

YOUTUBE'S ALGORITHMIC ENFORCEMENT AND DEMONETIZATION POLICY VIS À-VIS COPYRIGHT LAW: AN EDIFICE OF OPACITY AND ARBITRARINESS?

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ABSTRACT

The story of YouTube from starting as a video-sharing social media platform to now becoming a giant in the entertainment industry is a fascinating story. Since its inception in 2006, YouTube has grown at an exponential rate. It has now become the only surviving player in the copyright-based business model, ousting the likes of Napster and relegating DailyMotion to the lower echelons of the market. Most media houses, label studios and producer's preferred destination for releasing the trailers, songs or sneak peeks of their next project is done on YouTube first. The platform is also one of the exponents of the rise of the Over-The-Top (OTT) content, boasting of many original shows with great production value. Creators like PewDiePie, MKBHD and iJustine are popular among the masses for their great content. It can be said that YouTube has permeated into everyone's lives. However, there is another side to this story. YouTube always comes under criticism for its platform policies and guidelines. There are concerns that YouTube is not advancing the interests of copyright owners and not allowing them to enjoy their rights. YouTube regulations are termed opaque and possess a colour of arbitrariness. The monetization policy of the platform is also severely criticized by scholars and creators alike, for favouring only big channels and creators and disincentivizing smaller creators. The platform has also been accused of misusing safe harbour provisions to escape liability. Many jurisdictions have started amending their laws to impose greater liabilities on YouTube not only generally but also from a copyright perspective. Is it time that India did the same with its copyright and cyberspace laws?

I. INTRODUCTION

YouTube has dramatically altered how individuals express themselves and engage on the Internet. People from all around the world post almost 400 hours of video to YouTube every minute, chronicling significant events as well as ordinary life.¹ These videos aid in the dissemination of news, highlight new artistic work, and give many hours of amusement. When a content sharing

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¹ Arun Dunna et al., *Paying Attention to the Algorithm Behind the Curtain. Bringing Transparency to YouTube's Demonetization Algorithms*, 6 PROCEEDINGS OF THE ACM ON HUMAN-COMPUTER INTERACTION, Issue CSW2, at 1.

platform is operating at this scale with billions of users on its platform, the policies and measures it takes to regulate its affairs will have wide-ranging consequences.

YouTube is a popular platform for independent video content providers to showcase their work. The YouTube Partner Program [“YPP”] is one of the oldest monetization programs established in 2007. However, in recent years, modifications to monetization rules and the adoption of automated decision-making algorithms for monetization have been a cause of criticism and conflict between content providers and the platform.² Authors such as Rimmer³, Laura Zapata⁴ and Magaldi et al.⁵ have, in their scholarly works, alleged that YouTube’s underlying monetization algorithms favour larger channels and effectively restrict minority voices by demonetizing their material. Susanne Kopf, in her work, has alleged that YouTube’s algorithm does not favour particular creators and their content, and the platform can control whose content reaches a broader audience. According to Kopf, “The rules and logic underlying this algorithm are largely unknown to visitors of YouTube—beyond the fact that personal search history and interest are taken into account, visitors are not informed about the algorithm’s criteria.”⁶ The uploading of pirated films to legitimate websites such as YouTube has a genuine and permanent impact on the earnings of content owners. The two exclusive rights most relevant to YouTube under Indian copyright law are the rights “to not allow distortion of the copyrighted work” & “to derive an economic benefit out of the exploitation of the work.” YouTube inserts ads in between videos to capture the revenue generated from traffic to its videos. It also does not allow small users to claim revenue from all aspects of the video, as noted by Thomas De Lisa.⁷

When a user interacts with the platform by searching for content, uploading content or managing their content, there may be an assumption that one is interacting with a search engine, which is learning with every search of the user and increasingly presents search results/content more tailored to what the platform thinks that the user wants to see. This is the algorithm of YouTube

² FRANCISCO J. MARTÍNEZ-LÓPEZ ET. AL., SOCIAL MEDIA MONETIZATION AND DEMONETIZATION: RISKS, CHALLENGES, AND POTENTIAL SOLUTIONS, SOCIAL MEDIA MONETIZATION: PLATFORMS, STRATEGIC MODELS AND CRITICAL SUCCESS FACTORS 185 (Francisco J. Martínez-López et al. eds., 2022).

³ Matthew Rimmer, *The Dancing Baby: Copyright Law, YouTube, and Music Videos*, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 150 (2017).

⁴ Laura Zapata-Kim, *Should YouTube’s Content ID Be Liable for Misrepresentation under the Digital Millennium Copyright Act*, (2016), 57 B.C. L. REV. 1847.

⁵ Jessica A. Magaldi, Jonathan S. Sales & Wade Davis, *All’s Fair in Love and War but Nothing’s Fair Use on YouTube: How YouTube Policies Favour Copyright Owners and Hinder Legal Fair Use*, 27 J. L. BUS. & ETHICS 51 (2021).

⁶ Susanne Kopf, “Rewarding Good Creators”: *Corporate Social Media Discourse on Monetization Schemes for Content Creators*, 6 SOCIAL MEDIA + SOCIETY (Nov. 2020).

⁷ Nicholas Thomas DeLisa, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms*, 3 BROOKLYN L. REV. (2016).

which is in operation, undertaking a myriad set of operations to regulate user activity on the platform and making sure that the various legal obligations binding the platform are complied with.⁸ This is what is known as “Algorithmic enforcement” and it helps in the regulation of the internal governance of YouTube, one of the compliances being that of the protection of copyrighted works available on the platform.⁹ There are several advantages to algorithmic copyright enforcement. It is frequently more efficient, saving money on office space and personnel. It might increase the uniformity of applying legal theories and remove the burden of human assessment.¹⁰ While some internet intermediaries such as Meta, and Twitter employ algorithms to automatically execute takedown notices issued by copyright owners, others, such as YouTube, go above the legal requirements by blocking the dissemination of infringing items before they become accessible online. Despite these efficiency-related benefits, algorithmic copyright enforcement lacks adequate accountability mechanisms for internet intermediaries’ acts, errors, and wrongdoings.¹¹ Kaye & Gray¹², in their scholarly work, gathered the opinion of 100 YouTube creators in a randomised sample through a survey, seeking to solicit opinions on how they navigated through the governance mechanism of the platform. In this survey, 25 creators were of the opinion that YouTube “fails to secure due process”, terming the mechanism as “absurd”, “inadequate” & “an eldritch mess”. As per YouTube’s appeal mechanism, the claimant (party initiating the copyright strike) has the opportunity to decide the claim and possesses two opportunities to reject the dispute of the creator before YouTube steps in to review the case.¹³ According to a creator, this is equivalent to “a murderer going to court and deciding whether he is guilty or not.”¹⁴ Thus, it appears that the internal platform appeal mechanisms fall short of adequately securing due process. Algorithmic enforcement mechanisms are opaque in their exercise of discretion over determining fair use and copyright infringement. The Indian IT Regime has also recognised the need to compel such Intermediaries to bring fairness and transparency in its operation, as evidenced by the provisions of the New IT Rules, which will be discussed in subsequent Parts. Hence, there is a growing need to combine user autonomy and free expression with the protection of copyright holders and internet service providers as YouTube’s popularity in India rises.

⁸ Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473 (2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² D. Bondy Valdovinos Kaye & Joanne E. Gray, *Copyright Gossip: Exploring Copyright Opinions, Theories, and Strategies on YouTube*, 7 SOCIAL MEDIA + SOCIETY (2021).

¹³ *Id.*

¹⁴ *Id.*

In this context, the main objective of this paper is to examine how YouTube's policies and measures such as algorithmic enforcement and demonetization policy are impacting copyright holders and creators, arguing that the present approach of the platform fosters opacity and arbitrariness. This paper has five Parts. The first Part introduces the issues surrounding YouTube's algorithmic governance. The second part will deep dive into YouTube's tools, analysing its "tiered approach" to content takedown and will examine whether the moral right to prevent distortion and the right to derive an economic benefit from the copyright is honoured by the platform. In the third Part, the YPP's Demonetization Policy is analysed and a comparison with another burgeoning social media platform, Instagram's Monetization Policy, is undertaken. The fourth Part will discuss the Indian IT Regime and its interoperability with curbing copyright infringement, particularly around Section 79 of the Information Technology Act, 2000 and the new 2021 IT Rules. The paper is concluded in the Fifth Part with some suggestions.

II. YOUTUBE'S UNBALANCED ALGORITHMIC GOVERNANCE

A. Tiered Approach to content management

Algorithmic enforcement is now a pervasive phenomenon and has widespread usage. It is usually done in scenarios where there is voluminous data to be processed and it is humanely impossible to process each piece of data. In the case of Online Service Providers ["OSP"] such as Google, whose subsidiary is YouTube, they have devised algorithms in order to regulate the flow of data on their platform. This is done through ex-ante regulations, where, if the content fails certain pre-publishing norms, the content is prevented from getting uploaded on the platform. This algorithm also has ex-post mechanisms, where the content can be reviewed, and subsequent action is taken. Platforms like YouTube, Twitter and Meta have spent millions in R&D to perfect these algorithms. The automated algorithm was made in response to the Digital Millennium Copyright Act ["DMCA"], which put in place the notice and takedown system. Major online intermediaries use algorithms to filter, block, and disable access to allegedly infringing content automatically, with little or no human intervention. This is done to deal with the huge number of takedown notices sent by copyright owners, many of which are sent at the same time and automatically by robots that scan the web for allegedly infringing content. Others go above and beyond the legal requirements by preventing the circulation of copyrighted content before it is made available online.¹⁵ Enforcing algorithm copyright increases productivity and reduces commercial space and human costs.

¹⁵ Perel & Elkin-Koren, *supra* note 8.

YouTube employs three principal tools in order to check copyright infringement. They are:

1. Webform
2. Copyright Match Tool
3. Content ID¹⁶

1. *The Webform*

This is the entry-level tool which is available to all YouTube creators, irrespective of their size and time spent on the platform. Tools like Copyright Match and Content ID are not available in this tool. In case the user is of the opinion that another user has infringed his video, they can fill up this form with particulars such as:

- Contact Information
- Description of the user's copyrighted work
- Specific URLs of the allegedly infringing videos
- Declaration that the claim is being filed with good faith and genuine concern for protecting their copyrighted work
- Signature of the claimant¹⁷

According to YouTube in their most recent annual Copyright Transparency Report “*the Webform operates like the public web form where rightsholders or their representatives search YouTube and manually file a takedown request for content that potentially infringes their copyright.*”¹⁸ This tool is stated to be available in 80 languages and has been built for rare usage, such as by artists who possess few copyrights and discover their videos on YouTube only periodically. The webform is the sole instrument necessary for the great majority of rightsholders, according to the platform. In the first half of 2023, more than 60 % of rightsholders who used the platform's Copyright Management Tools took advantage of the web form to file for takedown notices to address their infringement concerns.¹⁹

However, the web form has numerous difficulties due to its elementary and bare-bones functionality. Its drawbacks can be better highlighted through the contentions levelled by the

¹⁶ *YouTube Copyright Transparency Report*, GOOGLE, <https://transparencyreport.google.com/youtube-copyright/intro> (last visited Apr. 10, 2024).

¹⁷ *Overview of copyright management tools*, YOUTUBE HELP, https://support.google.com/youtube/answer/9245819?hl=en&ref_topic=9282364#zippy=%2Ccopyright-match-tool%2Ccontent-id (last visited Apr. 10, 2024).

¹⁸ *Id.*

¹⁹ *Id.*

plaintiffs in the case of *Athos Overseas Ltd. v. YouTube*²⁰, where the plaintiff, the company of a renowned Spanish-language movie producer, moved the Court against YouTube. Athos alleged that the platform had taken no action to stop the rampant piracy of his movie collection, which was being displayed on the platform. The company further alleged that YouTube had in fact earned ad revenue and stood to make a wrongful gain in the form of revenue being generated from the pirated videos being hosted on the platform.

When the plaintiff contacted YouTube to remove the pirated copies using Content ID, the platform agreed to do so, but on the condition that the plaintiff would “have to agree to release YouTube from all possible claims arising from prior acts of piracy related to the plaintiff’s movie collection.” When such an agreement was declined by the plaintiff, he was directed to use the webform method to manually take down each instance of the infringing work from the platform. The plaintiff would email YouTube a takedown notification after a pirated movie was detected. YouTube would erase the entire stolen video. YouTube would only delete one video from one infringer relating to the one infringing upload indicated in the takedown notice. The same infringement could reupload the film until three takedown notices were submitted within 90 days. Only then will YouTube terminate the infringer’s login. The same infringer might then establish a new login and publish the pirated films again, starting a vicious circle in which only Defendants profit at Plaintiff’s cost.²¹ Plaintiff contends that they have submitted to YouTube over 10,000 copyright infringement notifications at a pace of five to ten per day for over six years without success and that their movie titles have been seen hundreds of millions of times on YouTube. They allege that the Defendants, namely YouTube, know Plaintiff’s copywritten content is on their platform and continue to infringe on it.²²

However, the Court favoured YouTube and relied on the holdings in the cases of *Viacom & Veoh* to hold that just because intermediaries employ independent mechanisms to deploy copyright infringement, does not mean that they can be held liable for not taking down content that the plaintiffs have not referred to in their DMCA notice. The DMCA regime, in the words of the Court, do not require YouTube to go beyond the particulars of the notice and takedown videos “on its own initiative”, even if the notice generically mentions “other infringing copies of videos” to be removed.

²⁰*Athos Overseas, Ltd. v. YouTube, Inc.*, 1:21-cv-21698-GAYLES/TORRES (S.D. Fla. Mar. 29, 2022).

²¹ *Id.*

²² *Id.* at 8.

This holding seems to confirm a loophole that is present in the DMCA regime that negatively affects copyright owners. YouTube, in its Terms and Policies, clearly state that if a user avail any of the tools available on its platform, the platform would be subsequently discharged from being held liable for any infringing copies made available on its site. However, if users do not wish to waive the right to sure, they would have to manually sift through pages and pages of YouTube to scour out the infringing clips of their copyright content, with no scope of compelling YouTube to take down all infringing copies in a blanket manner. Hence, if one were to keep costs and efficiency in mind, there is no other way but to give in to the service's tools. There also seems a concerted to push users to the other tools such as Copyright Match and Content ID, which are not available to smaller channels.

According to YouTube, 98.97% of the successful copyright actions on YouTube are taking through Content ID.²³ This mode is the most preferred tool to those whom it is available. Content ID is available only to over 9000+ partners such as “*movie studios, record labels, and collecting societies.*”²⁴ On the other hand, a measly 0.27% of successful copyright claims are done through webform, in spite of this tool being used by close to 2 billion YouTube users.²⁵ The above data highlights the ineffectiveness of the webform tool to adequately address copyright infringement.

2. *Copyright Match*

This is the next tier of tool that is available for curbing copyright infringement. Copyright Match tool is available to those creators who find that their work is reposted on a more frequent basis as compared to other creators. The intent of this tool is to bring the features of Content ID to more rightsholders. YouTube's Copyright Match Tool is available to users who've made a legitimate copyright takedown request. After a takedown request is authorized, the Copyright Match Tool scans YouTube uploads for potential matches. The tool shows claimants prospective matches so they may determine what to do.²⁶ However, in order to avail this tool, the creator is required to:

i. Be part of the YouTube Partner Program (YPP)

OR

ii. Demonstrate a “short history of takedowns through the webform”²⁷

²³ GOOGLE, *supra* note 16, at 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

In order to become a part of the YPP, you need to have attracted 4,000 hours of viewing and 1,000 subscribers in the prior 12 months to the date when you apply to become a part of YPP²⁸ In order to showcase how difficult it is to reach such numbers, it is pertinent to have a look at the statistics that the social media firm Social Balde has put out on YouTube channels. In this study conducted in 2022, it is estimated that there are more than 51 million channels on YouTube having more than 10 subscribers.²⁹ Within this, 25 million channels have between 10 to 100 subscribers and around 17 million channels feature subscriber numbers between 100 to 1,000. It may be construed that around 42 million channels are kept out of the YPP because they are unable to breach the 1000 subscriber mark. The result of this is that such requirements lead to the creation of an “exclusive club” of sorts for the YPP members. In spite of the fact YPP members do not have access to the premium Content ID, they can still make use of the Copyright Match tool, which is more than sufficient for independent content creators to satisfy their copyright management needs.

However, the fact that this is available only to those creators who are part of the YPP is concerning on the following fronts:

- a. Membership to the YPP is tedious and involves multiple compliances, not only at the entry point, but also in the duration that you are part of the YPP.
- b. In case a content creator is not complying with YouTube’s community, Advertiser and Copyright guidelines, their monetization is affected, and they are not able to generate ad revenue from the video created.³⁰ Arun Dunna *et al.* Have noted that there are further “restrictions on the use of profanity, violent, graphic, sexually suggestive, demeaning, tobacco-related, and controversial or sensitive content in videos or their metadata. The initial process of identifying whether a video meets the advertiser-friendly guidelines is completely automated via the demonetization algorithm.”³¹
- c. All creators do not have the wherewithal or investment capacity to raise their channel or viewer engagement to such levels as YouTube deems sufficient for grant of membership into the YPP.
- d. Even though those creators who “sufficiently demonstrate a short history of takedowns” are also eligible to use Copyright Match tool, the difficulties faced by the plaintiff in the *Atheros*

²⁸ *YouTube Partner Program overview & eligibility*, YOUTUBE HELP, <https://support.google.com/youtube/answer/72851> (last visited Apr. 10, 2024).

²⁹ J. C. Taylor, *YouTube Bares Its Anti-Creative Roots*, CREATIVE FUTURE (May 5, 2021), <https://www.creativefuture.org/youtube-bares-its-anti-creative-roots/>.

³⁰ *YouTube channel monetization policies*, YOUTUBE HELP, <https://support.google.com/youtube/answer/1311392?hl=en#zippy=%2Ccreator-responsibility> (last visited Apr. 10, 2024).

³¹ Dunna *et al.*, *supra* note 1, at 5.

case is sufficient evidence to point out the frailties of the webform. Hence, this is even more difficult evidence to show to YouTube in order to avail the tool.

3. *Content ID*

This leaves us with YouTube's most premium and best in class tool- Content ID. The tool uses a technology called "Content Matching" where "Content ID scans and matches uploaded videos against a vast database of reference files provided by content owners. These reference files typically include "audio tracks, video clips, or even full-length videos that are registered by copyright holders." The algorithm then generates a "unique fingerprint" for each reference media generated on its database. This fingerprint is derived from a number of factors, including information, visual traits, and audio waveform. YouTube's Content ID system examines user-uploaded videos and matches their fingerprints to reference files stored in its database. It searches for resemblances in sound, images, and additional features. According to YouTube, a substantial amount of investment is made each year to make Content ID better and all-encompassing. The rationale behind this tool is that as content creators continue to use Content ID to enforce their copyright, it continues to expand its own copyright library with the help of the uploaded user reference files. This helps the tool to get better, while also providing the users with a sophisticated service. Over 9000 YouTube "business partners" such as movie studios, record companies, and collecting organizations have access to this technology. According to YouTube, "these partners' copyright demands are in a class by themselves, and their material - today's blockbuster song, movie sequences, or viral video — is at the core of creative reuse on YouTube."³² Their activities comprise nearly 98% of all copyright actions on YouTube, despite having the fewest users. These statistics goes on to show that Content ID is the most well equipped to solve the copyright claims on YouTube. The other tools are, comparatively, inherently lacking and are not sufficient to solve the needs of its target audience. However, it is also unfair on those users who do have access to these tools, as the messaging seems to be that the platform does not give due precedence to the copyright needs of the small and medium scale independent creators, who also depend on YouTube and its policies to a greater extent as these creators may not have the financial backing to pursue their infringement cases through other avenues.

B. YouTube's Unfair Content Takedown regime

In their Annual Copyright Report 2021, YouTube claimed that the reason why every tool is not accessible equally to all the users is due to the fact that the platform has evidence to show that

³² *Id.*

there is a high chance that the tools may be abused and used for frivolous purposes by the users of the platform. YouTube believes that this “tiered” approach is the only solution for the “creation of a balanced ecosystem”, where rightsholders, viewers and the users of the tool are protected from “*significant disruption that can result from the abuse or otherwise invalid use of our tools.*”³³ The platform has seen “high levels of abuse” on the public webform, which is the most widely available tool available to all the YouTube users. According to the report, more than 8% of videos asked for removal using the public webform in the second half of 2021 were subject to abusive copyright removal requests, suggesting these requests were likely bogus assertions of copyright ownership. This misuse rate is 30 times greater than in limited-access products like Copyright Match Tool and Enterprise Webform, where it’s 0.2% or below.³⁴

Dailymotion, which has a footprint in 46,631 websites, employs a similar policy for takedown of content on its platform, if found that such content infringes copyright of owners. If a user discovers that their copyrighted work is being transmitted on the platform without their due consent, a “copyright infringement notification” can be submitted to the moderators of Dailymotion. When such notification is received, the “community support team” will process such request within 48 hours.³⁵ As per Dailymotion, it “works closely with Audible Magic and INA to provide content protection systems based on audio and video digital fingerprints. All videos uploaded on Dailymotion are compared with INA and Audible Magic fingerprints databases. Every time a video corresponding to a fingerprint is identified, it leads to blocking of the video.”³⁶ The algorithmic process employed by Audible Magic to detect infringing content is available on its website. As per Audible Magic, the patented algorithm is trained to capture “very small clips of audio to be measured for distinctive characteristics. These compact audio “fingerprint” measurements can be uniquely distinguished when compared to measurements taken from any other audio clip.” When the fingerprints of unknown media material are compared to known fingerprints stored in an Audible Magic database, Audible Magic’s patented technique is utilized to identify the content. The procedure is applicable to both video footage that includes an audio track and any other type of audio content.³⁷

³³ *Id.*

³⁴ *Id.*

³⁵ *Report a copyright infringement*, DAILYMOTION HELP CENTER (2023), <https://faq.dailymotion.com/hc/en-us/articles/203657336-Report-a-copyright-infringement>.

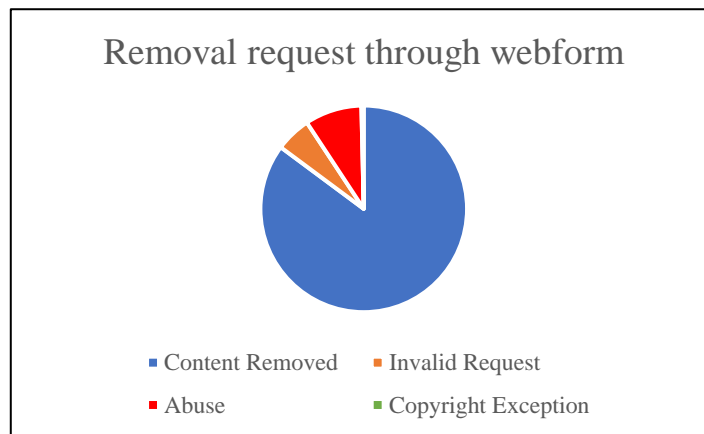
³⁶ *How to protect your copyrighted work?* DAILYMOTION HELP CENTER (2023), <https://faq.dailymotion.com/hc/en-us/articles/203921173-How-to-protect-your-copyrighted-work>.

³⁷ *Audible Magic-Core Technologies & Services Overview*, AUDIBLE MAGIC (2015), https://www.audiblemagic.com/wp-content/uploads/2015/04/AM_overview_datasheet_150406.pdf.

Hence, on Dailymotion, all tools are available to all users, irrespective of whether they are monetized or non-monetized creators. On YouTube, the tools available to users differ based on whether their content is monetized or non-monetized. YouTube claims that such a tiered approach is due to “high levels of abuse” seen on its tools available only to non-monetized users.

However, this claim does not weight due to the following reasons:

- i. YouTube has a team that reviews video claims. This team processes removal requests and “requests further information from claimants as necessary”.³⁸ This means that the chances of abuse or frivolous requests becoming successful due to the automated nature of the tool is less due to the human intervention being supplied through the team.
- ii. The platform has given data for the actions taken by it in response to removal requests.



*Source: Annual YouTube Copyright Transparency Report*³⁹

Considering that this data is to be interpreted in light of the fact that the population that has access to and uses the public webform is estimated to be 2 billion, it is still interesting to note that most of the removal requests result in removal of the content, considering the fact that the process is not entirely automated. Abuse constitutes only 6.40% of the total requests, meaning that the instances of abuse are not of such high levels as claimed by the platform, when viewed in the context of the volume of removal requests received through the webform.

- iii. According to the statistics published by YouTube, only 198,512 users actually used the webform tool to file for video removal requests.⁴⁰ Previously, it was noted that webform copyright actions account for only 0.27% of the total copyright actions on the platform. This, coupled with the low instances of abuse, indicate that the implications of frivolous claims

³⁸ GOOGLE *supra* note 16, at 7.

³⁹ *Id.*

⁴⁰ *Id.*

through webform is an issue that can be solved without having to resort to making the higher tier tools inaccessible to the majority of the YouTube users.

In a recent development, Associate Broadcasting Limited, the operator of television and digital channel TV9, has initiated legal action against tech giant Google concerning the threat of their YouTube channels being removed due to copyright strikes. Over the period spanning from 2020 to 2023, TV9's YouTube channels have been instrumental in disseminating news covering a wide array of global events, including natural disasters, man-made crises, and conflicts such as the recent Gaza war. However, TV9 found itself facing a copyright strike, alleging that certain footage used in their videos belonged to a party in the US. Subsequently, the videos containing the disputed content were taken down. TV9 has argued before the court that the removal of their YouTube channel would result in irreparable harm, as they stand to lose their subscriber base, which numbers in the millions.⁴¹ Ravi Singhania, Managing Partner at Singhania and Partners LLP, expressed his view on Google's stance, deeming it quite severe. He opined that for a large news channel, facing just three strikes within a 90-day period for an IP breach, resulting in the complete removal of the entire account and the loss of all followers, appears excessively harsh. Singhania suggested that the courts might not endorse such actions. While acknowledging Google's right to impose damages and seek indemnification for any losses incurred by the YouTube channel, Singhania criticized the complete removal of the account as unduly severe.⁴² According to Shashank Agarwal, an Advocate at the Delhi High Court, Google and YouTube are considered intermediaries under the Information Technology Act, 2000, while copyright infringements fall under the purview of The Copyright Act, 1957.⁴³ As intermediaries, Google and YouTube are entitled to exemption from liabilities under Section 79 of the IT Act, 2000, for any third-party information, data, or communication links hosted on their platforms. However, to qualify for this protection, the intermediaries must exercise due diligence in fulfilling their obligations under the IT Act, 2000. Agarwal noted that, thus far, the courts have not been granted the authority to direct intermediaries like YouTube to take down channels for copyright infringement. Instead, only the government has been vested with the power to block access to any information stored on computer resources in the interest of national sovereignty, defence, security, or to prevent other

⁴¹ Monica Beruha, *New IT Rules Mandate Removal of Content by Intermediaries*, ECONOMIC TIMES: LEGALWORLD.COM (Jan. 16, 2024), <https://legal.economictimes.indiatimes.com/news/editors-desk/new-it-rules-mandate-removal-of-content-by-intermediaries/106902983#:~:text=The%20new%20IT%20Rules%20mandate,deemed%20illegal%20concerning%20India's%20sovereignty.>

⁴² *Id.*

⁴³ *Id.*

prescribed offenses under the Act. As such, the issue of copyright infringement falls within the realm of the Copyright Act, 1957, for which the appropriate remedy lies.⁴⁴ This case highlights the issue of censorship by YouTube when it removes content from channels, impacting their ability to share information and engage with their audience. As noted above, all intermediaries are already required to comply with the requirements of the new IT Rules 2021 to diligently take down content which falls under the aforementioned grounds through which free speech may be restricted by the Government. The users of the platform are already required to adhere to such guidelines. The bundling of complying with separate set of Community and Advertiser Guidelines seems to prove the allegations that authors such as Zappin *et al.* Have alleged: Censorship by Proxy.⁴⁵ They term this process of censorship as “Apocalypse”: “*a process in which content creators, are denied paid ads in their YouTube videos. Consequently, they are denied revenue, their income on the video-hosting platform is reduced and their video is less likely to be promoted or recommended on the platform, eventually getting censored.*”⁴⁶

YouTube is a platform that is supposed to provide free access to all producers, allowing them to create, upload, and manage their content without any bias or favouritism. YouTube’s attempt to prevent abuse has led to a violation of their own principles. They have created a system where certain users are denied access to certain tools, based on the creator’s ability to attract viewer engagement. Membership into the YPP heavily relies on viewership. The platform’s policy, which restricts access to tools like Copyright Match and Content ID to prevent abuse, has resulted in an imbalance that favours only the most prominent creators. This has caused difficulties for smaller creators and users who lack the same level of influence on the platform. This disparity also extends to the manner in which YouTube provides copyright management tools to content providers, as previously highlighted. Small and Medium creators lack access to the Copyright Match tool, which would allow them to effectively safeguard their copyright management requirements. This tool eliminates the need for manual costly manual detection of each instance of copyright infringement on their uploaded content, as well as the requirement to meet the strict criteria of the YPP. In the same vein, current participants of the YPP who consistently engage viewers should be recognized and rewarded for their contributions to promoting the platform. This can be done by granting them restricted access to Content ID and permitting them to claim advertising money from videos that infringe upon artists’ copyrights.

⁴⁴ *Id.*

⁴⁵ Anthony Zappin et al., *YouTube Monetization and Censorship by Proxy: A Machine Learning Prospective*, 198 *PROCEDIA COMPUTER SCIENCE* 23 (2022).

⁴⁶ *Id.*

Section 2(d)(vi) of the Indian Copyright Act defines an “author” as “in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;” Since YouTube creators create their own videos, or cause the work to be created, they may be termed as the “authors” of their original work. In this context, it is important to analyse how creators, who acquire the title of publishing author when they post their original content on YouTube, are affected by the operation of the “YouTube Algorithm”.

C. Enforcement of Author’s Rights on the Platform

Broadly, *inter alia*, an author has the following two primary rights available to him in connection with his creation:

- i. Right to not have the work distorted by the publisher or any other party
- ii. Right to derive economic benefit from the work

1. *Right to not have work distorted by publisher or third party*

As part of the moral rights granted to the author of a copyright, the author has a right to enforce the integrity and structure of his work, as he originally created it.⁴⁷ With regards to moral rights, the Delhi High Court, in the case of *Amar Nath Sehgal v. UOI*⁴⁸, held that since an author’s moral rights are the “soul of their work”, such rights cannot be violated, even if the work is sold. The moral rights of the author were seen to be violated when works were destroyed or altered. In the case of *KPM Sundaram v. Rattan Prakashan Mandir*⁴⁹, the Delhi High Court again held that even though the licensee of a work may make necessary modifications to adapt the work of the author, the modifications should not be such that the original work is so affected as to reduce the reputation of the original author. When the author sends his work to the publisher for publication, he expects that the work’s structure and integrity would not be tampered with by the publisher. If the work is distorted or altered in such a way that it becomes unrecognizable and people are unable to connect the work with the author, the author has the right to withdraw the work in order to preserve its integrity. For example, a prominent YouTube creator, Unbox Therapy, who has over 22 million subscribers, was reacting to reports that YouTube was carrying out “experiments” to insert as many as 11 ads in between the playing length time of a video.⁵⁰ Another YouTube creator, Zackary Smigel, talks about how creators have little to no control on which ads are inserted in what parts of the uploaded video: “Now you might be quick to blame creators in this whole

⁴⁷ The Copyright Act, 1957, § 57, No. 14, Acts of Parliament, 1957 (India).

⁴⁸ *Amar Nath Sehgal v. Union of India*, 117 (2005) DLT 717.

⁴⁹ *KPM Sundaram v. Rattan Prakashan Mandi*, AIR 1983 Delhi 461.

⁵⁰ LaterClips, *YouTube’s Unskippable Ads are Getting Out of Hand*, YOUTUBE (2022), <https://www.youtube.com/watch?v=TXyF4Qzmj6c>.

situation because creators determine how many ads you're seeing right well prepare for me to blow your mind.... creators actually don't know when an ad is going to play on a video and how many ads you will see..."⁵¹ YouTube's video editor just gives a probable view of when ads would be placed in your video. It is merely a probabilistic preview and the actual ads may be placed in unplanned sections of the video and the creator is hamstrung to make any changes, other than to takedown the whole video itself.

In the context of YouTube, such distortion may happen due to ads which play not only before the video but also during and sometimes after the video. A common perception is that the creator of the video is choosing the ads that he wants to display while the video is playing. This results in the author's work losing its identity when certain ads are displayed out of the context of the content of the video or ads which the author does not want displayed with his video. The only recourse available to the creator in such cases is to demonetise the video voluntarily, if the creator is a part of YPP, or takedown the video itself. This is another aspect of copyright law that YouTube fails to address on its platform.

2. *Right to derive an economic benefit*

The Indian Copyright Act lists some of the acts that the owner can do in respect of his work.⁵² That portion of the author's rights known as "economic rights" allows for the production to be used for financial gain. The most fundamental right protected by copyright law is the prohibition or duplication of the original work. Aside from that, it grants the owner the exclusive right to make any adaptation, replication, or modification to the copy, as well as the right to rent, lend, transfer, license, or assign the copy to a third party, and the right to publicly exhibit the work for monetary benefit. In the context of YouTube, the content creator has a right to monetize his video, wherein they would be able to make money in exchange of disclosing his work on the public platform. YouTube's popularity among independent media creators is due to its early and ongoing practice of sharing advertising money with "advertiser-friendly" content sources. As content producers' incomes rise, being a "YouTuber" or independent media creator is a popular employment option. Increasing reliance on YouTube payments by video providers makes (algorithmic) evaluations of "advertiser-friendly material" (monetizable content) vital. Artists universally accept YouTube's reliance on machine learning algorithms for (de)monetization decisions due to the magnitude of the categorization problem at hand. Some content producers complain about YouTube's opaque

⁵¹ Zackary Smigel, *I promise, and I can prove it*, YOUTUBE (2023), <https://www.youtube.com/watch?v=a5wq4dH6ePs>.

⁵² The Copyright Act, 1957, § 57, No. 14, Acts of Parliament, 1957 (India).

demonetization mechanism. In recent years, other social media platforms have followed this system of revenue sharing models with creators and come up with their own monetisation policies. Today, Instagram is one of the fastest growing social media platforms with a sizable user base. It has become a popular destination for delivering content within a capsule time duration in the form of “reels”. Such capsule videos enable fast content consumption, which has found appeal to an audience with a fast-decreasing attention span. The platform recognised the potential of such content delivery and began implementing monetisation policies from 2016-17 onwards on a phased basis.

Basis	YouTube Partner Program	Instagram Monetization ⁵³
Eligibility	Channels must have 4,000 watch hours in the past 12 months and 1,000 subscribers to apply. Additionally, the content of the channel must comply with Community Guidelines and Advertiser Guidelines.	Prospective accounts must have at least 10,000 followers, the age of the applicant must be 18 years or older, and the account must meet Partner Monetization Policies. Additionally, the account must demonstrate “authentic user engagement” in the form of likes, views and comments. ⁵⁴
Content	Eligible for Monetization through ads displayed on videos	Eligible for Monetization through various means, including brand tie-ups, IGTV ads, and shopping tags
Revenue Share	Creators typically receive a percentage of revenue generated from ads shown on their videos.	Revenue share percentages may vary depending on the type of Monetization (e.g., branded content partnerships). Instagram may also offer revenue sharing for certain features.

Table 1: Comparison between YPP & Instagram Monetisation Policy

However, Thomas DeLisa examined the practical scenario in which YouTube splits revenue roughly evenly with content owners (representing the visual, audio, and underlying composition). According to DeLisa, the actual ratio is 55 percent to 45 percent, with YouTube collecting 45%

⁵³ *Instagram Partner Monetization Policies*, INSTAGRAM HELP CENTRE, https://help.instagram.com/512371932629820?helpref=faq_content (last visited Apr. 10, 2024).

⁵⁴ *Id.*

of ad revenue and rights holders earning 55%. Within this 55% accruable to the rights holders, 10% is paid to the proprietor of the visual, 30% is paid to the holder of the sound recording, and 15% is paid to the proprietor of the composition.⁵⁵ This split also applies for the users. For example, if you post your dance video backed by the latest Shakira hit song, then the video would comprise of the music and composition of Shakira and the visual component would be made up by your dance sequence. In this scenario, you should be getting 10% of the revenue for your visual, and the remaining 50% should go to Shakira's publisher and the record label. However, you may not get a hold of this 10% cut accruable to you. Being a small channel, you do not have access to Content ID and this is why you will not be able to monetize the visual component of your video on your own. Another reason may be that since you are infringing the rights of the music owner in the first place, there should be a further split in the revenue accruable to you in favour of the other rights holders.⁵⁶ This issue exists even in the Content ID tool. The result of the other tools is that the video is taken down and there is no avenue to claim the monetary compensation in the form of ad revenue or royalty unless one were to drag the dispute to the court. Hence, the above conditions create an inequitable situation where all users and creators do not have equal tools available to them to enforce their rights over their literary creation. Such a scenario can be avoided by making all tools available to all users of the platform, irrespective of whether such a creator is a medium scale creator or a large-scale creator. Content ID can be made available to even medium scale creators, and such a criterion can be devised by YouTube in the same way that monetization thresholds have been created. Such a threshold should be as inclusive as possible, making sure that many creators can be caught in the resulting catch net. When the Content ID tool is found to be misused (using false hits and frivolous strikes as a determining factor), the platform can keep a scorecard of successful and unsuccessful cases of copyright strikes initiated upon use of Content ID by such creators. If it is found that there is a high incidence of unsuccessful strikes, the tool can be disabled for such user and they can be given a chance to make a case for re-enablement of the tool. YouTube should also listen to the feedback of its wider community, which includes small and medium scale creators, instead of only well-known creators on the platform. Practicing such inclusive measures will enable equitable policy development and present a fair reflection of the needs of the community.

⁵⁵ DeLisa, *supra* note 7.

⁵⁶ *Id.* at 17.

III. YOUTUBE'S DEMONETIZATION POLICY AND DENUDATION OF CREATOR'S REVENUE

Arun Dunna et al (2022)⁵⁷ had undertaken a study where they conducted a measurement of the YouTube monetization algorithms. The incidence of different monetization decisions and the time taken to reach them was also looked at by the author. The findings of the work are relevant for this study. YPP members have the ability to earn money from their creations. The minimum criteria for membership are as follows:

1. Content creators must have a minimum of 4,000 views and 1,000 subscribers.
2. Creators must consent to comply with YouTube's community guidelines, which seek to combat the inflation of engagement metrics and ad fraud, impersonation of individuals and channels, spam and scams, harassment and cyberbullying, dangerous and violent content, hate speech, nudity and sexual content, as well as the sale and production of firearms and illegal goods.
3. Conducting a comprehensive automated and manual assessment to ensure that the channel does not breach any content restrictions. The evaluation encompasses the subject matter, the videos that have gained the highest popularity, and the accompanying metadata, such as thumbnails and video descriptions.⁵⁸

Nevertheless, even after fulfilling these criteria, there is no assurance that all videos created by the content provider will be eligible for monetization. This is due to the requirement for each individual video to adhere to the YouTube advertiser requirements. Failure to adhere to any of these criteria or the mandated checks during the membership approval process for the YPP will lead to the automatic de-monetization of a specific video, or perhaps the entire creator's channel.⁵⁹ YouTube provides two options for artists desiring to monetize their content throughout the video posting process.

1. **Set as private:** Uploading videos as unlisted allows them to be subjected to demonetization but remain hidden from the broader audience. The author receives a preliminary algorithmic monetization estimate within a timeframe of 20 to 60 minutes after posting. Subsequently, creators have the option to initiate an appeal for human evaluation, publicly release their work, or make alterations to its content and seek another automatic assessment.

⁵⁷ Dunna et al., *supra* note 1.

⁵⁸ *How to make money on YouTube*, YOUTUBE CREATORS, https://www.youtube.com/intl/en_in/creators/how-things-work/video-monetization/.

⁵⁹ *YouTube channel monetization policies*, YOUTUBE HELP, <https://support.google.com/youtube/answer/1311392?hl=en#zippy=%2Ccreator-responsibility>.

2. **Verify the authenticity of your own products:** Videos created by producers who have a track record of providing content suitable for advertisers can be monetized right away if the creators themselves confirm that the video fits YouTube's requirements for monetization. Nevertheless, videos can lose their potential to generate revenue and the creator's freedom to verify their own content may be limited if further examinations reveal breaches of YouTube's criteria for content suitable for advertisers. In addition, continuous infractions may result in termination from the YouTube Partners Program.⁶⁰

A. Demonetization And Appeal

The algorithm's determination is not definitive. Developers have the option to request a human review of judgments made by algorithms about demonetization. The system automatically reassesses each alternative. Even after a period of 48 hours, if the audience actively interacts with the provided content, there may be changes made to the way it generates revenue. Videos may experience periods of demonetization and subsequent remonetization, particularly within the initial 48 hours after being uploaded. A 'yellow dollar' signal is shown beside demonetized films on writers' dashboards. Automated judgments about demonetization can be challenged by requesting a manual review conducted by a human. Conducting a human video review can be a time-consuming process, potentially requiring several hours or even weeks. YouTube human reviewers have a preference for videos that attract a large number of viewers. This exemplifies the frequently criticized preference for larger establishments.⁶¹ Arun Dunna et al., as aforementioned, collected a sample size of 354,884 videos published by 9,695 channels between July 22 and September 9, 2020. The data collection was done by picking a specific time period and only based on publicly available data. Most of these videos were collected from "YouTube Trending" thus giving for a diverse collection of videos and channels, since YouTube keeps updating the list every 15 minutes.⁶²

For example, a furore erupted against YouTube when popular influencer Logan Paul uploaded a video in which he was seen filming in a location in Japan known for suicides. In the video, it can be seen that his team comes across the dead body of a man who had allegedly committed suicide. However, the video does not stop instead, Paul continues to show the body and makes comments that are "disgusting" and "disrespectful" to viewers. This video made its way to #1 in the "Trending" section of YouTube. The platform took no action against Logan Paul and did not take

⁶⁰ *Id.*

⁶¹ Dunna et al., *supra* note 1.

⁶² *Id.* at 8.

down the video on their own. However, following the backlash from followers, Logan Paul himself took down the video and posted an apology video. YouTube faced severe criticism for failing to take decisive action and only taking punitive action after 10 days of the incident.⁶³

“You beautiful bastards, what’s up?” Before alerting his followers on August 31, 2016, well-known YouTube creator Philip DeFranco welcomed his viewers in almost all of his hundreds of episodes as follows. At that point, he said that his greeting and other aspects of his video might need to be altered. He cautioned that YouTube’s new “advertiser-friendly” policies might affect his ability to get paid to promote on the content-sharing website. Due to the presence of “graphic content or excessive strong language,” several of his videos have previously been “demonetized.” Views of those videos would no longer generate DeFranco his advertising income.⁶⁴

The relevant findings from the study are as follows:

1. 13.3% of the sampled movies were unmonetized, yet just 0.5% were demonetized or remonetized. Over a quarter of demonetized videos in the sample were remonetized, showing a high false-positive rate. Video monetization status adjustments take five days on average. Remonetization takes 13 hours longer than demonetization, indicating extra human scrutiny.
2. Different channels have different monetization methods. Channels with fewer subscribers have higher demonetization rates and lengthier remonetization delays than popular channels with over 1 million users. These results confirm YouTube’s tiered governance.

This research shows a considerable difference in channel view increase dependent on monetization. Statistically, demonetizing a video led to fewer referrals.⁶⁵ These findings have been corroborated by other literature examining the biases present in the YouTube algorithm.⁶⁶

Platform	YouTube Partner Program (YPP) ⁶⁷	Instagram Monetisation ⁶⁸
Demonetisation Policy	Content that violates YouTube’s Community	Instagram may restrict or demonetize accounts that

⁶³ *YouTube punishes Logan Paul over Japan suicide video*, BBC NEWS (Jan. 11, 2018), <https://www.bbc.com/news/world-asia-4264432>.

⁶⁴ Robyn Caplan & Tarleton Gillespie, *Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy*, 6 SOCIAL MEDIA + SOCIETY, (2020).

⁶⁵ *Id.*

⁶⁶ Zappin et al., *supra* note 45.

⁶⁷ YOUTUBE HELP, *supra* note 59.

⁶⁸ INSTAGRAM HELP CENTRE, *supra* note 54.

	<p>Guidelines, including but not limited to inappropriate or harmful content, may lead to demonetisation. YouTube employs automated systems and manual reviews to enforce these guidelines. Additionally, if a channel receives repeated strikes or violations, it may face demonetisation or termination. Creators are notified of demonetisation, and they can request manual reviews for reconsideration.</p>	<p>violate its Community Guidelines, Terms of Service, or other policies. This includes content containing hate speech, violence, nudity, copyright infringement, or other violations. Accounts may also face restrictions if they engage in fraudulent activities, such as buying followers or likes. Instagram typically notifies users of violations and may take actions such as removing content, disabling features, or suspending accounts. Creators can appeal demonetisation decisions through Instagram’s appeals process.</p>
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Table 2: Comparison between YPP Demonetisation Policy & Instagram Demonetisation Policy

A comparison between YPP & Instagram’s Demonetization Policy shows that there are similarities in that both platforms require the user to conform to additional Community guidelines and platform-mandated forms of expression which has to be incorporated in the content to be monetised. It may be stated that the allegation of censorship by proxy and platform mandated appropriate forms of expression is enforced even by the likes of Instagram.

Hence, from the above, it can be deduced that YouTube and Instagram, some of the most popular video-sharing platforms in India, suffer from allegations of censorship by proxy and use Policies that lead to allegations of unfair treatment by its users. YouTube does not treat the users equitably and this affects the enjoyment of economic rights of the users on the platform, which are ensured by copyright laws. Hence, there is a need to bring about some form of accountability and public

oversight in their operations. The next Part analyses the reconceptualization of the role of YouTube as an intermediary in the Indian context.

IV. YOUTUBE'S ROLE AS AN INTERMEDIARY: A SHIFT IN STANCE IN INDIAN IT LAWS

The US regime under the Digital Millennium Copyright Act was one of the first statutes that defined the liability of YouTube and other social media operators, classifying them as intermediaries and fastening liability on them for enabling copyright infringement, while carving out exceptions for exempting from them for acting on being served a notice from the copyright owner to take down the infringing content. Early examples of algorithmic content moderation on YouTube originated from the development of algorithms to automatically process such requests. In the Indian context, this clause is comparable to S.79 of the Information Technology Act of 2000, which describes a similar approach of online intermediaries in the Indian context.⁶⁹ This Section states that intermediaries, who host content of third party users on their platforms, would be exempted from liability for such content, provided they undertake due diligence to remove such content when found to be averse with the law. In adopting this clause, however, the Indian IT regulation system inherited the problem of granting internet intermediaries too much leeway to avoid accountability by performing a sweeping takedown of all content that has been asked to be deleted. There was lack of clear interpretation of the phrase “due diligence” and what exactly constituted due diligence which would save liability upon the intermediaries. The safe harbor provisions were enacted in 2004, following the Avinash Bajaj⁷⁰ case where the top management personnel of the platform Baazi.com was jailed for sale of objectionable content on the platform by a third-party vendor. However, since then, the character of the internet has changed drastically and the mechanisms of governance on the platforms have also undergone a sea change.

In comparison, the EU Copyright Directive imposes heightened liability on content sharing platforms like YouTube and states that they can be “taken to court for making copyright-infringing

⁶⁹ “Exemption from liability of intermediary in certain cases. – (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if–

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not– (i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.”

⁷⁰ Avnish Bajaj v. State (NCT) of Delhi, 2008 150 DLT 769.

content available to the public, even where it has been uploaded by their users.”⁷¹ This seeks to reduce the amount of unauthorized copyrighted material available online. This entails a requirement on content-sharing platforms to obtain authorization from the rights-holder, for example in the form of a license, before it displays copyrighted material uploaded by its users. This license must cover situations in which its users are not seeking to make a profit. However, the intermediaries can still escape liability, provided that they comply and take steps to eliminate unauthorized dissemination of copyright on their platform. In the context of YouTube, the Directive has forced the platform to enable all users to request for automatic filtering of infringing material, and not merely takedown. This is in line with the prerogatives of the Directive.⁷²

In the Indian context, the Copyright Act 1957 along with Copyright Rules, 2013 in conjunction with the Information Technology Act and IT Rules (recently amended in 2021) is responsible for regulating the online digital copyright space. The Delhi HC, in the case of *MySpace Inc. v. Super Cassettes Industries Ltd.*⁷³, stated that the provisions of the IT Act (S.79&81) and the Copyright Act (S.51&52) have to be harmoniously construed. The Court, in that case, also held that intermediaries cannot be held accountable to remove *all infringing copies* from their platform and are only required to remove those copies for which it is given notice by the copyright owner. While Section 52 saves the fair use of copyrighted material for non-monetary and research purposes, Rule 75 provides for a DMCA-esque takedown procedure.⁷⁴ However, the discretion is placed on the intermediary that *if they deem it to be infringing*, only then the content would be taken down. In 2019, this jurisprudence brought about by the decision of the Delhi High Court was challenged in a District Court decision given in the case of *M/S ShreeKrishna v. Google India Pvt. Ltd. & Ors.*⁷⁵ Before expanding on this precedent, it will be mindful to revisit the judgment of the American Court in the *Athos* case. In that case, the Court had held that YouTube cannot be held liable for not taking down infringing content apart from what was mentioned in the takedown notice served by Athos. The instant case posed before the District Court brought about almost identical facts. The plaintiff, a production company, alleged that the Defendants, who own the domain name www.youtube.com, exploited and improperly utilised the Plaintiff's valuable intellectual property on purpose. The copyright

⁷¹ Directive (Eu) 2019/790 Of The European Parliament And Of The Council, art. 17.

⁷² Directive (Eu) 2019/790 Of The European Parliament And Of The Council, Art.17(4)(b) and (c).

⁷³ *MySpace Inc. v. Super Cassettes Industries Ltd*, 2016 SCC OnLine Del 6382.

⁷⁴ “A copyright holder may complain in writing to an intermediary with details of (i) the identity of the work, (ii) its ownership of the work, (iii) the fact that the underlying copy is infringing and is not a permitted use under s.52 or otherwise, (iv) the location of storage, and (v) the uploader, if known. The copyright holder must undertake to file an infringement suit within 21 days of the notice. While clause (c) permits only the “owner of copyright” to deliver a written complaint, Rule 75 appears to extend the power to do so to exclusive licensees as well.”

⁷⁵ *M/S ShreeKrishna v. Google India Pvt. Ltd. & Ors*, Cr. No 2198 of 2016(India).

encompassing the cinematograph films, audio-visual melodies, sound recordings, and underlying literary and musical works of the Plaintiff is encompassed within this. The aforementioned works were being uploaded to the website YouTube and downloaded by users through a tool known as “YouTube Downloader”—all without the plaintiff’s authorization or assent. The actions of the Defendants, as alleged by the Plaintiff, resulted in considerable financial detriment to the Plaintiff, given that a considerable proportion of the Plaintiff’s income is generated from its films and the music associated with them. The Defendants relied on the *MySpace* judgment to contend that their liability was saved by the safe harbour provisions of S. 79 of the IT Act. The District Court held otherwise. In its pronouncement, the Court held Defendants liable for copyright as soon as the Defendants obtained knowledge of the titles of the Plaintiff’s works, it became their duty to locate the URLs containing the allegedly infringing content and eliminate it. Moreover, the Court dismissed the Defendant’s contention that the appropriate procedure for requesting removal of content was not adhered to, which entails specifying the URLs of the purported infringement. As a result, the Court ruled that this claim of infringement is against the Defendants.

Hence, it can be seen that there is inconsistency in the interpretation and application of S.79 of the IT Act 2000 in the case of copyright infringement. Around this time, the MeITY started deliberations on whether there is a need for a relook of the safe harbour provisions available to intermediaries, in light of a calling attention motion on “Misuse of Social Media platforms and spreading of fake News” was admitted in the Parliament (Rajya Sabha) in 2018 (Monsoon session). These deliberations would eventually lead to the State enacting the IT Rules, 2021 to replace the erstwhile 2011 Rules. The aim of these rules was to “*provide additional avenues for grievance redressal apart from Courts and also ensure that the Constitutional rights of Indian citizens are not contravened by any Big-tech Platform by ensuring new accountability standards for SSMLs.*” Hence, with the advent of the IT Rules 2021, there seems to have been some accountability placed on the intermediaries.

Rule 3 of the IT Rules mentions the categories of content which the rules deem to be in contravention of the Rules and places the burden on the SSML to exercise due diligence in terms of taking swift action to disable access to such content on their platforms. Sub-Rule (2) of the Rules mandates that the intermediaries shall inform its users of the appointment of the Grievance Redressal Officer to be appointed by them and empowers users to send complaints to such Grievance Officer and places the burden on the intermediary to resolve the complaint within 72 hours of the receipt of such complaint. Within the categories mentioned in Rule 3 of 2021 Rules, the intermediaries are required to inform users to not upload content that they do not have the

right to use⁷⁶ and to not upload content that infringes a trademark, patent or copyright of another person.⁷⁷ The Intermediaries are also required to take reasonable steps of its own to ensure such content is not uploaded on their platforms.

As a result, there were additional compliances placed upon Significant Social Intermediaries (“SSMIs”) in the form of having a greater national physical presence in terms of ensuring that the content conforms to the Rules, undertake efforts to ensure that non-conforming content is swiftly removed from their platforms, appointment of grievance redressal personnel, among other stringent compliances. YouTube would fall under the category of SSMI since it performs the role of a social intermediary and also has users above the mandated threshold, one anticipates that the platform would be hit the most by Rule 4(4) which states “SSMIs must employ *technology-based measures including automated tools to proactively identify information depicting* (i) rape, child sexual abuse or conduct, or (ii) *any information previously removed following a Government or court order.*” This Rule places compliance burden on the intermediaries in terms of the automated tools being used by them to regulate content. Rule 4(4) further goes on to mention that the automated tools should identify prohibited categories of information given in Rule 3 and intimate users of such prohibited content when they try to access such content on their platform. The provisos to Rule 4(4) state:

- a. The measures taken by the intermediary shall be proportionate to the interests of freedom of speech and expression, privacy of users on the platform of such intermediary and the interests should be protected through appropriate use of technical measures.
- b. There should be appropriate human oversight and there should be periodic review of the technical measures.
- c. The tools used by the intermediaries should be “accurate and fair” and the “propensity of bias and discrimination” should be regulated.

This Sub-Rule brings about much needed accountability on the intermediaries to ensure that the automation tools used by them to regulate content should adhere to principles of proportionality, free speech, privacy and promote fairness and eliminate biases.

The 2021 Rules defines “social media intermediary” to mean those who “*primarily or solely enables online interaction between two or more users and allows them*” to exchange information and “significant

⁷⁶ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 3(b)(i).

⁷⁷ *Id.*, Rule 3(b)(iv).

social media intermediary” means those social media intermediaries who have more than 5 million registered Indian users on its platform.⁷⁸ Additionally, Rule 6 also empowers the government to “**any intermediary** to comply with the same obligations as SSIMs if their services are adjudged to pose a risk of harm to national security, the sovereignty and integrity of India, India’s foreign relations or to public order.” Rule 7 states that non-compliance with regard to any of the compliance mentioned in Rules 3,4 or any other Rule would result in the intermediary losing its safe harbour status, making it vulnerable to any legal challenge.

This crackdown on Social Media Intermediaries is in sync with a global push to ensure Big Data companies such as Google, Meta and Twitter are made more accountable for the content hosted on its online platforms. However, the drift of these diligence measures seems to be towards enabling greater State surveillance and greater traceability of messages transmitted on the platform as more leeway has been given to the State to order for removal of content on grounds of national interest. In addition, the SSIM has to appoint national grievance redressal employees who will have a permanent physical presence in the country as part of an “internal grievance redressal mechanism”. Since YouTube would fall under the category of SSIM since it performs the role of a social intermediary and also has users above the mandated threshold, one anticipates that the platform would be hit the most by Rules 3 and 4(4).⁷⁹ Additionally, the SSIMs also have to publish monthly compliance reports, where they have to make public all the actions taken by them in response to complaints/grievances transmitted to them.⁸⁰ The following are the compliance reports published by YouTube between the period of August 2023 to February 2024:

Time Period	Complaints Received of Copyright Infringement (1)	Content removed due to Copyright Infringement (2)	Content removed by automated detection (3)
Aug 2023	26,553 (92.6% of total requests)	108,030 (98.0% of all removal actions)	765,480
Sept 2023	20,610 (91.1% of total requests)	64,834 (98.2% of all removal actions)	693,377
Oct 2023	20,551(92.4% of total requests)	64,313 (98% of all removal actions)	636,128

⁷⁸ *Id.*, Rule 2(w).

⁷⁹ “SSIMs must employ *technology-based measures including automated tools to proactively identify information depicting* (i) rape, child sexual abuse or conduct, or (ii) *any information previously removed following a Government or court order.*”

⁸⁰ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 4(1)(d).

Nov 2023	17,989 (91.4 of total requests)	55,666 (97.1% of all removal actions)	762,333
Dec 2023	19,847 (91.3% of total requests)	63,636 (97.5% of all removal actions)	817,962
Jan 2024	21,671 (89.2% of total requests)	61,180 (95.6% of all removal actions)	805,125
Feb 2024	20,292 (90.5% of total requests)	56,037 (93.7% of all removal actions)	874,271

Table 3: showing YouTube action on copyright infringement complaints and cases and instances of automated detection content removal for India for Aug 2023-Feb 2024⁸¹

From the above data, the following findings may be deduced:

1. Most of the complaints YouTube receives pertains to copyright infringement
2. Majority of complaints results in removal of content
3. Automated content removal has a major role to play in content moderation and removal & human intervention makes up a small fraction of the intervention.

Further, in the words of YouTube, as per their Transparency Report, the complaints received from users (Represented in 1) are from “individual users located in India via designated mechanisms during the one-month reporting period. These complaints relate to third-party content that is believed to violate local laws or personal rights on Google’s SSMI platforms.”⁸² These are the complaints routed through the Grievance Redressal Officer and are as per the prohibited categories of content mentioned in Rule 3 of the IT Rules. On the other hand, the removal actions highlighted in Columns 2 and 3 represent actions taken by YouTube when the content violates “our Community Guidelines or content policies or meets local legal requirements for removal.”⁸³ This shows that a greater number of removal actions on YouTube takes place on the platform’s own Guidelines and Policies rather than that of the provisions of the IT Rules, leading to concerns that users may face a situation of “double jeopardy” where free speech is first censored by the platform’s own policies and then by the State enacted IT Rules.

This also raises following further concerns:

1. There is no human judgment of the veracity of the complaints being made to the platform

⁸¹ PDF Download Center, GOOGLE TRANSPARENCY REPORT, <https://transparencyreport.google.com/report-downloads?hl=en> (last visited Apr. 10, 2024).

⁸² *Id.*

⁸³ *Id.*

2. All the complaints result in an automated takedown of the content
3. Since there is no official data from YouTube available on the algorithm and its operation w.r.t content moderation, this renders the whole mechanism opaque and lends it a color of arbitrariness.

Thus, even though India has slowly started aligning with the global practices when it comes to regulation of the online intermediaries, it still has a long way to go to reach a stage of maturity. This classification of YouTube along with intermediaries such as Meta or Twitter is not proper, as YouTube is not merely a social intermediary. It may be a significant social intermediary but its business model, which thrives on video sharing and advertising, is different from that of other social intermediaries. In recent years, it has become the primary platform for content creation and uploading, thus being one of the major avenues for authors and creators to realize the benefits of their copyrighted work. Even though the compliances regarding a complaint mechanism and the burden of ensuring a fair and unbiased automated algorithm are welcome, The IT Rules, 2021 feel like a missed opportunity in what could have been the formulation of an effective mechanism to check copyright infringement and to fasten greater liability on YouTube for being “a facilitator of infringement”, as the mechanism has still not been fully fleshed out in terms of an appellate forum and the oversight role of a quasi-judicial quorum. In this regard, the forthcoming Digital India Bill has proposed a classification of intermediaries based on their differing nature of operation. Hence, there would separate set of rules for each classification of intermediaries based on their mode of operation. However, there is progress yet to be made on the passage of this Bill.

V. CONCLUSION

The scrutiny faced by YouTube’s existing self-regulating governance mechanism underscores the imperative for reforms aimed at addressing issues of copyright protection, transparency, and fairness. To bolster the platform’s regulatory framework, several suggestions have been proposed: *Firstly*, the classification of intermediaries such as YouTube into distinct categories with tailored regulatory rules could better address the unique challenges, they pose in terms of copyright protection and content governance.

Secondly, an emphasis on copyright protection and the incorporation of mechanisms for greater human intervention in platform governance would enhance the enforcement of copyright laws and alleviate concerns regarding automated content moderation.

Thirdly, expanding the availability of copyright tools like Copyright Match and Content ID, albeit in limited functionality, would empower content creators to safeguard their intellectual property rights and counter instances of infringement.

Lastly, the establishment of an offline presence by YouTube within the country could facilitate closer engagement with stakeholders and regulatory authorities, thereby enhancing accountability and oversight.

Furthermore, the need for uniform application of YouTube's policies to avoid perceptions of opacity and arbitrariness has been highlighted, along with the importance of harmonizing the platform's regulations with state-mandated requirements. While India has taken initial steps towards aligning with global practices in regulating online intermediaries, there remains considerable progress to be made. The classification of YouTube alongside platforms like Meta or Twitter under the same regulatory framework may not fully capture its distinct business model and function as a video-sharing and advertising platform.

Although the Information Technology Rules, 2021 introduce significant provisions such as a complaint mechanism and requirements for fair and unbiased automated algorithms, there are still gaps in establishing an effective mechanism to combat copyright infringement and hold YouTube accountable as a facilitator of infringement. The forthcoming Digital India Bill proposes a classification of intermediaries based on their mode of operation, which could lead to separate sets of rules tailored to each classification. However, progress on the passage of this bill remains pending.

In conclusion, while strides have been made in regulating online intermediaries like YouTube, further refinement and enhancement of the regulatory framework are essential to effectively address copyright infringement and ensure accountability. Continued collaboration between stakeholders, policymakers, and regulatory authorities is vital to creating a balanced and robust regulatory environment that fosters innovation while protecting the rights of content creators and copyright holders.