

**WHAT'S IN A NAME?: THE NEED FOR DISCLOSURE ON DIGITAL
WRONGDOERS IN IP WRONGS**

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ABSTRACT

The ever-increasing scale and rampancy of intellectual property [“IP”] violations on the internet have necessitated a rethink of the intellectual property law framework in India. The nature and scope of remedies available to an ordinary intellectual property rights holder need to be interrogated against new standards. These include, in particular, new forms of violations and the heightened persistence of violating content. Technology-driven developments have expanded the reach of unlawful content on the internet, rendering presently available legal remedies like content takedown markedly insufficient. Digital anonymity has further compounded the challenge by precluding access to other remedies, like damages. Disclosure on unidentified digital wrongdoers, in this context, can prove to be potent, both as an immediate remedy and a deterrent in the larger legal framework. This paper explores the need for and permissibility of disclosure of the identity and information of unknown digital wrongdoers to an intellectual property rights holder in India. The paper adopts a dual-pronged approach, making the case for both judicial disclosure orders and statutory provisions allowing direct disclosure by online intermediaries. It first discusses the common law disclosure remedy of Norwich Pharmacal Orders and its adaptability vis-à-vis Indian law in light of a recent Delhi High Court ruling. Secondly, it looks into the limitations of the present intermediary liability regime and the need for introducing domain-specific regulations, like a disclosure mechanism in the case of intellectual property wrongs. In exploring the tension of such a mechanism with a wrongdoer’s right to privacy, the paper attempts to strike a balance between the desirability and constitutionality of disclosure on digital wrongdoers.

I. INTRODUCTION

The growth of the online world has witnessed a parallel growth of intellectual property violations, albeit in different forms from its offline counterpart. The internet, more specifically e-commerce, is particularly prone to IP violations as such wrongs are rooted in the dissemination of content, which is what the internet fundamentally provides a platform for. The ease of dissemination, coupled with the infinite possibility of replication across the digital universe can leave an IP rights holder acutely vulnerable despite legal protection. Magnifying the issue are the multiplying cases

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of infringement and passing off by unknown digital users—a legal challenge that remains largely unaddressed and seemingly unsurmountable.

Disclosure of the identity and information of digital wrongdoers, in this context, can serve to mould conventional remedies designed for the physical world for application in the virtual realm. By tackling the issue of digital anonymity, the idea of disclosure addresses the distinct challenge posed by the internet. It brings to the fore the imminent need for novel solutions—both judicial and legislative—to address online IP violations. In exploring disclosure as one such solution, this paper posits an individual IP rights holder and their interests at the centre of the legal framework governing the intersection of IP rights and the internet.

This paper begins by identifying the challenge of digital anonymity and the limitedness of existing reliefs under the Indian IP legal framework. Upon establishing the need for disclosure, it discusses the merits of the common law remedy of Norwich Pharmacal orders in this regard. In the nature of judicial disclosure orders, these orders direct an innocent intermediate facilitator of a legal wrong to disclose the identity of an unidentified ultimate wrongdoer to the aggrieved party, when necessary for claiming relief. The paper discusses the scope of their adoption in India with respect to domestic laws and in the wake of recent judicial developments. It then proceeds to assess the current intermediary liability regime in India and its limitations with respect to IP laws. It argues in favour of introducing IP-specific liability, like a statutory disclosure mechanism, to enable IP rights holders to better access available reliefs.

II. THE CHALLENGE OF DIGITAL ANONYMITY

Online IP violations have acquired a distinct status among IP wrongs given the ease of their reliance on the concealment of a wrongdoer's identity, and the consequent difficulties in law enforcement. These difficulties arise out of the inapplicability of some of the existing remedies under Indian IP laws in cases involving unidentified wrongdoers. Anonymity and pseudonymity enabled by the internet allow wrongdoers to employ masked identities while encroaching upon others' IP rights. The judicial ascertainment of such infringement remains ineffective in providing redress to aggrieved parties, as even the most basic legal remedies require knowledge of the infringer's identity. This, in itself, is one of the hardest things to ascertain in the digital universe. Pecuniary remedies are the most potent illustration of remedies rendered inaccessible by the concealment of a wrongdoer's identity. Damages can't be claimed by an aggrieved person when they don't know who to implead. The inability of rights holders, like e-commerce sellers, to claim

pecuniary relief in such cases diminishes the value of their proprietary rights. With the growth of e-commerce, the disincentivizing effect of unchecked IP violations hurts the interests of IP rights holders and the economy alike. Criminal remedies under IP laws, like imposition of fines or imprisonment be under statutes like the Trade Marks Act, 1999 or the Copyright Act, 1957 [**“Copyright Act”**], are also unavailable against unidentified violators. The public interest sought to be protected through the enforcement of such criminal provisions, therefore, suffers on account of lack of knowledge of who to prosecute.

The difficulty of identifying online infringers has prompted courts to widen the scope of injunctive reliefs or takedown orders in cases of online IP violations. The Delhi High Court recognized dynamic injunctions by way of which entire rogue websites and their variants can be blocked without impleading each successively emerging variant.¹ Such orders, however, have been passed after giving a fair opportunity of hearing to the impugned websites, who were known defendants. Ex parte injunctive relief against unknown violators in the form of an *Ashok Kumar* order² has also been recognized judicially. This order acts as a cease-and-desist order, restraining future infringement by unidentified infringers and providing immediate relief to the plaintiff. Though it is unaffected by the lack of knowledge of the infringer’s identity, the extraordinary nature of this remedy, coupled with the absence of compensatory relief, limits its scope.

The effectiveness of takedown orders in the context of online violations is further limited by the instant replication of infringing content and the potentially never-ending cycle thereof. The judiciary has also taken notice of this disturbing trend. While ordering the blocking of an infringing domain name the Delhi High Court, in *HT Media & Anr. v. Hindustantimes.tech & Anr.*, called into question privacy protection features that enable digital users to completely mask their identities.³ The Court laid emphasis on the key instrumentality of anonymity-enabling features in online IP violations and their widespread scale. The limitations of takedown orders and the judicial acknowledgement of the same underscore the necessity of disclosing infringer identity and information. Such disclosure is imperative not just for its deterrence value but also to expand the effectiveness of existing legal remedies against unknown persons.

¹ *UTV Software Communications Ltd. v. 1337x.to*, 2019 SCC OnLine Del 8002.

² *Taj Television v. Rajan Mandal*, 2003 FSR (22) 407; *Dabur India Ltd. v. Ashok Kumar*, 2022 SCC OnLine Del 823.

³ *HT Media & Anr v. Hindustantimes.tech & Anr*, The High Court of Delhi CS (COMM) 352/2022.

III. ORDER OF DISCLOSURE PASSED BY THE DELHI HIGH COURT

The High Court of Delhi, in a recent judgement in *Neetu Singh and Anr. v. Telegram FZ LLC and Ors.*⁴, has made significant advances in this direction. In this case, an action alleging copyright infringement was brought by Ms. Neetu Singh, a popular author and teacher, and M/s K.D. Campus Pvt. Ltd., through which the former ran coaching centers. The plaintiffs filed a suit for permanent injunction, damages, and other reliefs against Telegram, an online intermediary, whose platform was being used by infringers for the unauthorized dissemination of copyrighted material, such as course materials, books, and lectures, belonging to the plaintiffs. Besides the immediate removal of such material from the platform, the plaintiffs also sought information about the unknown infringing users from Telegram via a discovery application under Order XI Rule 10 of the Code of Civil Procedure, 1908.⁵

The relevance of this demand for disclosure on digital wrongdoers as a necessary accompaniment to legal redress lies not only in its novelty but, more importantly, in the context against which it is raised. The *Neetu Singh* case exemplifies the challenge confronting IP rights holders on the internet. The plaintiffs' requests to Telegram for the removal of infringing content were rendered futile by the almost instantaneous re-emergence of blocked infringing channels under new names. Provisions for the creation of new channels and their operation in end-to-end encrypted, private mode enable this 'hydra-headed'⁶ nature of digital infringers. The disparity usual in legal battles between a lone IP rights holder and online intermediaries, which command vast resources, was also typified by this case.

The Delhi High Court rose to the challenge and permitted disclosure of the wrongdoers' information, at first in sealed cover to the Court and subsequently to the plaintiffs, for the sole purpose of undertaking legal action.⁷ The possibility of injunctions becoming a toothless remedy in the absence of commensurate damages or monetary deterrents prompted the Court's decision. To this effect, Justice Prathiba Singh noted,

"45. (vi) ...In the present case, the infringement has to be nipped in the bud, without which Courts would have to continue to repeatedly pass injunction orders against mushrooming channels containing infringing content. The Court cannot perpetually supervise such infringements and, thus, the origin

⁴ *Neetu Singh and Anr. v. Telegram FZ LLC and Ors*, 2022 SCC OnLine Del 2637.

⁵ Code of Civil Procedure, 1908, Order XI Rule 10, No. 5, Acts of Imperial Legislative Council, 1908 (India).

⁶ *MySpace Inc. v. Super Cassettes Industries Ltd.*, (2016) SCC Online Del 6382.

⁷ *Neetu Singh and Anr. v. Telegram FZ LLC and Ors*, The High Court of Delhi, Order dated Nov. 24, 2022, CS (COMM) 282/2020.

and source of the infringing material has to be traced and such devices or persons involved in the infringement ought to face consequences in accordance with law, including being held liable for damages. That would not be possible if the source of such infringing copies, i.e., the details of the infringing channels are not disclosed...’⁸

The Court reasoned that the broadly worded nature of the Copyright Act, 1957⁹ reflects the legislative attempt to lend adaptability to the law in the face of evolving challenges like that of unknown wrongdoers. By employing a purposive interpretation of the Copyright Act, Justice Singh read the permissibility of disclosure on wrongdoers into the statute. In doing so, the Court attempted to construct provisions of the Information Technology Act, 2000¹⁰ [“**IT Act**”], the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021¹¹ [“**Intermediary Guidelines, 2021**”] and the Copyright Act harmoniously.

The judgement’s reliance on the specific facts of the case and provisions of the Copyright Act, however, prevents the emergence of a principled position that can be relied upon by all IP rights holders as settled law. The judgement falls short of laying down uniform pre-conditions, the satisfaction of which would merit redress in the form of a disclosure order. In fashioning such a solution, Indian courts can look towards the the common law remedy of a Norwich Pharmacal Order which has guided the jurisprudence of disclosure, in the absence of statutory mechanisms, in several jurisdictions.

IV. NORWICH PHARMACAL JUDICIAL RELIEF

Originally devised by the English House of Lords in the eponymous matter of *Norwich Pharmacal Co. v. Customs and Excise Commissioners*¹², a Norwich Pharmacal Order is an order of disclosure passed against the facilitator of a legal wrongdoing. The Court, in this case, ordered the defendant customs office to disclose the identity of an unknown wrongdoer who was importing pharmaceutical drugs in contravention of the plaintiff’s patent rights. Though not directly involved in the patent infringement, the defendant’s innocent facilitation of the legal wrong formed the premise for the imposition of a duty of disclosure on them. A Norwich Pharmacal Order, however, is limited to disclosure of information and does not impose any liability on the facilitating third party against which it is passed.

⁸ Neetu Singh and Anr. v. Telegram FZ LLC and Ors, 2022 SCC OnLine Del 2637.

⁹ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

¹⁰ Information Technology Act, No. 21, Acts of Parliament, 2000 (India).

¹¹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

¹² *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] AC 133.

The Court in *Norwich Pharmacal Co* laid out a triple test that needs to be satisfied for the passing of such an order, namely: (1) the conduct of a legal wrong by an ultimate wrongdoer; (2) the necessity of an order to enable action against such wrongdoer; and (3) the ‘mixing up’ of the person against whom the order is sought in the wrong and their ability to provide the plaintiff with the necessary information. Lord Reid, while explaining the basis for this order, stated that:

“p.175 B. ...if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong doers...”¹³

A Norwich Pharmacal Order, therefore, is aimed at the identification of wrongdoers for the purpose of seeking legal redress, which would otherwise be precluded in the case of unknown wrongdoers. It is issued “*where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw*”.¹⁴ A type of pre-action disclosure order¹⁵, these orders are essentially enabling in nature. The only cause of action in such cases is discovery. Their key utility lies in their ability to ‘unlock’ information necessary for advancing a legal claim, which would have been difficult to obtain via investigative methods.¹⁶

Norwich Pharmacal Orders are rooted in the courts’ equitable jurisdiction. Factors that have guided the courts’ discretion include the strength of the applicant’s potential claim, whether the denial to pass an order would frustrate the operation of justice, the potential to deter similar wrongdoing in the future, the existence of alternate means to obtain the requisite information, the degree of confidentiality of the information sought, whether the respondent was or should have been aware of facilitating the wrongdoing, etc.¹⁷ In balancing the competing rights of the applicant and the privacy rights of the wrongdoers, the courts have been guided by considerations of

¹³ *Id.*

¹⁴ *Mitsui v. Nexen Petroleum*, [2005] 3 All ER 511 (U.K.).

¹⁵ Gill Davy & Scott Speirs, *Can you make a Norwich Pharmacal application against potential defendants?*, (Mar. 14, 2023), NORTON ROSE FULBRIGHT, <https://www.nortonrosefulbright.com/es-es/inside-disputes/blog/202303-can-you-make-a-norwich-pharmaceutical-application-against-potential-defendants>.

¹⁶ Julia Smirnova, *Disclosure: A Guide to Seeking Norwich Pharmacal Orders*, MONDAQ (Dec. 2, 2022), <https://www.mondaq.com/jersey/arbitration--dispute-resolution/1256774/disclosure-a-guide-to-seeking-norwich-pharmaceutical-orders>.

¹⁷ *Rugby Football Union v. Consolidated Information Services Limited (formerly Viagogo Ltd)*, [2012] UKSC 55.

necessity and proportionality. Being a versatile remedy, such orders have been adopted by jurisdictions outside England, like Canada and Ireland.

Though the scope of a Norwich Pharmacal Order is not limited to IP violations or online legal wrongs, it is particularly germane to their intersection. Its ability to overcome the challenge of intermediary-enabled anonymity explains this suitability. The innumerable intermediaries present on the internet, namely, social media platforms, e-commerce websites, internet service providers, domain name registrars, online payment sites, etc., unknowingly foster legal wrongs by anonymous users. The frequent recourse to Norwich Pharmacal applications against telecommunication companies in England and Ireland evidences its suitability.¹⁸

V. ADOPTION OF NORWICH PHARMACAL ORDERS IN INDIA

The adoption of Norwich Pharmacal Orders in India, therefore, can serve to enable IP rights holders to access reliefs available under the existing legal framework, like damages, against unknown wrongdoers. Online intermediaries, by providing a platform and facilities to subscribing users, get ‘innocently mixed up’ in the posting of infringing content. Provisions for operating accounts in private mode where the identity and contact details of a user are hidden, end-to-end encrypted secret chats, etc. indicate the indirect involvement of online intermediaries in legal wrongs committed by anonymous or pseudonymous users.

English courts have conceptualized ‘mixing up’ as an act distinct from that of being a mere bystander. A facilitator of a legal wrong is not said to be someone who happens to witness an offending act and thereby acquires relevant information. Instead it is someone under an obligation to acquire information about the offending act, albeit not for the benefit of the victims.¹⁹ In the context of Indian legislation, the obligation imposed upon online intermediaries to preserve information about legal violations by Rule 3(1)(g) of the Intermediary Guidelines, 2021²⁰ fulfils the said requirement. The stated intellectual property policies of most social media and e-commerce platforms, too, lay down procedures for reporting IP violations, which equip them with actual knowledge of the same.

¹⁸ Andrew Carter, *Norwich Pharmacal Orders [2023 Guide]*, FRANCIS WILKIS JONES, <https://www.franciswilksandjones.co.uk/norwich-pharmacal-orders/>.

¹⁹ *Various Claimants v. News Group Newspapers Limited*, [2013] EWHC 2119 (U.K.).

²⁰ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(1)(g).

The import of Norwich Pharmacal Orders into Indian law would be consistent with the principles of discovery and disclosure of information under Order XI of the Code of Civil Procedure. Under the Code, a Court is empowered to direct disclosure of documents and information relating to ‘any matter in question in a suit’.²¹ As observed by the Delhi High Court in the *Neetu Singh* judgement²², Order XI is aimed at obtaining an admission from the opponent, which can make discharge of the burden of proof easier for the plaintiff. The administration of interrogatories and ordering of disclosure is not only permissible, but has been held to be the Court’s duty to encourage, given the role they play in the advancement of a legal action.²³ The Courts have time and again reiterated the need to interpret these provisions liberally.²⁴ A creative construction of these provisions would permit the accommodation of a Norwich Pharmacal Order.

As orders solely of disclosure and not personal liability, the adoption of Norwich Pharmacal Orders would be consistent with the ‘safe harbour’ enjoyed by online intermediaries in India under the Information Technology Act, 2000. Section 79 of the IT Act which grants limited immunity from third-party liability—i.e. liability for the acts of its users—to online intermediaries. Norwich Pharmacal Orders are sought against intermediaries only to the extent of disclosure of information about wrongdoers and do not impose any liability on such platforms themselves. Adoption of such orders in India, therefore, can serve to strike a balance between a robust IP rights framework and digital propriety.

Indian courts can gain from the experience of English and Irish courts, which have increasingly been issuing Norwich Pharmacal Orders against social media giants like Facebook, Twitter, etc. in cases of statutory and tortious wrongs.²⁵ Their thresholds for the sufficiency of ‘mixing up’ of online intermediaries in their users’ acts have not been too high, inclining more towards law enforcement, especially in cases of IP violations.²⁶ The Irish Court of Appeal even ordered an internet service provider to provide the plaintiffs with necessary information about all infringements by a user via a single application after the failure to comply with two cease and desist notices.²⁷ Allowing the disclosure of information about successive wrongs by a user via a single application can make legal recourse cheaper and more accessible for an aggrieved user.

²¹ Code of Civil Procedure, 1908, Order XI Rule 12, No. 5, Acts of Imperial Legislative Council, 1908 (India).

²² *Neetu Singh and Anr. v. Telegram FZ LLC and Ors*, The High Court of Delhi, Order dated Nov. 24, 2022, CS (COMM) 282/2020.

²³ *A.K. Aggarwal v. Shanti Devi*, The High Court of Delhi, CM(M) Appeal No. 154 & 155/1995.

²⁴ *Tara Batra v. Punam A. Kumar*, The High Court of Delhi, CM(M) No. 925/2019.

²⁵ David Culleton, *The Law Relating to Norwich Pharmacal Orders*, Vol 5, IRISH JUDICIAL STUD. J., 20-46 (2021).

²⁶ *Id.*

²⁷ *Sony Music Entertainment (Irl) v. UPC Communications Irl Ltd (No 2)*, [2015] IEHC 317 (Irl.).

Such orders would also not stand in violation of the infringers' right to privacy under Article 21 of the Constitution.²⁸ In *K.S. Puttaswamy v. Union of India*, the Supreme Court held that privacy is not an absolute right and can be restricted to protect legitimate State interests.²⁹ The *Neetu Singh* judgement has held that disclosure of an infringer's data satisfies the triple test laid down in *K.S. Puttaswamy*. It reasoned that such disclosure is justified by the presence of permitting laws, in the nature of discovery and disclosure provisions, the legitimate State interest in curbing legal wrongs, namely IP violations, and proportionate necessity, given the ever-expanding reach of IP violations.³⁰ Under the intermediary liability scheme in India, only the processing of personal data is restricted by users' fundamental rights and imposes liability on the intermediaries.³¹ The disclosure of infringers' personal data pursuant to a court order, per *Neetu Singh*, does not constitute processing of data and, hence, is permissible.³²

Being an equitable remedy, a Norwich Pharmacal Order involves balancing the competing rights of applicants and infringers. The emphasis on the proportionate necessity of disclosure in *Neetu Singh* can guide the issuance of Norwich Pharmacal Orders. Regulating the extent of the disclosure of information can also help achieve this balance. The Court in *Neetu Singh* permitted disclosure only for the purpose of legal proceedings. The applicants were prohibited from sharing the information with third parties, including governmental authorities and the police, except to that end.³³ Further, the jurisprudence of Norwich Pharmacal Orders in England shows that the order is subject to an implied undertaking that the information acquired through it will not be used for any ulterior motive. The use of the information for purposes unrelated to legal proceedings has been dealt with seriously by the courts.³⁴ The existing legal framework, therefore, in light of *Neetu Singh*, provides a congenial ground for the adoption of Norwich Pharmacal Orders in India.

VI. INTERMEDIARY LIABILITY AND DIRECT DISCLOSURE

Though the judicial enforcement of IP laws in India stands to be strengthened by the adoption of Norwich Pharmacal Orders, such orders necessitate an aggrieved party to undergo the long, expensive, and cumbersome process of litigation. Their dependence on the Court's discretion and

²⁸ INDIA CONST. art. 21.

²⁹ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

³⁰ *Neetu Singh and Anr. v. Telegram FZ LLC and Ors*, 2022 SCC OnLine Del 2637.

³¹ Information Technology Act, 2000, § 79(2)(b), No.21, Acts of Parliament, 2000 (India).

³² *Neetu Singh and Anr. v. Telegram FZ LLC and Ors*, 2022 SCC OnLine Del 2637.

³³ *Neetu Singh and Anr. v. Telegram FZ LLC and Ors*, The High Court of Delhi, Order dated Nov. 24, 2022, CS (COMM) 282/2020.

³⁴ Smirnova, *supra* note 16.

equitable jurisdiction further obfuscates a litigant's chance of obtaining a favourable order, discouraging them from seeking judicial remedies. The arduous task of going up against online intermediaries, which command extensive resources, adds to the list of deterrents. The judicial adoption of such orders, therefore, must be supplemented by a legislative intervention permitting aggrieved IP rights holders to directly seek disclosure of infringers' identities from online intermediaries in certain cases. An overhaul of the intermediary liability provisions under the IT Act and Intermediary Guidelines is needed to this effect.

Section 79 of the IT Act, read with the Intermediary Guidelines, sets up a scheme of minimum standards which online intermediaries need to meet to avoid third-party liability. Observance of due diligence and takedown of wrongful material, like infringing content, upon receiving actual knowledge of the unlawful acts are some of the compliances required of online intermediaries.³⁵ Due diligence, required specifically for IP wrongs, is limited to informing users not to engage in acts that infringe on another's IP rights under Rule 3(1)(b)(iv) of the Intermediary Guidelines.³⁶ These safe harbour provisions of limited immunity are consistent with international standards of intermediary liability, in the interest of the open internet. However, their horizontal manifestation in India, which provides uniform liability for all kinds of legal wrongs, limits their potential for adaptability. Concerns over possible adverse implications for domains as distinct as contract, tort, criminal, and constitutional law prevent changes to the regime.

The primary impediment to carving out a disclosure mechanism specifically for online IP violations, too, is the horizontal nature of intermediary liability provisions in India. Blanket disclosure provisions, under the singularity of the current intermediary liability regime, can assume dangerous proportions by easing the path for state surveillance in cases of criminal wrongs. A shift towards domain-specific, vertical regulation of intermediary liability, therefore, is the need of the hour to better protect IP rights. A due diligence obligation to institute a mechanism for direct disclosure of a wrongdoer's identity in the case of proven IP violations should be included in the same.

Recalibration towards the vertical regulation of intermediary liability falls in line with the recent international policy debate on this issue. The European Commission, as part of its Digital Single Market Strategy, has demonstrated an inclination to move towards a stricter, vertical liability

³⁵ Information Technology Act, No. 21, Acts of Parliament, 2000 (India).

³⁶ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(1)(b).

regime.³⁷ The Commission intends to move from a negligence regime, based on actual or constructive knowledge of unlawful acts, to a proactive monitoring regime. The need for a duty of care has also been identified. The imperative for this shift is rooted in the changing needs of e-commerce, especially with respect to IP protection. In the face of similar concerns, the ideas of 'sectoral legislation' and a 'problem-driven approach' discussed by the Commission³⁸ can steer the debate in India as well.

The permissibility of domain-specific regulation of intermediary liability in cases of IP rights is evidenced by the protection of IP rights from restrictions under the IT Act. The proviso to Section 81 of the IT Act saves rights conferred by the Copyright Act, 1957 and the Patents Act, 1970 from the overriding effect of the IT Act. The legislative intent to mould intermediary liability in service of the protection of IP rights is made manifest by this saving provision. The harmonious reading of Sections 79 and 81 by courts, while imposing liability on online intermediaries for IP violations³⁹, provides judicial recognition for extended regulation in their respect. Legislative amendments to this effect can provide for a more robust IP law framework and overcome the uncertainty currently present among intermediaries about the extent of their liability in cases of IP violations.⁴⁰

VII. IP AS A DISTINCT VERTICAL FOR INTERMEDIARY LIABILITY

Since a move towards more vertical regulation of intermediary liability has been necessitated by domain-specific challenges and contradictions, the scope of these regulatory frameworks should be guided by a solution-oriented approach to overcome the limitations of uniform liability. In failing to make a distinction between different classes of legal violations, horizontal regimes overlook the distinct nature of different legal rights, the interests they seek to protect, and their concomitant requirements in terms of remedies.

Non-recognition of the distinction between public and private legal wrongs is foremost among these oversights, implications of which are faced by IP rights holders. IP rights, being proprietary rights, are essentially private rights.⁴¹ Ownership, over intangible property in case of IP laws, demands that these rights take an exclusionary orientation. Domain-specific remedies that help

³⁷ Giancarlo F. Frosio, *From horizontal to vertical: an intermediary liability earthquake in Europe*, 12 JOURNEY OF INTELL. PROP. L. & PRAC. 565 (2016).

³⁸ European Commission, 'Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe' (Communication) COM (2016) 288 Final.

³⁹ MySpace Inc. v. Super Cassettes Industries Ltd., (2016) SCC Online Del 6382.

⁴⁰ Indranath Gupta & Lakshmi Srinivasan, *Evolving Scope of Intermediary Liability in India*, 37 INT'L REV. OF L., COMPUTERS & TECH. 294, 2023.

⁴¹ Wenjun Liu, *Discussion on Intellectual Property's Private Right Nature*, 2 NATURE AND SCIENCE 84 (2004).

maintain this exclusionary control over property by preventing and punishing encroachers—in both the physical and digital realms—must be statutorily provided. Technology-induced changes in the role of intermediaries as gatekeepers and facilitators of digital services have influenced the expansion of intermediary liability in India.⁴² Their facilitation of IP wrongs now necessitates a vertical expansion of their due diligence obligation to provide for remedies like information disclosure.

Private laws like IP laws, when viewed as a socio-legal institution and not just a collection of rules⁴³, reveal a public, administrative dimension as well. Efficient private property law institutions incentivise risk-taking, which lies at the root of the growth of the economy and allied fields like science, technology, the arts, etc. The effect of curtailment of private rights, therefore, extends beyond the individual rights holder to a larger disincentivising atmosphere that compromises the interests of the economy. Efficacious remedies, like disclosure in cases of IP violations, become imperative to prevent such disincentives.

A purposive approach to interpreting the permissibility and scope of reliefs given the distinct nature and object of the right has been adopted in *Neetu Singh* as well. Justice Singh, while discussing the indispensability of disclosure to other reliefs, observed,

“40. ...Take down’ or blocking orders are merely token relief for the interregnum and without monetary relief of damages, coupled with mushrooming of infringing platforms, the copyright owner’s spirit to create and write may be considerably negated. The protection of the same is integral to the public policy behind the legislation as well. The legislative intention to prevent such continued infringement and effectively implement the provisions of the Copyright Act would be frustrated by any interpretation to the contrary.”⁴⁴

In light of its enabling nature, disclosure of infringer identity and information is vital for the proper exercise of IP laws as a private property law institution. The limited accessibility of court-ordered disclosure orders necessitates a direct, non-judicial channel for obtaining the same relief.

⁴² Gupta & Srinivasan, *supra* note 40.

⁴³ Henry E. Smith, *Intellectual Property and the New Private Law*, 30 HARV. J. OF LAW TECH. 1 (2017).

⁴⁴ *Neetu Singh and Anr. v. Telegram FZ LLC and Ors*, 2022 SCC OnLine Del 2637.

VIII. SUGGESTIONS FOR A STATUTORY DISCLOSURE MECHANISM

Though the need and juridical basis for seeking direct disclosure from online intermediaries are apparent, the question of its statutory form and operation remains difficult to answer. Direct disclosure of user information by online intermediaries without judicial intervention posits legitimate concerns about the invasion of infringers' fundamental right to privacy. Thresholds for its permissibility, therefore, should be higher than those in the case of court-ordered disclosure. Without granting unfettered discretion to online intermediaries to disclose infringer identities and information, a direct disclosure mechanism should permit it in stipulated cases.

With disclosure being a step subsequent to content takedown, the creation of a legal mechanism for it can benefit from the experience of operationalising the latter. The removal of unlawful content from the internet has been based on 'notice and takedown' procedures. The Digital Millennium Copyright Act, 1998⁴⁵ provides for the direct removal of infringing content from online platforms in cases of IP violations. It lays down a stipulated format for notifying an online intermediary of a violation and compliance requirements on the latter's part. Since India became a member of the WIPO Copyright Treaty in 2018, the DMCA is applicable in India on par with its domestic law, i.e the Copyright Act, 1957. Despite the institution of multi-tiered compliance structures, including counter notices and due diligence, the reality of content moderation in India reveals non-compliance with such requirements.⁴⁶ Reliance on cost-saving measures like artificial intelligence based auto-filters by online intermediaries has led to a dangerous trend of proactive monitoring of content, bordering on censorship in several cases.⁴⁷

Modelled akin to a 'notice and takedown' procedure, disclosure can be facilitated through a 'notice and disclosure' route. Similar provisions listing the prerequisites for a complaint seeking disclosure should be included in the Intermediary Guidelines. It, however, should be permissible only in cases of judicially ascertained infringement. The determination of an IP violation, like infringement, is a specialised task that can only be discharged by a court of law. The incapacity of artificial intelligence tools to correctly identify cases of infringement, based on different legal doctrines and contextual intricacies, causes automated filtering mechanisms to injure IP rights instead of protecting them. False positives are a case in point. The Supreme Court in *Shreya Singhal v. Union of India* has

⁴⁵ The Digital Millennium Copyright Act, 1998, 17, U.S.C, 1998 (USA).

⁴⁶ Yashaswini, *DMCA Infringements: Much Ado About Copying?*, INTERNET FREEDOM FOUNDATION (July 27, 2021), <https://internetfreedom.in/dmca-infringements-much-ado-about-copying/>.

⁴⁷ Nithya C., *The Liability Regime of Internet Intermediaries for Online Copyright Infringements and the Bane of Proactive Monitoring*, <https://iplawindia.org/wp-content/uploads/2021/03/Nithya.C.pdf> (Dec. 22, 2020) (Report for the Fulfilment of Internship).

reaffirmed the impermissibility of the ‘privatisation of justice’⁴⁸ by holding that the lawfulness of online content can be decided only by public authorities. It held that a court order or government notification is mandatory for the removal of content from online platforms.⁴⁹ Permitting disclosure only in cases of a proven IP violation can help prevent unchecked violation of an alleged wrongdoer’s privacy. Without proof of a violation, an IP rights holder cannot bypass the judicial system and should have to apply to courts for disclosure through orders like Norwich Pharmacal Orders.

To avoid the criticisms subjected to ‘notice and takedown’ procedures, a disclosure mechanism should not be based on algorithmic intelligence based, privately enforced standards but on transparent legal obligations.⁵⁰ Statutory disclosure provisions must oblige online intermediaries to maintain internal review infrastructure to assess the veracity of such complaints. A detailed legislative scheme of due process outlining the contours and conditionalities of disclosure is essential. Disclosure of user information should be limited to the extent required for the institution of legal action. Conditions like permitting direct disclosure only after exhausting alternative remedies like seeking the removal of infringing content can be considered. Supplementary provisions obliging online intermediaries to inform users of the permissibility of disclosure through their rules and regulations or privacy policies are also required.

IX. CONCLUSION

Protection of IP rights in the online world requires novel and innovative legal solutions. This paper has attempted to establish disclosure of unidentified wrongdoers’ information as one such necessary remedy. Disclosure, through judicial and legislative interventions, is a stepping stone that can help revitalise the existing Indian IP law regime against challenges thrown by the internet. The *Neetu Singh* judgement has laid the groundwork for the import of intermediary-directed Norwich Pharmacal Orders into Indian law. A principled adoption of the same can take us closer to the finish line. On the legislative front, the paper has demonstrated the need for more vertical regulation of online intermediary liability in the case of IP laws, given their distinct property-based nature. It has argued in favour of establishing a statutory disclosure mechanism as part of an intermediary’s obligation to exercise due diligence. Though the issues of the exact nature of such a mechanism and its tension with the wrongdoers’ right to privacy remain far from resolved, this paper has taken the mantle of flagging the challenges facing an ordinary IP rights holder in the

⁴⁸ *Id.*

⁴⁹ Shreya Singhal and Ors. v. Union of India, AIR 2015 SC 1523.

⁵⁰ Frosio, *supra* note 37.

form of digital anonymity. A recalibration of the Indian IP law framework, guided by requisite remedies like disclosure, is now needed to address them.