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ENFORCING COPYRIGHT IN DEFIANCE OF COPYRIGHT LAW

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ABSTRACT

The rise of the internet has transformed the way authors publish their work. The monopoly of conventional publishers over the means of publication is no longer sincere ever since technology facilitated direct communication between the authors and their audience. The role of conventional publishers is now supplanted by digital players who acted as publisher-intermediaries in spaces of digital communication. Being enablers of communication of content, they occupy a strategic role in terms of securing copyright for authors vis-à-vis their work hosted over the internet. In order to suit the purpose of effective enforcement of copyright in digital times, the community allows these players certain leeway to tweak the manner of dissuading infringement of original works. The freedom to slightly tweak the model of copyright protection has not been very well respected. Taking the instance of YouTube and its ContentID mechanism, we try and understand the various ways in which privately determined schemes of copyright enforcement interfere with the ideals of conventional copyright law.

I. INTRODUCTION

The strategically synthetized position of publishers, as the enablers of copyright, had for long granted them the leverage to demand patronage of the moneyed aristocracy. In exchange for financial gain, publishers promised to curate an atmosphere of information which would favour the nobility. This *quid pro quo*, however, cost society their freedom to express themselves. The natural flow of free speech was consistently manipulated through the selective publication of content by publishers.

The coming of technology served as a respite. It initiated the much-needed revolution to call for the termination of the publishers' monopoly. The original gatekeepers of what information was to be allowed in society, were now intently being alienated from the duty of gatekeeping altogether. With the task of publication being reduced to the simple click of a button, the non-natural relevance of the publisher was turning to dust. Consequently, when digital technology boomed, content creators smiled even as publishers cried rivers of melancholia. Everyone was a publisher now.

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This happiness was, however, short-lived. Technology proved to be as much a curse as it was a boon. With the phasing out of the conventional publisher, we saw the emergence of a new class of digital publishers. This new publisher, while sounding the bugle of free speech and while 'renewing' the incentive to create, began to subtly institutionalize those very practices which digital communication was ushered in to destroy in the first place.

Dressed in the righteous façade of being harbingers of substantive free speech, these digital publishers sought enhanced protection of the law to forestall the possibility of over-enforcement of copyright. It was reasoned that if the digital publisher is held guilty of hosting infringing material, he/she would be compelled to undertake a pre-publication assessment of the content, which would run against the idea of free publication of works. This would, essentially, reinstate the unhealthy relevance of past publishers and undo all the positive change catalysed through the evolution of technology.

Acknowledging the above situation as a real threat, society responded with the idea of creating safe havens for these digital publisher-intermediaries. It was decided that the intermediary would not be susceptible to infringement claims unless it knew the materials hosted as being infringing. Furthermore, certain conditions were added to invoking this scheme of safe haven protection. This was done to carefully balance the economic interests of copyright owners and the free speech concerns of society. It was decided that intermediary protection would be conditional on adherence to a vigilant takedown mechanism, i.e., the intermediary must undertake to swiftly take down infringing material when informed of the existence of contravening content on its medium. The USA's Digital Millennium Copyright Act ["**DMCA**"] goes beyond the take down condition and prescribes an additional requirement of incorporating 'Standard Technical Measures' to materially secure the copyright owners' works against infringement by obscure elements. Interestingly, the phrase 'Standard Technical Measures' has not been exhaustively defined in the Act. It is loosely expanded as being a collation of all such measures which is agreed upon by intermediaries and copyright owners alike, as being instrumental in safeguarding content against infringement. The ambivalent connotation of the phrase is perhaps, well intended to ensure that the unpredictability of technology does not hinder bona fide attempts at curbing infringement. However, such intentions rarely serve as a deterrence to mischievous elements who continue to prey on the ambiguity of the law to abuse the process of its fairness. Such is the case with the intermediaries as well.

Although 'Standard Technical Measures' ["**STM**"] is not a universal requirement, intermediaries continue to portray the same as a universal component of copyright enforcement.[1] In doing so, they promote a regime of global copyrights which is opposed to the sovereign administration of copyright territorially. In importing these STM standards, intermediaries tend to disclose a bias towards US copyright law in defiance of native legislative requirements which operate based on the particular intellectual requirements of those specific countries.

Furthermore, even while strategically universalizing the operation of the DMCA, intermediaries begin to enforce a manner of private copyright enforcement which rests on their determination of what STMs should be. With their terms of use and with sophisticated AI by their side, intermediaries began to operationalize instantaneous assessment of content- with scant regard for the basic tenets of copyright. Setting into a collusive arrangement with certain authors of worldwide relevance, these intermediaries began administering a parallel regime of copyrights which prima facie seems discriminatory, arbitrary and antithetical to the entire notion of copyright and free speech.

For the sake of convenience, we shall primarily investigate YouTube's Content ID scheme and try to examine how the system promotes an alternative model of copyright enforcement, tending to 'over-enforcement'- which is not just harmful for copyright's underlying objective of fostering free speech, but is also debilitating of every sovereign's inherent right to steer their individual digital space.

II. NEW STANDARD OF WHAT CONSTITUTES INFRINGEMENT

Per the basic tenets of copyright law, infringement denotes a non-justified misappropriation of a substantial share of the original copyright owner's content.[2] The qualitative and quantitative test to determine the existence of infringement rests on human judgment of how the works are perceived by the consumers of the same content.[3] While certain scholars believe the borrowing of the slightest share of copyrighted works would instantly set the ball of infringement rolling[4] (the bright line standard), there are others who swear by the de minimis rule[5] of human adjudication vis-à-vis qualitative/quantitative similarity. So long as the borrowing is trivial, the claim of infringement seems redundant to the de minimis loyalists. Although it is understood that YouTube

[1] (Apart from America, we find similar provisions of STM in Australia and Singapore).
[2] Feist Publications, Inc. v. Rural Tel. Serv. Co. Inc., 499 U.S. 340, 361 (1991).
[3] Newton v. Diamond, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) (9th Cir.).
[4] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) ["Brightline test"].
[5] Newton v. Diamond, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) (9th Cir.).

prescribes a minimum length for matches at around half a minute, the same does not hold true for beneficiaries of Content ID, who can manually set the limit even lower.[6] In essence, they may mechanically adopt the 'bright line' test of *Grand Upright* [7] against the human adjudication of quantitative/qualitative assessment test as advocated in *Newton v. Diamond.*[8]

The leaning of judicial determination regarding such a choice, i.e., to toe the 'bright line' test (of the 9th circuit) or to adopt the de minimis justification (of the 6th circuit), is heavily dependent on the country administering the regime of copyrights. Since the finer points of IP administration vary under the intellectual requirements of the country, it would be unfair for us to adjudicate a standardised test for all jurisdictions to submit to.[9]

YouTube and most other intermediaries do exactly this. In the name of enforcing copyrights, they standardize the enforcement mechanism to neglect sovereign requirements. They deploy Artificial Intelligence ["**AI**"] which is incapable of varying its mode of detecting infringement to the different regimes through which the content is hosted, and in effect propel a universally standardized determination of copyright examination. In choosing between the holistic de minimis test and the AI enforceable bright line test, they choose the latter for the sake of convenience and globally subvert the individualistic sovereign determination of countries who would, probably, prefer a more nuanced analysis of what must qualify as infringement in their space of content consumption.

In essence, through the easy way of deploying AI for determining infringement mechanically, intermediaries possibly desire to re-calibrate the copyright regimes operating in isolation into one globalised sphere of harmonized operations. In doing so, they assume extreme significance as being functional sovereigns, whose determination transcends the laws of officiating sovereigns.

III. THE DIFFICULT QUESTION OF FAIR USE

The de minimis question aside, infringement also rests on the idea of justification and condonation. The two similar yet different paradigms of fair use and fair dealing, act as arbiters to ensure that copyright does not become a hindrance to accessibility. They act as a means to ensure availability

[6] YouTube Help, '*How Content ID Works*' - https://support.google.com/youtube/answer/2797370 'Set default policies' https://support.google.com/youtube/answer/3369992.
[7] Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991).
[8] Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003).
[9](The requirements of the law or the provisions suitable to a highly industrialised and economically developed country like the U.S.A., or U.K. may not necessarily suffice or be suitable for adoption in an underdeveloped and semi-industrialised country like ours. Such provisions, if adopted, far from furthering the industrial progress of the country might themselves hamper progress. The law has therefore to be suitably fashioned *See* https://ipindia.gov.in/writereaddata/Portal/Images/pdf/1959-_Justice_N_R_Ayyangar_committee_report.pdf).

of access with the purpose of facilitating free speech. Their purpose, in other words, is to keep copyright from being a hindrance to free speech, to its desired role of being an enabler which drives the engine of free speech.

Now, it is settled that the finer points of copyright regimes vary across countries under the varying intellectual requirements.[10] Some countries opt for fair use, like the USA, and there are some countries that opt for the paradigm of fair dealing. While both are similar in the sense that they condone infringement, their method of operation still remains quite different. Fair use is a broader principle which adjudicates its invocation on a case-to-case basis through the famous four-factor test eloquently summarized in *Acuff Rose*.[11] It acts as a condoning factor in certain instances of infringement decided by the judiciary on a case-to-case basis. Fair dealing, on the other hand, does not condone as much as restrict copyright in certain very particular instances of dealing, which the law lists as being prima facie fair.[12]

YouTube, being a US entity, gives far more credence to Fair Use over Fair Dealing.[13] Unlike Fair Use, which requires arbitration on a case-to-case basis, Fair Dealing does not evoke such a necessity on account of it being an exemption to copyright itself.[14] In any instance, the AI used by intermediaries for assessing instances of infringement is incapable of determining the validity of the subjective fair use criteria as well as the somewhat objective assessment of fair dealing.[15] To pre-empt itself from being categorized as opposed to free speech, intermediaries leave the assessment of whether fair use/fair dealing applies to the judgment of the copyright owner.[16] This passing-the-buck approach and incorporation of a content owners' scheme of self-regulation seems like an enthusiastic invitation to an institution of over-claiming copyright.[17] A simple

[10] (WTO allows countries to super specify functional terms used in TRIPS, for this very reason).
[11] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[12]Ishan Sambhar, "*India: Concept Of Fair Use And Fair Dealing In Copyright*" (May 13, 2020), MONDAQ, https://www.mondaq.com/india/copyright/930556/concept-of-fair-use-and-fair-dealing-in-copyright#:~:text=Fair%20dealing%20is%20an%20exception,Canada%2C%20Australia%20and%20New%20Zealand.&text=Fair%20use%20is%20a%20limitation,granted%20under%20U.S.%20copyright%20law.
[13] (For example, the YouTube page targeting a German audience and explaining fair use: 'Was it "Fair Use" (angemessene Verwendung)' https://www.youtube.com/yt/about/copyright/fair-use/#yt-copyright-protection).
[14] *Id.*
[15] YOUTUBE HELP, HTTPS://SUPPORT.GOOGLE.COM/YOUTUBE/ANSWER/2797370?HL=EN&REF_TOPIC=4515467.
[16] (YouTube explains that as it automatically generates claims against those upload matching content, the Content ID user is 'responsible for avoiding incorrect results', such as 'claims that interfere with authorised uses of content. It however also warns that 'YouTube takes action to address cases of abuse and error', including disabling specific reference files (...) and releasing all associated claims, disabling Content ID or even terminating YouTube partnership; 'Content eligible for Content ID' https://support.google.com/youtube/answer/2605065).
[17] YOUTUBE'S FAIR USE PROTECTION, https://www.youtube.com/intl/en-GB/yt/about/copyright/fair-use/#yt-copyright-protection.

warning against 'over-claiming' does very little to undo the real threat of invalidating the necessary functioning of justified use vis-a-vis fair use/fair dealing.[18]

Even disregarding the wholly inept manner of assessing fair use/fair dealing, YouTube's preferential vocalization of Fair Use as the optimal mode of defence to its users, discloses an unhealthy desire to converge copyright jurisdictions to one global regime, at least in the digital space.[19] This usurpation of regulating and administering copyright under what it deems to be the law provides yet another testimony to the gradual evolution of digital publisher-hosts from being regular intermediaries to digitally 'functional sovereigns'.[20]

IV. DISCRIMINATORY PRACTICE OF RESTRICTING COPYRIGHT IN ACCORDANCE WITH THE RELEVANCE OF THE CONTENT CREATOR

The purpose of copyright law is to promote original, unique expressions. The threshold of what constitutes 'original' is intentionally kept low to encourage constituents of society to come and express their unique expressions devoid of any fear of external judgment.[21] Although the 'modicum of creativity' standard did gain some momentum in instances of assessing the copyrightability of compilations, the general rule continues to remain the 'sweat of the brow'.[22]

Now, the bundle of rights attracted on account of copyright should remain substantively the same for authors of differing works. A celebrated author cannot claim greater rights on account of his heightened popularity or intellect. The incentive to publish is equal for all.[23]

However, taking advantage of the lack of substantive sovereign control over the digital space, intermediaries began to abuse their liberty under the Standard Technical Measures route, to extend differential arrangements of copyright enforcement to different brands of content creators. YouTube, for instance, has varying schemes of enforcement mechanisms offered to different content authors- Content ID, Copyright Verification Programme, and Copyright Match Tool. The most effective, 'Content ID', is reserved only for those who 'own exclusive rights to a substantial

[18] CLEAN UP INCORRECT CLAIMS, https://support.google.com/youtube/answer/4352063. (For example, one has to exclude content one does not own from a reference file submitted for identifying matching uploads (https://support.google.com/youtube/answer/4389910)).
[19] For instance, if India exempts the use of copyrighted music for weddings because of socio-cultural tradition- the same should not be flagged off as infringement in videos uploaded and viewed in India; see Section 52 (za), Indian Copyright Act, 1957.
[20] (Originally used by Prof Henning Khan of Cambridge).
[21] University of London Press v. University Tutorial (1916) 2 Ch 601.
[22] Feist Publications, Inc. v. Rural Tel. Serv. Co. Inc., 499 U.S. 340, 361 (1991).
[23] *Supra* n. 21.

body of original material that is frequently uploaded by the YouTube user community'.[24] The remaining authors are allowed mellowed-down versions such as the 'Content Verification Program', the 'Copyright Match Tool', or just a simple notification web form instead of Copyright enforcement.[25]

The final decision in regard to which author deserves what mode of copyright enforcement is solely YouTube's discretion. They reason that since different authors have 'different requirements', YouTube voluntarily determines the most suitable tool of enforcement which is to be made available to a particular author. The most significant factor of such determination is the volume of content shared by the author on YouTube.[26] Even accounting for YouTube's vague justification, it is but evident that the real purpose of such a discriminatory mode of copyright enforcement is to promote a sense of collusion with the major authors, in continuing to profit from privately administered 'copyright' regimes.[27]

With different incentives for different authors, the neutrality of the marketplace of ideas is severely impacted. Creators with more incentive are not just encouraged to produce more than others, but they are also granted wider privilege in policing available content.[28] As a result, the space of free speech is adversely occupied by one set of authors who now dictate public opinion through an artificial monopoly over the ideas piercing society.[29]

This scheme of private enforcement of copyright is wholly derogatory to the purpose of copyright itself. With reduced standards of protection, upcoming authors are forced to invest in additional safeguards to enjoy the same level of protection which copyright law should have granted them in rem. The additional costs involved in ensuring substantive copyright protection result in further lowering of the already low incentive made available to the non-preferred authors. The volume of works produced being directly proportional to the incentive offered in lieu of publication, it is safe

[24] 'Qualifying for Content ID' https://support.google.com/youtube/answer/1311402; 'Content eligible for Content ID', https://support.google.com/youtube/answer/2605065.
[25] *See* generally 'Copyright management tools', https://support.google.com/youtube/answer/9245819.
[26] Google Support, Manage Live Chat Messages, GOOGLE SUPPORT, https://support.google.com/youtube/answer/1311402.
[27] S Jacques, et. al, *Automated anti-piracy systems as copyright enforcement mechanism: a need to consider cultural diversity*, EUROPEAN INTELL. PROP. REV. (2018) 40(4), 218-229.
[28] (To understand the basics of Content ID – which as per YouTube's owner Google 2018 report now deals with 98% of all copyright issues on YouTube, *see* Kent Walker, *Protecting What We Love About the Internet: Our Efforts to Stop Online Piracy*, GOOGLE BLOG, https://www.blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-our-efforts-stop-online-piracy/, ¶ 21,25 (Nov. 15, 2018).
[29] See generally Kate Klonick, *The New Governors: The People, Rules, And Processes Governing Online Speech*, 131 HARV. L. REV 1598 (2018).

to assume that the lowering of protection by private agents will have a telling effect on the otherwise robust public repository of knowledge held dear by society.

V. THE MONETIZATION ALTERNATIVE

We are aware that copyright law provides economic incentives to authors to create and publish works for society to consume. Without the economic incentive, there is hardly any motivation for the author to selflessly share his knowledge with society. The bundle of economic rights attracted to publication of original content occupies centre stage in the enforcement of rewards promised within the social bargain of copyright.[30]

YouTube and various other intermediaries have schematized improvisations within their already disparaged mode of private administration of copyright, which upsets this angle of economic incentive within copyright jurisprudence. In furtherance of its ambitious policy of favouring a few major authors, these intermediaries have moved from a post-infringement blocking paradigm to a regime of post-infringement monetizing, i.e., to say infringing material is no longer blocked but rather monetized on behalf of the proclaimed copyright owner.[31] Although this may appear as a genius move to harmonise free speech interests with copyright concerns, the picture gets somewhat distorted when we factor in how errantly YouTube and the other intermediaries assess infringement.

The test of infringement varies for different classes of authors depending on what mode of copyright enforcement has been made available to them.[32] The most preferred authors who have access to 'Content ID' and other similar methods of enforcement- possess the arbitrary power to disrupt the economic incentive of other creators who, maybe, borrowed a trifling portion of prevailing content for the sake of a legitimate purpose, let's say critical commentary.[33] The strict invocation of the bright line test[34], in violation of the specific country's domestic intellectual requirements, opens a window for the perceived owner to allow the 'secondary content' to run with the condition that revenue earned on account of the same shall flow to the perceived owner

[30] *Supra* n. 21.
[31] Google Support, Manage Live Chat Moderators, GOOGLE SUPPORT, HTTPS://SUPPORT.GOOGLE.COM/YOUTUBE/ANSWER/3013321.
[32] Google Support, Manage Live Chat Participants, GOOGLE SUPPORT, HTTPS://SUPPORT.GOOGLE.COM/YOUTUBE/ANSWER/2797370?HL=EN&REF_TOPIC=4515467.
[33] *See* https://www.youtube.com/watch?v=l4HpWQmEXrM&feature=youtu.be, a video of a surprise marriage proposal using an Indie-Pop song as background that, due to the video's popularity, has been listened to by 14 million viewers. See also the 'Harlem Shake' example, discussed in Michael Soha and Zachary J. McDowell, *Monetizing a Meme: YouTube, Content ID, and the Harlem Shake, Social Media + Society*, January-March 2016, pp.1-12).
[34] Bridgeport case, *Supra* n. 5.

alone.[35] The consequence of this dubious arrangement results in an absolute denial of the benefits of copyright law to a class of authors, through the over-enforcement of copyright claimed by the group of preferred authors.[36]

As had been discussed earlier, the concept of trivial copying is not a defence to the beneficiaries of Content ID who have the liberty to set a seemingly de minimis limit for detecting matches (even less than 30 seconds).[37] That being the case, even if the subsequent content of more than twenty minutes captures a 5-second clip of the previous content in furtherance of a comparative review, for example, Content ID will perceive the entire content of twenty minutes to be a factor of infringement of the 5-second clip. This takes away the economic incentive for the author of the second work since the first owner decides to aggressively piggyback on Content ID for establishing monetization rights over the entire second video for what would appear to be a prima facie case of trivial borrowing or justified borrowing. Just like that, the economic incentive is no longer available to a large class of authors. Without incentive, these authors gradually go back to the paradigm where it seems profitable for them to not share their knowledge with society. As a result, society will only receive a fraction of the ideas/works which it ought to be receiving. The marketplace of ideas would therefore be hindered, and the engine of Free Speech would be substantially rusted.

VI. THE AMERICAN BIAS?

Apart from the difficult idea that intermediaries favour a particular class of authors, it is also unnerving that their mode of private enforcement of copyright seemingly favours American authors over any other nationality. National Treatment, which forms the bedrock of modern IP jurisprudence, appears to be wholly lacking in the mode of operations aggressively propagated by these private administrators of the digital space.

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[35] S Jacques, K Garstka & M Hviid, J Street, *Automated anti-piracy systems as copyright enforcement mechanism: a need to consider cultural diversity*, 40(4) EUR. INTELL. PROP. REV. 218-229 (2018).

[36] (YouTube, for example, explains that since January 2014, Content ID claims have 'outnumbered copyright takedowns by more than 50 to 1' (*see* Google Support, *Manage Live Chat Messages*, GOOGLE SUPPORT, https://support.google.com/youtube/answer/7002106?hl=en-GB. In 2017, 90% of Content ID claims imposed automated monetization by running adds against an upload which matches with claimed content – which overall has resulted in YouTube paying out more than 6 billion USD in total (and over 1.8 billion from 10/2017-09/2018) to right holders who have monetised the use of their content on the platform – *see* generally, Google Public Policy, *How Google Fights Piracy*, GOOGLE PUB. POL'Y BLOG (Nov. 15, 2018), https://www.blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-our-efforts-stop-online-piracy/.

[37] *See* Kat, *How do I delete a comment on YouTube?*, GOOGLE SUPPORT (Aug. 27, 2019, 9:17 AM), https://support.google.com/youtube/thread/1281991; YouTube Creators, Updates to Manual Claiming Policies, GOOGLE PUB. POL'Y BLOG (Aug. 15, 2019), https://youtube-creators.googleblog.com/2019/08/updates-to-manual-claiming-policies.html.(indicating that despite some changes to improve the system for creators, any inclusion of someone else's content will continue to afford the exclusive monetization options to the Content ID claimant).

We know that safe harbour protection for these intermediaries is contingent on them adhering to legally prescribed take down procedures. Ideally, such takedown manoeuvre is only initiated upon notice from the copyright owner. However, most of these intermediaries also subscribe to an internal take down procedure, to avoid the technicalities of legal takedowns. Since the internal takedown procedure is devoid of legal sanction, they follow whatever policy the intermediaries deem fit for the scheme of business. For example, YouTube upon detecting 'infringement', sends a preliminary notification to the perceived copyright owner. The copyright owner then has the option of blocking/monetizing the claimed infringing content. The author of the 'infringing' work may dispute the blocking/monetization of his work, which then goes back to the original copyright owner. The copyright owner when predisposed to such a 'dispute', has the option to either release his claim or continue with the action he had decided earlier. An appeal is then allowed to the 'infringing' author before the DMCA takedown procedure is finally invited.[38] It may be worth mentioning that while it may seem that pre-DMCA notice takedown is violative of free speech, the refuge of Standard Technical Measures is too broad, which in turn provides sustenance to the seemingly high-handed collusive schemes of YouTube and their select authors.

Assuming that the owner of the claimed infringing work has the time and patience to consecutively dispute the false claim of infringement, and then appeal against the persistent denial of copyright, YouTube conspicuously requires the non-American authors to agree to the jurisdiction of any judicial district in the USA where the 'service provider may be found'.[39] The forceful desire to globalize the takedown procedure under the DMCA is a heavy burden on non-resident creators. Apart from them lying at the mercy of self-evaluation of what constitutes infringement and/or fair use by the preferred authors, the neglected authors are now de facto dissuaded from taking their grievance to the judicial system for the heavy costs involved. It is very likely that a content creator from a far-flung region of Southeast Asia would give in to what would prima facie be considered over-enforcement of copyright, to merely continue accessing the benefits of publication, devoid of any semblance of the rewards of copyright. Neglected non-American authors are thereby afforded second-class treatment in regard to disputing over-enforcement. Their intellectual prowess is thereby subdued by a strategic denial of the benefits of copyright.

[38] Electronic Frontier Foundation, *A Guide to YouTube Removals*, https://www.eff.org/issues/intellectual-property/guide-to-youtube-removals

[39] ('Counter Notification Basics' at https://support.google.com/youtube/answer/2807684; see Section 512(g)(3)(D) DMCA – whereby the user will also 'accept service of process from the person who provided notification under subsection (c)(1)(C) [of the DMCA] or an agent of such person)

VII. LIVE STREAMING AND FREE SPEECH

A very recent example of how over-enforcement of copyright can impede free speech is exemplified in a recent interaction of a citizen with police authorities in Beverly Hills.[40] Disappointed with the police response to his request for body cam footage in a speeding matter, Senett Devermont began streaming the interaction on his Instagram account via live streaming. The police officer catering to Devermont's request pulled out his phone and began playing copyrighted music to deter the citizen from communicating his interaction to the society at large. Instagram, which follows an algorithm similar to that of YouTube Live, carries the threat of banning users who repeatedly stream content which qualifies as 'infringement' per their analysis.[41]

Unlike general content, which carries a subdued free speech angle, live stream includes free speech concerns placed over and above subsidiary concerns of copyright enforcement. Blocking live streams for inadvertent inclusion of copyrighted content, by way of irrelevant noise, is not so much a denial of economic rights, as much as it is a denial of fundamental existence. The forthright subrogation of constitutional rights for the sake of insulating economic rights, even when there is no real threat to the economic paradigm of incentives, is a extant derogation of the significant ability to communicate freely within society. The entire process of raising a dispute, appealing the blocking of the stream, and the subsequent DMCA mechanism is wholly inept at mitigating the denial of opportunity to communicate a particular expression at that eventful point in time.[42]

Let's say, I witness a particular crime unfold. I was vigilant enough to record the incident on my phone, and live stream it for the sake of allowing the public as well as law enforcement to be able to quickly ID the perpetrator and take him into custody. However, because the video captured music emanating from a nearby club, the concerned intermediary turned off my stream and deleted my video. The subsequent reinstatement of my video will do little to undo the damage caused to the purpose of live streaming the event.

We need to understand that one of the reasons why countries allow for safe harbour protection is to incentivise free speech even at the cost of infringement. It is unanimously agreed upon that content must be removed only after it is found to be infringing, and not when it is presumed to

[40] Dexter Thomas, *Is This Beverly Hills Cop Playing Sublime's 'Santeria' to Avoid Being Live-Streamed*, https://www.vice.com/en/article/bvxb94/is-this-beverly-hills-cop-playing-sublimes-santeria-to-avoid-being-livestreamed.

[41] Google Support, *Manage Live Chat Messages*, GOOGLE SUPPORT https://support.google.com/youtube/answer/3367684?hl=en.Kat.

[42] *Supra* n 29.

be infringing. The denial of the right to free speech on account of private enforcement of copyright is a step back in ensuring the growth of a polity through a robust marketplace of ideas.

VIII. CONCLUSION

Ironically, the cure for over-enforcement of copyright has been manipulated to become its primary abettor. Masquerading as the freedom riders promoting the publication of speech devoid of any form of encumbrance, these intermediaries rose to the pedestal of public functionaries only to abdicate their responsibility towards society. By shunning the ethical obligations which they ought to honour against society, they came into a problematic usurpation of power barren of any form of accountability. It is strange how these platforms plead freedom from liability on account of public function, and yet use the same freedom to deny the public function altogether.

The purpose of safe havens, which is to dissuade copyright from turning into a sword against free speech, is rendered infructuous when the safe haven protection is exploited to overcompensate a few authors while denying free speech to the majority of society. It is time we revisit the arrangement to ensure that intermediaries honour the public function undertaken. It is time for the international community to take stock of the situation and repair the seemingly privatized territory of digital space. While we do see certain sovereign efforts much like the EU Digital Single Market Directive which focuses on ensuring free speech is protected by way of insulating content from arbitrary blocking and removing, we have seen little intention to address the elephant in the room the difficult question of denying copyright through the alternative demonetization paradigm. This piece is a sincere attempt to request a serious reconsideration of the private enforcement of copyright brazenly propagated in the online world.