

STRIKE(-ING) OUT FREE SPEECH: EXAMINING COPYRIGHT AS A TOOL FOR ONLINE CONTENT CENSORSHIP IN THE USA AND INDIA

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ABSTRACT

In the realm of copyright, the notice-and-takedown provision is increasingly being used as a tool in political strategy to curb dissent, manipulate public opinion and create a narrative that aligns with the ruling political forces. Parallely, content moderation, which was previously done manually at the behest of government agencies, is now undergoing a worrisome transition to becoming fully automated. The cumulative impact is that copyright takedowns have increased manifold, and the users are often left remediless due to a lack of transparency and accountability of online platforms while removing such content. The research analyses the legal standards pertaining to copyright and free speech, highlights the inadequacies of the current legal frameworks and offers recommendations for balancing the rights of content holders with the duty of online platforms to remove infringing content while preserving digital freedoms.

I. INTRODUCTION

The internet has transcended international boundaries and assumed almost a ‘supra-human’ role in the Digital Age.¹ With the advent of Social Media Intermediaries [“SMIs”] and the increase in instances of online copyright infringement, the existing copyright frameworks of various countries have proven ineffective and undermined the internet’s long-standing values of freedom, creativity, and innovation. The aim of the research is to understand how copyright takedown notices are employed as a tool to stifle dissent. Under the garb of copyright infringement,² these notices are used to pull-down discourse that is critical of the current majoritarian viewpoint. In the subsequent section, the use of algorithmic filters by social media intermediaries is examined and an argument is made that automated systems are inadequate to conduct a fact-specific enquiry which is the standard in law to determine fair use and/or copyright infringement. The concluding analysis addresses the tussle between fair use (fair dealing in India) and the fundamental right to freedom

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¹ Aakanksha Kumar, *Internet Intermediary Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as a Trade Barrier*, 19 J. INTELL. PRO. RTS. 272 (2014).

² David Sohn, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, CTR. FOR DEMOCRACY AND TECH. (2010), https://cdt.org/wp-content/uploads/pdfs/copyright_takedowns.pdf.

of speech and expression. Recommendations are proposed to reform the existing legal frameworks to safeguard these rights more effectively while ensuring the integrity of copyright enforcement mechanisms.

II. THE LAW IN INDIA AND THE USA – ISP LIABILITY FOR INTELLECTUAL PROPERTY VIOLATION

The Digital Millennium Copyright Act 1998 [**“DMCA”**] is a US federal law that was legislated to protect copyright holders from unlawful distribution or reproduction of their online works. The DMCA, under Section 512,³ provides right holders with an expedited “notice-and-takedown” system that warrants them to request search engines and social media intermediaries to remove content on grounds of copyright infringement. The eligible internet service providers can avoid liability for copyright infringement based on the content posted by their users by virtue of the ‘safe harbor protection’ in exchange for swiftly removing content and upholding the exclusive rights of the copyright holders.⁴ The DMCA’s safe harbor provision protects online platforms from liability for user-uploaded content, as long as they act promptly to remove the infringing content/material when notified. Section 512 of the DMCA elucidates four categories of internet service providers who qualify for safe harbor protection. The safe harbor provisions of the DMCA can be applied if the service provider participates in one or more of the related activities listed hereinafter: (a) acting as a conduit for the automated online transmission of content as instructed by third parties (a “mere conduit”); b) temporarily storing content that is being automatically transmitted over the internet from one third party to another [“caching”]; c) storing content on an online service provider’s [**“OSP”**] system or network at the user’s request [“hosting”]; or d) directing users to online websites using information location tools, like a search engine [“linking”].⁵ The nature of the activity determines whether an OSP qualifies for a certain safe harbor.

With the widespread dissemination of online content becoming the driving force of the internet, the necessity to safeguard the intellectual property rights of content creators is now felt globally. The World Intellectual Property Organization Copyright Treaty [**“WIPO”**] 1996 requires WIPO member states and signatories to safeguard the copyright of any work generated by inhabitants of

³ Digital Millennium Copyright Act, 17 USC § 512 (1998).

⁴ A safe harbour protection is a provision in law which provides for protection from liability or significantly reduces liability if certain conditions are met. It is envisaged under Section 512 of the Digital Millennium Copyright Act 1998 and Section 79 of the Information Technology Act 2000.

⁵ United States Copyright Office, *Section 512 of Title 17 – A Report of the Register of Copyrights* (May, 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

a foreign country within their respective jurisdictions.⁶ The treaty essentially suggests that the DMCA will be applicable in and treated at par with every member country's domestic copyright law. The Government of India acceded to the WIPO Copyright Treaty in 2018, thus granting DMCA the same legal enforceability in India as the domestic copyright law.⁷ As a result, internet users in India are governed not only by Indian intellectual property laws, but also by the Digital Millennium Copyright Act, 1998, i.e. the law that applies to content originating in the United States. The DMCA, being a pertinent part of the United States' copyright framework, is applicable to websites hosted in the United States. Interestingly, all major platforms like Meta, WhatsApp, Instagram, X and YouTube are based out of the US and are bound to work within the confines of the DMCA.⁸ It is asserted that the United States plays a significant role in the international trade agenda, thereby compelling countries in the Global South to adapt their internal laws and regulations to U.S.-based standards to establish uniformity and facilitate improved business relations. Consequently, copyright infringement recognized on any such platform will incur the wrath of the DMCA for any offender, regardless of geographical location as most of these platforms are owned by Silicon Valley firms that are subject to the DMCA.

Parallel to the United States' framework, the rights of copyright holders in India are protected under the Copyright Act of 1957. The rights and liabilities of internet service providers are protected under the Information Technology Act, 2000 supplemented by the IT (Intermediary Guidelines and Digital Media Ethics) Code, 2021. Section 51 of the Copyright Act sets out that a copyright is infringed *inter alia* when any person does anything, the exclusive right to do which is conferred on the copyright holder.⁹ There are certain exceptions to copyright infringement known as the principles of "fair dealing" envisaged in Section 52 which entails specific, statutorily demarcated circumstances wherein a protect work can be used without a license or permission.¹⁰ An "intermediary"¹¹ defined under Section 2 (1)(w) of the Information Technology Act, 2000, shall be exempted from liability for any third-party information, data or communication made available or hosted by it under Section 79(1) of the IT Act, 2000. This is called the safe-harbor provision and is subject to certain conditions laid down in subsection (2) and (3) of Section 79 of the Information Technology Act, 2000.

⁶ The World Intellectual Property Organization Copyright Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997).

⁷ Press Information Bureau, *Cabinet approves accession to WIPO Copyright Treaty, 1996 and WIPO Performance and Phonograms Treaty, 1996*, GOVERNMENT OF INDIA (04 July, 2018), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=180389>.

⁸ Digital Millennium Copyright Act, 17 USC § 512 (1998).

⁹ The Copyright Act 1957, No. 14 Acts of Parliament, 1949, § 51 (Ind.).

¹⁰ *Id.*, § 52

¹¹ The Information Technology Act 2000, No. 21, Acts of Parliament, 2000, § 2(w) (Ind.).

III. THE LAW WEAPONIZED

Social critics Edward Herman and Noam Chomsky, in their book *Manufacturing Consent*, contend that the State's bureaucracy holds "monopolistic control over the media" which results in authorized monitoring and censorship.¹² In response, a propaganda model is suggested, one which focusses on unequal distribution of wealth and power and explicates how money and power influences mass-media choices, curbs dissent, manipulates public opinion and upholds the interests of the elite class.¹³ Chomsky discusses how media outlets, through selective news reporting, create a narrative that aligns with dominant political and economic forces.¹⁴ In an interview with Alan McLeod,¹⁵ Chomsky asserts that the propaganda model can be transfused into the information age. He highlights the power of targeted advertising and how social media algorithms may feed into "echo chambers" and fortify existing beliefs, thus further altering public discourse.¹⁶ Herman and Chomsky's theories, albeit in the political-economic sense, bear a striking resemblance to the systematic suppression of political critique and dissent. The main argument made herein is that the disingenuous use of copyright law leads to stifling of dissent, or in turn, takedown of content which is critical of the prevailing political standpoint. It is argued that content takedowns under the Indian and American laws are error-prone and violate the constitutional guarantee of the freedom of speech and expression coupled with the freedom of the press. The two main reasons which facilitate the incorrect application of copyright laws are:

- 1) The overreach and misuse of copyright law for silencing criticism and dissent;¹⁷
- 2) Increased automation in content moderation (which includes the incapacity of AI to conduct a fact-specific enquiry on a case-to-case basis).¹⁸

According to Google's Monthly Transparency Report of November 2023,¹⁹ 97.1% of the content removed from Google and YouTube was related to copyright claims. The graph showing the reasons for content removal is given below:

¹² EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988).

¹³ *Id.* at 61.

¹⁴ ALAN MACLEOD, *PROPAGANDA IN THE INFORMATION AGE: STILL MANUFACTURING CONSENT* (Routledge 2019).

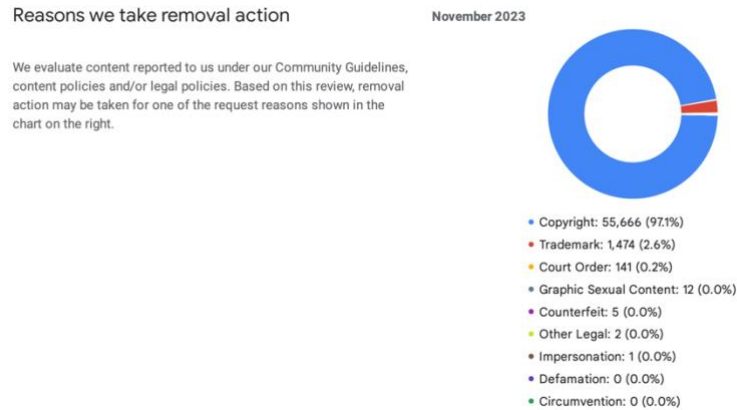
¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sep. 2010), https://cdt.org/wp-content/uploads/pdfs/copyright_takedowns.pdf.

¹⁸ Dan L. Burk, *Algorithmic Fair Use*, 283 THE UNIV. CHI. L. REV. (2019).

¹⁹ Google, *Monthly Transparency Report, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (2023), https://storage.googleapis.com/transparencyreport/report-downloads/india-intermediary-guidelines_2023-11-1_2023-11-30_en_v1.pdf.



Copyright law creates opportunities for mala fide actors who want to stifle free speech under the garb of copyright protection. A video showing President Trump lamenting George Floyd’s death and warning about the “violence and anarchy” from radicals was taken down from Twitter over alleged copyright infringement.²⁰ Another example from India is the removal of the BBC documentary on the Indian Prime Minister, Narendra Modi which investigates his role in the 2002 Gujarat riots. A Meta representative was quoted saying, “the content was removed due to copyright claims by the rights holder”.²¹ A Lumen database report confirms that in January 2023, at least fifty tweets were taken down at the direct request of the Indian government through the Ministry of Information and Broadcasting.²² Journalists from *The Intercept* (an award-winning adversarial journalism organization) have averred that Elon Musk has failed to ‘stand up to the authoritarian governments’ and eventually caved to unprecedented demands.²³ Even tweets by actor John Cusack linking to *The Modi Question* have been blocked in India, however, they remain visible to American audiences.²⁴ The impact of India’s over-censorship of anti-majoritarian content is clearly reflected in BBC’s copyright claims and the consequent removal of the documentary on the Prime Minister. These takedowns serve as a disconcerting reminder of the powers enjoyed by the government, which are often abused to curb dissent, suppress legitimate content and manipulate public opinion to uphold the views of the ruling (elite) class.²⁵ At this juncture, we shall delve into

²⁰Jonathan Easley, *Twitter Removes Trump Campaign Tribute to George Floyd Claiming Copyright Complaint*, THE HILL, <https://thehill.com/homenews/campaign/501270-twitter-removes-trump-campaign-tribute-to-george-floyd-claiming-copyright>.

²¹ Russell Brandom, *Why Is the Modi Documentary So Hard to Find? Some Blame Lies with the BBC*, REST OF WORLD (2023), <https://restofworld.org/2023/why-is-the-modi-documentary-so-hard-to-find-some-blame-lies-with-the-bbc>.

²²Ministry of Information and Broadcasting, *Legal Request for Twitter from India*, LUMEN DATABASE (Jan. 20, 2023), https://lumendatabase.org/file_uploads/files/5097820/005/097/820/original/Legal_Request_for_Twitter.pdf?1674320467&access_token=Vbprc_ia6fmjek5G0sunAg.

²³ Murtaza Hussain & Ryan Grim, *Elon Musk Caves to Pressure from India to Remove BBC Doc Critical of Modi*, THE INTERCEPT (Jan. 24, 2023), <https://theintercept.com/2023/01/24/twitter-elon-musk-modi-india-bbc>.

²⁴ @JohnCusack, TWITTER, <https://twitter.com/johncusack/status/1616019439014617090>.

²⁵ Edward S. Herman & Noam Chomsky, *supra* note 12.

case studies from three different jurisdictions in support of the first argument hereinabove i.e. the misapplication of copyright law to silence criticism:

A. Overly aggressive copyright claims during US Presidential campaigns

In 2020, California-based band Linkin Park issued a cease-and-desist notice against Donald Trump for unauthorizedly using their copyrighted music, i.e. featuring a cover version of the band's infamous song "In the End" in a political campaign video. Subsequently, Machine Shop Entertainment, the business arm and management company of Linkin Park, filed a DMCA takedown notice seeking removal of the video claiming infringement of copyright.²⁶ Pursuant to the copyright complaint, the tweet enclosing the campaign video put up by Mr. Trump's campaigners and retweeted by Donald Trump, was taken down "in response to a report by the copyright owner", as the takedown notice read.²⁷ In the same year, a viral anti-Trump video was produced by the Lincoln Project, a group of Republican strategists who opposed Trump's re-election. The video titled "Mourning in America" depicted the United States declining and struggling under the weight of the pandemic, unemployment and economic downturn, all of which was attributed to Trump's leadership.²⁸ In response, the Trump campaign claimed that the video used footage and materials that were copyrighted, particularly from Trump's rallies and other campaign related events, and filed a copyright complaint.²⁹ Pursuant to the complaint, platforms hosting the video including Twitter were asked to takedown the controversial video. The Lincoln Project contested the takedown arguing that their use of the footage fell within the domain of "fair use" which allows the legitimate use of copyrighted content for the purposes of criticism, commentary, news reporting, or parody – contexts that could apply to the "Mourning in America" video. Fair use is a legal principle that allows the use of copyrighted material without permission/authorization from the author. The doctrine of fair use attempts to strike a delicate balance between the rights of the authors of copyrighted works with the right of the public to access the said works in limited circumstances.

Similar instances of political stifling under the garb of copyright-related actions include the takedown of an advertisement publicized by CBS news anchor Katie Couric commenting on

²⁶ Daniel Kreps, *Linkin Park Issue Cease and Desist After Trump Retweets Campaign Video Set to "In the End"*, ROLLING STONE (July 19, 2020), <https://www.rollingstone.com/music/music-news/linkin-park-cease-and-desist-trump-video-1030886/>.

²⁷ *Id.*

²⁸ The Lincoln Project, *Mourning In America*, YOUTUBE (May 04, 2020), https://www.youtube.com/watch?v=t_yG_-K2MDo.

²⁹ CNN Politics, *Donald Trump just broke the most basic rule of politics*, CNN (May 05, 2020), <https://edition.cnn.com/2020/05/05/politics/lincoln-project-ad-donald-trump/index.html>.

Barack Obama's "lipstick on a pig" remark during John McCain's 2008 campaign,³⁰ and the takedown of a Mitt Romney campaign video³¹ which was used to highlight Barack Obama's relationship with lobbyists.³²

The takedown of politically sensitive content exemplifies how copyright law can be used as a tool in political strategy, especially in efforts to limit the distribution of critical or opposing viewpoints during a highly polarized election.

B. Copyright as a weapon of censorship under Ecuadoran President Rafael Correa's regime.

The ubiquitous growth of digital technology has added a newfound layer of complexity to the relationship between copyright and censorship. Rafael Correa, who served as the Ecuadorian President from 2007 to 2017, was infamous for his position on media regulation and limiting free access to news and information. In October 2013, Pocho Alvarez, a filmmaker, found that his nine-minute video, "*Assault on Íntag*" pertaining to the harassment suffered by an indigenous community was taken down from his YouTube account.³³ The video included President Correa's photos and voice saying, "Let us see who is causing these problems" implying that residents of the area were obstructing construction.

The Ecuadoran government under President Correa is one of the finest examples of systematic suppression of political dissent. President Correa allegedly invested "millions of dollars of public funds" to remove content that was deemed anti-majoritarian. DMCA notices were issued to remove "unauthorized content" from the state-operated TV channel ECTV.³⁴ A critical documentary by Santiago Villa, titled "*Rafael Correa: retrato de un padre de la Patria*" was also pulled down due to a copyright infringement claim.³⁵ Moreover, the government accused the investigative news website *La Fuente* of copyright infringement and claimed that the owners were illegally

³⁰ Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sep. 2010), https://cdt.org/wp-content/uploads/pdfs/copyright_takedowns.pdf.

³¹ The Telegraph, *US election: Barack Obama and Mitt Romney campaign ads depict different realities*, YOUTUBE (May 01, 2012), <https://www.youtube.com/watch?v=RBn7rK7QUtc>.

³² Lizbeth Hasse, *President or Pirate? The DMCA Takedown War of the Presidential Campaigns*, CREATIVE INDUSTRY, <https://www.cilawyers.com/president-or-pirate-the-dmca-takedown-war-of-the-presidential-campaigns>.

³³ José Miguel Vivanco, *Censorship in Ecuador Has Made It to the Internet*, HUMAN RIGHTS WATCH (2014), <https://www.hrw.org/news/2014/12/15/censorship-ecuador-has-made-it-internet>.

³⁴ Claudio Ruiz, *Copyright as a Tool to Censor Political Dissent in Latin America*, CREATIVE COMMONS (2017), <https://creativecommons.org/2017/01/20/copyright-tool-censor-political-dissent-latin-america>.

³⁵ Claudio Ruiz, *Copyright as a Weapon of Censorship*, DERECHO DIGITALES (Oct. 21, 2014), <https://www.derechosdigitales.org/8125/ecuador-copyright-weapon-censorship>.

publishing confidential information.³⁶ However, Ecuador's excessive content regulation and a deplorable free speech record leads us to believe that the real intention behind such acts was to silence whistleblowers and prevent allegations of corruption within Correa's administration.

In the last two decades, copyright has served as an effective means of regulating the dissemination of information; this, in turn, has broadened the scope of government censorship in Latin America where it is now used to restrict access to information and silence anti-majoritarian discourses and critical speech. The aforementioned instances highlight how copyright law can be misused in politics by leveraging aggressive takedown notices to limit the distribution of critical or opposing viewpoints. Mala fide takedowns exemplify the propaganda model and the suppression of political discourse, as suggested by Herman and Chomsky in their book *Manufacturing Consent*.³⁷ By claiming infringement on campaign materials or content, political entities can temporarily suppress unfavorable media, stifling public discourse and potentially influencing the narrative in their favor even if the usage of the content might otherwise be protected under fair use.

C. Copyright as a weapon of structured political stifling in India

1. Doordarshan, Prasar Bharati's copyright takedowns

Amid the recent controversies, India has been on the forefront of systematic political stifling. In 2023, Abhisar Sharma (former employee at Zee, ABP, BBC and NDTV) who is now an independent journalist, received two copyright notices from Doordarshan, Prasar Bharati which is the government's broadcasting channel that has the exclusive rights to cover the Parliament.³⁸ The subject matter of the copyright notices was the use of Prime Minister Modi's sound bites over which Prasar Bharati (allegedly) owned copyright. The two videos in contention were:

"Modi avoids answering questions! Sansad turned into a Chunaavi Sabha! Opposition's Rahul ridiculed"; and

"Rahul Gandhi's harshest comment on BJP-RSS | Rahul Gandhi | NDA Vs INDIA".³⁹

Prima facie it is evident that these videos were on matters of public interest. Interestingly, Prasar Bharati's website states that their mission and objective is "to safeguard the citizen's right to be

³⁶ Freedom House, *Freedom on the Net – 2020*, FREEDOM HOUSE, <https://freedomhouse.org/country/ecuador/freedom-net/2020>.

³⁷ Edward S. Herman & Noam Chomsky, *supra* note 12.

³⁸ Vallari Sanzgiri, *Prasar Bharati sends YouTube news channels copyright strikes for clips of Parliament, PM speeches*, SCROLL (Sep. 25, 2023), <https://scroll.in/article/1056536/prasar-bharati-sends-youtube-news-channels-copyright-strikes-for-clips-of-parliament-pm-speeches>.

³⁹ *Id.*

informed freely, truthfully and objectively on all matter of public interest, and to present a fair and balanced flow of information including contrasting views...’’⁴⁰

When questioned about the copyright claims, Mr. Sharma stated that the biggest impact of such takedown requests is a hit on channel’s revenue.⁴¹ It must be borne in mind that independent journalists earn majorly through platforms like YouTube and Twitter. Malicious takedown requests under the garb of copyright infringement not only affect video monetization, but also impede the free flow of information in public interest. The video uploaded by Abhisar Sharma was subjected to a copyright notice on the pretext that “a copyright owner has claimed some material in his video”.⁴² Although the video remained live, the notice read that the video is now either being monetized by the original copyright owner, or the owner has chosen to receive analytics about it. According to Section 28 of the Copyright Act, 1957, the government is the first owner of copyright in case of ‘government works’. Thus, the government can regulate, restrict or allow the use of said works. However, an exception is carved out under Section 52(1)(a)(iii) for the reporting of current events and current affairs, including the reporting of a lecture delivered in public. A cumulative reading of the provisions indicates while the government holds the exclusive rights to reproduce, distribute and display these works, reporting of current events and current affairs is protected squarely by the fair dealing defense.

An interesting question to be raised at this juncture is – why are videos of public relevance not allowed to be used, critiqued, or reviewed by independent journalists? The researcher asserts that parliamentary proceedings should be made available in the public domain. The Indian government, by authorizing only authorized journalists to use footage of the G20 event, violated another provision of the Copyright Act, 1957 – Section 52(1)(za) which permits the communication to the public of an official ceremony held by the Central Government or the State Government or any local authority. In this regard, not a single independent journalist was allowed to cover the United States’ President Joe Biden’s meeting with the Indian Prime Minister. Resultingly, the only photographs that will enter the history books from this meet would be the ones taken by official government photographers.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

2. *TV Today – Newslaundry dispute*

In another instance from 2021, YouTube froze News Laundry's (an independent journalistic organization) channel for alleged copyright violation after TV Today (the parent company of the Aaj Tak-India Today group) reported it multiple times. Since its inception in 2012, Newslaundry has been infamous for having critical opinions, pieces, reportage and satirical commentary about the various organs of the government. The Newslaundry channel takedown reflects the larger issue of overly aggressive copyright strikes purported to handicap independent journalists. The Internet Freedom Foundation ["IFF"] in a letter to Google India⁴³ wrote that the practice of 'complaint bombing'⁴⁴ leads to the takedown of journalistic critique. The IFF termed this malicious practice as "weaponization of intellectual property",⁴⁵ a trend which is now increasingly employed by huge media conglomerates and political parties to serve their unscrupulous interests.

TV Today preferred an application before the High Court of Delhi seeking mandatory injunction, permanent injunction and damages against Newslaundry on the ground that the content of the programmes of the Defendants was formed majorly out of the content produced by the Plaintiff.⁴⁶ Arguing the application, the Defendants (Newslaundry) contended that their use of the Plaintiff's content constituted "transformative use" and should be squarely covered by Section 52 of the Copyright Act, 1957 inasmuch as they give due credit to the plaintiff and in no manner, try to show that the content is owned by the Defendants. The Delhi High Court, in its order dated 29th July 2022⁴⁷ corrected YouTube's grave error of taking down the videos uploaded by Newslaundry by dismissing the application under Order XXXIX Rule 1 and 2 moved by TV Today against Newslaundry. The High Court opined that at the interim stage, the Defendants were successful in establishing a *prima facie* case and the balance of convenience would tilt in favor of the Defendants in the event that they are able to establish fair comment, justification (defenses against defamation) and fair use.⁴⁸ While dismissing the application, the Hon'ble Court held that no irreparable loss or injury will be caused to the Plaintiffs if the interim injunction is not granted. The High Court held, "It would definitely be in the public interest that every broadcaster has the right of fair comment on current events and of criticism and review, including the programme created by others."

⁴³ Anandita Mishra, *IFF Writes to Google India about Recent Instances of YouTube Copyright Strikes*, INTERNET FREEDOM FOUNDATION (Oct. 18, 2021), <https://internetfreedom.in/iff-writes-to-google-india-about-recent-instances-of-youtube-copyright-strikes>.

⁴⁴ Complaint bombing refers to the act of sending a large number of takedown requests in an attempt to moderate and censor legitimate speech.

⁴⁵ Anandita Mishra, *supra* note 43.

⁴⁶ Code of Civil Procedure, 1908, Order XXXIX, rr. 1-2 (India).

⁴⁷ T.V. Today Network Limited v. News Laundry Media Pvt. Ltd. and Others, (2022) SCC OnLine Del 4899 (Ind.).

⁴⁸ *Id.*

Pertinently, as aforementioned, the Court left the issues of “justification”, “fair comment” and “fair dealing” open for trial.

The Newsland order is as a progressive step and comes as a sigh of relief for advocates of independent journalism and those holding anti-majoritarian views. It reinforces the stance that news reporting falls under the criticism and review net of Section 52. Notably, the Court held that the fair use inquiry is a “question of fact”.⁴⁹ At this juncture, it is vehemently argued that AI systems are incapable of conducting a fact-specific inquiry to determine fair use because determination of fair use requires taking into account the purpose and character of use, the nature of the copyrighted work, the amount and substantiality of the portion used in respect of the copyrighted work, and the effect of the use on the potential market or value of the copyrighted work.⁵⁰ While AI *may* prove efficient in mapping the allegedly infringing material onto the copyrighted works in its database, the accurate, fact-oriented determination of the four-factor fair use test remains a big hurdle for AI systems to learn and implement.

For now, readers may find solace in reading Dr. DY Chandrachud, CJI’s opinion in *Madhyamam Broadcasting Limited v. Union of India*.⁵¹

“An independent press is vital for the robust functioning of a democratic republic. Its role in a democratic society is crucial for it shines a light on the functioning of the state. The press has a duty to speak truth to power, and present citizens with hard facts enabling them to make choices that propel democracy in the right direction. The restriction on the freedom of the press compels citizens to think along the same tangent. A homogenized view on issues that range from socio-economic polity to political ideologies would pose grave dangers to democracy. The critical views of the Channel, Media-One on policies of the government cannot be termed, ‘anti-establishment’. The use of such a terminology in itself, represents an expectation that the press must support the establishment. The action of the Ministry of Information and Broadcasting by denying a security clearance to a media channel on the basis of the views which the channel is constitutionally entitled to hold produces a chilling effect on free speech, and in particular on press freedom. Criticism of governmental policy can by no stretch of imagination be brought within the fold of any of the grounds stipulated in Article 19(2).”

⁴⁹ *Id.*

⁵⁰ Copyright Act of 1976, 17 U.S.C. § 107.

⁵¹ *Madhyamam Broadcasting Limited v. Union of India*, (2023) SCC OnLine SC 366.

A perusal of these case studies highlights a slow, but worrisome progression from active human moderation (for political purposes) to automated content monitoring and censorship. The overuse of copyright law by government agencies to stifle dissent has slowly withered and has been overtaken by ‘super-intelligent’ content moderation algorithms. It is argued that the evolution of super-intelligent AI poses a real and imminent threat of - what British computer scientist and Professor at University of California, Berkeley Stuart Russel calls, the ‘gorilla problem’.⁵² Russell, in his book *Human Compatible* states, “the biological lineage leading to contemporary humans was inadvertently created ten million years ago by the ancestors of the present-day gorilla.”⁵³ What are the gorillas’ thoughts on this? The destiny of their species is ultimately restricted to what humans choose to permit.⁵⁴ He compares this notion to how humans could (and are most likely to) face a similar gorilla problem, or “the question of whether humans can maintain their primacy and autonomy in a world which comprises of machines with substantially greater intelligence.”⁵⁵

IV. THE LIMITATIONS OF AUTOMATED CONTENT MODERATION

At this point, it is critical to submit that content moderation algorithms are insufficient to conduct fact-specific inquiries which are imperative in determining instances of online copyright infringement. A comprehensive fair use analysis is necessary before taking down any content which cannot be fit into a straitjacket formula for these algorithms. For example: judicial scrutiny is indispensable in determining the nature, character and purpose of the use of any copyright work rather than trying to reduce the test to an executable computer code.

Algorithmic systems are intended to balance the rights of content owners while limiting the liability of intermediaries. The purpose of fair use is to define the contours of infringement and to allow for free expression relating to artistic creativity and public discourse.⁵⁶ However, the biggest problem with fair use is that it is context-sensitive and is fraught with *ex-ante* uncertainty.⁵⁷ The uncertainty problem can be overcome by incorporating context-specific fair use standards into copyright-policing algorithms to prevent illegitimate takedowns. The paramount question for legal scholars, lawyers, judges and computer scientists is – can a personalized, fact-specific inquiry like the fair use analysis, be incorporated into a machine-driven algorithmic system?⁵⁸ In the United

⁵² STUART J RUSSELL, HUMAN COMPATIBLE: ARTIFICIAL INTELLIGENCE AND THE PROBLEM OF CONTROL, 132 (2019).

⁵³ *Id* at 132.

⁵⁴ *Id* at 132.

⁵⁵ *Id* at 132.

⁵⁶ *Id* at 284.

⁵⁷ *Id* at 284.

⁵⁸ *Id* at 285.

States, a finding of fair use requires an adjudicatory consideration of four factors, viz. the nature of the work, the amount and substantiality of the work used, the effect of the use on the potential market and the purpose and character of use.⁵⁹

Another difficult arises when automated takedowns are rarely challenged due to significant cost asymmetries. A DMCA takedown can prove cumbersome for individuals and organizations lacking the financial wherewithal to defend themselves in litigation. This may give rise to a “chilling effect” on the freedom of speech and expression, thus discouraging individuals from openly expressing dissent due to the fear of facing costly legal repercussions. It must be noted that unlike full-blown legal and institutional intervention, algorithmic identification and removal is relatively inexpensive. Users, service providers, and content owners have all lowered their expectations in light of the fact that most takedown decisions judgments are final.⁶⁰ Fair use factors are not considered by automated systems and the removal or takedown decisions are effectively deemed final before and *if* the dispute reaches any court or tribunal where a fair use inquiry might be conducted.⁶¹

V. ASSESSING THE LEGAL IMPACT

The interplay between automated content moderators and fair use was highlighted in the judgments mentioned hereinafter. In *Lenz v. Universal Music Corp.*,⁶² the US Ninth Circuit Court considered a question of whether copyright holders have been abusing or misusing the extrajudicial takedown procedures provided for in the DMCA by declining to first evaluate whether the content qualifies as fair use.⁶³ The Court unequivocally held that copyright holders must first conduct a fair use analysis⁶⁴ before issuing a takedown notification. The facts leading to the present appeal were – in 2007, Stephanie Lenz uploaded a video of her children dancing in the kitchen, in which the song “Let’s Go Crazy” by Prince can be heard playing in the background for approximately twenty seconds.⁶⁵ She shared the video on YouTube to “share it with (her) family and friends”.⁶⁶

⁵⁹ The Copyright Act of 1976, § 17.

⁶⁰ Roger Brownsword, *Lost in Translation: Legality, Regulatory Margins, and Technological Management*, 26 BERKELEY TECH. L.J. 1321 (2011).

⁶¹ Burk, *supra* note 18 at 290.

⁶² *Lenz v. Universal Music Corp.*, 815 F.3d 9th Cir. 1145 (2016).

⁶³ *Id.*

⁶⁴ Fair use is evaluated along four metrics: (1) the “purpose and character of the use,” with consideration to whether the purpose is commercial or nonprofit; (2) the nature of the copyrighted piece; (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and (4) the effect of the use on the copyrighted work’s market value.

⁶⁵ Stephanie Lenz, *Let’s Go Crazy #1*, YOUTUBE (February 8, 2007), <https://www.youtube.com/watch?v=N1KfJHFWhQ>.

⁶⁶ *Id.*

The recording label Universal Music Corporation sent a DMCA takedown notice alleging copyright infringement and demanding the video to be removed. Consequently, YouTube removed the video, and Lenz filed a DMCA counter-notification pursuant to Section 512(g)⁶⁷ claiming fair use. After the video was reinstated, Lenz filed a suit against the recording label claiming misrepresentation and that Universal did not have a “good faith belief” in demanding the video to be removed.⁶⁸ The Ninth Circuit Court held that a fair use inquiry is necessary before considering a takedown request.⁶⁹ The court elaborated that the “good faith requirement” as envisaged under 7 U.S.C. §512(c)(3)(A)(v) necessitates a subjective, rather than an objective analysis.⁷⁰

In the Indian context, the “good faith belief” standard is reflected in Section 51 (a) (ii) of the Copyright Act, 1957. The provision lays down the requirement of “actual knowledge” of infringing material and carves out an exception that “a defendant would not be held liable for infringement if he was not aware and had no reasonable ground for believing that communication to the public would lead to infringement of the copyright”.⁷¹ The scope of Section 51 as well as the concept of intermediary liability were dealt with, extensively, in the landmark judgment of *My Space Inc. v. Super Cassettes Industries Ltd.*⁷²

In *MySpace*, an appeal was filed by the Defendant [**MySpace**] against an interim injunction granted in favor of the Plaintiff, Super Cassettes Industries Ltd [**SCIL**]. In the original suit, SCIL sought a permanent injunction and damages from MySpace for infringement of the copyright owned by it in cinematograph films, sound records, and literary and musical works.⁷³ SCIL argued that they had sent several legal notices outlining the nature of infringing works to MySpace. In addition to listing each and every work owned by SCIL, without an iota of indication whether it was accessible on the website of the appellant, the list provided by SCIL was vague and arbitrary and presented two impossibilities: first, it completely disregarded the defense “fair use”. Second, it failed to identify specific works or the location where the works could be accessed. Thus, the Delhi High Court concurred with MySpace’s contentions to hold that SCIL had a duty to list the works specifically for which it has a copyright. Giving a blanket list enlisting all content owned by

⁶⁷ Digital Millennium Copyright Act 1998 § 512 (g), 17 U.S.C. §1201.

⁶⁸ *Lenz v. Universal Music Corporation*, 815 F.3d 1145 (9th Cir. 2016).

⁶⁹ *Id.* at 1153.

⁷⁰ *Rossi v. Motion Picture Association of America*, 391 F.3d 1000 (9th Cir. 2004) 1000.

⁷¹ The Copyright Act No. 14 of 1957, Acts of Parliament, 1949, § 51 (India).

⁷² *Myspace Inc. v. Super Cassettes Industries Ltd.*, (2016) SCC Online Del 6382.

⁷³ *Super Cassettes Indus. Ltd. v. Myspace Inc. & Another*, (2011) 48 PTC 49.

the organization would run against the longstanding principles of copyright law. A Division Bench of the Hon'ble Court made the following significant observations:

(a) The essential element under the Copyright Act and IT Act is “actual” knowledge and not mere suspicion or general awareness.⁷⁴ Mere exercise of a certain degree of control over the uploaded content would not amount to having “actual knowledge”.

(b) Section 79⁷⁵ and Section 81 of the IT Act, 2000⁷⁶ and Section 51 (a) (ii) of the Copyright Act, 1957⁷⁷ must be read harmoniously.⁷⁸ Section 81 of the IT Act, 2000 contemplates an overriding effect of the Act over other laws meanwhile Section 79 guarantees the safe harbor protection to intermediaries. Section 51(a)(ii) of the Copyright Act provides that the copyright in a work would be infringed when any person permits for profit the communication of the work to the public *unless* he was not aware and had no reasonable ground for believing that communication to the public would lead to infringement of the copyright.

The *MySpace* and *Lenz* cases highlight the global limitations of algorithmic content moderation. It is clear that the current systems are insufficient in conducting case-specific, fact-oriented analysis of the multifactor test before removing infringing content. Without a comprehensive assessment of fair use, users are often left perplexed (and effectively remediless) when faced with an arbitrary “*your post has violated community guidelines*” takedown. Perusing *MySpace*, the contention herein is that despite the level of progress in the field of AI, the requirements of ascertaining “actual knowledge” and the “exercise of due diligence” cannot be accurately addressed through algorithmic content moderation by online intermediaries.

VI. PERSPECTIVES OF AI SCIENTISTS AND IP PROFESSORS

What flows from the previous section is that in essence, the determination of fair use may not always be reasonable or accurate, however, an analysis of the multifactor test to determine fair use is necessary. In *Fair Use Infrastructure for Rights Management Systems*,⁷⁹ Professor Dan Burk and Professor Julie E. Cohen argue that fair use standards cannot be translated or programmed into executable computer code, and thus, human oversight is crucial. It is asserted that notions like “educational use”, “classroom use” and “news reporting” are complex ideas and might be

⁷⁴ Myspace Inc. v. Super Cassettes Industries Ltd., (2016) SCC Online Del 6382.

⁷⁵ The Information Technology Act No. 21, Acts of Parliament, 2000, § 79 (Ind.).

⁷⁶ The Information Technology Act No. 21, Acts of Parliament, 2000, § 81 (Ind.).

⁷⁷ The Copyright Act No. 14 Acts of Parliament, 1949, § 51(a)(ii) (Ind.).

⁷⁸ Myspace Inc. v. Super Cassettes Industries Ltd., (2016) SCC Online Del 6382.

⁷⁹ Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 41 HARV. J.L. & TECH. 55 (2001).

extremely difficult to get programmed into an automated, technical protection system.⁸⁰ Accordingly, the likelihood of deploying “a judge on a chip” is questionable.⁸¹ While it is true that algorithmic copyright regulation might result in lower costs associated with copyright infringement determination, such automation will not completely eliminate costs. For example, the cost of constantly maintain and updating automated systems, tailoring and retailoring according to predicted uses⁸² and ensuring compliance to pertinent laws and regulations by obtaining licenses and addressing privacy concerns, would simply lead to what Professor Burk calls a “reallocation of costs”.⁸³

To identify potentially infringing content based on elaborate standards, tests, or patterns, automated systems employ algorithms, heuristics and abstractions. While algorithms can detect certain forms of copyright infringement with substantial accuracy, it is arguable that they have the context and complexity required to evaluate fair use or protected speech. Stuart Russell, in his book *Human Compatible*, describes this as the “problem of context”.⁸⁴ Russell argues that artificial intelligence systems struggle to comprehend and interpret the context in which they operate, leading to potential oversights and incidental outcomes.⁸⁵ Other potential issues involving the use of AI, particularly in creative industries, include unauthorized use of copyrighted material by AI models, difficult in attributing authorship or ownership of content and large-scale replication of content quickly amplifying the risk of spreading infringing material. Navigating these risks requires meticulous attention to data sourcing, usage rights, and emerging laws around AI and copyright. The sweeping intensity with which automated systems have come to the fore makes the time ripe to examine the inherent tension between automated content moderation and constitutional guarantees of free speech and expression.

VII. COPYRIGHT-FREE SPEECH DEBACLE: “A LARGELY IGNORED PARADOX?”

Intellectual property is often perceived as both a positive and a negative right, i.e., it protects the author’s work from potential infringement, but at the same time places an undue monopoly over creative expression by granting the right to a single person or entity. As a result, judges and lawmakers are expected to delicately balance the creators’ exclusive rights with expressive freedoms. The freedom of speech and expression is protected under the First Amendment of the

⁸⁰ Burk, *supra* note 18 at 292.

⁸¹ Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J.L. & TECH. 49 (2006).

⁸² Burk, *supra* note 18 at 294.

⁸³ *Id* at 293.

⁸⁴ Russell, *supra* note 52 at 132.

⁸⁵ *Id.* at Ch. 5

Constitution of the United States and under Article 19 of the Constitution of India. The right to freedom of speech and expression includes the right to publish and circulate one's ideas and includes the right to circulate opinions and views on social-media platforms.⁸⁶

Copyright has been described as “an engine of free expression” by the United States’ Supreme Court.⁸⁷ This role as an “engine of free expression” is subverted when copyrights seek to restrict the form expression might take by prohibiting the free use of copyrighted content. Famous legal school Melville Nimmer has termed this conflict a “largely ignored paradox”.⁸⁸ In his book, *Copyright’s Paradox*, Nimmer argues that the overuse of copyright law has undercut free speech and expression by silencing criticism and ossifying highly biased distributions of power.⁸⁹ Nimmer contests that copyright is often perceived as an ‘undue burden on expressive autonomy and liberty’.⁹⁰ Recently, democratic states have been trying to shape the boundaries of public discourse in line with their constitutional vision and agenda.

VIII. THE WAY FORWARD: MITIGATING OVER-DETERRENCE THROUGH AUTOMATED CONTENT MODERATION

The ever-evolving nature of copyright law and fair use ends up becoming a challenging endeavor especially considering the amount of content available on social media platforms. The preceding sections seek to call attention to the weaponization of copyright by government agencies and poses questions such as why videos of public relevance are not allowed to be used, critiqued or criticized by independent journalists (perhaps, due to Herman and Chomsky’s ideas of monopolistic control over the media to create a narrative that aligns with dominant political forces!).⁹¹ The unfolding of artificial intelligence in content moderation has cultivated newer problems such as the insufficiency of modern-day algorithms in conducting an analysis which should primarily be judicial in nature.

To strike an all-encompassing balance between the rights of content holders, rights of online platforms and the freedom of speech and expression, it is imperative to consider the limitations of automated content moderation and to ensure that human oversight is incorporated into the decision-making process before removing infringing content. Considering the legal uncertainty as

⁸⁶ Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842.

⁸⁷ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

⁸⁸ Melville Bernard Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1969).

⁸⁹ NEIL NETANEL, *COPYRIGHT’S PARADOX*, (Oxford Univ. Press 2008).

⁹⁰ *Id.* at 8.

⁹¹ Edward S. Herman & Noam Chomsky, *supra* note 12.

regards copyright content moderation over the internet, it is recommended that national legislators must clearly recognize “user rights”, incorporate complaint and redressal safeguards in the takedown processes and define the contours of permissible content filtering. It is further recommended that online platforms and creators of artificial intelligence systems incorporate the ‘Santa Clara Principles on Transparency and Accountability in Content Moderation’ [**“the Santa Clara Principles”**], a set of guidelines which promote transparency and accountability for internet platforms over the removal of legitimate content.⁹² Principle 1 of the Santa Clara Principles necessitates that companies should use automated processes to identify or remove content only when there is “sufficiently high confidence in the quality and accuracy of those processes”.⁹³ This principle envisions the consideration of human rights, more particularly the rights to freedom of speech, expression and non-discrimination, and stresses upon the importance of due process while developing such automated systems. Interestingly, the Santa Clara principles provide for an appeal against removed posts and suggest that “a meaningful appeal should include human review by a person or panel of persons that was not involved in the initial decision”.

In an open letter written to Mark Zuckerberg, the group of civil society organizations who put forward the Santa Clara Principles recommended Facebook to incorporate the following content moderation policies and practices: (a) clearly notify users why their content has been removed/restricted; (b) provide users a chance to appeal automated content moderation decisions; and (c) issue regular transparency reports.⁹⁴ In response, it was stated that Facebook has introduced the option of “re-reviewing individual pieces” that were removed for nudity, sexual activity, hate speech, or graphic violence, bullying, harassment and spam.⁹⁵ The author’s suggestion is to extend the ability of seeking re-review of content removals to copyright – related takedowns since algorithms are more likely to overlook the intricacies of fair use/fair dealing, a problem which can be easily corrected through human oversight. Presently, the need for human oversight in content moderation is a compelling necessity as human moderators can effectively evaluate the nuances of fair use and determine the validity of infringement actions which cannot be accurately assessed by automated systems

⁹² *The Santa Clara Principles on Transparency and Accountability in Content Moderation*, SANTA CLARA PRINCIPLES, <https://santaclaraprinciples.org>

⁹³ *Id.*

⁹⁴ *An Open Letter to Mark Zuckerberg*, SANTA CLARA PRINCIPLES, <https://santaclaraprinciples.org/open-letter/>.

⁹⁵ *Id.*