* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 25.04.2016
Pronounced on: 23.12.2016

\+ **FAO(OS) 540/2011, C.M. APPL.20174/2011, 13919 & 17996/2015**

MYSPACE INC. ..... Appellant

Through: Sh. Rajendra Kumar, Sh. Prashant Gupta and Sh. Kanishk Kumar, Advocate.

Versus

SUPER CASSETTES INDUSTRIES LTD. ..... Respondent

Through: Sh. Amit Sibal, Sr. Advocate with Sh. Neel Mason, Sh. Ankit Relan, Sh. Harsh Kaushik, Sh. Vinay. P. Tripathi, Ms Ridhima Pabbi, Ms. Rashi Punia and Sh. Sameer Rohatgi, Advocates.

Ms. Shwetasree Majumdar and Ms. Tanya Verma, Advocates, for intervener.

Ms. Kanika Jain, Advocate, for Intervener/Flipkart Internet Pvt. Ltd.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This is a defendant's interlocutory appeal in C.S(OS) 2682/2008 ("the suit")wherein the order, on application by the plaintiff("Super Cassettes" or "SCIL")for interim injunction was granted and the appellant ("MySpace") was restrained from hosting on its website all of SCIL's works including future works. Its application for vacation of the previously granted *ex parte* interim injunction was dismissed. SCIL's suit claimed permanent injunction restraining Myspace from infringing and exploiting its intellectual property, primarily the copyright owned by it in cinematograph films, sound recordings, and literary and musical works and has also claimed damages for such exploitation. This court, by the present judgment is conscious of the caution sounded in regard to interlocutory judgments by the Supreme Court in *International Confederation of*

*Societies of Authors and Composers v AdityaPandey*2016 SCC Online 967 (decided: 20 September 2016),that *"an elaborate reasoning with the "footnote" that the same are prima facie or tentative is hardly an effective remedy to prevent the imprint of such observations on the human mind that mans the court at different levels."* The single judge's impugned judgment spanned 132 pages; this court has striven, but not entirely succeeded to cover the entire spectrum of the case, the arguments addressed, the case-law cited and also furnish its reasoning, by this judgment in slightly over a third of that length.

2. SCIL also known as T-Series, started its business in recorded audio and videocassette production and flourished to become one of India's largest music companies. It now owns and controls copyright in more than 100,000 songs in various languages. It claims to acquires and produce various copyrighted works such as films (cinematograph films), music videos (audio-visual songs), songs (sound recordings), underlying musical works (melody) and literary work (lyrics) and that for acquisition of such work, it invests substantial sums and bears risks. It claims to be the launch-pad for several talented individuals and to have invested significantly to ensure high quality standards in audio-video production. SCIL's business is exploitation of its copyrighted works either by sale of audio/ video records or by licensing their use (including for sale, reproduction, sound recording, etc.) and on multiple platforms like satellite television, radio, digital, Internet and mobile platforms. By its program- the TPPL scheme ("T-Series Public Performance Licenses") it grants licenses to all those forming the user-base of its works, including restaurants/ *discotheques*, TV and radio stations, malls, hotels, public performers etc. The licensees are enabled to play/ use/ perform/ or communicate the respondent's works to the public. The revenue garnered by these furthers SCIL's business and provides a public platform to the original artists to showcase their talent. SCIL also enters into licensing agreements with various Internet music and video sharing/ streaming platforms and Internet service providers. This helps it to regulate and protect the use of its intellectual property and also ensures that a balance is maintained between the rights of the owner of copyrighted work and the use of such work in emerging media.

3. Myspace (variously referred to as "defendant" or "appellant") is an Internet Service Provider (ISP) and claims to be an "internet intermediary "and operates the social

networking and entertainment website www.myspace.com. Its website was first launched in the United States but it now has global outreach. Its foray to India was sometime in 2007. When a user accesses Myspace from here she/he is automatically redirected to the website's India- centric version. Here users can access music works, entertainment videos, images, cinematograph works etc. without paying any fee. Essentially, Myspace provides a free of cost platform to its users and offers an interactive user-submitted network of friends, personal profiles, blogs, groups and photos, music, video, instant messaging services etc. Mere browsing or accessing content on Myspace does not require registration. If a user chooses to upload content on the website, albeit for free, he/she is required to register with Myspace. User registration is governed by the Myspace.com Terms of Use Agreement and Privacy Policy which oblige the registrant inter alia to respect the intellectual property rights of others and prohibits them from uploading, embedding, posting, emailing, transmitting or otherwise making available any material that infringes any copyright, patent, trademark, trade secret or other proprietary rights of any other person or entity. If MySpace notices that content uploaded on its website is in violation of its user terms, the content can be either removed or the membership of the violator can be terminated at its discretion. MySpace's business model, in addition to acting as a conduit for information, is also to provide automated ancillary services, whereby a limited license is sought from the user to use, modify, delete from, add to, publicly perform, publicly display, reproduce and display the User Generated Content (UGC)so as to facilitate access to user-stored material so that it can be converted into a format which is compatible with the website. Thus, it is through this agreement that it has a limited power to remove content if found violative of its user terms. It claims not to derive monetary gains from its User Generated Content (UGC). While advertisement is its chief source of revenue, the advertisements are not marked directly against the UGCs but are against licensed content through a service known as "Adwords". Here it is clarified by the appellant that while advertisements may exist against a UGC, their functioning is not tied to the content being viewed. Advertisements are generated by an automated process-which is term- centric and not content-centric. It explains that when a user types a search

term, the search engine displays results closest to the search term in descending order of relevance- these are "natural results".

4. The referencing service "Adwords" generates advertisements alongside the web content. How this service works is that a commercial entity reserves one or more keywords so that as and when search terms are typed by a user which resemble the keyword so registered, an advertisement is generated under the heading "Sponsored Link" which is displayed either on the right hand side of the screen or to the right of the natural results or above the natural results. MySpace states that the nature of its service, renders it somewhat vulnerable, that despite the user agreement, infringing material could make its way into the website. Being a US based company has in compliance with the US Digital Millennium Copyright Act ("DMCA"), which provides for intermediary laws, installed a notice and take down procedure. Under this *regime*, a copyright owner can send notice to the appellant that its content is on the website without any authorization and accordingly the appellant will take corrective steps by removing (taking down) the specified content. Other than this, the appellant has developed three safeguard tools on its own cost:

a) Hash[1] Block Filter

b) Take Down Stay Down[2]

c) Rights Management Tool

The hash block filter works by recording the "hash" and creating a "fingerprint" of the file, which has been removed; both of these are unique identifiers for that file. By doing so it is ensured that content which has been removed is not posted again. Thus, as soon as MySpace receives a notice for take down from an owner, it adds the hash of the file to the Hash-Block Filter and the fingerprint to the "Take Down Stay Down tool". The latter too ensures that once an infringing content is taken down it is not uploaded again. Other than this, a Rights Management Tool is available to all copyright owners for free. To use this

[1] A hash is a word or phrase preceded by a hash sign (#), used on social media sites such as Twitter to identify messages on a specific topic.

[2] A "take down" procedure is one where, upon receipt of notice regarding unauthorized upload of copyrighted material, the host sitewould remove the allegedly infringing file, and also take *digital fingerprint* of the offending material, then store the information binary numbers uniquely representing the file – in a database, to ensure that it will not be reposted without settling the controversy.

the content owner has to register with MySpace and create digital fingerprints of its contents by using a software designed by Audible Magic[3]. The content owner then provides the fingerprint to the appellant to block all such content, which have the same fingerprint. Essentially, if the first 30 seconds of any uploaded content matches the fingerprint provided by the copyright owner, it is blocked automatically. In this way, the appellant has created several mechanisms to ensure that copyrighted material is taken down from its website as soon as it detected.

5. Sometime in January 2008MySpace offered SCIL and other copyright and content owners the option of registering for its Rights Management Tool. Upon discerning infringing content on Myspace's website SCIL issued a legal notice dated 20.02.2008 to take down (i.e remove) such content towards which it provided a sample list of the webpages which were displaying its content and also claimed damages for infringement. On 12.03.2008, Myspace replied to the notice assuring SCIL that the infringed content identified by it had been taken down and had been placed in the "copyright filter" in order to prevent further infringement. SCIL alleged that Myspace was still broadcasting infringing content on its website despite the assurance that such content had been taken down. After this, the parties tried to amicably settle the issue, but were unsuccessful which finally led to the institution of the suit by SCIL. It filed the suit court alleging that MySpace's business model facilitates infringement of its intellectual property rights through a platform in which its works are made available to the public for viewing, distributing and sharing despite no authorization or valid license by it to the host, MySpace. A substantial amount of content is unauthorized audio-video clips and songs the copyright of which exists with several owners including the plaintiff. SCIL claimed that Myspace generates revenue from its website by strategically advertising alongside copyrighted content and that its terms and conditions agreement itself includes a clause which enables MySpace to procure a limited license from the uploader to modify, add to or delete uploaded content. SCIL is also aggrieved by MySpace's refusal to take down the infringing content from its website, by using existing technology, that resulted in

[3]A concern which provides automatic media content recognition software and services.

continued infringement. SCIL alleges that MySpace also invites and encourages users to upload additional content on its website thereby making the copyrighted work accessible to millions of viewers for free. Such unauthorised works are copied and stored under control by MySpace to facilitate further illegal distribution and sharing.

6. The plaint alleged that the extent of infringement can be understood by the way MySpace facilitates easy access to information on the website by a) providing identifiers along with the content like the name of the song, producer, genre etc.; b) allowing users to comment on the content which is viewable by other users; and c) creating "tags" on the uploaded content which serve as keywords to enable others to locate content on the site. It has also explained the flow of information on MySpace's website through a schematic diagram. SCIL urged that such freely available copyrighted content, which is otherwise available to users at a charge has made the website immensely popular- more the popularity, higher the traffic on its site which results in more views and consequently more revenue. Every "click" on SCIL's content in the Internet generates ₹ 1 and since this content is available across territorial borders and on multiple devices, the loss of revenue because of MySpace's website is immeasurable. Further, the free and easy availability of content on the website makes it unnecessary for users to legitimately buy CDs or DVDs and has resulted in substantial business as well as revenue loss for SCIL. Therefore, SCIL sought permanently injunction restraining MySpace from reproducing, adapting, distributing, communicating, transmitting, disseminating or displaying on its website any content the copyright of which exists with it and also sought damages. In its application for *ad interim* injunction SCIL urged that despite sending notices to MySpace and despite its assurance that content had been taken down, they were still available for public viewing. It also impossible, argued SCIL to keep track of its copyrighted content, because it was available the world over on MySpace's website and further fresh material was uploaded each second. SCIL asserted that since the interim injunction would be with respect to its own work MySpace would be free to continue its business with all other content. Furthermore, once the necessary licenses were secured by MySpace, it was free to upload and stream SCIL's content on its website. SCIL in para 47 of its application provided a list of its works (movies/ music albums) which were due for release in order

for MySpace to ensure that such works do not find way into its website without proper authorization. It relied on previous orders in *Super Cassettes Industries Ltd. Vs Youtube LLC & Ors*(CS (OS) No. 2192/ 2007) and *Super Cassettes Industries Ltd. Vs Yahoo Inc. and Anr* (CS (OS) No. 1124/ 2008) where it had claimed and was granted similar interim relief. Citing irreparable loss of revenue because of the continuing infringement the plaintiff sought the interim relief to restrain MySpace, its representatives, agents etc. from *"reproducing, adapting, distributing, communicating, transmitting, disseminating or displaying on their website www.myspace.com, www.in.myspace.com or any sub-domain thereof or otherwise infringing in any manner the cinematograph films, sound recordings and/or the underlying literary or musical works in which the Plaintiff owns exclusive, valid and subsisting copyright(s)"* and further temporary injunction to restrain such persons *"acting on their behalf and in active concert or participation with them or any of them from causing, contributing to, inducing, enabling, facilitating or participating in the infringement of, in any manner the cinematograph films, sound recordings and/or the underlying literary or musical works in which the Plaintiff owns exclusive, valid and subsisting copyright(s) on their website www.myspace.com, www.in.myspace.com or any sub-domain thereof or otherwise;"*

7. On 19.12.2008, when the suit and application was heard, the Court, while registering the suit passed the following interim directions:

> " *In the meantime… the plaintiff agrees as a gesture of goodwill, to handover the copies of the albums mentioned in para 47 of the plaint to Myspaces, for Myspaces to ensure that the copyright of the plaintiff in any of the aforesaid audio visual, songs, sound recordings and literary and musical works is not communicated to the public through/ on/ via/ the website of the plaintiff (sic) www.myspace.com."*

SCIL also had *to "furnish an updated catalogue of its works in which it has a copyright, to Myspaces"*. MySpace was to endeavour to *"ensure removal of the infringing contents in which the plaintiff have a copyright, from its aforesaid website and file an affidavit of compliance in this regard before the next date of hearing."* It is thus evident, that the *ad interim* order was made on assumption of MySpace's infringement, by acceptance of SCIL's allegations, without any discussion of the *prima facie* merits of the action.

8. MySpace in its written statement and reply stated that after the order of 19.12.2008 was passed, SCIL provided 9 CDs to it containing 11music albums(para 47 of the application). Another disk consisting of an updated catalogue of all SCIL's works too was given. So far as the 11 albums were concerned, MySpace sent it to Audible Magic Corporation to create digital fingerprints of all the songs featuring in those albums for the purpose of blocking them and from being uploaded on MySpace's website. MySpace found that the list and catalogue ran into almost 3000 pages with close to 150,000 titles rendering it technologically difficult to comply with the second part of the order. Instead, MySpace stated, that if SCIL were to use the fingerprinting service, for no cost, it would be a more practical and feasible approach to deal with infringement of copyrighted work as this was also the accepted industry practice. MySpace argued that by not registering for the RMT, the plaintiff was acting illogically, placing the entire liability on MySpace to track each and every work of its and accordingly buying their licenses. MySpace stated that SCIL as content owner could not disclaim its responsibility to monitor online content for possible violations. Simultaneously, MySpace appealed against the second part of the order (in FAO(OS) 31/2009).

9. Whilst it was pending the court granted it liberty to apply under Order 39 Rule 4 for vacation of the interim directions made on 19.12.2008. MySpace argued in its appeal that the order to "*endeavour to ensure removal…… before the next date of hearing*" was impossible to comply as the catalogue consisting SCIL's works ran into 10 volumes and it was difficult to discern the works which actually featured on its website. On the other hand SCIL argued in those appellate proceedings that infringing material was being uploaded every moment, rendering it impossible for the plaintiffs to pinpoint exactly which of its content was available on MySpace's website and it was because of these reasons that the entire catalogue was supplied. After hearing both sides and referring to the prayer made in the suit, this Court passed the following order on 06.03.2009

> "*12. In our view the prayer in the respondent's plaint is general in nature. It does not refer to specific titles in respect of which infringement has taken place. The catalogue when printed out gives the name and title of songs and films in which the plaintiff claims copyright. The plaint does not state that all of the songs/ films have been uploaded on the appellant's*

> *website. However, the scope and nature of the plaint is left to be determined in the suit. In light of this fact, we are of the view that as and when the respondent provides details of its songs and films which have been uploaded on the website of the appellant, the appellant shall immediately take remedial measures to remove the same from its website not later than within one week from the date of such communication. In our view, if such requisitions of the respondent are complied with within a week by the appellant, it would constitute sufficient protection of the respondent's rights as an interim measure, and would demonstrate the endeavour of the appellant to comply with the interim order dated 19th December, 2008. We, however, make it clear that nothing said in this order would come in the way of the decision of the learned Single Judge.*"

10. MySpace also moved an application under Order 39 Rule 4, CPC. It argued that the relief sought in the suit was open-ended and capable of compliance because it was a near-impossible task for MySpace to identify content which actually belonged to SCIL- there existed a technological constraint to search through millions of videos and identify those works which were owned by the plaintiff. MySpace stated that as an intermediary it did not possess any actual or real knowledge about the content being uploaded nor could it control the kind of content that was being uploaded except to the extent that it could remove that content which was stored in its systems once it received a notice detailing the content as well as it location (URL) from the copyright owner. It explained that once content was uploaded on the Internet, a unique address was generated called the Uniform Resource Locator (URL). Every time the content was shared, a fresh URL was created and since the Internet was a vast space, countless URLs holding the same content could be created. This resulted in a scenario where removing infringing content became impossible. Therefore, once the original owner of the works intimated MySpace about the content and its location, it would become much easier to remove it.

11. MySpace claimed that once it received notice dated 20.02.2008 for removing the content it promptly complied and that it was misrepresentation on part of SCIL before the court when it complained about non-compliance by MySpace in removing infringed works. For instance, SCIL had asked MySpace to remove its work titled *"Aajkiraat"*. After MySpace removed and blocked the song, it conducted a random search of the song and found that a remix (combination of two songs) of *"aajkiraat"* whose duration was only 01.15 minutes came up in the search. MySpace claimed that existing technological

tools only combed out songs which were an exact match to the one provided by the copyright owner; thus, songs which were just snippets or of poor quality or mashups and remixes could not be filtered out. Similarly, if the song was uploaded by a third party who had bought the license from a copyright owner, then by removing the content MySpace would be violating the user's right to use the works.

12. In the hearing of the suit, for interim orders, SCIL argued that MySpace, by using its content without licence or any authority committed infringing activities under Section 51(a)(i) and 51(a)(ii) of the Copyright Act (hereafter "the Act").It argued that the moment MySpace communicated SCIL's works to the public without permission and which consequently resulted in loss of revenue, the matter became a clear case of violation under Section 51(a)(i). It was further argued that MySpace was generating revenue by creating a website for users to upload unauthorized content; it was making profit by providing a "space" as contemplated under Section 51(a)(ii) and consequently MySpace was liable under the said provision too. In order to clarify its stance, SCIL argued that "place" under section 51(a)(ii) was to include not just a physical or tangible space but an intangible space too like the internet and that in the present case, the exception to Section 51(a)(ii) would not be invited as MySpace possessed the knowledge as well as had reasons to believe that the content being uploaded was without authorization from the original owner; this would be evident from the fact that all the technological tools were created only because MySpace had a reasonable apprehension of copyright violation on its website. SCIL asserted that the US Digital Millennium Copyright Act (DMCA) provisions did not apply, as the laws of this country i.e. the Act would apply. It was argued that Section 14 and 51 of the Act had to be read together to prove primary infringement of the intermediary. MySpace, by providing a space were actually authorizing users to make content available to millions of other users. Relying on several precedents, it was urged that MySpace had committed copyright infringement. The safeguard tools adopted by it were inadequate because, still rampant violation took place. If SCIL were to intimate MySpace, about a violation- so it was urged, especially in cases of fresh releases where maximum revenue is generated within the first few days of the

release, then by the time it took down the content, the work would have been communicated to a large audience resulting in substantial revenue loss to SCIL.

13. MySpace on the other hand argued that no injunction was warranted in the circumstances of the case it claimed to be only an intermediary and even otherwise since registration was free, no revenue was being generated because of the works of the users. As for "Adwords" it was argued that these were nothing more than hints. To illustrate it was stated if a user were to search for *"Punjaban"*, a song would appear in the results and along with it an advertisement, like *"Punjabi Matrimonial"* would pop up automatically because of the similarity in the keyword. It was emphasized that thousands of videos were uploaded each day to an audience of millions and the sheer volume of data in question made it impossible for MySpace to manually monitor uploaded content for infringement. MySpace tried to make a distinction between infringement happening in the real/ physical world and that happening in cyberspace/ virtual world. MySpace stated that to appreciate the nature of online content vis-à-vis its legal implications, international covenants- WIPO Copyright Treaty (WCT) and WIPO Performance and Phonogram Treaty (WPPT)had to be taken into account. It quoted Article 8 of the WIPO Copyright Treaty to explain that its role as a facilitator did not invite liability associated with infringement. MySpace also stated that by creating a website for users to share their content it was only acting as an "intermediary", under the Information Technology Act ("IT Act"). It argued that the provisions of the IT Act and Act had to be read harmoniously. As a US based company, it took several remedial measures in compliance with the DMCA. MySpace argued that not reading the IT Act and Act in a complimentary manner would lead to an absurd situation where an intermediary would be absolved from liability under the IT Act but would still invite strict liability under the Act; surely this was not the intention of the legislation as the entire reason for enacting Section 79 of the IT Act was to shield intermediaries from liability invited by primary infringers as long as the intermediary fulfils the conditions set out in the provision including exercise of due diligence and lack of actual knowledge.

14. MySpace highlighted that SCIL did not claim relief against any specific infringed work and had required it to remove all its works- both current as well as future works.

The impossibility of acting on such demand came in when a)MySpace was required to peruse through the current works, which runs into more than 100,000 titles and b) MySpace had to monitor of every future work being uploaded on the Internet. In the latter instance, another issue arose, i.e liability for infringement of works not in existence and were to be uploaded in the future could not be assumed or fastened. The *quia timet* relief sought by the plaintiff was impermissible in law. Lastly, it was argued that MySpace had several safeguard measures in place to track and remove infringing content, which included the Rights Management Tool, Take Down Stay Down tool, and the Hash Block Filter. All SCIL had to do was register with MySpace to take benefit of these technologies. In the absence of the plaintiff taking such recourse, the entire burden of liability could not have been transferred to the intermediary alone.

15. After hearing arguments of both the sides, the learned Single Judge made a detailed and lengthy analysis to ascertain whether a *prima facie* case for interim injunction was made out. Proceeding first with the history of internet technology and the consequent evolution of law to cope up with such technological advancements, the impugned judgment analysed relevant Copyright provisions under Sections 13, 14 and 51 and was of the opinion that under Section 51(a)(i), one is liable for infringement under two circumstances a) when he/she does those acts which the owner of copyright is conferred by the act to do, without the latter's authority or b) when a person permits any place for profit for infringement of copyright. Interpreting the word "any place" under Section 51(a)(ii), the learned Single Judge held that the terminology would include both physical and virtual place. The impugned judgment contrasted provisions of Indian copyright law from the UK CDPA Act, 1988 and the repealed UK Copyright Act 1956, and held that while the relevant provision under the UK Act of 1956 used the words "place of public entertainment", the Indian Act deliberately used *"any place"* to cover all places where infringement occurs without not restricting it to a class of place. It was noted that "apparatus" occurred in the UK CDPA Act, whereas Parliament in India had not explained the scope of "any place" and kept its import wide, to encompass technological developments including the creation of a new space- i.e. web space. The impugned judgment relied upon *Comdel Commodities Ltd. Vs Siporex Trade SA,* (1990) 2

All ER 552, which ruled that when new conditions arise in the society after the enactment of a statute, there cannot be an *a priori* assumption that the provisions of the Act would not apply.

16. The learned Single Judge also held that MySpace had created a "space" and allowed uploading of content by users, which was saved it in its database and collected a limited license to add, modify and delete content for that purpose. The placement of advertisements alongside uploaded content, resulted in profits which *prima facie* led to "permitting for profit any place" under Section 51(a)(ii). The single judge surmised that the kind of advertisement displayed before a movie clip - keeping the user busy till the actual content played which required MySpace's complicity. MySpace's post infringement safeguards, under the Sections51(a)(ii) and 55 of the Act could only assist in reduction of damages. An infringer's liability was not mitigated because safeguard tools were applied or the party had exercised due diligence post infringement. MySpace was aware of possible infringement, for which it created safeguard tools. It was held that provisions of the DMCA were of no help for decision because Indian laws contained no provision to balance an infringer's right with a content owner's. Creation of safeguard tools on apprehension of infringement did not preclude a finding of knowledge of infringement. The single Judge held that the DMCA and the Indian Copyright Act were not *pari materia* because there was no safe harbor in the Indian Act.

17. The Single Judge held that MySpace's refuge and claim under Section 79 of the IT Act, as safe harbor for intermediary liability was unfounded as Section 81 has overriding effect, contains a proviso- *excepting and thus protecting* copyright and patent owners' rights. It was also held that MySpace was not without knowledge of SCIL's works on its website because it had been provided an entire list of such works and had notified MySpace repeatedly about infringements. Knowledge was deduced by the limited license by MySpace when the content was uploaded, then saved on its server to enable its programmers to modify content and insert advertisements, company logos etc. to the video clips. Moreover an India-centric operational office, which modified works and inserted India centric advertisements into the videos, strengthened the inference of MySpace's knowledge and liability for infringement under Section 51(a)(ii). Section 14

of the Act, compels as a precondition for use of copyrighted works, "authorization" by the owner; has a wide import, which meant that MySpace should countenanced uploading of infringing works, this was distinguishable from permitting a place for profit under Section 51(a)(ii). The single judge was of the view that no *prima facie* case of copyright violation was made out under Section 51(a)(i). The Single Judge required further proof, at the time of trial, to establish infringement. It was held that in the absence of any proof that MySpace did wilfully flouted the Division Bench order of 06.03.2009 or that despite receiving notice of the SCIL's rights in particular works, it had not taken down the content, then there was infringement. MySpace's argument that it was an intermediary under Section 79 of the IT Act was not agreed to because, the single judge held that it did not provide access to a communication system to store, host or transmit third party information but also taking a limited license. Therefore, it transgressed the limited role an intermediary's limited role under Section 79(2)(a). Modification of content, that was uploaded, meant that it did not satisfy the conditions prescribed under Section 79(2(b). He also negated MySpace's contention to read harmoniously the provisions of the IT Act with that of the Act, ruling that doing so would lead to a situation unforeseen by the legislature. He held that MySpace's interpretation would lead to excusing liability under Section 79 and a copyright owner, despite proviso to Section 81 would be remediless. The judgment felt that proviso to Section 81 meant that the Copyright Act is a complete code of rights and remedies.

18. The impugned judgment held that MySpace could not use volume of titles as an excuse to shrug its responsibilities. To this end, the Single Judge provided possible solutions to MySpace inasmuch as it could, at the stage of modification, enquire about the works including its title and ownership and before directly making it available to the public, run a preliminary background check. The Single Judge granted *quia timet* <u>*interim*</u> relief, rejecting MySpace's argument stating that it was not limited to tortuous liability but also in cases of future wrongs in copyright cases. MySpace had stated that to trace out ownership in each and every work would be next to impossible. The court rejected this argued and held MySpace responsible to weed out unauthorized uploads and granted a prohibitory order- i.e. requiring MySpace to issue prior notice to the actual owners of the

content to take preventive action before the infringement even takes place. The Single Judge relied *upon Garware Plastics and Polyester Ltd. and Ors Vs. Telelink and Ors;* AIR 1989 Bom 331 to reject MySpace's contention regarding difficulty to segregate infringing from non-infringing material. The impugned judgment ruled that SCIL would suffer irreparable loss if injunction were denied; it restrained MySpace and its agents/representatives from modifying SCIL's works by adding advertisements, logos or sponsorships thereto or earning profits consequent to uploading matter on its websites or thereby make them available to the public "*without making endeavours to enquire the ownership of the plaintiff (as at that stage of modification, MySpace's have all means to enquire about the same) and thereby making them available to the public either by displaying (or playing or exhibition) of on the website or allowing the downloading from their website or otherwise of the said works in the modified form which will lead to permitting the place for profit within the meaning of Section 51 (a) (ii) of the Act and causes infringement of copyright of the plaintiff."* An injunction in relation to SCIL's *"future works to be uploaded by the users other than those which are mentioned in (a)"* and to delete *"the works of the plaintiff as and when the plaintiff provides the details of its songs and films which have been uploaded on the website of MySpace's, MySpace's shall immediately take remedial measures to remove the same from its website not later than one week from the date of such communication."* was given.

Appellant/ MySpace's arguments

19. MySpace urges that a substantial question of public interest has arisen with respect to the rights and liabilities of service providers, social media websites and other Internet intermediaries. It is argued that every time a copyright violation takes place, fixing liability on intermediaries- who merely provide an information-sharing platform, results in a dangerous trend. The manner of Internet functioning would be under threat. Elaborating it is urged that information dissemination over the Internet is different from(and in a "non- material" fashion) as compared to information dispersion in the material world. Therefore, application of Copyright laws should keep in mind this information dissemination over the Internet. Reference is made to two treaties, the World

Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty. In India, after the 2009 amendment to the IT Act, it cannot be said that the Parliament still fix liability on intermediaries even if they satisfy the conditions listed under Section 79 of the Act. Under the current legal scheme, MySpace cannot be held liable vicariously for the acts of others. MySpace says that its users are to respect others' copyrights, evident from its "User Agreement and Privacy Policy". If a user accepts the agreement, the onus not to upload copyrighted works is on the user.

20. MySpace also urges that the single judge erred as the relief granted is open, general and incapable of compliance. It is impossible to scan through millions of videos or audio files to remove which SCIL claims are copyrighted. Its catalogue has more than 150,000 songs and no *prima facie* case was made to show that such content was uploaded on MySpace's website. The direction to remove SCIL's future works i.e. works for which no copyright violation was shown; it is urged this is opposed to Section 51(a)(ii) which refers to "the work" implying a existing specific work not referring to or all or future works. The impugned order is far-reaching and erroneous. MySpace relies on *Time Warner Entertainment Company, L.Cpl. & Others Vs. RPG Netcom* 2007 (34) PTC 668 which held that a vague injunction order with respect to future works is unwarranted. Also, it is impossible for the Court to monitor implementation of the order in respect to content, not in existence. MySpace states that the Division Bench order dated 06.03.2009 is workable as it reckons notice and take down measures as practicable. MySpace urges that existing technology enables content removal only when a content owner gives to notice of infringing works. MySpace argues to keeping in place several safeguard tools, described earlier, to ensure that copyright of an individual is respected. The single Judge mandated it to take pre-infringement measures, i.e. go through each work for infringement before communicating it to the public. This is incapable of performance. MySpace besides may violate a content owner's right to fair use. MySpace cannot possibly know the nature of rights, which an up-loader has; the only solution is for SCIL to notify each of its works. Reliance is placed on the judgement in *Stephanie Lenz Vs Universal Music*572 F.Supp.2d 1150 (N.D. Cal. 2008) where it was held that an

obligation was on copyright owner to consider fair use before sending take down notification and failure to do so raised a triable issue as to whether the owner acted with good faith before sending such notification.

21. The Division Bench order dated 06.03.2009 is relied urging that it is workable since it reckons notice and take down measure as a practicable arrangement. MySpace urges that in existing technology, content removal is feasible if content owner gives to notice of the infringing works. MySpace submits to keeping in place several safeguard tools, which have been discussed above, to ensure that copyright of an individual is respected. However, the Single Judge has discarded this effort on the ground that the Indian law does not absolve liability of an intermediary merely because it has safeguard provisions. The impugned judgment failed to appreciate giving effect to vague directions, would result in MySpace shutting down its India operations; it would in effect have to geo-block its website in India, causing irreparable business and financial loss. It relies on the decision of a US Court in *Religious Technology Center Vs. Netcom Online Communication Services Inc.* 907 F. Supp. 1361 (1995) where the Court had upheld protection of an internet intermediary from liability. The Court was sensitive to the fact that holding internet intermediaries liable for all activities that cannot be reasonably deterred would be unworkable; as billions of bits of data stream through the Internet it would be practically impossible to sift infringing information from non-infringing ones. Counsel for MySpace also relied on *UMG Recordings Inc., et al Vs. Veoh Networks, Inc., et al*.,620 F.Supp.2d 1081, 1092 wherein the intermediary Veoh which had created a web space for users to upload, stream and download videos which were automatically modified into "flash format", was granted immunity from liability by application of S 512(c) of the DMCA (safe harbor provisions). Reliance was also placed on *Scarlet Extended SA Vs. Societe Beige Des Auteurs, Compositeurs Et Editeures*ECLI:EU:C:2011:771**;** *Tiffany (NJ) Inc. and Tiffany And Company Vs EBay Inc.*600 F.3d 93***;*** and the decision of the Amsterdam Court of Appeal in*BUMA and Stemra Vs. Kazaa* Amsterdam, Court of Appeal, 4th Three-Judge Civil Section, 28 March 2002, to assert the above proposition. *Society of Composers, Authors and Music Publishers of Canada Vs. Canadian Assn. of Internet Providers*; 2004 SCC 45 has been

relied upon to elucidate the protection granted to intermediaries from liability in case of copyrighted content under the Canadian law.

22. Counsel for MySpace argues that the Copyright Act forbids anyone to "permit" for profit communication of a work and that to grant such "permission", some minimum control should be shown.This control has to be in respect of works complained of. Reliance is placed on *Performing Right Society Vs. Ciryl Theatrical Syndicate Ltd*, (1924) 1 K.B.1, which held that exercise of control specific knowledge of performance preconditions conclusion of permission. MySpace asserts to not exercising any control or possessing knowledge of the infringed works. MySpace complains that the impugned judgment creates a legally baseless artificial distinction as it ignores the exception under Section 51 (2)(ii)- that excludes intermediary liability if it is unaware or has no reasonable belief that the works communicated to the public infringe copyright. That exception, it is urged contemplates "authorization" which is permitting a place for communicating copyrighted works. It is argued also that the amendment to the Copyright Act, w.e.f 21.06.2012 took note of the challenges faced by intermediaries despite following due diligence procedures. Reference is made to Section 52(1)(b), which provides absolute immunity to intermediaries, who are the backbone of the Internet, i.e. whose functions are core to the working of the Internet like telecommunication carriers and Internet service providers (ISPs). On the other hand Section 52(1)(c) provides a limited immunity to the intermediary. This immunity is available to intermediaries such as search engines, social media websites etc. so long as they have no reasonable belief that the content hosted infringes copyright. MySpace refers to its use of safeguard tools, and says that the erroneous opinion of the single Judge such use, constituted "actual knowledge". Here, MySpace contends that it is on the basis of "general knowledge" of infringement that the safeguard tools were introduced and this could not be the test for attaching secondary liability, when the accepted standard worldwide is "actual knowledge" and cited the "red flag" test which has evolved under the US law under Section 512 of the DMCA; in fact even in Indian law, under the IT Act, Section 79(3) requires exercise of due diligence, and employing safe guard tools was in furtherance of that requirement. Reference is also made to the Information Technology Intermediaries Guidelines issued on 13.04.2011 and

the subsequent clarification of 18.03.2013 (under Section 79) to assert that an intermediary was required to respond to a notice from a content owner within 36 hours of receiving such notice and comply by taking down the content within one month. This made it certain enough that safe harbor provisions existed even with respect to copyright act. Reliance is placed on *Viacom International Vs. YouTube Inc.*No. 07 Civ. 2103 (LLS) to show that general knowledge/ awareness is not enough to place liability on an intermediary. The intermediary should be "actually aware" of infringing content; further the onus of pointing out and policing infringing content is on the content owner and not on the intermediary and once the owner sends out notice or a "red flag" for taking down content, the duty is cast on the intermediary to remove it, failing which it would attract liability.

23. MySpace argues that Section 81 has an overriding effect and that the learned single judge erred in not appreciating that the *proviso* to the section only clarifies that the IT Act shall not prevent a copyright owner from exercising its rights under the Copyright Act. If the legislature intended to make an exception to the defence guaranteed under Section 79, a proviso would have been made within that section. Its omission means that Section 79 continues to exempt intermediaries such as the appellant as long as they satisfied the conditions mentioned therein.

24. MySpace also argues, additionally, that Section 52 (1)(b) and (c) provide it immunity from liability because transient storage for the facilitation of sharing is permissible and that a upon receipt of intimation that such storage has infringing content, is the intermediary responsible to remove it; in case within a specified period, the copyright owner does not secure an order from the court, such content can continue to be retained and facilitated in the intermediary's website. This amendment to the Act, emphasizes MySpace, supports its argument that without specific knowledge on its part, there cannot be secondary liability based on deemed or attributed knowledge.

Intervenor's Arguments

25. An intervenor's application C.M. No 3095/ 2012 was moved by Centre for Internet and Society, an independent, non-profit research organisation, accredited as a

permanent observer with WIPO which works in the field of internet research and society. On 22.05.2014, this Court, conscious of the nature of the issue and its implication on a substantial portion of the public, granted the intervenor liberty to assist the Court without impleading it as a party. Similarly another intervenor Flipkart Internet Pvt Ltd has also submitted several propositions on the IT Act and the Copyright Act along with various international as well as Indian judicial propositions on safe harbor provisions as well intermediary liability.

Arguments of plaintiff/SCIL

26. SCIL contends that MySpace is not an ISP, but a resource centre accessible through an ISP. Comparing MySpace with a mall owner, SCIL claims that it has both knowledge as well control over the content shown, on its website in the manner a mall owner exercises control over his premises. SCIL urges that Myspace is guilty of both direct as well as contributory infringement. It urges that MySpace copies the works of the respondent and creates a platform to share and download the content; MySpace solicits users to contribute content which may be infringing as well as non-infringing which it stores on its servers and then itself modifies and duplicates the content after which it places advertisements strategically to gain monetary benefits. SCIL argues that MySpace copies and stores content in its own servers and thereby commits direct infringement under Section 51(a)(i) of the Act. Further, it also infringes under Section 51(a)(ii) when it permits use of its "space" for profit by communicating to the public, SCIL's works. SCIL relied upon the decision of this Court in *Supercassette Industries Vs Nirulas Corner House (P) Ltd.* 148 (2008) DLT 487 where this court found MySpace hotel liable under Section 51(a)(ii) of the Copyright Act when it had set up television sets broadcasting songs and videos belonging to the plaintiff in its rooms for guests to view. The court observed that *prima facie* balance of convenience lay in granting relief of injunction to the plaintiff.

27. SCIL argued that several of its rights were violated, demonstrating it visually by a chart. It urges that under Section 51(a)(ii), once a copyright owner establishes that an intermediary has permitted its space for communicating infringing works to the public,

the burden is upon its ignorance or lack of reasonable grounds to believe that infringing content was uploaded on its website. The language of Section 51(a)(ii) shows that an infringer's lack of knowledge about infringement is irrelevant. MySpace had knowledge of continuing infringement despite notice- that was sufficient to hold its reasonable grounds of belief about infringement on its website. Reliance was placed on *Sega Enterprises Ltd. Vs MAPHIA*, 857 F. Supp. 679, 683 (N.D. Cal. 1994) to say that where there is knowledge, encouragement, direction and provision to enable infringement, the website is liable regardless of its lack of knowledge of exact location of the files. The exclusive right to exploitation, adaptation, storage including and especially electronic storage, reproduction and communication to the public was now violated because of MySpace's acts. Its inaction to take down offending content resulted in infringement.

28. SCIL argues that to claim exception sought by MySpace under Section 52(1)(b) and (c), it should satisfy the criteria spelt out. It asserts that the storage referred to in those provisions are "transient" storage, such as cached data and that stored temporarily to facilitate online functions, whereas MySpace permanently stores data on its site to make it available to its audience. According to SCIL, both Section 52(1)(b) and 52(1)(c) provide exemption in case of transient and incidental storage for electronic communication and electronic access to links. Transient storage should be of lawful content. Thus the owner should duly authorize the primary work; any transient storage then is exempt under Section 52(1)(b) and 52(1)(c). SCIL illustrates this assertion by stating that when cricket matches or songs are broadcast or streamed online on websites such as YouTube, licensing is an essential precondition. A streaming license may extend to content downloading activity. However, at times cached data is created automatically which temporarily stores data on to the servers to facilitate streaming. This kind of cached data is exempted under the amended provisions and not the kind that the appellant wilfully stores, i.e. entire content permanently.

29. SCIL relied on the Standing Committee report on copyright amendment, which had excluded only ISPs from absolute liability. Websites such as MySpace, that host content are protected only if they are unaware of infringing content. Thus, intermediaries except ISPs were not completely immune from copyright liability. It is urged that

MySpace's reliance on Section 79 of the IT Act is meritless. MySpace does not exercise due diligence and the moment it takes the license to modify uploaded works, it possesses knowledge about the infringing nature. MySpace is has to obtain the license from the original owner and not from the infringer. Furthermore, the proviso to Section 81clearly states that the rights of copyright and patent owners would not in any way be curtailed by the provisions of the IT Act. *Arguendo*, even if it were assumed that MySpace could claim safe harbor under Section 79, it does not fulfil the criteria enlisted in the provision. It would not fall under Section 79(1) because that deals with information held by an intermediary in its capacity as an intermediary. If an intermediary actively begins participation in communicating such content and does not comply with the requirements of Section 79(2) and 79(3), the safe harbor under Section 79(1) is inapplicable. Myspace initiates transmission, negating Section 79(2)(b), by setting up a website enabling users to transmit information. SCIL stresses that the term "initiates" is to be interpreted meaningfully. MySpace not only created the website, but also tracks and monitors activity what takes place on its web-space. Similarly, Section 79(2)(c) is inapplicable as due diligence required to be exercised under that section was not fulfilled. Neither did Myspace remove content SCIL asked it to, nor has did it terminate the subscription of an individual user who had uploaded infringing content. Similarly MySpace is in contravention of Section 79(3)(a) and (b) when it aids and abets copyright infringement and places the onus on the respondent to supply it with details of each of its works available on SCIL's website. Notice is brought to the fact that several other service providers, due to lack of technology to identify and remove copyrighted works have entered into voluntary license schemes to legally distribute copyrighted works.

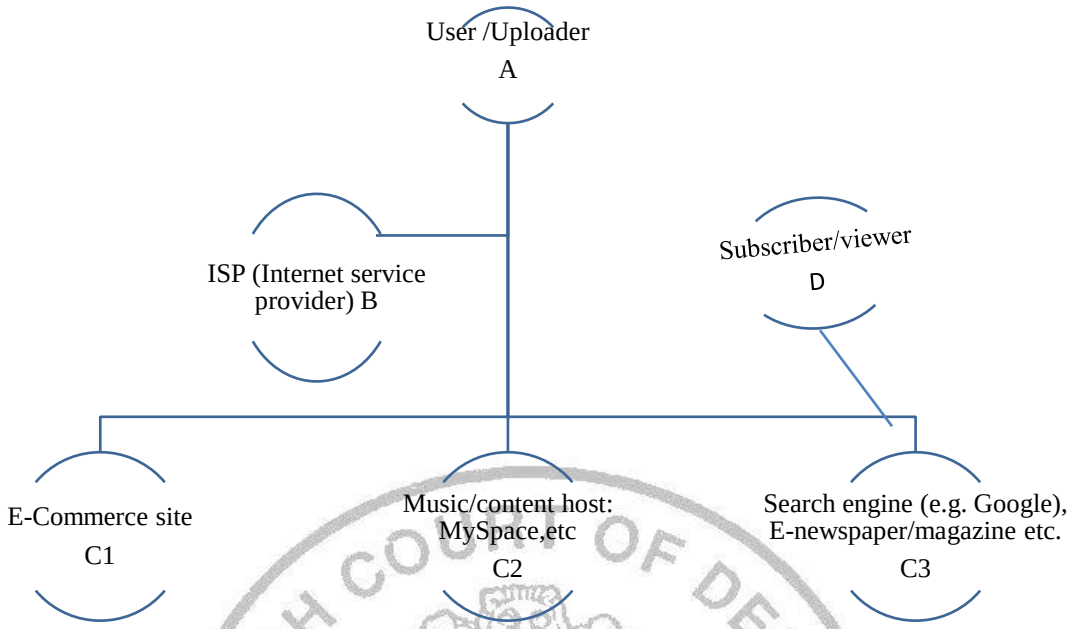
30. Emphasis is placed on Section 16 of the Copyright Act, which deems the Act to be a complete code, and thus any exemption or remedy would have to be found within the Copyright Act itself. MySpace's reliance on DMCA provisions is misplaced as the intent of that Act is not overriding copyrights. On a combined reading of Section 79 (safe harbor) and Section 81 the natural conclusion is that the Act has to be referred to even in the case of infringement by intermediaries and safe harbor provisions are accordingly limited. No harmonious construction of Section 79 and 81 along with the provisions of

the Copyright Act is possible, as the learned Single Judge rightly observed, because the objective sought under the Copyright Act is independent of the protection guaranteed to an intermediary under Section 79 and this bridge is created by the proviso to Section 81. If any remedy exists for the appellant, then that has to be sought from the Act. SCIL also contests that the impugned order is un-implementable and relies upon the Canadian decision in *Spectravest Vs Aperkni t*FSR [1988] 161where the High Court of Justice-Chancery Division held that in cases of intellectual property infringement, injunctions should be given not only to restrain current infringing activities which can be described with certainty but also restrain future/ fresh infringement which may not always be described exactly. In *Spectravest* (supra) it was observed that those who were infringing would find new and ingenuous ways to infringe and injunction orders cannot be "cabined or confined". SCIL also relied on *Pacific and Southern Co. Inc Vs Duncan*744 f.2d 1490 (1984). Here the defendant, a news company was broadcasting works, the copyright of which existed with the plaintiff. The United States 11th Circuit Court of Appeals held that a small damage recovery would be made everytime the plaintiff could identify the works infringing works. It was observed that where in cases there has been a past infringement and there is likelihood of future infringement, the Court must exercise discretion and grant injunction in respect of copyrighted works, whichmay have not necessarily been registered. Reliance was also placed on the 1994 judgment of the United States District Court in *SEGA Enterprises (supra)*where the Court granted injunction to the plaintiff which designed and created computer games and owned copyright in it against the defendant which ran an electronic bulletin board, which allowed for electronic storage, uploading and downloading of copyrighted work by third party users. Lastly, SCIL relied on *Garware Plastics* (supra) to urge that that if MySpace does not remove the infringing works and if the order of the single judge is not upheld then it would suffer severe financial losses despite the balance of convenience lying in its favour whereas no such hardship would be faced by MySpace which still had the option of obtaining appropriate licenses from the respondent to continue streaming its works. SCIL argues that Section 52 (1)(b) and (c) in fact reinforce its argument that primary liability occurs in the first instance when MySpace enables its users to post infringing content and that the exception

of Section 52 would be considered if at all, on case to case basis. However, as to the content itself, liability cannot be escaped.

Analysis and Conclusions

31. This Court, at the outset, notices that issues, which arise in this appeal, have far reaching implications to the parties as well as the general public at large, given the fact that world over a conflicting opinion prevails on intermediary liability. The court is equally conscious that this judgment should not preclude a full dress argument on these issues after evidence as to the extent of infringement alleged, the proportion of such infringement to the total content hosted by MySpace, and the proportion of advertisement and other revenue attributable to infringed works (as opposed to the entire revenue generated including non-infringed works) is clear. Therefore, the discussion proposed in this judgement would be to the extent possible, the barest minimum and decide on the soundness or feasibility of the *interim order* at this stage of the suit and centre round three broad questions: *first* whether MySpace could be said to have knowledge of infringement as to attract Section 51(a)(ii) and consequent liability; *Second,* does proviso to Section 81 override the "safe harbor" granted to intermediaries under Section 79 of the IT Act *third,* possibility of harmonious reading of Sections 79 and 81 of the IT Act and Section 51 of the Copyright Act. Before proceeding further, the nature of the dispute in respect of internet transactions, is explained through a diagram, extracted below:



The "user" at the top of the figure A is visitor of MySpace, who uploads content. The content that he uploads is available through the ISP (B), in C2- which is the website/platform created by MySpace At any given point of time, there can be potentially thousands: possibly hundreds of thousands of subscriber/viewers (D). If an original song or video is posted by its creator and gains popularity, the number of "hits"[4] would increase. The Internet Service Provider is the service provider.[5] The three figures (C1, C2 and C3) at the end of the figure are the intermediaries who host, or facilitate hosting of content.

Re Point No. 1:

32. MySpace argues that several million videos are uploaded on its website and it is not possible for it to monitor all data hosted on its website. Both under the Copyright Act and the IT Act, "actual" knowledge and not just suspicion is essential to fasten liability. Merely apprehension of unlawful content on the website and embargos placed through

[4]Denoting the number of times that song or video is viewed by those visiting the website it to hear or view it.

[5]ISP refers to a company that provides Internet services, including personal and business access to the Internet. For a monthly fee, the service provider usually provides a software package, password, username and phone number access.

user agreements do imply its knowledge of infringement. The provision for safeguard devices (the Rights Management Tool, Notice and Take Down provision, Take Down Stay Down tool and Hash Block Filter) does not imply actual knowledge of infringement. MySpace is aggrieved by the observation that it permitted use of its place for profit and had knowledge of copyright violations and argues that video modification or for advertisement insertion was through automated processes and did not suffer manual interference. The limited license obtained was to perform this automated task of modifying and inserting advertisements to the video: it was from the content up-loader-not SCIL. All these show that it did not possess "actual knowledge" nor have "reason to believe" that uploaded content infringed SCIL's rights. Clause 6.1 of MySpace's agreement with its users is relied on to say that it never claims any ownership of content; it clearly stated also that the entity which posts on MySpace's portal is with understanding that the limited license given to it is for all purposes and that the content owner would continue having rights *and by posting Content on, "through or in connection with the Myspace Services"* only limited license is granted to MySpace to display, reproduce, transmit, publicly perform it. SCIL, however, imputes knowledge to MySpace urging that its business model depends on inviting people to share and upload content on its website and then strategically inserting advertisements next to content, contributing to its revenue. Users do not profit from uploading. It is argued that MySpace stores permanently such works on its servers and placing advertisements and modifying data it proves that MySpace can control data shared on its website. It argues exercise of such control an element of knowledge surely exists. By providing a free platform for users to upload/ download/ stream/ view videos along with other interactive features like commenting and "liking" videos the appellant induces users to an attractive website and unlawfully enriches itself. In the circumstances, the learned Single Judge was correct in holding that the appellant had knowledge that the content on its website was infringing. SCIL states that it notified that its lists of titles owned; MySpace also dealt previously with SCIL and was therefore aware that songs likely to be uploaded did not in likelihood belong to its users or those uploading them. The existence of an India office with India

centric operations, which facilitate alteration of content by insertion of advertisements etc. points to knowledge.

33. Before going further on the issue of knowledge, it would be relevant to extract Section 51, which deals with infringement.

> *"51.* ***When copyright infringed.*** *-Copyright in a work shall be deemed to be infringed-*
>
> *(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-*
>
> *(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or*
>
> *(ii) 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; or*
>
> *(b) when any person-*
>
> *(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or*
> *(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or*
> *(iii) by way of trade exhibits in public, or*
> *(iv) imports into India, any infringing copies of the work.*
>
> *Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.*
>
> *Explanation.- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".*

34. The issue here is secondary infringement i.e. Section 51(a)(ii). On the issue of primary infringement covered under Section 51(a)(i), the Single Judge stated that further evidence was needed to show if MySpace directly infringed its rights. Since the subject matter of the appeal is only limited to Section 51(a)(ii), this Court shall restrict its

analysis to only the said provision. Section 51(a)(ii), in its first part states that when anyone permits for profit any place for communication of copyrighted work to the public he/she is liable for infringement. MySpace owns a website where third party users upload and view content. In a sense the appellant is provider of a place, albeit virtual, to communicate various kinds of works. MySpace does enter into a contract with users, but for a limited purpose. The contract does not specify the kind of works users would upload. Users are free to upload whatever content they wish to, without specifically informing MySpace about it. It provides the space freely, and users choose their content for communicating it to the public. What MySpace does is insertion of advertisements through automated processes without going through the content itself. Thus, it cannot be doubted that MySpace permits a place for profit as it definitely generates revenue.

35. Section 51(a)(ii) contains, in the second part, an exception, i.e of lack of knowledge or reasonable belief. Where a party is unaware and had no reasonable ground for believing that the works so communicated are infringing works, then, the first part, (casting liability would be inapplicable). The Single Judge held that a general awareness is sufficient, instead of specific knowledge to impute knowledge. The provision of safeguard tools and as clauses in the user agreement, concluded the single judge disclosed MySpace's general awareness that works uploaded (on its website) were infringing. This Court does not agree with the "knowledge" test applied by the Single Judge. Simply put, that test overlooks that unlike "real" space, in a *virtual* world, where millions of videos are uploaded daily, it is impossible under available technology standards to identify the streaming content, which actually infringes. Knowledge has a definite connotation, i.e a consciousness or awareness and not mere possibility or suspicion of something likely. The nature of the Internet media is such that the interpretation of knowledge cannot be the same as that used for a physical premise.

36. *Copinger and Skone James* on Copyright, 16th Edition, Vol 1classifies "knowledge"as both actual knowledge and constructive knowledge. Actual knowledge would connote, facts such as whether the infringer turns a blind eye or adopts as a "Nelsonian" outlook showing failure to take steps to inquire into the kind of work it

permits; this is to be seen in the context of digital media. A general awareness or apprehension that a work may be violative of copyright here would not pass the knowledge test. This rule when applied to an Internet service provider attains a different connotation. In the present case, where the system stores millions of videos, can MySpace be attributed with *specific knowledge* of infringement as to attract content responsibility? To say so would require MySpace - to know all owners of all works, and not just that of SCIL- a possibilitynot contemplated by the Copyright Act.A further aspect to this exception is "reason to believe" or what is referred to as constructive knowledge. Mere suspicion is insufficient; and similarly an apprehension is not enough. Here again would it be reasonable to expect a defendant/content host to sift through millions of videos or audio files to form a reasonable belief that certain specific data infringes copyright of someone? The requirement is to give specific information to the content host or the website(MySpace) that infringement occurs with respect to the specific work. A general or vague description of the works would be insufficient as this then leaves room for MySpace to rely guesswork as to what content has to be removed. Therefore, the onus is upon the plaintiff to give detailed description of its specific works, which are infringed to enable the web host to identify them. SCIL's argument here that insertion of advertisements or modification of content by MySpace disclosed its knowledge- is unpersuasive. MySpace consistently states that the advertisement insertions etc.are through automated processes-which has not been seriously disputed. The modification made is to the format of the video or audio file and not to its content. The automated process does not apparently involve MySpace's actual control. The extent of automation or for that matter the amount of manual/ human control can be discerned only at trial once evidence is led to show how the automatic process works and to what extent modifications are made and controlled. In the absence of such evidence, at a *prima facie* level this Court is of the opinion that if the modification/ addition is entirely through an automatic process without any human intervention then knowledge cannot be attributed to MySpace.

37. The question of deemed or constructive notice, in the opinion of the court, cannot be on the basis of any generalization, without inquiry into circumstances: it is a fact

dependent exercise. For instance, in the context of even a "deemed" notice about existence of encumbrance by way of statutory charge, under Section 3 of the Transfer of Property Act, the Supreme Court held that *"There is no principle of law imputing, to all intending purchasers of property in municipal areas where municipal taxes are a charge on the property, constructive knowledge of the existence of such municipal taxes and of the reasonable possibility of those taxes being in arrears. It is a question of fact or a mixed question of fact and law depending on the facts and circumstances of the case."*(*Cf. Ahmedabad Municipal Corporation v Haji Abdulgafur Haji Hussenbhai*AIR 1971 SC 1201). Likewise, it was emphasized in a later decision that *"A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it."* (*R.K. Mohammed Ubaidullah v Hajee C. Abdul Wahab*2000 (6) SCC 402). Knowledge is to be therefore placed in pragmatically in the context of *someone's* awareness (i.e a human agency); a modification on the technical side by use of software would*per se* not constitute knowledge. Nevertheless, if the software requires some kind of approval or authorization from a person or authority as opposed to a computer system then knowledge can be attributed. This however has to be seen at the stage of trial and is beyond the purview of this appeal.

38. In this case, SCIL claims to have sent MySpace several notices describing the infringing works. Despite this MySpace did not take down the content. MySpace counters that SCIL had supplied to it more than 100,000 songs and works in which it held copyright. MySpace performed a scan and found that several of these works listed SCIL's notice, were uploaded by distributors or performers. This presented two impossibilities, one that the list provided by SCIL did not point to specific works nor did it provide the location where the works were accessible; the list was vague and general and listed every work that SCIL produced without showing whether it was available on the appellant's site and importantly, that it completely ignored the "fair use" aspect. In the peculiar circumstances, this court agrees with MySpace's contentions. SCIL is under a duty to specify the works in which it owns copyright. Merely giving the names of all content owned by it without correspondingly stating those, which MySpace is *prima facie*

infringing, is contrary to the established principles of copyright law. It is only when a specific work is mentioned can it be said that MySpace possesses knowledge of a work being infringed on its website. Providing long lists of all works, tasking MySpace with identifying and removing infringing content is not enough. It is only when MySpace has specific or actual knowledge or when it has reasonable belief, based on information supplied by SCIL and if despite such knowledge or reasonable belief it fails to act can it be held liable for infringement. It would be crucial here to highlight a grey area, with respect to knowledge, e.g when a genuine licensee uploads works of SCIL. In the absence of a notice containing specific works there is possibility whereby MySpace makes a general search to identify the plaintiff's copyrighted work, it may come across works uploaded by authorized distributors/ promoters. The general notice would constrain it to blindly remove the content, which can lead to disputes. In some other instances, a licensed performer may upload a video which is a combination of two songs or a remix- where rights in one half originally vest with SCIL and the owner of the second could be some person other than SCIL, makes it impossible for MySpace to discern the nature of rights and whom it finally vests with. There could be still other cases, where a copyrighted work may be adapted in the form of another creation, based on the original.[6] In such cases, requiring removal would result in prejudice and injury.[7] In the absence of specific titles and locations it would be impossible for MySpace to identify and remove such content. In such cases it becomes even more important for a plaintiff such MySpace to provide a specific titles, because while an intermediary may remove the content fearing liability and damages, an authorized individual's license and right to fair use will suffer or stand negated. In other words, an indiscriminate and blind acceptance of SCIL's entire list to run a general filter and "take down" all content would result in grave damage and result in likely multifarious disputes: with up-loaders, many of whom are original creators in their own right and might have used a miniscule quantum of the copyrighted content in

[6] "adaptation" is defined as "(iv) in relation to a musical work, any arrangement or transcription of the work" in the Copyright Act.

[7] For an Indian Classical Carnatic instrumental version of Adele's album *"Hello"* has beenposted by one Mahesh Raghvan on YouTube (https://www.youtube.com/watch?v=wPTgMrOQ7fk- accessed on 20 December 2016). The video was viewed over 1.1 times. The title of the song is *Hello*, identical to the original title. Yet, it is a complete adaptation as the work is in a new format.

their larger original creation; with distributors, who might hold genuine licenses and with others who create versions, remixes or original titles which may have little content; still there may be other content uploaders whose material only superficially resembles with the titles owned by SCIL, because of the lyrics or titles but is otherwise genuine creation with its independent copyright. The remedy proposed by SCIL and accepted by the single judge in such cases results in snuffing out creativity. This court holds that in the context of the *prima facie* conclusion that there was no direct infringement by MySpace, the finding by the single judge of constructive knowledge and "secondary" infringement, is incongruous and not tenable. For the foregoing reasons, this court concludes that *prima facie* there was no knowledge on the part of MySpace, with respect to allegations of infringement of the plaintiff-SCIL's works.

Re Point No. 2 and 3

39. The Internet is a virtual space of undefined boundaries. Its sheer expanse renders enforcement of regulations a challenging task. Also exponential growth in hardware technology, makes Internet access easy. Most hardware devices are Internet compatible; further, the increase in geographical coverage and Internet speed (3rd and 4th Generation currently and eventually many more!)makes possible access to high-speed data in remote areas as well. These strides also throw up concerns about the value for another individual's right to privacy, reputation, or copyright etc. Most legal systems across the world have tried to keep pace with technology; yet the peculiar nature of the Internet, and its pace, renders the task difficult. Emergence of the Internet saw concerns regarding copyright, resulting in intensive discussions on the agreements framed under the Berne Convention (for protection of literary and artistic works) and Rome Convention (protection of performers and producers of phonograms and broadcasting organization). The emergence of new types of markets and new types of information dissemination needed revisiting of these conventions; as a result WPPT and WCT, commonly known as "internet treaties" were framed in 1996. They recognized the need for establishing a framework in domestic legal systems towards protecting copyright of individuals while balancing digital economy as well as rights of Internet intermediaries.

40. In the USA, DMCA was signed into law in 1998 to give effect to the 1996 Internet treaties and it created a system imposing limitations on the liabilities of internet service providers when found engaging in certain types of activities. These activities carried the immunity known as "safe harbor". Such safe harbor provisions apply as long as (i) the intermediary establishes, publicizes and implements a "Notice and Take Down" regime for removing content once a copyright owner sends a notice to the intermediary; (ii) there exists a system for identifying repeat offenders and removing them from the system and (iii) to make provisions for technical protection measures. Similarly in the European Union including United Kingdom, Internet Service Providers are given immunity under the European Copyright Directives (ECD). Here the range of enterprises covered under "ISP" is much larger and includes not just traditional service providers but also include hosting services, e-commerce merchants, social networking sites, cloud computing services, mobile hosts etc. Under the ECD, to maintain immunity, the ISP must not initiate the transmission, select the receiver of the transmission or modify the information contained in the transmission; similarly the intermediary is not liable for cached material as long as the above factors are complied with. Immunity is also subject to the ISP taking down cached content once it receives actual knowledge that the original source of the information has been removed or access to it disabled, or removal or blocking of access has been ordered by a competent court or authority. A hosting defence is also available to service providers which limits liability which may accrue on providing information storage services as long as the service provider does not have actual knowledge of unlawful activity or that upon receiving such knowledge fails to act expeditiously to remove or disable access to such information. Around the globe, similar regimes are prevalent especially in China and Korea.

41. In India, Internet technology is regulated by the IT Act. The Act also stood as a facilitator of digital commerce in the country by providing safeguard tools. In many ways the Indian "safe harbor" provisions for online intermediaries are similar to the ECD, not the DMCA. "Intermediary" is a broadly defined term, catering to all perceivable kinds of service providers on the Internet and is similar to the definition of intermediaries as found

in the ECD. Intermediaries find mention and are defined under Section 2(1)(w) of the Act which reads as follows:

> *"(w) "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online-payment sites, online-auction sites, online-market places and cyber cafes;"*

42. The concept of intermediaries attains more significance in the context of Section 79, which provides safe harbor to intermediaries in India subject to certain terms enunciated thereunder. This court is conscious that a significant amendment to this provision took place in 2008; the Information Technology Amendment Act was brought into force on 5 February, 2009. However, that amendment brought in greater clarity to the *nature of duty and the circumstances whereby intermediaries could be held liable.* It is therefore, relevant in the present case, as it covers the greater part of the period in these proceedings. Section 79 provides intermediaries exemption from liability for any third party information, data or communication link made available or hosted by it. Section 79 reads as under:

> "*79. Exemption from liability of intermediary in certain cases.-*
>
> *(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 made available or 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 communication system over which information made available by third parties is transmitted or temporarily stored or hosted; 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.*
> *(3) The provisions of sub-section (1) shall not apply if-*

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or authorise 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.

Explanation.- For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."

43. In this case MySpace, the appellant, facially falls within Section 2(1)(w) and qualifies as an intermediary/ Internet service provider because it acts as a "conduit"/ portal for information where users can upload and view content. It acts as a service provider by allowing users to upload, stream, share and view content which it hosts. This brings the court to the second part of the discussion i.e. whether MySpace can claim protection from liability as an Internet intermediary under Section 79. MySpace's business enables third parties enter into a contract with it to upload content. Undoubtedly such content can be both infringing or non-infringing/ original or copyrighted. What MySpace seeks to achieve is create a platform- without adding or contributing any information on its own, where users can freely exchange data in the form of songs, videos, documentaries etc. By this model all content is uploaded by users and qualifies as "User Generated Content" (UGC) and all that MySpace does is provides a neutral platform. To access or stream songs hosted by MySpace no subscription or signing up is required; users have to register with it and sign up under the terms and conditions to upload content or comment on the songs and videos. While signing up, Myspace requires its users to agree to its user agreement as well terms and conditions which expressly states that up-loaders are required to respect the IP Rights of others and not post infringing content. Clause 10 of its Privacy Policy reads as under:

"*10. Protecting Copyrights and Other Intellectual Property*

You may not use the Myspace Services in a manner that violates other's intellectual property rights. If you are an intellectual property owner that believes

its rights are being infringed by a use of the Myspace Services, you can contact us. More"

Elaborately, this is stated under Clause 10 of the Myspace Terms of Use Agreement:

"*10. Protecting Copyrights and Other Intellectual Property*

Myspace respects the intellectual property of others, and requires that our users and Members do the same. You may not upload, embed, post, email, transmit or otherwise make available any content that infringes any copyright, patent, trademark, trade secret, privacy, publicity or other proprietary rights of any person or entity. It is Myspace's policy to terminate, in appropriate circumstances, the membership of repeat or substantial infringers. If you believe your work has been copied and posted on or through the Myspace Services in a way that constitutes copyright and/ or trademark infringement, please see the Copyright Infringement Notice Form and the Trademark Infringement Notice Form where you may notify Myspace of your complaint. More information about copyright and trademark can be found here."

44. MySpace clearly places an embargo on its users from uploading content in which they do not possess the relevant rights and at the same time gives content owners the option of notifying them in the event that they find the content hosted on its website is without due license. It claims immunity from liability, as an intermediary following due diligence as well complying with the provisions of Section 79. It contends to neither initiating the transaction nor selecting its receiver. As far as modification is concerned, MySpace urges that the modifications (by inserting advertisements) are automatic and are part of the core system with the only purpose of making the content compatible with the webpage. This being the case, the argument by MySpace is that it complies with the requirements of Section 79(2)(b) and consequently should be guaranteed protection under Section 79(1).

45. SCIL, the respondent opposes this and states that the appellant modifies the content wilfully and besides this has placed advertisements to make profits and consequently it cannot seek protection under the safe harbor provisions. Furthermore, by virtue of the overriding Section 81 of the same Act and more importantly its proviso, the safe harbor provisions would be of no avail to the appellant and that ultimately, only the provisions of the copyright act, specifically Section 51(a) would be applicable. The learned Single Judge agreeing with the respondent held that the appellant was barred from

seeking relief under Section 79(1) and that only the copyright act would apply to it. Holding this, the Single Judge found the appellant *prima facie* to be liable of secondary copyright infringement under Section 51(a)(ii); on primary infringement the Single Judge was of the opinion that no prima facie case existed which warranted interim relief and that a trial would be needed to prove primary or direct liability under Section 51(a)(i).

46. Section 79, has an overriding effect; it begins with the words "*Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3),*" which means that the only restriction to be placed in the application of Section 79(1) is contained within the section: Section 79 (2) and Section 79 (3). This means that irrespective of any other law, an intermediary is guaranteed a safe harbor and the only restriction comes from Section 79(2) and (3). However, the added twist in construction arises due to the proviso under Section 81. Section 81 which itself provides for an overriding effect of the Act reads as follows:

> *"Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*
>
> *Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970)"*

Interestingly, the amendment to Section 79 came into effect from 27.10.2009 and through the same amendment a proviso was added to Section 81. What prompted Parliament to amend Section 79 still remains a speculation but the deliberate act of adding the proviso to Section 81 could only lead one to assume that the Parliament intended to not disturb the rights of copyright or patent holders in light of the 2008 amended provisions to the IT Act. This is also apparent from the Intermediary Guidelines Rules, 2011 ("Rules"), which was framed as clarification to the 2008 amendment. Observing the language of Rule 3(2)(d) of the Rules, an intermediary would be required to inform users by including in its user agreement or terms and conditions to not host, display, upload, modify, publish, transmit, update or share any information that "*infringes any patent, trademark, copyright, or other proprietary rights*". Reference is also made to the report of the Parliamentary Standing Committee which states that the proviso shall be such that the

rights conferred under the IT Act shall be supplementary to and not in derogation of the provisions of the Copyright Act or the Patents Act. While it is true that Reports of Parliamentary Standing Committees cannot be the absolute basis for interpreting statutes, however, in the absence of any further discussion on this aspect, this report is a relevant tool in discerning the intent of the Parliament in enacting the proviso at the same time of introducing safe harbor provisions.

47. In this Court's opinion, Section 79 grants a measured privilege to an intermediary. However, that would not mean that the rights guaranteed under the Copyright Act are in any manner curtailed. All Section 79 does is regulates the liability in respect of intermediaries while the Copyright Act grants and controls rights of a copyright owner. Under the circumstances, it is difficult to conceive how one would pose a barrier in the applicability of the other. The true intent of Section 79 is to ensure that in terms of globally accepted standards of intermediary liabilities and to further digital trade and economy, an intermediary is granted certain protections. Section 79 is neither an enforcement provision nor does it list out any penal consequences for non-compliance. It sets up a scheme where intermediaries have to follow certain minimum standards to avoid liability; it provides for an affirmative defence and not a blanket immunity from liability.

48. At the other end is the Copyright Act which does not specifically mention or define internet intermediaries nor does it lay down any special protection except as provided for under Section 52. Even under Section 51, the infringement contemplated is general in the sense that it does not distinguish between virtual space and actual physical space. Parliament by amending the IT Act intended to create a separate provision and *regime* for intermediaries. To avoid the consequence of a width and sweep of Section 79, resulting in blanket immunity to intermediaries, Parliament deemed it essential to state that copyright owners could still pursue legal remedies against such intermediaries in specified circumstances. To put it differently, but for the proviso (to Section 81), copyright owners would have been unable to pursue legal recourse against Internet intermediaries. Under the current regime, while private copyright owners can still demand action against intermediaries who may themselves post infringing content, intermediaries

can seek safe harbor where the content is uploaded by third party users or is user generated.

49. Here it is pertinent to mention that while Section 51 of the Copyright Act provides for a system of "notice", Section 79(3) contemplates "receiving actual knowledge" or through notification by the government or its agency. The scope was widened in *Shreya Singhal Vs UOI* (2015) 5 SCC 1, where actual knowledge was held to mean a Court order in cases relatable to Article 19 of the Constitution of India. In case of Section 51(a)(ii), the only exception is that MySpace was not aware or had no reasonable grounds to believe that the content was infringing. Section 79(3) perhaps is more mindful of the way the internet functions and supplemented knowledge with the term "actual knowledge". Given the supplementary nature of the provisions- one where infringement is defined and traditional copyrights are guaranteed and the other where digital economy and newer technologies have been kept in mind, the only logical and harmonious manner to interpret the law would be to read them together. Not doing so would lead to an undesirable situation where intermediaries would be held liable irrespective of their due diligence. By acting as mere facilitators and despite complying with legal norms, intermediaries can attract great liability, for no fault of theirs which in the long run would not only discourage investment, research and development in the Internet sector but also in turn harm the digital economy- an economy which is currently growing at a tremendous pace and without which life could potentially come to a standstill. Surely, such a consequence was not intended by Parliament, which mindful of techno- legal developments around the world created for safe harbor provisions. Another aspect is the manner how Internet is accessed. If a strict regime is implemented with respect to intermediary liability, such intermediaries could conveniently migrate to a location where data protection laws are not as rigorous and the content would still be accessible. Under such circumstances while the economic loss is one aspect, it would become near impossible to trace intermediaries to take down content.

50. Section 79(3) of the IT Act specifies that when a person has actual knowledge or upon notification by the appropriate government or its authority fails to expeditiously remove or disable access to an unlawful content then the immunity granted under Section

79(1) is revoked. The knowledge contemplated under this section is *actual* knowledge. In *Shreya Singhal* (supra), Section 79(3) with Rule 3(4) of the Rules were read down to mean receipt of actual knowledge from a court order or on being notified by the appropriate government. However, this was in respect of restrictions under Article 19(2) of the Constitution of India. The Supreme Court was conscious of the fact that if millions of requests for take down are made, it would become difficult for intermediaries (such as Google) to identify legitimate requests. In the case of copyright laws it is sufficient that MySpace receives specific knowledge of the infringing works in the format provided for in its website from the content owner without the necessity of a court order.

51. Several judicial systems around the world have ruled on knowledge and what would constitute knowledge so as to invite liability. Under the DMCA, a *''red flag''* test, which has both subjective and objective elements. In determining whether the service provider was aware of a ''red flag,'' the subjective test of whether under the given facts and circumstances a reasonable observer could discern infringement, however such determination should be arrived at by using an objective standard. In the US judgment- *Viacom v YouTube* (supra)**,** Viacom claimed copyright infringement against YouTube, which is a famous Internet service provider**.** It was held YouTube (an online intermediary) qualified for safe harbor provisions under the DMCA and the court outlined of the *"Red Flag"* test to determine whether the defendant had specific and identifiable knowledge or just a general awareness of the infringing activity on its website. The Court also acknowledged "fair use" and volume of data that such intermediaries host and observed as under:

> "*That makes sense, as the infringing works in suit may be a small fraction of millions of works posted by others on the service's platform, whose provider cannot by inspection determine whether the use has been licensed by the owner, or whether its posting is a "fair use" of the material, or even whether its copyright owner or licensee objects to its posting.*"

While talking of red flag the court held as under:

> "*Although by a different technique, the DMCA applies the same principle, and its establishment of a safe harbor is clear and practical: if a service provider knows (from notice from the owner, or a "red flag") of specific instances of infringement, the provider must promptly remove the infringing material. If not,*

the burden is on the owner to identify the infringement. General knowledge that infringement is "ubiquitous" does not impose a duty on the service provider to monitor or search its service for infringement. "

52. In the 2013 decision of *UMG VsVeoh*718 F 3d 1006, 1026, the 9th Circuit Court of Appeals granted the intermediary Veoh safe harbor protection under **§** 512 of the DMCA. In its earlier decision of 2008, the Court found that the software functions of Veoh including the process for storing data was covered under safe harbor provisions. Safe harbor protected conversion of videos into flash form by chunking videos to make it more accessible for easy viewing and downloads by the user, which only affected the form and not the content of the movies. In 2013 too, whilst largely approving the 2012 decision in *Viacom Vs YouTube* (supra), the court held that safe harbor provisions apply and recognized that web hosting services would have to store user material to make them accessible to other users and also held that specific knowledge of a particular infringing activity would be required in order to fulfil the objective element of the "red flag" test. In another context but on the red flag issue, *Perfect 10 VsCCBill*, 488 F.3d 1102 it was held that mere storage of files with names suggestive of infringement by a third party itself would not be a red flag. It was emphasized that **§** 512 did not require service providers to police the content on their server but rather to terminate at an "appropriate time" after having actual knowledge of infringing activity. MySpace relies upon *Religious Tech Centre* (supra), which was decided before the DMCA came into effect. This Court finds some merit in the observations made in that decision. The Court held that where the infringing subscriber is clearly directly liable for infringement, imputation of liability on countless service providers whose role is nothing more than setting up and operating systems which necessary for the functioning of the Internet is illogical. It was further held that finding intermediaries responsible for the act of others, which cannot be deterred would be impractical and theoretically impossible especially given that "*Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from non-infringing bits*". An objective test was prescribed where the Court held that had the defendant not received notice from the plaintiff then it could be said that it did not have knowledge. However, in that case since the defendant received notices for taking down

content, and yet refused to acknowledge and remove it, the court held it to be liable of contributory infringement. This judgment lays down an objective test that in case of Internet intermediaries, if a notice is sent and no action is taken then, MySpace would be liable under secondary infringement. In *A& M Records Inc v Napster, LLC* 239 F.3d. 1004 (2001) the issue was whether Napster, the defendant was liable for deliberate knowledge; what was the applicable standard for deciding an intermediary's infringement. On the facts, it was held that Napster had actual information and knowledge of copyrighted infringed works on its site. The appellate court indicated the relevant test for the purpose:

> *"We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. ... Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.*

Napster was held to possess *actual* knowledge that *specific* infringing material is available using its system which it could block access to the system by suppliers of the infringing material, and that it failed to remove the material. In a later decision, the US Supreme Court had occasion to consider the issue of copyright infringement in the context of software that had potentially infringing use. In *MGM Studios Inc v Grokster, Ltd* 545 US 913 (2005) the proper test in such cases was laid down:

> *"We hold that 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."*

More relevant for the discussion in this case is the test indicated for discerning intent:

> *"it has to be shown that the distributors of the program have advertised and/or otherwise induced its use for copyright infringement; if this intent can be shown, additional contributory aspects may be relevant. For example, MGM et al. had asserted that the defendants' refusal to incorporate protocols that would filter copyrighted materials from the file-sharing network constitutes an intent to promote copyright infringement."*

Justice Souter also noted that

> *"...in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative*

steps to prevent infringement, if the device otherwise was capable of substantial non infringing uses. Such a holding would tread too close to the Sony safe harbor."

53. More recently, in a judgment dated 16th June 2016 in *Capitol Records, LLC v. Vimeo, LLC*. 826 F.3d 78, the US Second Circuit went a step further and held that to disqualify a service provider from safe harbor, the plaintiff is under burden of proving that the defendant had knowledge. Interestingly the Court held that mere interaction by a service provider's employees with user videos of recognizable songs did not imply knowledge Furthermore, a mere suspicion by the service provider's employees' that infringement was taking place on the site and sporadic incidents of alleged employee encouragement of user infringement, was insufficient to negate the safe harbor protection. The High Court of Australia in *Roadshow Films Pty Ltd. VsiiNet Ltd* [2012] HCA 16 absolved the liability of iiNet, which was a peer to peer service provider. The Court was of the in order to ascertain liability what would be relevant is to see the extent of control the intermediary has in preventing the infringement, the relationship between the service provider and the infringer as well as if there are any reasonable tools to control or prevent infringement. No liability could be attached on iiNet, which exercised no control on the content uploaded, nor could it modify or take down the content. In the absence of such control and a limited contractual relationship- one entered into only for the purpose of using iiNet's software, it could not be held liable for infringement.

54. To attribute knowledge to the intermediary industry would mostly likely lead to its shutdown, especially where content is of this magnitude and size. Closure of website and business would inevitably follow, for instance, if messenger services like Whatsapp or social media portals like Facebook or Twitter, (given the number of users registered with these service providers as well as the volume of information being broadcasted/ "forwarded"), were held liable for each infringement. The greater evil is where a private organization without authorization would by requirement be allowed to view and police content and remove that content which in its opinion would invite liability, resulting in a gross violation of the fundamental right to privacy.

Due Diligence

55. Parliament was mindful of a content owner's rights and accordingly mandated intermediaries to follow certain minimum standards of diligence. These standards are set out under Section 79 of the IT Act read with the Intermediary Guideline Rules, 2011. Section 79 provides an affirmative defence to an intermediary as long as it complies with the associated conditions. Under Section 79(2)(a) an intermediary can seek safe harbor protection if its role is limited to "*providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted.*" MySpace's business –in its own words is one where it owns and controls servers that stored data *permanently* unless specifically deleted by it or the user. It however points out that this permanent storage of data is part of how the Internet, especially service providers function. Storage is necessary to transmit or host data. Storage could be either on the user's hardware device, as in the case of "peer to peer sharing" networks, or in a central server like the ones contemplated of in MySpace's case. Storage is an essential part of the transmission/ hosting process and MySpace only provides access to system to third parties enabling transmission of information. It is necessary to distinguish made between "transmitted", "temporarily stored" and "hosted". Transmission includes both live data: such as live streaming as well as data saved on a system for transmission. Parliament did not distinguish between the kinds of data transmission. Problems might arise in the case of stored data, where content, for the purpose of transmission is stored on the server of the service provider. In such cases too knowledge (of infringement) becomes relevant. If the host has specific knowledge that the transmitted content is unlawful, then no safe harbor can be granted. Another term used under 79(2)(a) is "host". Reference is made here to Rule 3(3) of the Intermediary Rules, which was released by way of a clarification to Section 79 of the IT Act. Rule 3(3) specifically provides that an intermediary shall not knowingly host or publish any information for the purpose of sub rule 2 to Rule 3. Rule 3(4) emphasizes on intermediaries whose computer system are used for storing or hosting or publishing of information. The relevant portions of the intermediary rules are extracted below:

"Information Technology (Intermediaries Guidelines) Rules, 2011

3. ***Due diligence to be observed by intermediary*** *— The intermediary shall observe following due diligence while discharging his duties, namely : —*

XXXXXX XXXXXX XXXXXX

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that —

(a) belongs to another person and to which the user does not have any right to;

(b) is grossly harmful, 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 whatever; ….

….

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force;

…….

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation

(3) The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2):

Provided that the following actions by an intermediary shall not amount to hosing, publishing, editing or storing of any such information as specified in sub-rule: (2) —

(a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource;

(b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorised by the intermediary pursuant to any order or direction as per the provisions of the Act;

(4) 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). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

(5) The Intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to immediately terminate the access or usage rights of the users to the computer resource of Intermediary and remove non-compliant information."

56. Furthermore, under Section 79(2)(b) an intermediary should not initiate the transmission, select the receiver of the transmission and select or modify the information. It is reasonably clear that MySpace complies with the first and second sub-clauses; it has a "free for all" platform, which by itself does not initiate the sharing feature. While it has created the "share" option that *per se* does not mean that it "initiates" an action. Content, which is shared can be both lawful and unlawful and in any case at a *prima facie* stage, this Court does not discern that MySpace initiates the transmission; the usage of that feature rests purely in the hands of third party users. Similarly it does not choose its audience/ receiver. Anyone with Internet access can open its website and be a receiver/ viewer of the data being transmitted. Now, on the third sub-clause of whether MySpace selects or modifies information, this court at a *prima facie* stage finds that firstly the modification is to the format and not to the content and secondly even the process of modifying the format is an automatic process without either MySpace's tacit or expressed control or knowledge. In the circumstances this Court concludes that MySpace *prima facie* complies with the requirements of Section 79(2)(b).

57. The other aspect that needs to be complied with is the "due diligence" clause under Section 79(2)(c). Here once again, the Intermediary Rules are relevant-especially Rule 79 (3). MySpace's website -for purposes of viewing does not require the user subscription to its terms and conditions. However, for the purpose of uploading, sharing, commenting etc. subscription with MySpace is needed and for this purpose an agreement is entered into between the parties. To comply with the due diligence procedure specified in the Rules, MySpace has to publish its rules, regulations, privacy policy and user agreement for access of usage. These agreements and policies on the appellant's website must comply with Sub Rule 2 of the Rules. MySpace has annexed its user agreements and privacy policies which suggest due compliance with the said rules. It requires its users to comply with its privacy policy and user agreements before they can create their accounts with the appellant in order to modify, add, host, upload, and transmit etc. their data. This however, does not end the list of duties MySpace has to follow. There are several users who may agree to the terms and conditions and still upload infringing content. Under Section 79(3) read with Rule 3(4) of the Rules posit an intermediary on receiving "actual knowledge" or upon obtaining knowledge from the affected person in writing or through email to act within 36 hours of receiving such information disable access to such information. If copyright owners, such as SCIL inform MySpace specifically about infringing works and despite such notice it does not take down the content, then alone is safe harbor denied. However, it is for SCIL to show that despite giving specific information the appellant did not comply with its notice.

40. In view of the above discussion, this Court is of the considered view that proviso to Section 81 does not preclude the defence of safe harbor for an intermediary in case of copyright actions. Accordingly it is held that Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously.

Applicability of Section 52 of the Copyright Act

58. An additional defence was later included that MySpace was shielded from liability by virtue of Section 52(1)(b) and (c). It is clarified here that the amendment to Section 52

of the Copyright Act, w.e.f from 21.06.2012 would not be applicable in the circumstances of the case. Relevant portion of Section 52 is as under:

"52. ***Certain acts not to be infringement of copyright.*** *-(1) The following acts shall not constitute an infringement of copyright, namely:*

XXXXXX XXXXXX XXXXXX

(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;"

59. Section 52(1)(b) and (c) refer to transient and incidental storage. Transient means any work which is temporary or impermanent and incidental would mean something subordinate to something of greater importance (Black's Law Dictionary, 7th Edition). These include "cached" data, web cookies or any other like form of data, which is generated automatically to improve the performance of the core function. The ECD, under Article 13, refers to caching as an "automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of that service." Concise Oxford English Dictionary**,** 10th Edition defines *caching* as an *"auxiliary memory from which high-speed retrieval is possible"*[8]. While ISPs may generate cached content as part of the process, the content in question is of a different type. Hosting and storing data, as observed earlier does not qualify to be referred to as incidental or transient data. The nature of the data being uploaded is of a permanent type, one which is accessible

[8] http://www.dictionary.com/browse/caching defines this expression, in relation to computers as *"a temporary storage space or memory that allows fast access to data.."*

whenever demanded or searched for. These are the major functions and any storage which is of a temporary form aiding in the better performance of the main function would be covered under Section 52(1)(b) and (c). Under the current circumstances of the appeal, the content in question is the permanent kind. If it is found, during trial that the appellant stores temporary information to further its main goal of providing smooth access to permanent content, then it can choose to seek defence under Section 52(1)(b) and (c).

The nature of relief

60. MySpace urged that the relief provided by the single Judge to SCIL is vague and general and also completely without considering how the Internet functions, rendering the order un-implementable. It is argued that without giving a specific list of works, MySpace cannot go through several millions of videos to identify those works in which SCIL owns copyright. Moreover, the learned Single Judge could not have granted injunction in respect of future works as there can be no copyright in respect of works that are not even in existence. MySpace fears that the only way to implement the order of the learned Single Judge, in the absence of specific titles would be to completely shut down its India centric business which, needless to say would cause it irreparable damage especially at a *prima facie* stage where there is no concrete proof that it is causing infringement. It is also pointed out that the order of the Division Bench of this Court dated 06.03.2009 was a possible workable solution and MySpace could have duly complied with it if it were restored. SCIL refutes this argument, highlighting that infringing content is uploaded on MySpace's website, causing it business losses; the order of the learned Single Judge granting it comprehensive injunction should be upheld because that would adequately take care of its interests. MySpace- says SCIL, should merely remove the content belonging to SCIL and continue broadcasting those in which it does not have a copyright. This would prevent SCIL's further business losses. SCIL urges that the relief granted by the learned Single Judge should be upheld as the balance of convenience lies in its favour. SCIL relied upon the judgment of this Court in *Super Cassettes Industries Ltd*. *Vs Nirulas Corner House (P) Ltd*, 148(2008)DLT487.

61. *Nirulas Corner House* is inapplicable to the present case because a hotel owner is not an intermediary and secondly the hotel was attributed with directly playing infringing

content. Moreover the problem in this case is about identifying actual works from millions of works; this aspect was not contemplated in *Nirulas* (supra). For similar reasons SCIL's reliance on *Pacific and Southern Company Inc. Vs Carol Duncan*, 744 F.2d 1490 would also have to be rejected. *Sega Enterprises Ltd* is of little relevance given that the judgment was passed in 1994, before the safe harbor regime and enactment of the DMCA. Furthermore, from then till now several developments have taken place in the field of both Internet as well as intermediary technology.

62. Though *prima facie* MySpace is not liable for secondary infringement, yet there is no gainsaying that infringing works are on its website. The court is under a duty to device an equitable relief suited to the facts when liability has not been ascertained fully. At the same time precious independent talent would suffer without due recognition and monetary incentives given that monies performers would have received by licensing content are now available freely without payment. Despite several safeguard tools and notice and take down regimes, infringed videos find their way. The remedy here is not to target intermediaries but to ensure that infringing material is removed in an orderly and reasonable manner. A further balancing act is required which is that of freedom of speech and privatized censorship. If an intermediary is tasked with the responsibility of identifying infringing content from non-infringing one, it could have a chilling effect on free speech; an unspecified or incomplete list may do that. In an order of relief such as that passed by the learned Single Judge, MySpace would be in contempt of court for not complying with an order, which is otherwise impossible or at best onerous and cumbersome of performance. In order to avoid contempt action, an intermediary would remove all such content, which even remotely resembles that of the content owner. Such kind of unwarranted private censorship would go beyond the ethos of established free speech regimes.

63. Another factor for consideration while granting relief is the potential threat to a private contract, which an individual user would have with an ISP. Without a clear and specific list of titles by the content owner to the ISP, to avoid liability it would remove content stored/ uploaded by legitimate users too. A user enters into a contract with an ISP to share her/his content as long as it complies with the terms of the user agreement. If a

user uploads his original works to be communicated to the public including for the purposes of fair use, then the ISP removing such content while complying with a notice of a general kind would surely be in breach of a private contract with its user. In *Roadshow Films* (supra) the court recognized this and held that incomplete notices by the content owner would invite upon the ISP the legal risk of wrongfully terminating a user account.

64. The rapid growth of technology calls for new legislative and judicial approaches; dialogues are to be held between various stakeholders for creating non-discriminatory and transparent licensing schemes as well as a mutually acceptable framework for exchanging rights information. To avoid risking legal action from breach of contract, a four-step mechanism could be setup. This was identified by the OECD in its draft report "*The role of intermediaries in Advancing Public Policy Objective*" dated 29th September 2010 and includes (i) notice and take down (ii) notice and notice (iii) notice and disconnection and (iv)filtering. The first step has been elaborately discussed and does not need further analysis. The second step is notice and notice where once an intermediary receives notice from a content owner it passes on the notice to the infringing subscriber. The third step is the notice and disconnection or "three strikes" model evolved by the French government. Here once an infringing subscriber is found to be uploading infringing content more than 3 times, the intermediary can go ahead and terminate the services of such intermediary; this step to a certain extent acts like a deterrent. Finally there's the filtering step where tools like the kind developed by the appellant are used to identify and remove content automatically. *EMI Vs UPC*, [2009 no. 5472 P] is a case where the Irish High Court suggested implementing tools such as DtecNet or Copysense, used to identify subscribers uploading infringing content.

65. MySpace already has the notice and take down tool under which SCIL can notify it of specific infringing works enabling a "take down". It also has the Rights Management tool which SCIL can take benefit of to identify and remove content belonging to it. However, this does not mean that other innovative techniques for balancing traditional rights of copyright should not be pursued. Several other intermediaries have created innovative techniques to protect copyright. For instance, YouTube's Content ID, which neither blocks it or removes infringing content, but tracks or monetize the video content.

A similar cooperation can be worked out between the parties where MySpace may work out the monetary benefit derived from such infringed content and share it with SCIL without actually removing the content. These are possibilities worth exploring; in any event they are handy tools at the stage of trial, to calculate damages.

66. On the question of what relief would be practical, the Division Bench by its order dated 06.03.2009 had directed SCIL to supply a list of its works to MySpace, which it would remove within one week of receipt of notice. Perhaps the Division Bench was more mindful of technological constraints as well as the notice and take down mechanism considering the order was made before the amendment to the IT Act which introduced safe harbor provisions only in October 2009. The Court is conscious of the fact that under the current system, MySpace hosts several hundreds and thousands of videos, which is only growing every single day. Without a notice containing the details and location of the exact works in which infringement is complained of, MySpace cannot be expected to scan through such large number of videos to discern infringement. This is not only impractical but also dangerous for reasons discussed previously. A vague order of injunction against works which are yet to exist is not only contrary to law but also impossible to monitor. Therefore, SCIL cannot give vague and general lists of its works but will have to give notice with specific details as well as locations of the works, which the appellant shall remove within 36 hours of receiving such notice.

67#. Despite its lengthy analysis and reasoning, a fundamental aspect overlooked by the learned Single Judge is the peculiarity of the Internet intermediary industry. The Internet industry is often described as "fastest growing industry" enabling access and innovations at an exponential rate. In cases like these, the Court has to appreciate that relief should be sound and practical, not far-reaching and momentous in regard to policy and growth of trade or information dissemination. Such care is warranted where interim orders in respect of liabilities that are yet to be ascertained and claims tried. Whilst in other areas of law like property or contracts, enforcement mechanism has remained relatively unchanged, enforcement under the technology regime, because its nature is different. It is these considerations, which the court has to keep in mind while granting relief. Apart from avoidable prolixity and attendant imprecision in the impugned

judgment (which a reader may perhaps justifiably complain about this judgment as well) the width of the directions has resulted in what was colourfully described by the US Supreme Court in *Reno v American Civil Liberties Union* 521 US 244, as *"to burn the house to roast the pig"* (i.e a disproportionate response, or a remedy worse than the disease). The court has – as always to tread a delicate balance between the Scylla of over protection (of intellectual property and privileging it in an overbearing manner) and the Charybdis[9] of ineffective or under-protection, of IP rights: both of which chill and kill creativity, in the final analysis, harmful to society."

68. To summarize the conclusions, it is held as follows

(a) Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously. Accordingly, it is held that proviso to Section 81 does not preclude the affirmative defence of safe harbor for an intermediary in case of copyright actions.

(b) Section 51(a)(ii), in the case of internet intermediaries contemplates actual knowledge and not general awareness. Additionally, to impose liability on an intermediary, conditions under Section 79 of the IT Act have to be fulfilled.

(c) In case of Internet intermediaries, interim relief has to be specific and must point to the actual content, which is being infringed.

In light of the above discussion impugned order of the learned Single Judge is set aside and is substituted with the following relief:

(i) The plaintiff Super Cassettes shall provide an updated catalogue of "specific" works in which it holds copyright along with the location/ URL of such work on the appellant Myspace's website to the appellant as and when SCIL detects infringement.

[9] An allusion to Greek mythical monsters in the form of sea hazards which the hero, Ulysses had to navigate between: avoiding one meant danger by the other, making the choice of the path a dangerous one.

(ii) On receiving such notice from the plaintiff SCIL, the appellant/MySpace shall within 36 hours remove/ block access to such content, in accordance with Rule 3 (4) of the Intermediary Guidelines Rules of 2011.

(iii) MySpace shall also keep an account of all such content removed pursuant to such requests as well as other details such as the number of viewings (wherever mechanisms exist to track such action) of such content, till it is removed, the advertisement revenue earned from it (proportionately) etc to enable calculation of damages, at the trial stage.

69. The learned Single Judge, we notice, has directed the completion of depositions of parties' witnesses latest by 14th August, 2017. In the circumstances, and since the suit has been pending for a long period – about 10 years, every endeavor shall be made to complete the hearing by end of 2017 and dispose of the suit finally by end of December 2017.

70. The appeal is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

DECEMBER 23, 2016

[#] The above new paragraph was substituted by virtue of order recorded on 24.12.2016 which corrected grammatical errors and omission of a footnote in paragraph 67 of the judgment pronounced on 23.12.2016.