyright Infringement, Internet Intermediary, Comparative Law

## 1 Introduction

Through the internet, the development of technology has transformed all aspects of human life [1]. The world has become borderless and significant social changes have occurred in a short span of time. Armed with the main advantage it has on offer, namely a network that reaches all over the world, the trade, advertising, health, education, and entertainment sectors, especially in the era of the industrial revolution 4.0 today, have considered internet technology a necessity [2]. At the same time, the development of the internet has become a double-edged sword because even though it largely contributes to human progress, it is also an effective means of illegal acts, especially in the field of intellectual property, namely copyright infringement [3].

Law Number 28 of 2014 concerning Copyright (Copyright Law) recognizes the internet as a media for declaring copyright. Likewise, Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (EIT Law) also states that intellectual property distributed on the internet are electronic documents that must be copyright-protected. However, neither the Copyright Law nor the EIT Law has specified the

extent to which internet intermediaries are held responsible regarding copyright infringements. These unclear regulations have also created legal uncertainty for internet intermediaries themselves and can additionally contribute to various online copyright infringements. Examples include illegal movie streams, fake books and software sold on online trading sites (marketplaces), and so on [4].

It is very difficult and impractical to hold direct infringers accountable because of their sheer numbers and legal issues following their arrest. Therefore, the liability of internet intermediaries [5] has become an important topic as they [6] are considered to be involved as contributory infringers [7].

Currently, several countries have special rules regarding the liability of internet intermediaries for copyright infringement, such as the United States and members of the European Union [8]. This problem has also received attention in African countries such as Kenya, Morocco, and Tanzania [9]. India, a country in the priority watch list category, also has regulations regarding the liability of internet intermediaries. These consist of safe harbors, notices and takedowns, OSP requests, and regulations for P2P and web-host service providers.

The first recorded case regarding the liability of internet intermediaries was the case of Playboy against Frena in 1993 [10]. Frena was found responsible for uploading photos belonging to Playboy which had copyrighted material. Even though there has been no related claim or case in Indonesia to date, as a country that has ratified the TRIPs Agreement, Indonesia needs to provide clearer regulations regarding the responsibilities of internet intermediaries.

## **2 Research Methods**

This is normative legal research, which aims to explain legal principles, vertical and horizontal synchronization, legal comparisons, and legal history [11]. The purpose of normative juridical research is to determine or recognize a positive law and its implementation regarding a particular problem [12]. This research uses the comparative method, in which the legislation and implementation regarding the liability of internet intermediaries in the United States and India are reviewed and compared.

With online access to various regulations and academic articles from different legal systems, it is possible to make comparisons to analyze how other countries face similar problems, which we may face in similar ways [13].

## **3 Results and Discussion**

### **3.1 Liability of Internet Intermediaries on Copyright Infringement in Indonesia**

There are no clear regulations regarding the extent of the legal liability of internet intermediaries on online copyright infringements. However, according to the author, they can be liable for both criminal and civil crimes, namely:

#### **3.1.1 Criminal Liability**

In the realm of criminal law, internet intermediaries can be held accountable as an accessory or *medeplichtige*, specifically assistance before a committed crime by providing opportunities,

means, or information. This is similar to provocation (*uitlokking*), the difference being in the intention or will. In criminal assistance, the criminal intent already exists while in provocation cases, the intent is created by the provocateur [14].

As a legal consequence for acts committed by internet intermediaries as accessories of criminal acts, the provisions of Article 57 Paragraph (1) of the Criminal Code state that the accessory shall be sentenced to a lighter sentence than the perpetrator, specifically two-thirds of the maximum punishment of the crime committed.

Possible punishments according to the Copyright Law include imprisonment ranging from 1 (one) to 10 (ten) years in prison, as well as a fine of 100 million to 4 billion rupiahs according to Article 113. In addition, user-generated content (UGC), for example, e-commerce, can also be subjected to the provisions of Article 114 of the Copyright Law, as this article does not take into consideration whether the place of commerce is offline or online. The sanction for these business actors is a maximum fine of 100 million rupiahs.

Based on Law Number 11 of 2008 in conjunction with Law Number 19 of 2016 concerning Electronic Transactions and Information (EIT Law), copyright is recognized as an electronic document that must be protected. Therefore, internet intermediaries can also be held accountable. This is also confirmed in Article 15 Paragraph (2) which states that "Electronic system operators are responsible for their actions". Meanwhile, criminal liability regarding online copyright infringement is based on the EIT Law. Based on Article 32 Paragraph (1) and (2) in conjunction with Article 48 Paragraph (1) and (2) of the EIT Law, the maximum penalty is imprisonment for 8 and 9 years, respectively, and/or a maximum fine of 2 and 3 billion rupiahs, respectively.

Therefore, based on the provisions in the Copyright Law and the EIT Law, internet intermediaries can be held liable for criminal acts if deemed to have contributed to copyright infringement. However, based on the provisions of Article 95 Paragraph (4) of the Copyright Law, before the issuance of a criminal charge, an alternative resolution must be sought through mediation.

### **3.1.2 Civil Liability**

Civil liability can be divided into two, namely: (a) liability due to privity of contract, and (b) liability due to law. Furthermore, liability due to law is further classified into two types, namely (i) liability solely due to law and (ii) liability due to the actions of individuals.

For online copyright infringements, internet intermediaries are considered to have participated in copyright infringement as regulated in Article 99 of the Copyright Law even though the violation was committed by the users.

This is in accordance with Article 1365 of the Civil Code, which punishes both deliberate and accidental actions [15] as contained in Article 1366 of the Civil Code. Therefore, internet intermediaries that do not take preventive steps or respond to notifications of copyright infringement are considered responsible for losses based on negligence or inadvertence. The creator, copyright holder, or rights owner can file a claim to the Commercial Court.

## **3.2 Regulations on Internet Intermediary Liability in Some Countries**

Although common and civil law systems are distinguished not only in terms of historical heritage and origins, but also in handling various problems including legal sources, the legal profession, and legal education, there are clear similarities between the two, namely having to deal with various aspects of legal problems [16]. Therefore, comparing the legal system of two

countries, namely the United States and India, both of which have different legal systems from Indonesia, is very intriguing.

### **3.2.1 The United States of America**

Initially, the liability of internet intermediaries for copyright infringement was imposed in the United States based on jurisprudence, namely through judge-made law. However, this often resulted in various and inconsistent decisions.

This can be seen from several cases that occurred, where several judges decided that the internet intermediary is responsible for violations only because of the occurrence of the violation, for example in the case of Playboy Enterprises against Frena [17]. However, some judges decide using arguments and theories about legal responsibility such as direct, contributory, and vicarious liability, for example in the case of the Religious Technology Center against Netcom On-Line [18].

The case of Religious Technology Center against Netcom On-Line Communications Services, Inc. was tried and decided by Judge Ronald A. Whyte in the California Federal Court. In his decision, the judge decided that even though the defendant's (Netcom) system was only used to make reproductions by a third party (user), the defendant was deemed guilty of an infringement because when Netcom found out about the violation, it still allowed its existence and in turn enabling its continued dissemination to other internet users.

After this case and also as a form of response and follow-up to the WIPO Copyright Treaty in 1996, the Digital Millennium Copyright Act (DMCA) was unanimously approved by the Senator of the United States on October 12, 1998, and then signed by President Bill Clinton to become law on October 28, 1998.

The DMCA has been divided into 5 (five) titles, namely: (1) WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, (2) Online Copyright Infringement Liability Limitation Act, (3) Computer Maintenance Competition Assurance Act, (4) Miscellaneous Provisions, and (5) Vessel Hull Design Protection Act. The Online Copyright Infringement Liability Limitation Act (OCILLA) which is later known as DMCA 512 or safe harbor provisions regulates online copyright infringements.

The DMCA 512 regulates the extent to which the internet intermediary must be held responsible for online copyright infringement, namely:

- a. Internet intermediaries are not responsible for material posted by others on their site unless they receive a credible notice or clear evidence of a violation.
- b. Reproduction through transmissions, including caching is not subject to the responsibility and allows the network to function efficiently.
- c. The notice and takedown provision requires internet intermediaries to act quickly and efficiently.

Furthermore, the criteria for internet intermediaries to be protected by these safe harbor provisions are: (i) service providers may only provide transmission, routing, or connection for online communication; (ii) service providers may not take the initiative to transmit any material; and (iii) service providers may not change the material transmitted by their users. In addition, service providers are also required to provide notification regarding their policies in dealing with suspected copyright infringement to their users. The notification is part of the rules that must be approved when the user intends to become a member of the services provided.

The enactment of DMCA 512 can at least provide legal certainty for internet intermediaries against claims from creators, copyright holders, and related rights holders. In addition, it can also provide legal protection for intellectual property circulating on the internet. This is because

when a copyright infringement occurs, internet intermediaries are obliged to immediately remove the content in question from their system.

### 3.2.2 India

Like Indonesia, India is also a country that is placed on the USTR 2020 Special 301 Report, as many online copyright infringements occur in India [19]. However, India seems to be one step ahead of Indonesia in regulating internet intermediaries. This is due to the judges of the Indian Supreme Court who succeeded in issuing laws for the greater good of the Indian people [20].

Regulations regarding the liability of internet intermediaries first appeared in The Information Technology Act 2000 (IT Act 2000). In Article 2 Paragraph (1) letter w, an intermediary is defined as “any person who on behalf of another person receives, stores, or transmits that message or provides any service with respect to that message”.

The IT Act 2000 was then amended in 2008 and was later called the IT Act 2008. This differs from Indonesia in that the IT Act 2008 India regulates the extent to which internet intermediaries are responsible for online copyright infringements. This can be seen in the provisions of Article 79 of the IT Act 2008 which relieves internet intermediaries from responsibility regarding third-party information, data, or communication links, even if copyright infringements are present.

Internet intermediaries can be relieved from legal responsibility only if they transmit information or store content without initiating, modifying the contents, or selecting the recipients, and have carried out due diligence.

However, the exceptions in the provisions of Article 79 Paragraph (1) and (2) of the IT Act 2008 do not apply if the internet intermediary participates in law violations, either through conspiracy, provocation, persuasion, or possessing actual knowledge of the violation and failing to delete/remove access from the data. Therefore, if the internet intermediary has been proven to have committed the acts mentioned above, it will be subject to legal repercussions.

The liability of internet intermediaries for copyright infringement between United States and India is presented in the table below:

No.	United States of America (USA)	India
1.	Based on jurisprudence (case)	Based on jurisprudence (judge-made law)
2.	Regulated in The Digital Millennium Copyright Act (DMCA) 1998	Regulated in The Information Technology Act 2000 (IT Act 2000)/IT Act 2008
3.	<ul style="list-style-type: none"> <li>a. Internet intermediaries are not responsible for material posted by others on their site unless they receive a credible notice or clear evidence of a violation.</li> <li>b. Reproduction through transmissions, including caching is not subject to the responsibility and allows the network to function efficiently.</li> <li>c. The notice and takedown provision requires internet intermediaries to act quickly and efficiently.</li> </ul>	<ul style="list-style-type: none"> <li>a. Internet intermediaries can be relieved from legal responsibility only if they transmit information or store content without initiating, modifying the contents, or selecting the recipients, and have carried out due diligence.</li> <li>b. Safe harbour provision do not apply if the internet intermediary participates in law violations, either through conspiracy, provocation, persuasion, or possessing actual knowledge of the violation and failing to delete/remove access from the data.</li> </ul>

## 4 Conclusion

Although there are no laws regarding the liability of internet intermediaries on online copyright infringement, they can be subject to criminal liability through the concept of inclusion, specifically Article 56 of the Criminal Code. They can also be subject to civil liability by opposing the law as stated in Article 1365 of the Civil Code and negligence as stated in Article 1366 of the Civil Code. In addition, based on cases in the United States and India, it is necessary to revise the Copyright Law to regulate the liability of internet intermediaries by detailing the terms and obligations in preventing online copyright infringement or when an infringement occurs. This aims to provide legal protection for copyright owners as well as justice and legal certainty for internet intermediaries and their users.

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