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COPYRIGHT PROTECTION IN THE DIGITAL AGE: NEGLECT TOWARDS FAIR USE AND REVISITING SAFE HARBOUR GRANTED TO INTERMEDIARIES

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ABSTRACT

This paper examines the current state of copyright protection in the digital age, focusing on the neglect towards fair use provisions and the role of intermediaries in facilitating copyright infringement. With the rise of global access to the internet, copyright infringement has become increasingly prevalent, posing significant challenges to creators and rights holders. The paper begins by providing an overview of copyright law, its historical context, and the purpose it serves in promoting creativity and protecting intellectual property. It highlights the exponential growth of copyright infringement on the internet and the role played by intermediaries in enabling the unauthorized dissemination of copyrighted works. Intermediaries, such as online platforms and service providers, are essential for facilitating online communication and sharing of content. However, they also serve as conduits for copyright infringement through activities such as uploading, sharing, streaming, creating and publishing, linking, and advertising. The paper explores the different types of liability intermediaries bear, including strict, secondary, and tertiary, emphasizing the need for copyright reforms that address the current role of intermediaries.

To shed light on the complex dynamics surrounding fair use and safe harbour provisions, the paper examines key legal cases such as Napster v. Metallica, the Katy Perry "Dark Horse" lawsuit, and Stephanie Lenz v. Universal Music Corp. Insights from various creators, including Adam Neely, Rick Beato, and Glenn Fricker, are also incorporated to explore whether fair use genuinely benefits intermediaries.

Moreover, the paper presents a comparative analysis of how different jurisdictions, such as the United States, Europe, France, and India, approach copyright infringement on intermediary platforms. It discusses the challenges and limitations faced by these jurisdictions

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in effectively addressing copyright infringement in the digital realm. As big data has evolved, copyright protection requires innovative strategies. The paper proposes several suggestions to enhance copyright protection in the digital age. These suggestions include reaffirming the importance of fair use provisions, making intermediaries more transparent and accountable for the content they host, promoting cooperation and voluntary agreements between rights holders and intermediaries, fostering international solidarity in combating copyright infringement, and advocating for stricter measures against piracy.

INTRODUCTION

In the rapidly evolving digital landscape, copyright protection has emerged as a critical issue facing creators, users, and intermediaries alike. With the proliferation of online platforms and the ease of content sharing, the delicate balance between copyright enforcement and users' rights has been brought into sharp focus. This paper delves into the contentious aspects of copyright protection in the digital age, with particular attention to the neglect towards fair use provisions and the necessity of revisiting safe harbour protections granted to intermediaries. By exploring the challenges content creators and consumers face, I aim to shed light on the intricacies of copyright law in the digital era and propose potential solutions for achieving a more equitable and sustainable framework.

WHAT IS COPYRIGHT?

The Black's Law Dictionary defines "copyright" as the right of literary property recognised and sanctioned by positive law.[2] It is an intangible, incorporeal right granted by statute to the author or originator of specific literary or artistic productions, whereby he is invested, for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

Copyright came into existence after Gutenberg invented the printing press. With the advent of copyright, its protection was sought to protect intellectual labour in literary and artistic works. This seed of copyright developed into a broader canopy of security and now includes

[2]HENRY CAMPBELL BLACK, M.A., BLACK'S LAW DICTIONARY, PG. 406, (4th edition. 1968).

music, photographs, films and other original literary and artistic works. All such works are protected if they are authentic expressions of an idea.[3]

> *"Originality does not mean that one may not draw inspiration from elsewhere, as nothing is new under the sun."* - Lord Hoffman in *Designer's Guild v. Russell Williams.*[4]

The essence of the law of copyright is that it secures authors an exclusive right against unauthorised copies of their original artistic or literary works. Most jurisdictions have laws that protect such reproductions even in the form of public performances, making a sound or audio-visual recording, and making adaptations of the work. The Handbook of Copyright Law issued by the Government of India defines copyright as a bundle of rights given by the law to authors, including, *among other things*, rights of reproduction, communication to the public, adaptation and translation of the work.[5]

Copyright law aims to reward intellectual minds and encourage creativity while balancing the public interest in gaining access to original works. The Secretary of State for Industry, while introducing the Copyright, Design and Patent Bill of 1988 in the House of Lords, rightly said, *"Without copyright law, the publishing and record industries would scarcely operate. The entertainment world would be in chaos."*[6]

The beauty of copyright protection is that it extends to works, notwithstanding the amount of artistic merit. The United States Supreme Court held that a work's level of investment or commercial value has no standing insofar as its eligibility for copyright protection is concerned. All that matters is whether the work possesses the requisite originality.[7]

Four underlying principles are generally cited when a justification for copyright is demanded:[8]

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[3]JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES, PG 207, (1st edition. 2001)
[4]2001 FSR 113, 116.
[5]HAND BOOK OF COPYRIGHT LAW, BYCOPYRIGHT OFFICE,https://copyright.gov.in/documents/handbook.html
[6]Statement of Secretary of State for Trade and Industry while introducing the Copyright, Designs and Patents Bill to the House of Lords in 1988, as reported in Copyright and the Public Interest, by Gillian Davies, Thomson, Sweet & Maxwell, p 70-71.
[7]Bleistein v. Donaldson Lithographing Co., (1903) 188 U.S.239.
[8]COPINGER AND SKONE JAMES ON COPYRIGHT, 17TH EDITION, VOLUME ONE, PG.58.

i. *Natural law*—the author has an exclusive natural right of property over the work resulting from their labour and has the right to object to any unauthorised modification or distortion to the integrity of their work.

ii. *Just reward for labour*—the author deserves to be remunerated when their work is exploited.

iii. *Stimulus to creativity*—the guarantee of protection and the possibility of controlling and being paid for the exploitation of works encourages the authors to create. Anthony Trollope said, "Take away from Englishauthors their copyrights, and you would very soon take away from England her authors." [9]

iv. *Social requirements*—In the public interest, the authors and other rights owners should be encouraged to publish their works to permit the broadest possible dissemination of results.[10]

Copyright law, like all law, is organic. It keeps evolving to meet the needs of society. Most recently, technological advancements have prompted amends in the direction of copyright for it to become compatible with the running culture of people's online behaviours. These prompts of amendments also arise due to the contrast between the theory of copyright law and its practice—. In contrast, the law of copyright has provisions like fair use, which allow the public to use copyrighted works in specific manners generally considered to not harm the interests of copyright holders, in practice, we observe a growing number of instances where such provisions have been neglected.

WHAT ARE INTERMEDIARIES?

"Intermediary" is defined as a means or a medium in the Merriam-Webster Dictionary. The UNCITRAL Model Law on Electronic Commerce defines an intermediary as, concerning a particular data message, a person who, on behalf of another person, sends, receives or stores

[9]A.Trollope, *An Autobiography*,Second Edition,LONDON: WILLIAM BLACKWOOD & SONS, 1883.
[10]G..DAVIES, COPYRIGHT AND PUBLIC INTEREST,2ND EDITION, LONDON: SWEET & MAXWELL, 2002, PG 9 (REPRINTED 2013); S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURINGRIGHTS, 2ND EDITION, LONDON: BUTTERWORTHS,1989, PARA 1.01].

that data message or provides other services concerning that data message.[11] The Information Technology Act, 2000 (**"IT Act"**) gives favourable consideration to this definition while defining intermediaries. It provides a non-exhaustive list of examples, such as telecom service providers, internet service providers, search engines, online payment sites, online auction sites, online marketplaces and cyber cafes.[12]

The Organisation for Economic Co-operation and Development, in a 2010 report, defines internet intermediaries as the following:
'Internet intermediaries' bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.[13]

An intermediary does not create or publish the content that is posted thereon. It provides a platform for users to create and share content and facilitates interactions between them. It plays, ideally, no role in what is being posted and the curation or recommendation of content for users. These intermediaries include:

1. Social media platforms, like LinkedIn, Instagram, Twitter, Facebook, SoundCloud and Reddit;
2. Online gaming platforms, like Steam, GTA Online, FiveM, Epic Games and Battle.net;
3. E-Commerce platforms, like Amazon[14], SnapDeal, eBay, OLX and 99acres;
4. Cloud storage providers, like MEGA, Google Drive, OneDrive and Dropbox;
5. Internet service providers, like AT&T, Nippon Telegraph and Telephone Corporation, Reliance Jio, Bharti Airtel and Vodafone Group; and

[11]United Nations Commission on International Trade Law, UNCITRAL Model Law on Electronic Commerce, with Guide to Enactment, 1996: with Additional Article 5 bis as adopted in 1998, Art. 2(e), New York:United Nations, 1999.
[12]The Information Technology Act, 2000, § 2(1)(w), [Act 21 of 2000 as amended up to S.O. 4720(E), dated 26-9-2022] [Updated as on 11-10-2022].
[13]Perset, K., *"The Economic and Social Role of Internet Intermediaries*",No. 171,OECD DIGITAL ECONOMY PAPERS, OECD Publication, Paris,(2010), https://doi.org/10.1787/5kmh79zzs8vb-en.
[14]Amazon Seller Services Pvt Ltd and Ors vs. Amway India Enterprises Pvt Ltd and Ors 2020 (81) PTC 399 (Del).

6. Cloud service providers, like Amazon Web Services, Microsoft Azure and Google Cloud Platform.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 defines "social media intermediary" and "significant social media intermediary." In Rule 2(1) (w), a social media intermediary (**"SMI"**) is defined as an intermediary that primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.[15] Rule 2(1)(v) defines a significant social media intermediary (**"SSMI"**) as a social media intermediary having several registered users in India above such threshold as notified by the Central Government.[16] The Ministry of Electronics and Information Technology announced, in February 2021, the point for SMIs to be considered SSMIs as fifty lakh registered users.[17]

The "messenger" metaphor has been used to describe the role of intermediaries, highlighting that it is easier to target intermediaries than individual users who infringe upon copyrights.[18] Copyright owners have advocated for intermediaries to be held liable, similar to traditional publishers, while intermediaries argue against such extensive liability.[19]

HOW COPYRIGHT INFRINGEMENT OCCURS ON INTERMEDIARY PLATFORMS

Copyright infringement occurs on intermediary platforms in several ways, such as:

a) *Uploading*:

Users can upload and publish copyrighted material like music, snippets of films, book content, etc., without obtaining appropriate licences.

b) *Sharing*:

When a user posts a video containing a snippet of a film (and such conduct cannot be excused under the fair use doctrine) attached in a tweet, and when another user

[15]Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule (1)(w), [As amended up to Noti. No. G.S.R. 275(E), dated 6-4-2023]
[16] Supra note 14 atRule 2(1)(v)
[17]Ministry of Electronics and Information Technology notified, in February 2021, (https://www.meity.gov.in/writereaddata/files/Gazette%20Significant%20social%20media%20threshold.pdf
[18]Pranesh Prakash, *Don't Shoot the Messenger: Speech on Intermediary Liability*, 22nd SCCR of WIPO, (July 08, 2011).
[19]L. Edwards, *The Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, WIPO, https://www.wipo.int/publications/en/details.jsp?id=4142&plang=EN.

retweets the original tweet, the retweet can also constitute copyright infringement—even though it may not be in the first degree. Parallelly, on Instagram, adding a post containing copyright-infringing material to one's story can constitute the same. Users can also use P2P sharing platforms, like BitTorrent, uTorren and Seedr, to share files.

c) *Streaming*:

Platforms like YouTube, Twitch and Instagram facilitate audio/video streaming. Users often host live streams on such platforms and have music playing in the background, which they don't have the licence to distribute. This was so rampant on Instagram that Instagram interrupted streams that contained such music and published guidelines for including music in videos.[20]

d) *Selling or distributing*:

Users can sell or distribute content on intermediaries like Spring (formerly called Teespring), Shopify, MEGA, The Pirate Bay, and Google Drive. Pirated copies of books are rampant on Amazon.[21]

e) *Creating and publishing*:

This can be as simple as shooting a video of someone singing a copyrighted song using the Instagram app, posting it on Instagram Reels, and cross-posting it on YouTube. Or, it can be as elaborate as using Bandlab, an online digital audio interface, to remix a song And publish it on Bandlab and other platforms like YouTube and Instagram.

f) *Linking*:

Users can post links to websites (which can be intermediaries themselves), which can amount to contributory copyright infringement. This is commonly done on forums like Reddit.[22] Discord's community guidelines prohibit sharing "content that violates

[20] Updates and Guidelines for Including Music in Video, https://about.instagram.com/blog/tips-and-tricks/updates-and-guidelines-for-including-music-in-video/?ref=epidemicsound.com.

[21] Theo Wayt,*Pirated books Thrive on Amazon — and authors say web giant ignores*, NEW YORK POST, [July 31, 2022], https://nypost.com/2022/07/31/pirated-books-thrive-on-amazon-authors-say-web-giant-ignores-fraud/; , David Streitfeld, *What Happens After Amazon's Domination Is Complete? Its Bookstore Offers Clues*, THE NEW YORK TIMES, (June 23, 2019),https://www.nytimes.com/2019/06/23/technology/amazon-domination-bookstore-books.html.

[22] Dave Johnson, *A guide to Reddit's r/piracy subreddit, and how the community discussion site is combating illegal sharing*, BUSINESS INSIDER [INDIA], (April 1, 2021), https://www.businessinsider.in/tech/how-to/a-guide-to-reddits-r/piracy-subreddit-and-how-the-community-discussion-site-is-combating-illegal-sharing/articleshow/81857559.cms.

anyone's intellectual property or other rights." Still, this policing is not easy, and given the ease of creating a server on Discord, anyone can start making a collection of links to pirated material available to the public and do some damage before coming under Discord's radar.

g) *Advertising*:

Meta's Advertising Guidelines[23]list intellectual property infringement as "unacceptable content." However, IP infringement is not uncommon on Instagram and Facebook. Users can advertise a video of them singing a song without a suitable license. Pertinently, Meta has ways to report IPR violations occurring on its platforms.[24]

Intermediaries typically have rules against posting content to which users don't have intellectual property rights or licences. They also have mechanisms to prevent and penalise copyright infringement. YouTube, for example, has a system of copyright strikes.[25] The first time a user gets a copyright strike, they must go through "Copyright School," which "helps creators understand copyright" and its enforcement. If a user receives three copyright strikes, their account and content are subject to deletion, and they cannot create new channels. Instagram prohibits infringing copyright while utilising its platform. If the prohibition is not complied with, it can retaliate by deleting content or terminating the user's account, *among other things*.[26] Twitter[27], Bandlab[28] and other intermediaries also have similar mechanisms in place.

Once established that copyright infringement is not out of the ordinary on intermediary platforms, a question that arises is how do we look at these liabilities and who do these liabilities fall upon? There are various models for addressing the above:

[23] Introduction to the Advertising Standards, https://transparency.fb.com/en-gb/policies/ad-standards/?source=https%3A%2F%2Fm.facebook.com%2Fpolicies_center%2Fads%3Fwtsid%3Drdr_03KggYruk9tRhjTF8%26refsrc%3Ddeprecated

[24]Facebook Copyright FAQs, https://www.facebook.com/help/1020633957973118?helpref=about_content

[25] YouTube Copyright Strike Basis, https://support.google.com/youtube/answer/2814000?hl=en#zippy=%2Cwhat-happens-when-you-get-a-copyright-strike

[26] Instagram Terms of Use, Content Removal and Disabling or Terminating Your Account, https://help.instagram.com/581066165581870

[27] Twitter Terms of Service, Ending These Terms, https://twitter.com/en/tos

[28]*BandLab, Reporting infringement of your tracks*, (May 09, 2023),https://help.bandlab.com/hc/en-us/articles/115002961454-Reporting-infringement-of-your-tracks-

a) *Strict Liability*—

Under strict liability, intermediaries are held fully and unconditionally liable for the content posted by their users. This places the responsibility on intermediaries to monitor and regulate content. In *Bolger v. Amazon.com, LLC,* Amazon was found strictly liable for a defective product sold on its website.[29] Similarly, in *Super Cassettes Industries Ltd. v. MySpace Inc.*, the High Court of Delhi ruled that the safe harbour provisions of the IT Act would not apply to intermediaries in a copyright infringement case.[30] However, this decision was later overturned on appeal, and intermediaries can claim the safe harbour defence in copyright infringement cases.

b) *Secondary Liability*—

Intermediaries can be held liable for copyright infringement under the principle of secondary liability. Contributory infringement is a form of secondary liability where platforms with knowledge of infringing activity and contribute to it can be held liable. Contributory infringement, a kind of secondary liability, originates in tort law and stems from the notion that one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another may be held liable as a "contributory" infringer.[31]This means that platforms can be held responsible for copyright infringement even if they are not the ones directly publishing or sharing infringing material. "Contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible."[32] The Supreme Court of the United States has recognised the concept of contributory infringement, stating that it may be necessary to look beyond actual duplication to activities that enable such repetition. *A&M Records v. Napster Inc.* is an example where Napster was found to contribute to copyright infringement materially.[33]

c) *Tertiary Liability*—

[29]Bolger v. Amazon.com, LLC,53 Cal. App. 5th 431, 267 Cal. Rptr. 3d 601 (2020).
[30]Neutral Citation No-2011: DHC:3803.
[31]Gershwin Publishing Corp. v. Columbia Artists Management, *Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971).
[32]Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774 (1984).
[33]239 F.3d 1004 (9th Cir. 2001).

It applies to parties that assist secondary parties but have no direct relationship with the primary infringer.[34] These parties have no connection with the actual infringing activities. In *Religious Technology Center v Netcom On-Line Communication Services, Inc.*, the US District Court held Netcom, an internet service provider (ISP), liable for copyright infringement.[35]

AN OVERVIEW OF FAIR USE AND SAFE HARBOUR

Recently, courts have recognised the importance of user-generated content in the online ecosystem and the role of intermediaries in facilitating its creation and dissemination. Intermediaries may face legal challenges from rights holders claiming that user-generated content infringes upon their copyrights. However, courts have also recognised the importance of defences to use copyrighted material, such as fair use, in allowing users to express themselves creatively. For example, in *Authors Guild v. Google*, the court found that Google's scanning of books for its library project constituted fair use.[36] As intermediaries have expanded their role in the online ecosystem, courts have grappled with how much responsibility intermediaries should bear for content hosted on their platforms. Courts have recognised that intermediaries play a vital role in moderating content and may face legal challenges from users claiming their content was wrongfully removed. In *Herrick v. Grindr*, the court found that Grindr was not liable for the harm caused by a user who created multiple fake profiles, as Grindr had no duty to monitor user behaviour.[37]

FAIR USE

The doctrine of fair use promotes freedom of expression by permitting unlicensed use of copyrighted works in certain circumstances.[38]

Section 107 of the US Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of services—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that

[34]Benjamin H, Glatstein,*Tertiary Copyright Liability*, Vol. 71,THE UNIVERSITY OF CHICAGO LAW REVIEW, Pg 1610, No. 4 (Autumn, 2004).
[35]907 F Supp 1361 (ND Cal 1995).
[36] 804 F.3d 202.
[37]765 Fed. Appx. 586, 2019 U.S. App. LEXIS 9318, 2019 WL 1384092 (2d Cir. N.Y. March 27, 2019), Herrick v. Grindr LLC, No. 18-396 (2d Cir. Mar. 27, 2019).
[38]17 USC § 106 & 106A, [1976].

may qualify as fair use. Section 107 calls for consideration of the following four factors in evaluating a question of fair use:[39]

i. *Purpose and character of the use, including whether the service is commercial or is for non-profit educational purposes*—

Courts evaluate how the party claiming fair use uses the copyrighted work and are more likely to find in their favour if the service is for educational and non-commercial purposes.[40] This does not mean, however, that all academic and non-commercial uses are fair; Instead, courts will balance the purpose and character of the service against the other factors below. Additionally, transformative services are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character and do not substitute for the original use of the work.[41]

When YouTube user Miss Zizie published a video titled "Taylor Swift Blank Space (karaoke version)?" on the platform in 2014, no one at the video-sharing forum, nor the user herself, in all likelihood, gave any thought as to whether a karaoke with lyrics infringed upon the rights of the rights holders. Well, it does.[42]

ii. *Nature of the copyrighted work*—

This factor examines the extent to which the utilised content aligns with the fundamental objective of copyright law, which is to promote artistic and creative expression. Consequently, employing a highly imaginative or inventive work, like a novel, film, or song, is less likely to substantiate a fair use argument than a factual position, such as a technical article or news piece. Furthermore, using an unpublished work is less likely to be regarded as fair use.[43]

The traditional view of the United States Supreme Court has been to consider fair use as a defence against copyright infringement. However, a significant shift occurred in the case of *Lenz v. Universal Music Corp.*, commonly known as the "dancing baby" case, where the United States Court of Appeals for the Ninth Circuit concluded that

[39]17 USC § 107, [1976]
[40]Sony Corp. of America v. Universal City Studios, Inc.,(1984),464 U.S. 417, 451.
[41]Campbell v. Acuff-Rose Music Inc (1994) 510 U.S. 569; Blanch v. Koons 467 F.3d 244 (2d Cir. 2006-10-26).
[42]*Id.*at 42 at Pg 503; Leadsinger, Inc. v. BMG Music Publ'g, 429 F. Supp. 2d 1190, 1197 (C.D. Cal. 2005), aff'd, 512 F.3d 522 (9th Cir. 2008)].
[43]Dr. Kenneth D. Crews, *Fair Use*, COLUMBIA UNIVERSITY LIBRARIES, https://copyright.columbia.edu/basics/fair-use.html.

fair use is not merely a defence but a specifically authorised right.[44] It is recognised as an exception to the exclusive rights granted to the copyright holder of a creative work under copyright law. The court clarified that fair use should be distinguished from other affirmative defences, which excuse copyright infringement based on valid reasons, such as copyright misuse.[45]

iii. *Amount and substantiality of the portion used about the copyrighted work as a whole—*

Under this factor, courts look at the quantity and quality of the copyrighted material used. If the use includes a large portion of the copyrighted work, fair use is less likely to be found, and if the service employs only a small amount of copyrighted material, it is more likely. That said, some courts have located the use of an entire work to be fair under certain circumstances.[46]In other contexts, using even a tiny amount of a copyrighted work was deemed unfair because the selection was an important part—or the "heart"—of the work.

iv. *Effect of the use upon the potential market for or value of the copyrighted work—*

Courts review whether and to what extent the unlicensed use harms the existing or future market for the copyright owner's original work. In assessing this factor, courts consider whether the use hurts the current market for the original work (for example, by displacing sales of the original) and whether the use could cause substantial harm if it becomes widespread. In the case involving President Ford's memoirs, *Harper & Row*, the Supreme Court emphasised the fourth factor of fair use as the most crucial element.[47] This factor has held significant importance in honest use assessments over time. However, in the more recent case of *Campbell v. Acuff-Rose Music Inc.*, the Supreme Court introduced a different perspective by stating that all four factors should be examined and weighed together, considering the underlying purposes of copyright.[48] This shift in approach has contributed to a more balanced interpretation of fair use.

[44]801 F.3d 1126 (2015)
[45]*Id.*at 42 atPg 527.
[46]*Supra* note 33.
[47]Harper & Row, Publishers, Inc., et al. v. Nation Enterprises, et al., 471 U.S. 539.
[48]Campbell v. Acuff-Rose Music Inc. 510 U.S. 569.

In addition to the above, a court may consider other factors in weighing a fair use question. Courts evaluate fair use on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry. Thus, there is no straightjacket formula to ensure that a predetermined percentage or amount of work—or a specific number of words, lines, pages, or copies—may be used without a licence.

Fair dealing, similar to fair use in the United States, is an exception in copyright laws laid out in the copyright statutes of law jurisdictions of Great Britain, Canada, Australia and New Zealand. Though the two terms—fair dealing and fair use—may seem synonymous, there is a difference in their scope and meaning. Fair dealing permits only those uses or exceptions mentioned in the law's ambit, thus being narrow. Fair use, on the other hand, is broader and is decided on a case-by-case basis. Fair use is flexible and adaptable to changes, which makes fair use not a concrete framework. The concept of fair dealing limits the operation to six defences:[49]

a. Fair dealing for research or private study (§ 29(1) and (1C) of Copyright, Designs and Patents Act 1988 ("**CDPA**"));
b. Fair dealing for criticism or review (§ 30(1) CDPA);
c. Fair dealing exception will be available for 'quotation' (§ 30(IZA), introduced in 2014);
d. Fair dealing to report current events (§ 30(2) CDPA);
e. Fair dealing for 'parody, caricature or pastiche' (§30A(1) CDPA, also added in 2014); and
f. Fair dealing for illustration for instruction (§ 32 CDPA).

SAFE HARBOUR

Safe harbour is the legal provision that exempts intermediary platforms from liability for the actions of their users, subject to conditions. However, they may still be subject to injunctive relief or non-monetary remedies.

The concept of safe harbour acknowledges that intermediaries cannot actively monitor or control all the content posted or transmitted through their services. It understands that holding intermediaries accountable for every user's actions would make little sense and could stifle creativity, innovation and free speech on the internet. Intermediaries are usually required to

[49] BENTLY, SHERMAN, GANGJEE AND JOHNSON, INTELLECTUAL PROPERTY LAW, 5TH EDITION, PG NO. 229

implement a mechanism for receiving and processing notices of alleged copyright infringement or other illegal activities. Intermediaries should have no direct financial interest in the infringing material posted to qualify for safe harbour.

The object of safe harbour provisions is, *among other things*, to strike a balance between protecting IP rights and catalysing the growth of the digital economy. They provide legal certainty for intermediaries, encouraging them to host user-generated content without fearingliability for every user action. However, it's important to note that a safe harbour does not imply absolute immunity, and intermediaries must act responsibly and within the bounds of the law to maintain their shelter.

Safe harbour provisions vary by jurisdiction but generally establish certain conditions or requirements intermediaries must fulfil to qualify for protection. These conditions often include:

i. *Lack of knowledge—*

Intermediaries must not know of specific infringing content or unlawful activity on their platforms. Intermediaries cannot control it. They can only retain a safe harbour if they know of illegal activity and act. In *Viacom International, Inc. v. YouTube, Inc.*, Viacom International Inc. (**"Viacom"**) sued YouTube for copyright infringement, alleging that YouTube was liable for hosting user-uploaded videos that infringed upon Viacom's copyrights.[50] YouTube argued that it was protected under the safe harbour provided by the Digital Millennium Copyright Act of 1998.[51] The United States Court of Appeals for the Second Circuit held that to qualify for secure harbour protection, an intermediary must not have actual knowledge or awareness of specific infringing activity and must act expeditiously to remove or restrict access to infringing material upon obtaining knowledge or understanding thereof. The court found that YouTube knew of the infringing content and failed to remove it, thereby losing safe harbour protection promptly.

ii. *Expeditious removal—*

[50]Viacom International, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010); 676 F.3d 19 (2d Cir. 2012), 940 F. Supp. 2d 110 (S.D.N.Y. 2013).
[51]Digital Millennium Copyright Act of 1998, § 512.

Intermediaries are typically protected if they respond to valid infringement notices in good faith. Thus, they must act expeditiously to remove or restrict access to the infringing content and inform the user responsible for the content about the takedown. Once notified or aware of infringing content, intermediaries must promptly remove or restrict access to it. Courts often order intermediaries to implement measures to prevent access to or remove violating content. For example, in *L'Oreal v. eBay,*the Court of Justice of the European Union ruled that eBay could be liable for trademark infringement if it failed to take active steps to prevent the sale of counterfeit goods on its platform.[52] Many safe harbour frameworks require intermediaries to implement policies that address repeat infringers. This may involve terminating or suspending the accounts of users who repeatedly engage in copyright infringement or other illegal activities. In*Capitol Records, LLC v. ReDigi Inc.,*the United States District Court for the Southern District of New York found ReDigi to be ineligible for safe harbour under the Digital Millennium Copyright Act of 1998 (**"DMCA"**) because it failed to implement a policy for terminating repeat infringers at a reasonable standard.[53]

iii. *No active role—*

Safe harbour provisions generally stipulate that intermediaries are not required to monitor or filter user content for potential legal violations. This means that intermediaries are not held responsible for the actions or content of their users unless they have actual knowledge or awareness of specific infringing activities. Intermediaries should not actively engage in selecting, modifying, or altering the content provided by users, as this could undermine their status as mere conduits. The intermediary must act in good faith and not engage in willful blindness or deliberate ignorance of infringing activity. In *Svensson v. Retriever Sverige AB,*the Court of Justice of the European Union highlights the importance of intermediaries not exerting control or playing an active role in the content they link to.[54]

iv. *Compliance—*

[52]L'Oreal v. eBay [C-324/09], ECLI:EU:C:2011:474.
[53]Capitol Records, LLC v. ReDigi Inc. 934 F. Supp. 2d 640.
[54] Svensson v Retriever Sverige AB: C-466/12, C-466/12, [2014] All ER (EC) 609, [2014] Bus LR 259, [2014] IP & T 341, [2014] All ER (D) 123 (Feb).

Intermediaries may be required to adopt and enforce policies to address copyright infringement and other illegal user activities. The intermediary must comply with industry-standard technological measures to prevent or reduce infringing activity. *Perfect Ten v. Google* is an example of a case where a court found that an intermediary knowingly disobeying content and failing to remove it promptly disqualifies it from the safe harbour.[55]

HOW DIFFERENT JURISDICTIONS APPROACH COPYRIGHT INFRINGEMENT ON INTERMEDIARY PLATFORMS

The United States of America

The United States has been at the forefront of addressing online copyright infringement, with its legal regime recognising the exponential rise and severity of such violations. The US takes a vertical approach to intermediary liability, treating different actions differently under the DMCA. US courts have played a significant role in developing case law, establishing concepts like vicarious liability, contributory liability, and inducement to infringe.

§ 512 of the DMCA specifically addresses copyright infringement on intermediary platforms.[56] It aims to limit the liability of compliant service providers through safe harbour provisions, fostering the growth of internet-based services. Intermediaries must fulfilspecific stipulations and conditions to receive protection, such as complying with the notice-and-takedown procedure under § 512(c) and not selecting or modifying third-party content transmitted through their platforms.

The secondary copyright infringement regime in the US revolves around contributory and vicarious liability. The United States Supreme Court has justified holding platforms liable for copyright infringement when they are widely used.[57]

In contrast to the US approach, Indian and European lawmakers have adopted a horizontal direction, encompassing all kinds of crimes for which intermediaries may be liable.

[55]Perfect 10 v. Google, 508 F.3d 1146.
[56]*Id.*at 56
[57]Metro-Goldwyn-Mayer Studios v. Grokster Ltd. (2005)545 U.S. 913.

Europe

In the European Union (**"EU"**), Directive 2000/31/EC (**"E-commerce Directive"**)mandates member states to establish defences for certain types of online intermediaries.[58] Directive 2001/29 (**"InfoSoc Directive"**) and Directive 2004/48/EC (**"Enforcement Directive"**) require member states to grant rightsholders the right to seek injunctions against online intermediaries used for IP infringement.[59] The Directive on Copyright in the Digital Single Market (**"EU Copyright Directive"**) passed in 2019 includes provisions that require intermediaries to monitor proactively and pre-screen user-uploaded content using automated filters.[60]

The E-commerce Directive precisely delineates intermediary liability, granting immunity to intermediaries fulfilling certain conditions. It distinguishes between mere conduit providers, caching providers, and hosting providers based on their activities. The Enforcement Directive mandates that measures and remedies for enforcing IP rights be fair, equitable, effective, proportionate, and dissuasive without creating barriers to legitimate trade.

India

In India, Section 79 of the IT Act introduced a safe harbour provision that protects intermediaries from liability for user content if they observe due diligence and follow government-prescribed guidelines.[61] Recent court decisions, such as the High Court of Delhi ruling in*Flipkart Internet Private Limited v. State of NCT of Delhi & Anr*[62], have clarified that safe harbour will only be granted if intermediaries strictly adhere to the conditions and have no role in the infringement.

[58]Directive2000/31/EC of 8 June 2000 (ECD) (e-Commerce Directive/ECD), https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf
[59]Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, https://www.europarl.europa.eu/doceo/document/A-8-2015-0209_EN.html
[60]Directive (EU) 2019/790 of the European Parliament and of the Council, Title IV, Chapter 2, Article 17 of the 2019/790 EU Copyright Directive.
[61]The Information Technology Act, 2000, § 79, [Act 21 of 2000 as amended up to S.O. 4720(E), dated 26-9-2022] [Updated as on 11-10-2022]
[62] Flipkart Internet Pvt Ltd v. State of NCT of Delhi, 2022 SCC OnLine Del 2439, decided on 17-08-2022, https://www.scconline.com/blog/post/2022/08/19/intermediary-entitled-to-claim-protection-u-s-79-it-act-for-criminal-liability-unless-active-role-is-disclosed-delhi-high-court-quashes-fir-against-flipkart/.; Google India Pvt. Ltd. v. Visaka Industries, 2019 SCC OnLine SC 1587, decided on 10.12.2019, https://www.scconline.com/blog/post/2019/12/11/google-india-fails-to-gain-protection-under-section-79-of-the-it-act-2000-to-face-trial-in-a-2008-defamation-case/

Contemporary Perspectives of Interested Parties and the Neglect towards Fair Use

"The law does not just excuse fair use;it wholly authorises it."

-Richard C. Tallman, J[63]

People on the internet are fearless of the consequences of their behaviours and actions online.[64] This is due to the mirage that the online realm is not governed, and one has the licence to say, express, view and consume whatever one pleases. When logged onto social networking sites, people believe they are anonymous and invisible.[65] This sentiment is similar when it comes to intellectual property. People think downloading copyrighted content like films and music does not hurt the corresponding rightsholders. There needs to be more guilt, empathy and understanding of intellectual property among users. Even celebrities, including musicians, are not alien to lawsuits against them that arise out of them posting paparazzi photographs on their Instagram—the rights to which the photographers typically have.[66]

The case of the iconic heavy metal band Metallica going after Napster not just in the court of law but also in the court of public opinion is a classic example to demonstrate the behaviour and psychology of media consumers. Napster was launched in 1999 as a P2P file-sharing application focused on distributing MP3 audio files. Napster allowed users to share electronic copies of music stored on their personal computers. Napster was just a facilitator. As a CBS News article from May 2000 explains[67], Napster did not upload files on its service. The users themselves shared files. Napster merely facilitated the enlisting and search of files. The actual transfer of files happened between the computers of the users. By October 1999, Napster had four million songs available to download, and by March 2000, Napster had 20 million users already.[68] Napster exploited the advantage of newly widespread access to the internet and CD-burning technology. In the summer of 1999, Metallica recorded a song called "I

[63]Lenz v. Universal Music Corp., 815 F.3d 1145, 1151, 2016 U.S. App. LEXIS 5026, *13, 118 U.S.P.Q.2D (BNA) 1157, 1161

[64]See John Suler, *The Online Disinhibition Effect*,Volume 7, Number 3, CYBERPSYCHOLOGY & BEHAVIOR: THE IMPACT OF THE INTERNET, MULTIMEDIA AND VIRTUAL REALITY ON BEHAVIOR AND SOCIETY,(2004),https://doi.org/10.1089/1094931041291295

[65]*Ibid*

[66]Bill Donahue, *Why Can Miley Cyrus Be Sued for Posting a Photo of Herself to Instagram*?, BILLBOARD,(9th Dec. 2022), https://www.billboard.com/pro/miley-cyrus-instagram-paparazzi-photo-lawsuit-explainer/

[67]*How Napster Works - And How It Doesn't* - CBS News, by cbsnews.com staff cbsnews.com staff, CBS NEWS, May 17, 2000, https://www.cbsnews.com/news/how-napster-works-and-how-it-doesnt/.

[68]Tom Lamont,*Napster: The Day the Music was Set Free*,THE GUARDIAN, (Feb 24, 2013), https://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing

Disappear" for the soundtrack to *Mission: Impossible II*. It was set to release around the same time the movie did. However, much before that, Metallica discovered that multiple radio stations across the United States were playing an unfinished version of the song. They traced the leak to Napster and became the first musicians to sue Napster[69] in a US District Court in the Northern District of California in 2000.[70]

The public trial of *Metallica v. Napster* was quite eventful. Lars gave interviews on TV. He famously showed up at Napster's headquarters in California along with two attorneys and thirteen boxes containing over 60,000 pages of documents that had the usernames of more than 300,000 users who had allegedly shared their music on the platform where cameras and journalists greeted him.[71] During MTV's 2000 Video Music Awards, a skit starring Lars Ulrich and Marlon Wayans was aired to show how Napster users' "sharing" was stealing and illegal. In the performance, Ulrich suggests that if Napster users can "share" music, he should be able to do the same with tangible things.He then slaps a Napster sticker on everything he can see, including Wayan's soda can, computer—and girlfriend—and has them taken away. A voiceover at the end of the skit says, "Napster: Sharing's only fun when it's not your stuff."[72] Interestingly, during the same awards show, Shawn Fanning, founder of Napster, took the stage wearing a Metallica T-shirt. This move did not go well with Metallica's fans. Even their most loyal fans disapproved of them suing Napster and taking away people's ability to acquire copies of music for free.There was intense outrage by Napster users, including Metallica fans, over Metallica's stance.[73] Metallica won the legal battle but did not win in the court of public opinion. Fans started believing that Metallica had become avaricious and sold out.[74] Metallica's website got hacked, and the hackers left a message on

[69]Metallica v. Napster, Inc., 13 April 2020, https://www.stereogum.com/2079981/metallica-sues-napster-2000/columns/sounding-board/

[70]Tracy Reilly, "*Sad But True": Why Metallica's Fans Continue to Fail Them (and Not Vice Versa) Twenty Years After the Napster Lawsuit*, POPULAR CULTURE REVIEWPOPULAR CULTURE REVIEW 30.2, February 2020,https://www.researchgate.net/publication/339943776_Sad_But_True_Why_Metallica%27s_Fans_Continue_to_Fail_Them_and_Not_Vice_Versa_Twenty_Years_After_the_Napster_Lawsuit.

[71]Richard-B-Simon, *Metallica Deliver List Of MP3 Traders to Napster Headquarters*, MTV, (May 3, 2000), https://www.mtv.com/news/4kc84y/metallica-deliver-list-of-mp3-traders-to-napster-headquarters; Metallica fingers 335,435 Napster users, John Borland, CNET, (Jan. 2 2002), https://www.cnet.com/tech/services-and-software/metallica-fingers-335435-napster-users/

[72]COMMENT: "SHARING'S ONLY FUN WHEN IT'S NOT YOUR STUFF": NAPSTER.COM PUSHES THE ENVELOPE OF INDIRECT COPYRIGHT INFRINGEMENT, Sarah D. Glasebrook, 69 UMKC L. Rev. 811; Merlin Alderslade, *Lars Ulrich's Anti-Napster Video Remains One Of Metal's Weirdest Moments Ever*,(Metal Hammer), (September 29, 2022), https://www.loudersound.com/features/lars-ulrichs-anti-napster-video-remains-one-of-metals-weirdest-moments-ever

[73]P.J. Huffstutter,*Band: 300,000 Napster Users Broke Copyright*, https://www.latimes.com/archives/la-xpm-2000-may-04-fi-26409-story.html

[74]*Id* at 74

the website: "LEAVE NAPSTER ALONE."[75] There was a protest against Ulrich where people chanted against him during his showing at the Napster headquarters. A narrative of 'rich rock stars hungry for money want to keep filling their pockets' was formed. People believed that since they previously spent money on Metallica's concerts, merchandise and CDs, Metallica should be grateful and not restrict their songs from being distributed over Napster. Even after the Federal Judge ruledon Napster, fans voiced their outrage on Napster's message boards.[76] Some called for Metallica's boycott, while some called for acts of battery. Kirk Hammett, the lead guitarist of Metallica, said in an interview with Playboy, "I'm still shocked at the reaction people have. I thought it was obvious – people are taking our music when they're not supposed to, and we want to stop them. Computers make it seem like you're not stealing because you're only pressing a button. The bottom line is, stealing is not right." Indeed, stealing is not correct, be it in any form.

The case of Metallica suing Napster shows people are not receptive to strong IP safeguards. People feel entitled to work access, and the justifications are fallacious and unfounded. For example:

a) *"It's a digital copy, a software. No one is at a loss because it did not cost money."*
Yes, it costs money to make. Quite possibly, lots of it. As Lars Ulrich explained in his testimony before a Senate Judiciary Committee on Downloading Music on the Internet, when Metallica makes an album, they spend many months and hundreds of dollars of "our dollars" writing and recording. Recordproducers, recording engineers, programmers, assistants, and occasionally session musicians are typically hired. Recording studios are rented for months and constructed, bought, and maintained by small businessmen who must constantly upgrade costly equipment and facilities. There are many more people involved in this chain. Lars said, "Add it all up, and you have an industry with many jobs, a few glamorous ones like ours, and lots more covering all levels of the pay scale and providing wages that support families and contribute to our economy." He added that Metallica is fortunate enough to make a great living, but most artists aren't. Also, the primary source of income for most

[75]Tony Smith, *Pro-Napster hackers hit Metallica*, THE REGISTER, (Apr 17, 2000), https://www.theregister.com/2000/04/17/pronapster_hackers_hit_metallica/; 14 April 2000,https://web.archive.org/web/20200420202233/https://geek.com/news/metallicacom-hacked-565045/
[76]Steven Musil,*Fans voice outrage about Napster ruling*, (Jan 2, 2002), CNET,https://www.cnet.com/tech/services-and-software/fans-voice-outrage-about-napster-ruling/

songwriters is sales.[77]This applies to films, books, photographs, software—everything copyrightable.

b) *"The rights holders have already earned so much money. It does not matter."*

Firstly—this argument fails to account for all the small actors that rely on royalties and get small portions. If every time some content is lawfully streamed (like a film on Netflix) or a licence to it is purchased (like a song on iTunes), royalty cheques are going to someone, and piracy ensures that no one gets paid. Not even the people living paycheque-to-paycheque. *Secondly*—it is irrelevant how much money a rights holder has earned. If all but one apartment has been sold in a large township, no person will ever expect the construction firm to give that last apartment away for free. Just because Ford sells millions of cars yearly entitles no one to a free Bronco. *Thirdly*—copyright has much to do with the monetary aspect, but it's also about so much more. It's back to Coldplay not wanting their music used in advertisements.[78] It's about Jay Z and Neil Young not wanting their music to be available for streaming on Spotify.[79] Authors feel sentimental about their works (because it is theirs) and must be allowed to reserve how they are used.

c) *"I'm telling many people about this work, thereby publicising it, and therefore, the rights holders should not have any objection to it."*

[77]Lars Ulrich, *Roger McGuinn Testify Before Senate Judiciary Committee on Downloading Music on the Internet*, CNN.com Transcripts, Aired July 11, 2000, http://edition.cnn.com/TRANSCRIPTS/0007/11/se.01.html

[78]Katie Kindelan,*Top 5 Things You May Not Know About Coldplay*, (March 1, 2012), ABC News (go.com), https://abcnews.go.com/blogs/entertainment/2012/03/top-5-things-you-may-not-know-about-coldplay; *NO 'TROUBLE' FOR ADVERTS*, by NME, (Aug 24, 2002), https://www.nme.com/news/music/coldplay-615-1381235;Gordon MacMillan, *Coldplay turndown advertising deals worth £55m*,(Sept. 2, 2002), CAMPAIGN,https://www.campaignlive.co.uk/article/coldplay-turn-down-advertising-deals-worth-55m/156832

[79]Joana Allamani, *Why Jay Z Removed Most of His Music from Spotify*, (June 25, 2019), https://www.investopedia.com/news/why-jay-z-removed-most-his-music-spotify/#:~:text=Jay%20Z%20has%20also%20been,as%20not%20being%20artist%20friendly; Ava DuVernay is the latest artist to follow Neil Young's exit from Spotify because of Joe Rogan, by Christi Carras, Los Angeles Times (30 Jan. 2022) https://www.latimes.com/entertainment-arts/music/story/2022-01-30/spotify-joe-rogan-covid-neil-young-list-of-artists#:~:text=Entertainment%20figures%20Neil%20Young%2C%20left,have%20cut%20ties%20with%20Spotify.&text=Veteran%20singer%2Dsongwriter%20Neil%20Young,SPOTIFY%27s%20deadly%20misinformation%20about%20COVID.%E2%80%9D; Gil Kaufman, *Musicians Who Left Spotify After Neil Young Removed His Music*, BILLBOARD (Feb. 3, 2022), https://www.billboard.com/lists/musicians-who-left-spotify-neil-young-removed-music/joni-mitchell/.

> What's missing here is consent from rights holders. One cannot take this choice away from rights holders. What if an author does not want their work publicised? Should that be imposed on them?

There is another side to copyright infringement—where authors, content creators and the people—all get affected negatively and wrongly. One where the doctrine of fair use becomes a myth. Examples of recent YouTube policies in practice can serve as a good demonstration. Content ID is YouTube's content identification system.[80] Videos uploaded to YouTube are scanned against the audio and visual content database submitted to YouTube by rights holders. The video gets a Content ID Claim if Content ID discovers a match. This can either result in:

i. The video being blocked for viewing;

ii. Monetized by running ads and diverting the revenue to rightsholders of the claimed copyright/s, sometimes sharing that revenue with the user who uploaded the video and

iii. Tracking the viewer's viewer statistics.

Rightsholders often claim the advertising revenue from the video when their works are used therein. YouTube also gives certain rightsholders the option of claiming a video manually if the Content ID fails to match a copyrighted work used in the video.[81] Content ID is not privileged to be free from controversies.[82] Users reported false positives, incorrect time selection, targeting criticism, scams,[83] and a disregard for fair use. Journalist Cory Doctorow

[80]How Content ID works, https://support.google.com/youtube/answer/2797370?hl=en

[81]What is a manual claim?https://support.google.com/youtube/answer/9374251?hl=en

[82]Cory Doctorow, *How the EU's Copyright Filters Will Make it Trivial For Anyone to Censor the Internet*, (Sept. 11, 2018), EFF, https://www.eff.org/deeplinks/2018/09/how-eus-copyright-filters-will-make-it-trivial-anyone-censor-internet; Taylor B. Bartholomew, *The Death Of Fair Use In Cyberspace:Youtube And The Problem With Content Id*, Volume 13 No. 1, DUKE LAW & TECHNOLOGY REVIEW, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1271&context=dltr; Julia Alexander, *YouTubers and record labels are fighting, and record labels keep winning*,(May 24, 2019), THE VERGE, https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-cover; Paul Tassi,*The Injustice Of The YouTube Content ID Crackdown Reveals Google's Dark Side*, FORBES, (Dec. 19, 2013),https://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side/?sh=4c03eace66c8; *YouTube's Response To Content ID Copyright Controversy*, by GR STAFF, (Dec. 18, 2013), Gamerant, https://gamerant.com/youtube-content-id-copyright-controversy-response/; Alex mell Taylor,*YouTube's Copyright System Was Designed to Be Broken*, (Apr 30 2021), https://bettermarketing.pub/youtubes-copyright-system-was-designed-to-be-broken-1eb9b9c5b880

[83]Lindsay Dodgson,*YouTube channels are being held hostage with false copyright claims, but the platform's hands are tied*, (Jun 2, 2020), INSIDER, https://www.insider.com/youtubers-channels-are-being-held-hostage-with-fake-copyright-claims-2020-6

notes that "there is no bot that can judge whether something that does use copyrighted material is fair dealing. Fair dealing is protected under the law, but not under Content ID."[84]

For instance, we take two examples here to show how rightsholders often do not consider fair use when filing a manual claim on YouTube—Adam Neely's and Rick Beato's. Adam Neely is a bassist, composer and YouTuber.[85] He has over a million subscribers to his YouTube channel[86], where he talks about music theory, cognition, and jazz improvisation,*among other things*. Neely graduated summa cum laude with a BA in Jazz Composition from the Berklee College of Music in 2009 and an MM in Jazz Composition from the Manhattan School of Music in 2012, studying under Jim McNeely.[87] Neely published a video on YouTube titled "Why the Katy Perry/Flame lawsuit makes no sense" in August 2019 (**"2019 Katy Perry Lawsuit Video"**).[88] Katy Perry was sued by Flame for copyright infringement. Flame alleged that Katy Perry's song "Dark Horse" infringed upon his "Joyful Noise."[89]In the video, Neely talked about how and why the copyright infringement lawsuit was not founded and the severe ramifications of the case. The video went viral, and publishers like NPR contacted Neely to discuss the lawsuit.[90] Neely was vocal about the lawsuit because he viewed it as threatening musicians and creativity. Katy Perry had lost the jury trialbut won in appeal.[91] The 2019 Katy Perry Lawsuit Video was claimed by Katy Perry's publisher, Warner Chappell Music, Inc. (**"Warner Chappell"**), for using copyrighted works, as he announced with (reasonable) frustration in his February 2020 video titled "Warner Music claimed my video for defending their copyright in a lawsuit they lost the copyright for".[92] After that move, Neely's share of

[84]Cory Doctorow,*How the EU's Copyright Filters Will Make it Trivial For Anyone to Censor the Internet*, (Sept. 11, 2018), EFF, https://www.eff.org/deeplinks/2018/09/how-eus-copyright-filters-will-make-it-trivial-anyone-censor-internet

[85]Adam Neely Bio, http://www.adamneely.com/about

[86]Adam Neely on YouTube, https://www.youtube.com/channel/UCnkp4xDOwqqJD7sSM3xdUiQ

[87]*Id.* at 87

[88]Adam Neely, *Why the Katy Perry/Flame lawsuit makes no sense*, YOUTUBE, (Aug. 3, 2019),https://www.youtube.com/watch?v=0ytoUuO-qvg&t=298s

[89]Gray v. Perry, 2020 U.S. Dist. LEXIS 46313, Copy. L. Rep. (CCH) P31,611, 2020 WL 1275221 (C.D. Cal. March 16, 2020)

[90]Mark Navin,*Musician Says Katy Perry's 'Dark Horse' Copyright Infringement Verdict Sets A 'Dangerous Precede*, (Aug 14, 2019), NPRIllinois

[91]Laura Snapes, *Katy Perry wins £2.1m copyright appeal over hit single Dark Horse*, THE GUARDIAN, (Mar 11 2022),https://www.theguardian.com/music/2022/mar/11/katy-perry-wins-dark-horse-copyright-appeal; Mark Savage, *Katy Perry wins in Dark Horse Copyright Appeal*,(March 11, 2022), BBC News, https://www.bbc.com/news/entertainment-arts-60705977; Ethan Shanfeld,Katy Perry Wins Appeal in 'Dark Horse' Copyright Suit, (Mar 10, 2022), https://variety.com/2022/music/news/katy-perry-appeal-dark-horse-copyright-lawsuit-1235201510/

[92]Adam Neely 2, *warner music claimed my video for defending their copyright in a lawsuit they lost the copyright for*, YOUTUBE,(Feb 7 2020), https://www.youtube.com/watch?v=KM6X2MEl7R8

advertising revenue from the video would be sent to Warner Chappell. Neely talks about how his video's "Dark Horse" usage fell inside the four corners of fair use. He also goes on to illustrate the absurdity of the claim that he received. The lawsuit said that the video used the song's melody. However, Neely never played the song's theme in the video—only the ostinato. Interestingly, the content that was found infringing by the claim, which is expressed by timestamps, was the ostinato not of "Dark Horse," but for "Joyful Noise"—the song that Katy Perry fought in court to prove was not copied by her song "Dark Horse." What's even more interesting is that the 2019 Katy Perry Lawsuit Video was claimed after Katy Perry lost the jury trial and was ordered to pay $2.78 million in damages. Moreover, Neely does not even play the master (i.e. the original sound recording) of the song "Dark Horse" in the 2019 Katy Perry Lawsuit Video. He played its ostinato on a synthesiser.

I agree with Adam that his usage of Katy Perry's "Dark Horse," a work of eight writers[93], is protected by the fair use doctrine, and a case can be made for the same concerning every factor thereof.

Richard John Beato (Rick Beato) is a multi-instrumentalist, music producer, educator and YouTuber. He has over three million subscribers to his YouTube channel, which is about "everything music."[94] He has a Bachelor of Arts in Music and a master's in jazz studies.[95] Beato has grievances, too, about the way copyright claims work currently. He does not put YouTube at the centre of his blame. Instead, his resentment is directed, more often than not, towards rightsholders (or their publishers or representatives) who claim copyright infringement (similar to the 2019 Katy Perry Lawsuit Video where Adam Neely is aggrieved about the act of the rightsholder). Beato has been incredibly vocal about his stance against the demonetisations and blocks that do not consider the concept of fair use. He has published many videos about this on his YouTube channel.[96] Here are some titles for example:

1. "I Got My First Copyright Strike...I'm Pissed (Rant)"[97]
2. "The Music Industry SCAM to Ripoff YouTubers (Rant)"[98]

[93] 8 Writers of Dark Horse, THE MLC, https://portal.themlc.com/catalog/work/911259064
[94] Rick Beato on YouTube, https://www.youtube.com/@RickBeato/featured
[95] About Rick Beato, UCL, https://www.ucl.ac.uk/culture/whats-on/rick-beato
[96] *Id*. at 99
[97] Rick Beato, *I Got My First Copyright Strike...I'm Pissed (Rant)*, YOUTUBE, (Feb 4, 2021), https://www.youtube.com/watch?v=E5lY_DbUsok

3. "My Video Was Demonetized by 16 Record Labels…"[99]
4. "I Finally Claimed FAIR USE on a Video ...REJECTED! (Rant)" [100]
5. "I Confronted the People That BLOCKED My Video (Rant)" [101]
6. "The Idiocy of Blocking Music on YouTube (Rant)"[102]

"You can't teach people music without playing examples. I can't do something, well, 'this is *like* Led Zeppelin' or Bach. I created something like it, and you'll learn from it.' No, you have to learn from the actual sources," says Beato in his video titled "I Got My First Copyright Strike...I'm Pissed (Rant)"[103]. In his videos, Beato claims that he does not mind his share of advertising revenue from his videos being given to rightsholders. However, he is against rightsholders blocking access to and going to the extent of taking down the content, which results in the channel getting a copyright strike. Beato does not dispute the copyright claims that block his videos because he claims that it can lead to him getting a copyright strike. And yes, indeed, the path of disputing can lead to a copyright strike, according to Google's support article.[104] In the video titled "I Finally Claimed FAIR USE on a Video ...REJECTED! (Rant)" (**"Fair Use Claim Video"**)[105] Beato tells his viewers that in one of his live streams titled "Why Today's Music Is So BORING. The Regression of Musical Innovation"[106](**"Claimed Video"**), where he was talking about music theory with a whiteboard behind him and wearing an acoustic guitar, got a copyright claim from Warner Chappell. According to the lawsuit (which was shown by Beato in his video), the content during 7:33 and 8:02 was found to infringe upon the claimant's copyright. The claim reads, "[v]ideo uses this song's melody," referring to the Led Zeppelin song "Babe I'm Gonna

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[98]Rick Beato, *The Music Industry SCAM to Ripoff YouTubers (Rant)*, YOUTUBE, (Feb 23, 2020)https://www.youtube.com/watch?V=uhh8npj5sdy

[99]Rick Beato, *My Video Was Demonetized by 16 Record Labels...*, YOUTUBE, (June 23, 2022), https://www.youtube.com/watch?v=R3NnrWrkKZM

[100]Rick Beato, *I Finally Claimed FAIR USE on a Video ...REJECTED! (Rant*), YOUTUBE, (Jun 6, 2021), https://www.youtube.com/watch?v=JZ2s1fDeB8A

[101]Rick Beato, *I Confronted the People That BLOCKED My Video (Rant)*, YOUTUBE, (Jul 18, 2020), https://www.youtube.com/watch?v=RqvuEal2P2E&t=1009s

[102] Rick Beato, The Idiocy of Blocking Music on YouTube (Rant), YouTube, (Nov. 13, 2021), https://www.youtube.com/watch?v=iACrWgeksjI

[103]*Id.* at 102

[104]Dispute a Content ID claim - YouTube Help, https://support.google.com/youtube/answer/2797454?hl=en#zippy=%2Cif-i-dont-dispute-a-content-id-claim-how-can-i-resolve-it%2Cwhat-happens-if-my-dispute-is-rejected

[105]*Id.*at 105

[106]Rick Beato, *Why Today's Music Is So BORING:The Regression of Musical Innovation*, YouTube, (29 May 2021), https://www.youtube.com/watch?v=Ks4c_A0Ach8

Leave You (Remaster)."[107] Beato explains that he was not singing, humming or playing the song's melody in that snippet of the Claimed Video. He was playing the chords. The claim on the Claimed Video was dropped eventually, so one can watch it and listen to the claimed part. We did that, and Beato was right—he was arpeggiating the song's chords. He said the name of the song while playing the chord progression. A chord progression, per se, generally, cannot be copyrighted "Thus, although chord progressions may not be individually protected, if in combination with rhythm and pitch sequence, they show the chorus of Thank God to be substantially similar to the chorus of One, infringement can be found."[108]Either because they are not original or they belong to the shared language of music. Moreover, as Beato also points out in the Fair Use Claim Video, the Claimed Video is a "teaching/opinion"[109] video and it does not infringe upon the authors' rights due to its qualification as fair use. Beato says in the video that he disputed the copyright claim, and the process is such that the claimant will review the claim and decide if the dispute holds water or not—and in this case, Warner Chappell "decided" that the claim is still valid. We can confront the peril of this process given how it is patently against the principle of natural justice of *Nemo iudex in causa sua*, but I would instead not branch out. The part where the song's chords are played was manually claimed in the Fair Use Claim Video. He had not disputed that claim but had made a video about it, which he published on YouTube and tweeted on Twitter. The next day, according to Beato, the copyright claim was removed. Beato is a personality who has a platform to be vocal about this—Beato has more than 67,000 followers on Twitterand 633,000 followers on Instagram. I discussed earlier in this article that copyright does not matter how much artistic merit your work has; it does not know how popular or wealthy you are. That is the spirit of copyright, which can also be extrapolated to the user's side. The right of fair use ought to be available to a person who has just begun publishing videos on YouTube and has no subscribers, the same way it applies to a personality like Beato. It should not be that rightsholders only respect the doctrine of fair use when they anticipate or learn about a public outrage.

[107] *Ibid*
[108] Swirsky v. Carey, 376 F.3d 841, 848, 2004 U.S. App. LEXIS 14251, *17, Copy. L. Rep. (CCH) P28,852, 64 Fed. R. Evid. Serv. (Callaghan) 1002.
[109] *Id.* at 105

I don't, however, concur with the entirety of Beato's stance on copyright claims on YouTube. For example, in his video titled "The Idiocy of Blocking Music on YouTube (Rant)"[110], Beato claims that ECM Records has a blocking policy for all the artists they work with or represent. He claims that some videos he makes are meant to bring iconic, classic songs to the younger generation, who is unaware of these songs since they are decades old. Beato argues that the blanket blocking policy adopted by rightsholders like ECM Records and some other artists hurts the artists because they are becoming obsolete. Beato wants to talk about the music that directly or indirectly inspired the music we listen to today. He does not mind losing the advertising revenue from the video—he prefers that the artists get paid while the people learn about them—what he *is* vocal about is his stance against the blocking of the videos. From a strictly legal standpoint, a user cannot use copyrighted works without a valid license. It is irrelevant whether the rightsholders are attributed or if the use introduces and promotes the work to a new audience. But if the service falls within the ambit of the fair use doctrine (or fair dealing, according to the jurisdiction in which the copyright subsists), the user has the right against not only the blocking of the video but all kinds of copyright claims, including sharing of advertising revenue. Even from a moral standpoint, as already discussed, the authors of a work should have the choice of whether to license their jobs or not. If an author does not want to see their creations used in YouTube videos, they should have the right to block all such videos where their work is unfair.

Record labelshave a much higher influence on YouTube's decisions–perhaps a factor of which is the ability and propensity of record titles to litigate. Glenn Fricker, a music producer based out of Ontario[111] and the face of the YouTube channel "SpectreSoundStudios"[112]is quoted by The Verge, saying, "The record labels got all the power. There's no third-party arbitration system there. They make the claim, and you could deny it, but what's the point?"[113]

Numerous examples on YouTube exist where creators have received copyright claims needing more foundation in their videos. PaymoneyWubby, a YouTuber with over a million

[110]*Id.*at 107
[111]About Glenn Fricker, https://www.tcelectronic.com/artists/artist.html?artistId=glenn-fricker
[112]Glenn Fricker on YouTube, https://www.youtube.com/@SpectreSoundStudios
[113]Julia Alexander, *YouTubers and record labels are fighting, and record labels keep winning*,The Verge, (May 24 2019), https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-cover

subscribers[114], published a video on YouTube titled "YouTube STILL does not care about Fair Use,"[115] announcing that ByteDance Ltd. (**"ByteDance"**) had claimed copyright on his breakthrough video titled "What kids do on Musical.ly".[116] ByteDance is the company that acquired Musical.ly. PaymoneyWubby tells his audience that ByteDance claimed copyright on the content that he used in his video. However, the claimed content was posted by users of the social media platform "Musical.ly," and those videos were used in the context of critique and review. PaymoneyWubby later learnt that the reason BiteDance gave for the takedown of his video was the use of their "copyrighted logo" in the video.[117] Eventually, even PaymoneyWubby's video would be reinstated and his copyright strike removed from his record.

Courts in the United States have emphasised that the DMCA, 17 U.S.C.S. § 512(c)(3)(A)(v), requires rightsholders to consider whether potentially infringing material is a fair use of a copyrighted work under 17 U.S.C.S. § 107 before issuing a takedown notification to a service provider.[118]Stephanie Lenz published a 29-second home video on YouTube that featured her toddler dancing to a Prince song. Universal Music had sent a takedown notice to YouTube, alleging copyright infringement, following which the video was blocked. Lenz sued, arguing that her video constituted fair use and should not have been removed. The United States Court of Appeals for the Ninth Circuit observed that "Copyright holders cannot shirk their duty to consider—in good faith and before sending a takedown notification—whether allegedly infringing material constitutes fair use, a use which the DMCA contemplates as authorised by the law." Similar ideas are laid down in Article 17 of the recent EU Copyright Directive.[119]

[114]PaymoneyWubby on YouTube, https://www.youtube.com/@PaymoneyWubby
[115]PaymoneyWubby, *YouTube STILL does not care about Fair Use*, YOUTUBE, (Aug 30 2018), https://www.youtube.com/watch?v=oTHLFJJRtI8
[116]PaymoneyWubby, *What kids really do on Musical.ly*, YOUTUBE, (Jul 2 2018), https://www.youtube.com/watch?v=5PmphkNDosg
[117]PaymoneyWubby, *Cowardly actions of a cowardly group - Update Video*, YOUTUBE, (Sept 3, 2018), https://www.youtube.com/watch?v=Pu3bpqsa7dM
[118]Lenz v. Universal Music Corp., 815 F.3d 1145, 1160.
[119]DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 Apr. 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Art. 17(7) proviso (providing that "Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche."); and Art. 17(9) (requiring rightholders to "duly justify the reasons for their requests")]

The dissent in the case above emphasises that Universal Music's policy was to issue a takedown notice where copyrighted work was "the focus of the video"or "prominently featured in the video."[120] Universal Music did not instruct its agents to consider fair use. They were asked to spare videos with "a second or less of a Prince song" [121]or where a song was "distorted beyond reasonable recognition."[122] The dissent observes that "Universal's policy was expressly to determine whether a video made "significant use"—not fair use—of the work. Nothing in Universal's methodology considered the purpose and character of the use, the commercial or non-commercial nature, or whether the use would significantly impact the market for the copyrighted work."[123] Notably, the dissent holds that "Universal *knew* it had not considered fair use because § 107 explicitly supplies the factors that "shall" be considered in determining whether a use is fair.*[124]* I see no reason in law or logic to excuse copyright holders from the general principle that knowledge of the law is presumed."[125]

"[I]n an era when a significant proportion of media distribution and consumption takes place on third-party safe harbours such as YouTube if a creative work can be taken down without meaningfully considering fair use, then the viability of the concept of fair use itself is in jeopardy." - Judge Milan D. Smith, Jr. in *Lenz v. Universal Music Corp.*[126]

Hitherto,I have discussed the perspectives of the users of intermediary platforms and the rightsholders. I have little to say about intermediaries. Intermediaries, especially ones like YouTube where creators run advertisements and earn from their videos, need help balancing compliance with the law and avoiding litigation by making it easier to publish content and having good public relations. Intermediaries have tried to make and keep their platforms breezy and stress-free and implemented creator-friendly changes.[127] Google has a support

[120]*Id.* at 121, pg 1159 II.
[121]*Id.* at 121, pg 1149 I.
[122]*Id.* at 121, pg 1149 I.
[123]*Id.*at 121, pg. 1159.
[124]*Id.* at 121, pg. 1160.
[125]*Id.* at 121, pg. 1160.
[126]*Id.* at 121, pg. 1160.
[127]Todd Spangler, *YouTube Updates Copyright-Reporting System to Make It Easier for Creators to Manage Claims*, (Jul 10, 2019), VARIETY, https://variety.com/2019/digital/news/youtube-revamps-manual-copyright-claims-1203263607/; Akshay Gangwar, *Instagram Now Makes It Easier to See When You're Using Copyrighted Music*, (May 21, 2020), BEEBOM, https://beebom.com/instagram-guidelines-copyrighted-music/; Jacob Kastrenakes, *YouTube is making it much easier for creators to deal with copyright claims*, (Jul 10, 2019), THE VERGE,https://www.theverge.com/2019/7/9/20687985/youtube-manual-copyright-claim-updates-timestamps-automatic-release

article titled "Fair Use on YouTube,"[128] which explains what fair use is, how it differs internationally, and its four factors. Google claims that "copyright owners who repeatedly make erroneous claims can have their Content ID access disabled and their partnership with YouTube terminated."[129]

Intermediaries thrive in the realm where multiple actors—the law, rightsholders, content creators—are at play and manoeuvring these waters can become challenging very quickly and very fast.

Revisiting Safe Harbour

Over the past decade, social media platforms have presented themselves as mere conduits, downplaying their active role in content moderation, attributed to safe harbour provisions.[130]Allows intermediaries to moderate user content without losing safe harbour. Thus, deleting certain content does not make the intermediary a "publisher" or impose policing standards on them. It's important to note that § 230 was not initially designed for social media platforms, but they have managed to take advantage of its provisions. When social media platforms do acknowledge their moderation practices, they typically portray themselves as open, impartial, and non-interventionist. This is partly because their founders genuinely believe in these principles and partly to avoid obligations and liability. On the contrary, in India, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, *impose* due diligence and a "grievance redressal mechanism" on intermediaries.[131] The Rules mandate higher due diligence standards for significant social media and online gaming intermediaries.[132] Non-adherence to these Rules shall result in the intermediary losing safe harbour in India.[133]

The reality needs to be considered is that intermediary platforms actively shape and censor public discourse. They not only mediate general discussions but also constitute them. Media

[128]Fair use on YouTube, https://support.google.com/youtube/answer/9783148?hl=en#:~:text=Fair%20use%20is%20a%20legal,are%20infringing%20under%20copyright%20law.
[129]*Id* at 84
[130]47 U.S.C.§ 230.
[131]Supra note 14 atRule 3.
[132]*Supra*note 14 at Rule4.
[133]*Supra*note 14 at Rule 7.

engage in moderation by removing, filtering, and suspending content. They also make recommendations through news feeds, trending lists, and personalised suggestions. Additionally, they curate content by featuring it and offering it on their front pages. While the law predates the rise of social media platforms, these platforms have generally claimed the safe harbour provided by § 230.[134]

As social media platforms evolve in form and purpose and become central to online interactions, commerce and labour, the safe harbour provided to internet providers raises increasing concerns. I am now dealing with a new category between information conduits and media content providers. Social media platforms promise to connect users and deliver their messages to selected audiences. However, they host this content andorganise and algorithmically select which content to present to users. When platforms go beyond merely delivering content in reverse chronological order and start curating and selecting range based on enhancing user experience and engagement, they become hybrids, forcing us to challenge the traditional conduit-provider binary. Further, with big data's advent and rapid prevalence, intermediaries can realise what goes on their platforms. Higher data processing speeds[135]and better data management systems mean intermediaries are now aware of the content traffic on their media. This changes the nature of intermediaries from innocent and naive service providers to bystanders to potentially unlawful activity if they let potentially infringing material exist on their media.

The necessity of revisiting SafeHarbour can be demonstrated if we look at the case of Telegram—an instant messaging service. One can create channels on this platform, and as opposed to group chats, once a user joins a track, they get access to the entire message history, i.e. access to all messages, including links and media, sent before joining. Telegram is one of the biggest threats to copyright globally. One can use the search option of the platform and search the name of a film or a musical artist and find multiple channels that have unlawfully uploaded the content therein, available for download by anyone and everyone on Telegram. The High Court of Delhi has been hearing numerous copyright infringement cases against Telegram.[136] In one such case,*Neetu Singh v. Telegram FZ LLC*[137],

[134]*Supra* note 133.
[135]The Economic and Social Role of Internet Intermediaries, OECD, (April 2010), pg 4, ¶ 2.
[136]*Everything You Need To Know About 5 Copyright Cases Against Telegram At The Delhi HC*, by Aarthi Ganesan, (Jan 17, 2023), https://www.medianama.com/2023/01/223-telegram-5-copyright-cases-delhi-hc/

the Court held that the courts could direct Telegram to reveal the names and relevant details of users alleged to have unlawfully distributed copyrighted content.[138] Copyright infringement on Telegram is a cycle. Users distribute copyrighted content on the platform. A complaint can be submitted to dmca@telegram.org to request a rightsholder's content removal.[139] However, there are various channels and various users that commit copyright infringement on the platform. It is not unlikely for the same content to be made available by a user on the forum again. A rightsholder will likewise need to send a complaint to Telegram.

Rightsholders deserve a better mechanism to deal with copyright infringement on intermediary platforms—one that focuses not on the cure but the prevention.

CONCLUSION AND THE WAY FORWARD

At the very outset, it is clear that the current approach to addressing copyright infringement leaves all parties aggrieved in some form or other. Rightsholders exploit notice-and-takedown mechanisms. On the other hand, their works *are* being shared online, and it's not always easily detected or realised by them. Users have the right to fair use, which they cannot always enjoy without resorting to litigation. They are often subject to draconian, black-and-white processes of intermediaries for disputing a copyright takedown. Intermediary platforms are given a safe harbour in law but still shape their policies to suit rightsholding corporations to avoid litigation disproportionately, and in doing that, they face strong dissent from their users. While the law has made efforts to guarantee the right of fair use to users, these efforts have fallen short of making a real change for the public interest. Another question that knocks on the doors of our minds is that because intermediaries can detect potentially infringing material on their platforms, are they best placed to adjudicate upon it? Should they be the ones (even in the first instance) to decide if a material infringes upon an existing copyright? This *prima facie* is reminiscent of 'judge, jury, executioner.'

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[137]Neetu Singh v. Telegram FZ LLC 2022 SCC OnLine Del 2637

[138]*Repeated blocking of channels proving to be insufficient; Delhi High Court directs Telegram to disclose details of infringing defaulters*, SCC Blog, (Sept 2, 2022), https://www.scconline.com/blog/post/2022/09/02/delhi-high-court-directs-disclosure-of-details-of-infringing-defaulters-singapore-itact-copyright-infringement-legalnews-legalupdates-neetu-singh-legalresearch/; Nupur Thapliyal, *Indian Courts Can Direct 'Telegram' To Disclose Info Of Copyright Infringers Using Its Platform, Server Being In Singapore No Defence: Delhi HC*,(Aug 31, 2022), LIVELAW, https://www.livelaw.in/news-updates/copyright-infringers-telegrams-policies-physical-server-singapore-delhi-high-court-207993.

[139] Telegram FAQ:A bot or channel is infringing on my copyright. What do I do? https://telegram.org/faq#:~:text=If%20you%20see%20a%20bot,to%20dmca%40telegram.org.

Observing a different facet, the safe harbour has been extended to intermediaries in the context of mere facilitation and ignorance about the contents of the voluminous data processed and stored by them. Intermediaries have evolved, and it is high time that laws acknowledge and address this change.

I propose the following changes in the current approach to copyright protection in the digital age to overcome the shortcomings discussed in this manuscript.

a) *Reaffirm Fair Use (and fair dealing)—*

Fair use is a right that has been for too long taken for granted and treated with disregard. Lawmakers must enforce binding guidelines that reaffirm the doctrine of fair use. They must devise appropriate, standardised, user-friendly mechanisms for dealing with potentially infringing content on intermediaries that leave little to no room for abusing authors' rights under copyright law. The tool should allow users to be heard before coercive action is taken against their content. These guidelines and mechanisms should be uniformly suited to different kinds of intermediaries, and the implementation and enforcement must be given importance.

b) *Make intermediaries transparent and accountable—*

Intermediaries have been left to decide how they prefer addressing IP rights violations. There is a lack of transparency in the specifics of how copyright disputes are resolved and of accountability for being responsible mediators. This needs to change.

c) *Cooperation and Voluntary Agreements—*

Agreements like YouTube's with major performance rights organisation American Society of Composers, Authors, and Publishers[140] are amicable solutions that are a win-win for all parties. YouTube's Content ID also detects when a user has uploaded a cover song and directly diverts the whole or a share of the user's part of advertising

[140]Hannah Karp, *YouTube, ASCAP to Share Data in First-Ever Voluntary Deal*, (June 12, 2017), BILLBOARD,https://www.billboard.com/pro/youtube-ascap-share-data-first-ever-voluntary-deal/; FAQs for YouTube Content Uploaders, https://www.ascap.com/help/music-business-101/youtube-faq-uploaders#:~:text=What%20does%20ASCAP%20have%20to,to%20ASCAP%20members%20as%20royalties.

revenue to the songwriters and publishers of the original music, instead of both extremes—blocking the video and waiting to receive a takedown notice. Such agreements between intermediaries and organisations that represent authors are a great approach. Of course, Content ID's matches should be disputable with proper mechanisms in place, and fair use should not be forgotten.

d) *International Solidarity—*

We live in a global world. A person using TikTok in Waterloo can get recommended a video of an Italian barista on their feed. Social media has changed digital marketing, and now content creators have the entire world as their audience. In this context, there is a need for laws governing copyright tailor-made to address online copyright infringement (and non-infringement) that are similar across jurisdictions. The law of arbitration across countries needed to be equal and accurate to the spirit of the UNCITRAL Model Law on International Commercial Arbitration (1985) for uniformity to promote trade and international arbitration. I believe a similar need has arisen for copyright law, and no one heard the alarm go off.

e) *Making piracy laws stricter—*

Why can the law not mandate intermediaries like Telegram to adopt more authoritarian content identification systems and crack down on users uploading copyrighted material like films and songs by blocking access to the material? It might seem ironic, but online intermediaries must adapt to technological advancements. Safe harbour should only be extended to intermediaries prone to widespread distribution of pirated material if those intermediaries confront piracy. And as opined earlier, I don't advocate for an absolute takedown. Only access to the content should be blocked initially, and the user can plead their case if they have a valid defence under the law. Intermediaries, while accepting disputes to such obstruction of access, can require users to select a reason that they are claiming from a list, like educational purposes or critique, including an option for the user to claim that the work was not used in the upload at all which will help with false positives. Users can further explain why the use is fair. Intermediaries must set up specialised copyright departments dedicated to dealing with such disputes. The department employees must be educated and kept updated with the law and must decide upon the disputes.