Take-down means Stay-down
TAKE-DOWN MEANS STAY-DOWN

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**Intermediary**

An online platform that facilitates communication between users without being directly involved in it.

**IP**

Intellectual Property

**ISP**

Internet Service Provider is an intermediary that provides access to the internet.

**ISSP**

Information Society Service Provider is an all-encompassing term for intermediaries, including ISPs and OSPs, used under the European E-commerce Directive, 2000

**IT**

Information Technology

**MeitY**

Ministry of Electronics & Information Technology

**NASSCOM**

The National Association of Software and Service Companies

**NII**

National Information Infrastructure

**OCSSP**

Online Content Sharing Service Providers

**OECD**

The Organisation for Economic Co-operation and Development

**OSP**

Online Service Provider is an intermediary that provides services on the internet.

**RIAA**

The Recording Industry Association of America

**SABAM**

Société d’Auteurs Belge – Belgische Auteurs Maatschappij (Belgian association of authors, composers and publishers)

**SFVA**

Short-form Video Apps

**SME**

Small and medium enterprises

**UGC**

User generated content, i.e., content uploaded by users on online platforms

**UGC Platforms**

Intermediaries that allow users to upload user-generated content, such as YouTube, Instagram, TikTok, etc.

**UK IPO**

United Kingdom Intellectual Property Office

**UN**

United Nations

**UNCITRAL**

The United Nations Commission on International Trade Law

**WCT**

WIPO Copyright Treaty

**WIPO**

World Intellectual Property Organization

**WPPT**

WIPO Performances and Phonograms Treaty
The digital citizenry in India is estimated to reach 975 million via smartphones by 2025.¹ This can be attributed to the wave of affordable mobile data – the lowest in the world at $0.68 per GB² – as well as internet penetration via BharatNet which is now reaching 1.6 million people.³

This creates a truly unprecedented opportunity for the Indian content industries to use the potential of the home market to grow and become a global creative powerhouse. For India, which is an ancient civilisation that has an embedded culture of storytelling in the form of ballads, songs, dance, and theatre, the stage is now set to become a revenue and employment generator via ‘The Creative Class Economy’ like the US and the UK (Copyright industries accounted for 11.99%⁴ and 5.9%⁵ of the respective GDPs), without the market entry barriers that were present earlier in case of Music, film and television producers.

Through the decades, millions of people in India have journeyed on trains, buses, etc. across the country to make a career in the entertainment sector at centres like Bollywood, Kollywood, Tollywood, and more as these centres were where the radio stations, TV networks, and film production houses, which invested heavily in content creation via talent development in front of the camera and behind the camera, were located. Sustained investment in content creation is demonstrated by the global film industry, which was valued at $101 billion⁶ (₹7,11,040 crores) in 2019, and is estimated to spend $12.88 billion (₹95,312 crores) on script development yearly, which is around 13% of the total industry revenue. Coming to the global recorded music industry, according to IFPI⁷ in 2019 alone the recorded music industry spent around $5.8 billion⁸ (₹42,920 crores) on finding new talent, developing artists careers and marketing their music, which is around 27% of the total revenue of the recorded music industry.

Barring a few exceptions of state intervention through various price control mechanisms (such as Statutory Licensing for Radio and New Tariff Orders for TV Channels), free-market economic principles largely prevailed in the creative sectors. Licensing deals between the content creators and the content aggregators and distributors were largely voluntary. The risk-reward ratio was a function of supply and demand and hence, free-market dynamics helped the Indian TV and film sectors grow to become ₹68,500 crores and ₹7200 crores industries, respectively, in 2020.⁹ The dynamics have changed with the emergence of social media platforms.

In the smartphone era, anyone from anywhere can be a content creator. No more film schools, sleeping on pavements outside film studios or waiting for the break as an extra. From a hostel or an apartment or basti or hamlet, anyone can now be a content creator, and the world is literally their stage. The internet and smartphones have now created a level playing field. Cheap smart phones have penetrated deep into rural India, and they have sharper cameras, more powerful processors and they operate on reliable mobile networks with good

³ http://www.bbnl.nic.in/usage2.pdf.
⁵ https://lordslibrary.parliament.uk/impact-of-government-policy-on-the-creative-sector/
⁷ International Federation of the Phonographic Industry, the association representing the recording industry worldwide.
internet speeds. Apps have become lighter allowing them to operate with minimal mobile network bandwidth thus enabling regular digital content uploads. The software on smartphones or apps is capable of improving the quality of even amateur content—with filters, editing and voice recording. The internet’s global reach, free distribution, and search functions have made it possible for digital content—videos, music, jokes, dances and all manner of content that defy genres—to find a global audience, however niche. The common feature amongst all the forms of content uploaded is that music enhances the quality and entertainment quotient of the digital content and in most cases the music is copyright protected.

Music, film and television producers spend large swathes of money on content creation, thus benefiting the content creator ecosystem and also the national exchequer. However, in the digital content era, platforms are investing more on algorithms, content management, and search functions rather than remunerating entities involved in content creation. In most cases, content on such platforms is uploaded free of cost, and the content creator is not adequately compensated, and neither is the copyright holder (if and when copyright protected content is used). In new media, successful content creators merely receive a blue tick mark against their names and for most of them the rewards are rarely financial, the only reward for content creators is a few million likes. The sheer number of active users on interactive platforms who create content using mostly unlicensed copyright protected works allows these interactive platforms to generate advertising revenues through such user uploaded content. This results in low operating costs as interactive platforms do not adequately remunerate the copyright holders while increasing the earning potential of platforms. For instance, the combined gross ad revenue of Google India and Facebook India Online Services grew from ₹18,054.9 crores in FY 2019 - 2020 to ₹23,212.5 crores in FY 2020 - 2021. This is much more than the combined revenue of top media companies such as Star India, ZEEL, Sony Pictures Networks India (SPNI), Bennett Coleman and Company Limited (BCCL), TV18, Sun TV Network, DB Corp, Jagran Prakashan, and HT Media, which stands at ₹8,396 crore in FY 2020 - 2021.¹⁰

In India, with an ecosystem of 833.71 million internet users¹¹ engaging with various platforms in 2021, copyright protected content is the fuel that powers these platforms to astronomical profits and valuations. The prevailing law is creating an economic imbalance as platforms can get away with not seeking licenses for using copyright protected content, by invoking safe harbor protection under section 79 of the Information Technology Act, 2000. Platforms are able to shield themselves from liability for copyright infringement even when they are actively involved in the sharing of unlicensed copyright protected content and abstain from entering into fair licensing deals with copyright owners. This adversely impacts employment generation, revenues across the value chain in the creative community, fair compensation to investors, and taxes to the government, thus allowing such platforms to rake in huge profits.

The above-mentioned financial imbalance must be corrected soon by revamping section 79 of the Information Technology Act, 2000 and excluding interactive platforms which are actively involved in sharing of infringing content from the ambit of safe harbor provisions. A strong pan-India creative class is a sure step towards employment generation, a vibrant creative sector and increased tax revenue collections for the government, leading to an Atmanirbhar Bharat.

HISTORICAL PERSPECTIVE OF SAFE HARBOR PROVISIONS VIA DMCA
The internet, as a form of communication, started gaining popularity in the U.S. during the early 1990s owing to a rapid growth and advancement in computer technology. There was a threefold increase in the proportion of households adopting computers between 1989 and 2000 i.e. from 15% to 51%, respectively. This was largely because the computer provided entertainment, allowed individuals and families to communicate and transact seamlessly. Further, out of the total 105 million U.S. households, 44 million households had at least one member who used the internet at home in 2000.¹² However, this rise of the internet created a new set of concerns for copyright owners.

For instance, before the digital age, copyright infringement in the recorded music industry was limited to unauthorised copying and distribution of physical copies of sound recordings. Post the advent of the internet, copyright owners had to deal with the unauthorised use and dissemination of sound recordings through digital means as a new form of infringement. Further, the global reach of the internet made it difficult for copyright owners to deal with the resultant increase in the volume of infringement of their works.

This led to a slew of legal disputes relating to online copyright infringement across the landscape of media and entertainment during the early to mid-1990s. One such case at the onset of the digital era was *Playboy Enterprises, Inc v. Frena*, 1993.¹³ The U.S. District Court of Florida, in this matter, found the operator of a computer bulletin board service directly liable for infringing the plaintiff’s rights to publicly distribute and display copies of Playboy Magazine’s copyright protected images. The Court rightfully held the online service operator directly liable for the act of infringement taking place on their services.

Two years later, the U.S. District Court of Northern California, in the case of *Religious Technology Center v. Netcom On-line Communication Services*,¹⁴ found Netcom, the operator of an online bulletin board service, indirectly liable for contributory infringement for hosting infringing copies of the works of L. Ron Hubbard, on their platform.

A year after the Netcom decision, the U.S. District Court of Northern California in the case of *Sega Enterprises Ltd* (a video game company) v. MAPHIA,¹⁵ found MAPHIA, a bulletin board service operator, liable for contributory infringement for facilitating the uploading and downloading of infringing copies of Sega Enterprises’ video game content on its platform.

The aforementioned cases created an air of ambiguity around the issue of intermediary liability since there was uncertainty regarding the liability of online service providers for infringement by their users.
While deliberating on the broader concerns regarding exponential copyright infringement as a result of the newly emerged internet services, the U.S. began considering possible updates to its copyright laws. In 1993, the Clinton Administration announced an initiative to promote the development of a National Information Infrastructure (NII). The purpose of the NII was to enable all those residing in the U.S. to access information at an affordable price while promoting the protection of copyrights.

This was achieved by establishing a Working Group on Intellectual Property Rights, chaired by the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Bruce A. Lehman which existed within the Information Policy Committee, one of the committees under the Information Infrastructure Task Force (IITF).¹⁶ This Working Group was established to examine the IP implications on NII and make relevant recommendations on appropriate changes to the U.S. Intellectual Property laws.

On July 7, 1994, the Working Group released a white paper titled "Intellectual Property and the National Information Infrastructure", based on public and stakeholder consultations which analysed the issues around adequate copyright protection in the internet era.¹⁷ This white paper emphatically recommended that the service provider must be held liable for infringing activity facilitated on its platform given its capability to identify and stop unlawful activities carried out by its users.¹⁸

The recommendations of the white paper faced opposition from the Digital Future Coalition (DFC) which represented 42 organisations including libraries, Online Service Providers (OSPs), Internet Service Providers (ISPs), telephone companies, software and hardware manufacturers, consumer electronics companies, civil rights groups, etc. As per the reported total lobbying spends, the Internet Sector in the U.S. spent a total of $3.98 million on lobbying in the year 1999. In the same year, the DFC spent $20,000 on lobbying.¹⁹ Most of the funding came from the Home Recording Rights Coalition (HRRC), a grass root level lobby organisation representing the vested interests of consumer electronics manufacturers, wholesalers, and retailers of recording devices that largely benefitted from consumers downloading infringing content.²⁰

A series of congressional hearings between the copyright industry and the service providers were held between 1995-96 concerning the scope of liability of service providers. However, the efforts to enact the NII Copyright legislation in the 104th Congress were stalled due to the failure and breakdown of negotiations.²¹ This left the copyright industries in the lurch.

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¹⁶ INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE - THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (the “White Paper”)
¹⁷ Ibid
¹⁸ White Paper at Pg 117
Parallel to the developments in the U.S., similar discussions on the protection of copyright protected works in the face of new emerging digital technologies were taking place at a global level orchestrated by the World Intellectual Property Organization (WIPO). The U.S. Congress pushed the white paper recommendations (which held service providers liable for infringement) via treaty language at WIPO.²² As a result, organisations representing OSPs and telecommunication companies also lobbied for the inclusion of safeguards concerning service provider liability at the forum.²³

Ultimately, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), collectively called the “WIPO Internet Treaties”, were adopted in December 1996 after a formal consideration of the treaty framework. The WIPO Internet Treaties affirmed the operation of exclusive rights granting protection for performers and producers of sound recordings in the digital environment. The treaties introduced the making available right in light of the technological advancement ensuring that interactive online transmissions would require a prior authorisation from the copyright owners. Provisions for anti-circumvention technologies and for protection of rights management information were also included. However, specific obligations or safeguards concerning internet service provider liability were left unincorporated.²⁴

Subsequently, the Clinton Administration proposed several legislations addressing the potential liability of Online Service Providers (OSPs) while forwarding the WIPO treaties to the Senate for ratification. This revived the negotiations between copyright holders and OSPs concerning copyright, access to information, and safe harbor provisions, which shield OSPs from any liability for infringement taking place on their platforms. These negotiations were supervised by the Senate Judiciary Committee and the Subcommittee on Courts and Intellectual Property and House Judiciary Committee.²⁵

Meanwhile, telephone companies, commercial Internet service providers, libraries and schools insisted on making safe harbor provisions a precondition to implementing legislations adopting the WIPO Treaties.²⁶

These negotiations culminated in the espousal of the Digital Millennium Copyright Act (DMCA) on October 12, 1998, which aimed to create a balance between the rights of the copyright owners and the liability of the OSPs.

To that end, Section 512 DMCA provided for safe harbor provisions that shielded certain OSPs and Internet Service Providers (ISPs)²⁷ from liability of copyright infringement on their platforms.²⁸ However, the intended balance was not achieved with copyright owners getting the raw end of the deal, as acknowledged 20 years later in the US Copyright Office’s Report on Section 512 (discussed in more detail below).

²⁴ Section 512 of Title 17, A report of the United States Copyright Office https://www.copyright.gov/policy/section512/
²⁵ S. REP. NO. 105-190 (1998)
²⁷ S. REP. NO. 105-190 Available at https://www.congress.gov/105/crpt/srpt190/CRPT-105srpt190.pdf
UNINTENDED CONSEQUENCES OF SAFE HARBOR PROVISIONS

U.S. LANDSCAPE
In response to rising pressure from OSPs and ISPs to protect internet platforms from liability against user-generated content (UGC) uploaded on their platforms, the U.S. enacted the Digital Millennium Copyright Act (DMCA). The DMCA included safe harbor provisions, which protected OSPs from being held liable for hosting infringing content on their platform at the direction of the user. However, this did not adequately account for the fact that technology would grow at such a rapid pace, and that the very platforms the U.S. wished to safeguard would misuse this immunity for their own economic benefit.

A) Overview of the Digital Millennium Copyright Act (DMCA):

As established in the preceding chapter, Section 512 of the DMCA, by virtue of “safe harbor” provisions, limits the liability of an OSP in the event that copyright infringing material is found to be hosted by them. It is, however, vital to note that the original intent of Section 512 was to bridge the gap between the protection of copyright protected content on the internet and the consequent liability of the OSPs. However, the envisioned economic balance has not been achieved since OSPs, in today’s day and age, host UGC content to profit at the expense of copyright owners without consequence.

To better understand this dynamic, it is important to look at the finer points of the provision itself. Webhosting services are protected under Section 512(c). This protection is only granted provided they meet the three important pre-requisites as enumerated below²⁹:

Firstly, online service providers must prove a lack of actual knowledge about specific infringement on their sites. Alternatively, in the absence of such actual knowledge, it must be proved by them that they lacked an awareness of the facts and/or circumstances from which infringing activity is apparent i.e. they failed to meet the red flag knowledge requirement. On obtaining either actual or red flag knowledge, they must prove that they acted “expeditiously” to remove or to disable access to infringing material. This requirement was intended to create an obligation on OSPs to act promptly upon receiving information regarding infringing activity even in the absence of a takedown notice under some circumstances. However, the Appellate Court, in the case of Viacom Int’l., Inc. v. YouTube,³⁰ while upholding the District Court’s interpretation of the knowledge requirement opined that ‘red flag knowledge’ would entail having knowledge of specific and identifiable infringements. The Court further reiterated the necessity of specific knowledge regarding infringement for disabling access to the infringing material. In this case, Viacom instituted a suit against YouTube, claiming that tens of thousands of videos on their platform were infringing in nature, resulting in hundreds of millions of views which were gained unlawfully and without authorisation. The aforesaid judicial pronouncement narrowed the interpretation of “red flag knowledge”, which in turn weakened an OSP’s duty to act on information related to presence of infringing content online. The Viacom judgement has only exacerbated the difficulty of holding OSPs accountable especially since this case has been repeatedly relied on by subsequent decisions of various Courts. Further, such a rationale has unduly heightened the burden on the copyright owners for demonstrating red flag knowledge.

²⁹ S 512(c)(1)(A)-(C) of the DMCA.
³⁰ 676 F.3d 19, 38 (2d Cir. 2012).
Secondly, a service provider must not receive financial benefits directly attributed to infringing activity, in cases where the service provider has the right and ability to control such activity. The intention of this requirement was to ensure that OSPs do not go scot-free if they receive a financial benefit directly attributed to infringing activity on their platform. However, some judicial decisions in the U.S. such as Perfect 10, Inc. v. Giganews, Inc. ³¹ have narrowed the scope of this provision by increasing the burden of proof on the copyright holders. In the aforesaid case, the Central District of California required for the Plaintiff to prove the existence of a direct link of financial benefit attributed to the infringing content, and not merely a link to "infringing material in general" on the site. Such a narrow interpretation has added to the uncertainty surrounding the applicability of safe harbor protection to the services that are built on the back of unauthorised uses of protected works.

Thirdly, a service provider must respond expeditiously in taking down infringing content. For years copyright holders have tried to bring to light the inefficiency behind the "notice-and-takedown" mechanism employed by intermediary platforms due to the sheer volume of infringing content uploaded every day. Consequently, the Report on Section 512 also recognised the inefficacy of such notice-and-takedown mechanisms. The aforementioned Report likened the process of notice-and-takedown to a “whack-a-mole” situation in that taking down one piece of infringing content makes way for another to pop up in its place. Thus, the ultimate intent of the provision to relieve copyright owners of the administrative burden associated with the notice-and-takedown process has not been achieved.

The original intention of the U.S. Congress was to protect OSPs that merely provided hosting and storage services on their platform. However, the courts in the case of Viacom Int’l., Inc. v. YouTube³² strayed away from the U.S. Congress intention by interpreting the scope of hosting safe harbors beyond the intent envisioned by the legislature. It was held that UGC platforms like YouTube would fall under the category of “services related to storage”, and could avail safe harbor provisions under Section 512(c) because their activities were “related” to the activity of storing user-uploaded content. This broad interpretation of hosting and storage provisions under Section 512 gave an unfair advantage to UGC platforms like YouTube, despite them providing services which are not passive in nature. The decision in this case clearly illustrates an oversight by the court, wherein instead it ought to have taken into consideration the plethora of services offered by YouTube offers which are far more involved and active than that of mere storage and hosting services.

Such a broad interpretation of the U.S. safe harbor provisions by the U.S. judicial system has led to a huge economic imbalance between copyright owners and online service providers. This economic imbalance fostered by the DMCA regime was recently outlined in May 2020 by the U.S. Copyright Office, an equivalent of the Copyright Office of India under the Department of Promotion of Industry and Internal Trade, in its Study into Section 512.³³ This study was conducted pursuant to a request from the then Ranking Member of the House Committee on the Judiciary in 2015, Rep. John Conyers, Jr.³⁴

The U.S. Copyright Office concluded in its Report on Section 512 that “the balance Congress intended when it established the section 512 safe harbor system is askew", resulting in an increased burden on copyright owners to monitor copyright infringement of their works made available on online platforms. In doing so, an enhanced protection was afforded to OSPs without factoring in the rapid speed at which digital technology would ultimately advance.

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³¹ No. CV 11-07098, 2014 WL 8628031
³² 676 F.3d 19, 38 (2d Cir. 2012).
³³ Section 512 of Title 17, A report of the United States Copyright Office https://www.copyright.gov/policy/section512/
³⁴ House Register’s Perspective Hearing, 114th Cong. 49
Growth of UGC platforms freeriding on the back of recorded music:

Music is amongst the most widely consumed content on UGC platforms such as YouTube, Soundcloud, etc. In fact, as per a report by PEX,³⁶ music is the most consumed content on YouTube.³⁷ This is further backed by the following data points-

i) In the “10 to 100 million” and “100 million to 1 billion” views tiers, music leads the way in the share of total videos with 30% and 57%, respectively.³⁸

ii) For videos exceeding 1 billion views, music is responsible for a whopping 83% of videos.

iii) 9 out of the top 10 most-watched videos on YouTube are music videos.

These statistics demonstrate the importance of music for UGC hosting services. However, this value of music (or any copyright protected works) available online does not translate into any substantial economic gains for copyright owners due to the inherently advantageous positions held by these platforms. Such an insidious position of power comes through leveraging safe harbor protection during licensing negotiations.

Further, UGC platforms employ a business model that is fueled by selling their users' data to advertisers, who aggressively advertise on content made available by the platform's users. Given that music is the most popular content on UGC platforms, it becomes clear that the prevalent ad-supported business model is such that UGC platforms can ride on the back of music content and generate substantial revenues.

For instance, music content made available on platforms such as YouTube is monetized through advertising upon the content. This has helped YouTube generate substantial ad revenues to the tune of $8 billion, $11 billion, $15 billion and $19.6 billion during 2017 – 2020, respectively, and $6 billion in Q1 2021 (a 49% increase compared to the previous year's $ 4.4 billion in Q1 2020).³⁹

Therefore, what clearly emerges is an ad-supported business model which does not adequately remunerate copyright owners.

³⁵ Section 512 of Title 17, Pg. 136.
³⁶ Pex is a content management company which enables the fair and transparent use of copyrighted content at the speed and scale of the Internet.
³⁷ https://pex.com/blog/how-big-is-music-on-youtube/
Some UGC platforms continue to avoid negotiating licenses:

Despite the enormous ad revenues reported by UGC platforms, some large services continue to get away with paying no or a paltry copyright usage fee for the very content that they appropriate to their benefit. These platforms take umbrage under safe harbor provisions during negotiations with copyright owners by stating that the content uploaded is user generated and therefore, not their primary responsibility. This in turn allows UGC services to evade accountability for any infringement taking place on their platform.

From the above, it is clear that the compensation paid to copyright owners by UGC platforms and many social media is far below what is rightfully due to the owners. This disparity between the value that online user upload services extract from music and the revenue returned to the music community has been termed as the "value gap".⁴⁰

Platforms must pay fairly for content irrespective of their business models

Before UGC content was available, consumers were willing to pay for consumption of music in the form of cassettes, CDs or vinyl. However, with the proliferation of new forms of online distribution of content, the recorded music industry saw a decline in the retail value of music, with music slowly being considered a freely available commodity in the digital ecosystem.

Moving to a subscription-based model is one way of addressing this issue of music being converted from a paid commodity to one that is freely available online. However, UGC platforms that rely on safe harbor provisions are a setback even to the growth of the subscription economy. These platforms thrive on the ad-funded model without the need to agree on fair commercial terms for the use of content on their services, including whether and how to monetise the content.

⁴⁰ IFPI GMR Report 2018
iv Unfair burden on copyright owners:

“The companies (sic) platforms can’t help but keep what they are doing because they have this powerful AI engine they can tweak a knob to get more people to spend more minutes with me (sic) platform and then turn into dollars”
- Kai Fu Lee, AI 2041.

Despite their technological advantage, the platforms place the burden to shift through the gigantic amount of content, locate and notify the platform of infringing content on the copyright holder. In the year 2020, Twitter received over 2 million infringement notices from the U.S. music industry which reveals the extent of rampant theft of creative works and Twitter’s failure to prevent such illegal activity on its platform.⁴¹

Many UGC platforms claim to have systems in place to prevent copyright infringement on their platforms, however, these systems are often flawed and inefficient. For example, YouTube’s Content ID system (which uses audio fingerprinting technology to detect infringement) fails to capture a significant portion of unauthorized uploads,⁴² forcing copyright owners to individually monitor platforms for infringing content.

Another example of an ineffective mechanism to prevent copyright infringement is the notice and take down mechanism that a number of platforms employ. According to IFPI data, a large number of infringement notices sent by IFPI related to the same content and the same site. For example, in the case of Twitter in 2020, The Weeknd’s Blinding Lights was notified over 3,700 times and Harry Styles’ Watermelon Sugar was notified over 2,900 times after the first notice. This shows that the current “notice and take down” system has become an ineffective tool to address the sheer volume of copyright infringing content online.

UGC platforms such as Twitter, YouTube, Soundcloud, etc. have the technological capability to take appropriate measures against the barrage of infringing content uploaded on their platforms. However, as long as safe harbor provisions are too broadly granted, platforms do not have an incentive to take such necessary action and further gain an economic benefit by keeping their floodgates open for unauthorized user-generated content. This creates an uneconomical environment for copyright owners and discourages innovation.

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Inefficient notice and take-down mechanism leading to the rise of digital piracy

DMCA safe harbor provisions were intended to protect the works of copyright owners from digital piracy. However, because of the inefficient notice-and-takedown mechanism put in place by the DMCA, combatting rampant digital piracy is still an ongoing challenge for the recorded music industry. According to a June 2019 study conducted by the Global Innovation Policy Centre (an affiliate of the U.S. Chamber of Commerce), global online piracy costs the U.S. economy at least $29.2 billion in lost revenue each year.⁴³

Digital piracy was first facilitated by peer-to-peer networks, and today is enabled by cloud networks like cyberlockers i.e., a type of website which enables users to upload, store and distribute digital files on a dedicated storage infrastructure on the Internet administered by the website's operator.⁴⁴ Cyberlockers employ a business model that enables and, in many cases, encourages its users to upload content without the permission of the copyright owners. They are a major source of the staggering volumes of infringing content.

Let us take the example of the prominent cyberlocker 4shared. As of May 24, 2021, RIAA has submitted 1.1 million infringing 4shared URLs to Google for removal from its platform.⁴⁵ However, as per Google Transparency data, 4shared.com remains at the top with more than 68 million reported URLs on the grounds of copyright infringement as of May 2022.⁴⁶

From the above explanation, it becomes clear that-

a) Services such as cyberlockers do not take active measures to take down the infringing content on their platform when given notice of infringement.

b) Such services have an economic interest in ensuring uninterrupted access to infringing content.

Therefore, the DMCA notice and takedown process which works on the naïve assumption that entities will act responsibly to take down infringing content is not built to tackle new and emerging technologies such as cyberlockers.

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⁴⁵ https://transparencyreport.google.com/copyright/domains/4shared.com
UNINTENDED CONSEQUENCES OF SAFE HARBOR PROVISIONS

E.U. LANDSCAPE
A] Background and introduction of safe harbor provisions in the European Union (EU) via the E-Commerce directive, 2000

The growth of the Internet facilitated the growth of e-commerce in the EU. E-commerce gave SMEs an opportunity to compete on the same platform as larger companies that earlier had a monopoly over the market. A 1997 report from the European Commission titled “European Initiative in Electronic Commerce” estimated that electronic commerce revenues, both direct and indirect, were set to increase to 200 billion European Currency Unit (precursor to the Euro) worldwide by the year 2000.\(^47\)

The proliferation of e-commerce prompted the European Commission to create a favourable regulatory framework on both EU and global levels to enable further development. At the global level, this need for a standardised regulatory framework led to the adoption of the UNCITRAL Model Law on Electronic Commerce by the United Nations.\(^48\) Parallel to this development, bilateral discussions between the EU and the U.S. also took place, leading to the joint EU-U.S. statement on Electronic Commerce.\(^49\) All of these advances resulted in the adoption of the E-Commerce Directive (ECD)\(^50\) on 8th June 2000.

The ECD addressed disparities in member States’ legislation concerning the liability of service providers by establishing uniform industry norms while also striking a balance between the interests of the various stakeholders involved. In furtherance of this objective, a safe harbor regime in the EU was introduced by Section 4 of the ECD which exempted ISSPs from liability for illegal content on their platform.

The recent CJEU judgement in the joint proceedings of Frank Peterson vs Google LLC. and Ors., C-682/18 and Elsevier vs Cyando, C-683/18 (the YouTube/Cyando case) reaffirms the original intent of the ECD safe harbors provisions. The court dealt with the issues relating to the liability of services like YouTube and the cyberlocker Uploaded. The CJEU in this case confirmed that only technical, automatic and passive intermediaries may rely on the hosting safe harbor and a service would, therefore, be ineligible for the hosting safe harbor if it is found to be communicating to the public the works uploaded by its users. In this context, the CJEU observed that playing an indispensable role in the act of communication is not the only criteria and that platforms like YouTube and Uploaded could be held liable for an act of infringement “where that operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it, or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform.”

However, similar to the U.S., there have been various issues with the implementation of the EU safe harbor regime and the intended balance has not been achieved. The proliferation of the internet also led to a growing concern as to whether the new breed of ISSPs hosting potentially infringing copyright-protected material could take protection under the safe harbor regime. Recognizing the aforementioned issues, the EU policy makers introduced the Directive on Copyright in the Digital Single Market (CDSM).

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\(^48\) The UNCITRAL Model law was adopted to remove legal obstacles and increase legal predictability for electronic commerce.
\(^49\) This joint statement aimed to encourage open dialogue between governments and the private sector world-wide in order to construct a predictable legal and commercial environment for the conduct of business on the Internet.
B] Introduction of the Directive on Copyright in the Digital Single Market (CDSM) - A step in the right direction

On 6th May 2015, the European Commission communicated the Digital Single Market Strategy (DSMS), with the aim of shifting EU’s 28 national digital markets into a single one. This move was intended to boost digital connectivity and make access to cross-border online content easier for consumers.

The DSMS dealt with issues such as (i) transparency (ii) platforms’ usage of the information they collect, (iii) relations between platforms and suppliers, (iv) constraints on the ability of individuals and businesses to move from one platform to another, and (v) how best to tackle illegal content on the Internet.

The Strategy was followed by a “public consultation on the role and responsibilities of online intermediaries and platforms”.

In 2016, the Commission released their observations on the public consultation wherein it acknowledged the growing concern regarding copyright owners receiving a fair price for their content made available on online platforms which benefit economically from content distribution.

Therefore, the commission relayed its intention to address such a challenge through sector-specific regulation in the area of copyright in the form of a Directive on Copyright in the Digital Single Market (CDSM).

The new CDSM, which came into force on June 7, 2019, clarified the liability of certain online services – specifically, online content-sharing service providers (OCSSPs).

Article 17 of the new CDSM forms one of the key features of the Directive. It creates a legal basis for right holders to authorize the use of their works when uploaded by users of online content sharing service providers. Article 17(1) and (2) of the Directive states that Online content-sharing service providers perform an act of communication to the public or an act of making available to the public while giving public access to copyright-protected works or other protected subject matter uploaded by their users. Therefore, service providers need to obtain an authorization for the particular act of communication to the public or making available to the public.

In case of those service providers who have not obtained an authorization from copyright holders, Article 17(4) provides for a defense against liability for unauthorized communication provided certain cumulative conditions (best efforts) are met such as –

- **a.** they have made their best efforts to obtain an authorization,
- **b.** they have made their best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and subject matter for which rightholders have provided them necessary and relevant information, and
- **c.** they have acted expeditiously, upon receipt of a sufficiently substantiated notice from the rightholders, to disable access to or remove content from their websites, and made best efforts to prevent future uploads of notified works.

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54 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0790
In May 2022, in the case of Republic of Poland vs European Parliament and Council of the European Parliament, the CJEU upheld the validity of Article 17 of the Directive finding that the provision is compatible with Article 11 of the Charter of Fundamental Rights of the European Union and does not violate the right to freedom of expression because there are sufficient internal safeguards present in other parts of the Article, notably in Article 17(7), which contains an obligation not to prevent the availability of lawful uploads.

Currently, various member states such as Austria, Croatia, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Luxembourg, Malta, Netherlands, Romania, Slovakia, Spain have transposed the new Directive into their domestic laws. Other EU member states are also in the process of adopting the same.

Therefore, we see that after recognising the damage caused by an outdated liability regime under ECD 2000, Europe has now moved to introduce a regime that takes steps to avoid the safe harbor framework from being misapplied to certain active online services. However, there is still a long way to go for the right balance to be achieved between the interests of both the ISSPs and copyright owners.

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57 C-401/19,
58 https://www.create.ac.uk/cdsm-implementation-resource-page/
UNINTENDED CONSEQUENCES OF SAFE HARBOR PROVISIONS

INDIAN LANDSCAPE
A] Bare reading of S. 79 of the IT Act

The current Section 79 of the Information Technology Act 2000 reads as follows:

“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.

(3) The provisions of sub-section (1) shall not apply if–

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation: For the purposes of this section, the expression - third party information means any information dealt with by an intermediary in his capacity as an intermediary.”

In other words, Section 79 provides for the safe harbor protection to the intermediaries provided they meet the following prerequisites:

1. The role of an intermediary must be limited to facilitating communication between users without being directly involved in it;
2. The intermediary must not actively engage with their users' transmissions;
3. The intermediary ought to follow appropriate due diligence standards and obey all other guidelines as and when proposed by the competent government authorities;
4. The intermediary shall not have a first-hand role in the commission of an unlawful act; and
5. Most importantly, the intermediary shall expeditiously remove or disable access to illegal content, upon receiving actual knowledge or being notified of its illegality by the appropriate government or its agencies.

B] Adoption of safe harbor provisions in India via the IT Act, 2000.

India saw the growing importance of the Internet’s utility for government offices, educational institutions and business corporations. The late 1990s marked a steady recognition of India as a global player in the technology ecosystem. However, this recognition came with increasing pressure from organisations like NASSCOM, whose members included U.S. tech multinationals such as IBM and Microsoft, for India to quickly adapt to a standardised system of governance. Further, the expanding vision of U.S.-India cooperation envisaged by the then Prime Minister Vajpayee and President Clinton soon made it imperative for India to lay down appropriate regulations to govern the Information Technology sector.

In response, India enacted the Information Technology Act, 2000 (IT Act, 2000) based on the Model Law on E-Commerce adopted by the United Nations Commission on International Trade Law (UNCITRAL). The main aim of the UNCITRAL Model Law was to give a formal legal recognition to e-contracts. It is to be noted that the said model does not provide for standard intermediary liability exemption norms. One of the key objectives of the IT Act 2000 was to regulate and facilitate lawful electronic, digital and online transactions. Pursuant to the said objective, Section 79 of the IT Act, 2000 introduced India’s first safe harbor regime. The provision was subsequently amended in the IT Amendment Act of 2008. This amendment significantly broadened the scope of Indian safe harbors which consequently impacted the creative sector as was observed in the EU and the U.S.

C] Safe Harbor Provisions Pre and Post the 2008 Amendment

Prior to the IT Amendment Act of 2008, the safe harbor regime under Section 79 of the Act was restricted only to those intermediaries who - on behalf of another person - received, stored or transmitted any electronic message or provided any service with respect to that message. This includes services such as telecommunication or network providers. The intermediaries who fell within the ambit of this narrow definition were shielded only with respect to offences defined under the IT Act and not any other law.

Therefore, other internet platforms such as e-commerce services and search engines were rightfully obligated to regulate content stored or shared by third parties on their platform. Further, protection was granted only upon meeting the following requirements:

- a) any illegal activity taking place on the intermediary’s platform was done without their knowledge or
- b) due diligence was exercised by them to prevent the commission of offences such as sharing of illegal content.

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Intermediary liability in India changed drastically with the arrest of Avnish Bajaj, Chief Executive Officer of U.S.-based auction portal eBay's Indian subsidiary, Baazee.com, in the case of *Avnish Bajaj vs. State of Delhi*⁶⁴ (Bazee.com Case). In the said case, Avnish Bajaj was arrested under Section 67 of the IT Act 2000 and other relevant provisions of the Indian Penal Code for illegal content shared by a third party on the Bazee.com platform.

The arrest caused outrage amongst the likes of eBay, NASSCOM and the former Secretary of State of the United States of America, Colin Powell,⁶⁵ regarding the shortcomings of the initial Section 79 under the un-amended IT Act of 2000. This led to the introduction of the Information Technology (Amendment) Bill, 2006 before the Lok Sabha, where the Parliament addressed several aspects of Information Technology, one of the most crucial of them being the intermediary liability framework.

In 2007, the Lok Sabha referred the bill to the Standing Committee on Communications and Information Technology, which led to multiple stakeholders' consultations and parliamentary hearings to formulate the potential amendment to the IT Act. The Standing Committee presented its report on September 7, 2007. This report cautioned the Parliament about the imbalance that may be caused by the new safe harbor regime unless intermediaries exercise the appropriate due diligence as a prerequisite for being granted immunity against illegal activities occurring on their platforms.⁶⁶ It further pointed out the immense and irreparable damages caused to the victims through reckless activities undertaken in cyberspace, using the service providers' platform.⁶⁷

However, in spite of the clear warning given by the Standing Committee Report that intermediaries should not be absolved of responsibility for offences committed on their platforms,⁶⁸ the eventual amendment made via the Information Technology (Amendment) Act, 2008 broadened the scope of protection granted to intermediaries by:

a) Widening the definition of the term “intermediary” to include telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online marketplaces and cyber cafes.

b) Exempting them from liabilities for any third-party information data or communication link made available on their platform, such as illegal content hosted on their platform.

c) Conferring protection to them for offences other than those mentioned in the IT Act. (Including the Indian Copyright Act and Indian Penal Code). For example, an intermediary platform would be absolved of liability of infringement under Section 51 of Copyright Act for any third-party infringing content hosted by it by taking shelter under Section 79.

It is to be noted that despite an increase in the scope made by the 2008 Amendment, the legislative intent was still merely to cover those intermediary service providers which are passive and neutral.

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⁶⁴ Avnish Bajaj v. State (N.C.T.) of Delhi, (2005) 3 Comp. L.J. 364, 365 (Del)
⁶⁸ Ibid
In India, Section 79 of the IT Act provides for a uniform safe harbor protection to neutral and passive intermediaries against liability subject to the condition that they comply with the specified due diligence standards and disable information on receiving actual knowledge or order from appropriate authorities as mentioned under the Act.

In the U.S., Section 512 of the DMCA provides for safe harbor protection to intermediaries against copyright liability if an online service provider removes/disables access to allegedly infringing material, upon receiving a notice of infringement from a copyright owner or its agent in compliance with the statutory requirements under the DMCA.

In the E.U., Article 12 to 14 of the ECD provides for a uniform safe harbor protection to intermediaries against various types of content liability including copyright. The recently adopted Directive on Copyright in Digital Single Market (CDSM) provides for a new liability regime for copyright and rights related to copyright and protects online content-sharing service providers provided they comply with certain obligations mentioned under the said directive.

Further, with a view to address gaps in the online intermediary laws, the European Commission proposed a modern legal framework by introducing the Digital Services Act (DSA) in December 2020, part of a digital services package, which aimed to provide a safe and accountable online environment for users in the EU.⁶⁹

The DSA aims to create a safer online environment by syncing illegalities in the digital space with actions considered illegal in the real world such as illegal hate speech or terrorist content and unlawful discriminatory content, or that relates to activities that are illegal, including the un-authorised use of copyright protected material or activities involving infringements of consumer protection law.

Therefore, each jurisdiction deals with its intermediary liability framework in a distinct manner. However, similarities can be observed in the case of India, U.S. and E.U. while granting liability exemptions to such online intermediaries.

E] Judicial overview of the safe-harbor provisions

The current safe harbor provision under the IT Act protects intermediaries from liability for any illegal activity occurring on their platforms. This protection is provided to intermediaries that do not actively engage with the content posted by their users, limiting their role to facilitating communication between users without being directly involved in it. However due to uncertainties caused by judicial interpretations on the scope of protection and duties provided under Section 79 of the IT Act, certain active platforms have been able to exploit safe harbor provisions. These uncertainties can be observed in certain landmark judgements decided post the 2008 Amendment, which are as follows:

Shreya Singhal v. Union of India⁷⁰

The scope of Section 79 of IT Act was significantly broadened by the Supreme Court in the case of Shreya Singhal v. Union of India. In this case, the Hon'ble court interpreted “actual knowledge” under S.79 (3)(b) and Rule 3(4) of the now 2021 Intermediary Guidelines as a notice from a court order directing the intermediary to expeditiously remove access to the infringing material. The Court based its interpretation on the fact that removing access to the material would be very difficult for intermediaries like Google, Facebook, etc. to comply with, when millions of requests are made. However, with the advancement in technological tools and measures that are available for intermediaries to efficiently deal with take-down requests, the reasoning given by the court does not stand valid today. Despite the fact that this case did not deal with the violation of Intellectual Property Rights, the liberal interpretation of safe harbor exceptions by the court has enabled intermediaries to escape liability for copyright infringement taking place on their platforms.

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⁷⁰ WRIT PETITION (CRIMINAL) NO.167 OF 2012

Copyright © 2022 The Indian Music Industry
**Myspace Inc. v. Super Cassettes Industries Ltd.**

The Division bench of Delhi High Court in the case of Myspace Inc. v. Super Cassettes Industries Ltd. interpreted actual knowledge under S. 79 of the Act while dealing with intellectual property rights. In the said case, Super Cassettes filed a suit for copyright infringement against Myspace. Prior to the Division Bench judgement, the single judge bench of Delhi High Court granted interim relief in favour of Super Cassettes thereby restraining Myspace from dealing with Super Cassettes' repertoire. Subsequently, MySpace filed an appeal against this judgement. The division bench of Delhi High Court, while adjudicating upon the appeal, set aside the single bench judgement. It observed that the term “knowledge” under S. 79(3) of the Act has to be interpreted as “consciousness” or “awareness” in the form of “actual knowledge” of infringement. Therefore, mere “general awareness” of infringement would be insufficient to hold an intermediary liable. The court further stated that actual knowledge requires the platform to be notified of specific copyright protected works by the copyright owner as well as the location where the works are accessible. However, the Appellate Court failed to adequately address the impractical obligation placed on copyright owners to monitor and inform intermediaries regarding specific infringements in light of widespread digital copyright infringement.

**Christian Louboutin v. Nakul Bajaj**

Platforms like Facebook have significantly transformed from playing a passive role to a much more active one while engaging with their users. This calls into question whether the intermediary liability exemption under Section 79 of IT Act extends to active platforms participating in unlawful conduct. This question was answered by the Delhi High Court in the case of Christian Louboutin v. Nakul Bajaj, 2018 wherein the court observed that the safe harbor protection is only limited to those intermediaries which are mere conduits or passive intermediaries. The court in this case held an e-commerce website liable for the infringement of Trademark owned by the French-Egyptian fashion designer, Christian Louboutin. The court in this order stated that “While Section 79 of the IT Act is to protect genuine intermediaries, it cannot be abused by extending such protection to those persons who are not intermediaries and are active participants in the unlawful act. Moreover, if the sellers themselves are located on foreign shores and the trade mark owner cannot exercise any remedy against the said seller who is selling counterfeits on the e-commerce platform, then the trade mark owner cannot be left remediless.”

**Ajit Mohan & Ors. v. Legislative Assembly National Capital Territory of Delhi & Ors**

Recently, the role of active intermediary was once again brought to the attention of the Supreme Court. In the case of Ajit Mohan & Ors. v. Legislative Assembly National Capital Territory of Delhi & Ors, 2021, the Apex court held that while seeking protection under section 79 of the IT Act, intermediaries such as Facebook should not take a “simplistic approach” by presenting themselves as a platform merely posting third party content with no role in generating, controlling or moderating information. The court further observed that Facebook’s use of algorithms (which are sequences of instructions) to personalise content and news to target users proves that its role is not so “innocuous” and is more “active” while dealing with third party information.

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71 (2017) 236 DLT (DB)
72 CS (COMM) 344/2018
73 WRIT PETITION (C) NO.1088 OF 2020
Although some judicial decisions have recently acknowledged the expanding role of intermediary platforms, many others have broadened the scope of liability granted to such intermediaries under the IT Act. This uncertainty around the judicial interpretation of intermediary liability regime has enabled non-passive platforms to take undue advantage of existing safe harbor protection. Therefore, this has left copyright owners vulnerable to infringement.

F] The misuse of safe harbor provisions by active intermediaries-

Liability exemptions under the IT Act have been indiscriminately misused by some UGC services, which are well aware of infringing activities taking place on their platform. UGC services make available protected copyright protected content on their platform without prior authorization of the copyright owner, while also deriving revenue from said unauthorized content. This is completely against the spirit of Section 79 and it deprives artists, copyright owners in the recorded music industry and other copyright holders of fair remuneration for the usage of their works.

The behaviour of these platforms has led to a vicious cycle as follows -

1. Paltry revenues paid out to Creative Community
   Since the introduction of safe harbor provisions, the digital economy has seen a significant boost. Digital platforms that provide UGC services have observed unmatched growth in terms of revenues and market share.
   As early as 2010, Google India Private Ltd. reported revenues of ₹779.34 cr. ($172.03 million). The revenues grew to ₹5,593.8 cr. ($757 million) during FY 2020 (growth more than 700%). Further, as per Media Partners Asia, the estimated revenue of YouTube was ₹4000 cr. in 2020. ⁷⁴

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Similarly, Facebook India Online services reported revenues of ₹45.2 cr. for the year 2012. The revenues reached as high as ₹1,277 cr. in FY 2020.⁷⁵

In terms of the user base, platforms such as YouTube reported a user base of 44.8 cr. monthly active users on Android phones and tablets in India as on December 2020, while Facebook has 41 cr. subscribers, 53 cr. WhatsApp users and 21 crore Instagram clients.⁷⁶

However, despite professionally produced music being an important drive for the UGC services, the average revenue paid by some of these services to copyright owners is negligible compared to what licensed streaming services pay.

### Heightened immunity, less accountability for Intermediaries

The monetisation model that Big Tech follows has been nurtured by the heightened immunity availed through safe harbor provisions. The current safe harbor framework helps intermediaries evade any sort of accountability for illegal activities on their platforms.

In June 2021, Google started to publish its monthly transparency report indicating content removal requests in India under Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 which covers YouTube as well. As per the latest report for the month of March 2022, out of a total of 31,699 user complaints received, 30,833 of them were related to copyright issues. Further, of the 95,759 complaints mentioned in the Google transparency reports published during Q1 2022, 92,601 were related to copyright which constitutes 96.7% of all the complaints. For the FY 2021-2022, 96% of 3,78,789 complaints received by Google were copyright related.⁷⁷ Such a huge proportion of copyright related complaints proves that the current liability regime is ineffective and that there is a desperate need for change.

These platforms have time and again leveraged immunity granted to them under the safe harbor provisions and have not appropriately addressed the availability of unauthorised content on their platform.

### G] Short Form Video Apps following the same path

The mode of consumption of digital content is continuously evolving and so is the content itself with new formats popping up from time to time. In 2018, Chinese Tech Giant ByteDance released TikTok, introducing a new format of content sharing, short-form videos. Short-form content gained popularity like wildfire, given its bite-sized nature and easy to consume format. However, in June 2020, the Indian Government banned TikTok, along with 59 other mobile applications created and owned by Chinese companies, in what came to be known as “India’s Digital Strike” against China in the wake of the Galwan border clash.⁷⁸ After the national ban on TikTok, India witnessed a surge in domestic short-form video apps and social media platforms backed by large investments from Big Tech companies such as Alphabet’s Google, Microsoft⁷⁹ and Twitter.⁸⁰

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Proliferation of short form video platforms -

Indian Short-form Video Apps (SFVAs) have retained 65-70% of the TikTok era users driven by the migration of influencers to these platforms as well as change in user experience in the patterns of content consumption. Indians have jumped on the short-form video bandwagon, as is evident from the data below;

According to the EY FICCI M&E Report 2021, the user base on SFVAs has grown by 65% year-on-year in 2019 and 2020 and over 50,000 creators on SFVAs are estimated to have a following of over 100,000 each.⁸¹ Some of the popular Indian SFVAs are as follows:

- **MX Takatak**: Times Internet’s MX Takatak and HotShots (Gaana’s short video platform) had a total of 800 million daily video views combined as of September 2020.⁸² MX Takatak has over 200 million downloads and enjoys a monthly user base of over 150 million.⁸³

- **Josh**: Indian SFVA Josh was among the most downloaded apps on Google Play Store globally in March 2021⁸⁴ with 62.5 million downloads.⁸⁵ It has lately crossed over 150 million downloads.⁸⁶

- **Moj**: Moj was also among the most downloaded apps on Google Play Store globally in March 2021.⁸⁷ It surpassed the 100 million download landmark on Google Play Store by December 2020 within six months of its launch, becoming the fastest short video platform to reach this milestone.⁸⁸

- **Chingari**: Indian SFVA Chingari reported more than 40 million downloads till October 2021.⁸⁹

As per a Redseer report published in October 2021, despite the TikTok and Snack Video ban which occurred in June and November of 2020 respectively, monthly active users on these SFVAs have grown 1.37 times since 2020.⁹⁰

Further, between 60-62% of the SFVAs users in India were based out of Tier-2 cities - higher than the trend seen for other content-focused social media apps like Instagram and YouTube.⁹¹

Lack of obligation on the SFVAs to take appropriate licenses -

As in the case of a few UGC services, safe harbor protection granted to SFVAs give such apps considerable bargaining power during negotiations. This imbalance of power makes them get away with payments of negligible to no amounts for content by using safe harbor provisions as their shield. This makes it increasingly difficult to hold SFVAs accountable for infringement taking place on their platforms.

However, SFVAs cannot be termed as neutral intermediaries as they play an active role and therefore, should not fall under Section 79 of the IT Act. Thus, they should have an obligation to take appropriate licenses from copyright owners.

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⁸⁸ Google Playstore.


Steady Revenue Growth

SFVAs that pre-dominantly host unauthorized content have been observing favourable economic growth in terms of valuation/revenues. The growth patterns of these SFVAs are to a large part possible because they take undue advantage of the safe harbor provisions and gain exponential revenues on the back of unauthorised content made available on their platforms.
H) Increasing avoidance of licensing and piracy in the Indian recorded music industry due to intermediary liability safe harbor provisions

The overbroad safe harbors and digital piracy have caused immense loss to the Indian recorded music industry. This has a direct impact on the creative ecosystem as less value going to labels translates into less investment in new talent. The estimated value of the recorded music industry, if the issue of the ineffectual intermediary liability provisions was resolved, has been enumerated in the following graph.

When safe harbor provisions were introduced in India in 2000, the lawmakers were hopeful to create an ecosystem that would foster innovation in the country. However, the Committee should examine whether the objective has been achieved when it comes to use of copyright protected content under the safe harbor regime. In fact, it must be noted that even during the discussions that took place in the Lok Sabha in 1999 before the Information Technology Act was passed, Member of Parliament (MP) P Roopchand Pal had raised objections against the safe harbor provisions, and highlighted the concerns of the copyright owners. He withdrew the objection on the reassurance by the then Minister for Information and Broadcasting Pramod Mahajan that a suitable amendment would be brought about in the Copyright Act. However, 20 years later, copyright owners are still in the lurch, and the promised amendment has not yet come about.
COMPARATIVE JUDICIAL OVERVIEW OF THE SAFE HARBORS ECOSYSTEMS IN THE US, UK AND INDIA
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<th>PARTICULARS</th>
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<td>STATUTE</td>
<td>U.S.</td>
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<td>S. 512 of title 17 provides for safe harbor protection to intermediaries providing mere conduit, caching or hosting services, or information location tools, against copyright liability and provided the intermediary fulfills the conditions specified in the section.</td>
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<td>E.U.</td>
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<td>Articles 12 - 14 of the ECD are applicable to &quot;Intermediary service providers&quot; that provide mere conduit, caching or hosting services. ECD requires that only intermediaries that play a mere technical, automatic and passive role can take the defense of safe harbor protections.</td>
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<td>INDIA</td>
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<td>Section 79 of the IT Act provides conditional immunity to intermediary platforms so long as they abide by certain due diligence requirements. This immunity is extended only to intermediaries that merely provide access to a communication system.</td>
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<td>JUDICIAL APPROACH</td>
<td>U.S.</td>
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<td>US Courts have widened the scope of safe harbors while narrowly interpreting intermediary obligations and liability restrictions.</td>
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<td>The CJEU has confirmed that only purely technical, automatic and passive intermediaries are eligible for safe harbors.</td>
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<td>Indian Courts have expounded upon the prerequisite of intermediaries to play a passive role in order to qualify for safe harbors however there are uncertainties that remain. Courts have also read down the knowledge requirements for intermediaries thereby broadening the scope of safe harbors.</td>
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<td>PARTICULARS</td>
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<td><strong>U.S.</strong></td>
<td>Courts have widely interpreted safe harbors through various judgements thereby creating more potential for misuse.</td>
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<tr>
<td><strong>E.U.</strong></td>
<td>The EU Legislator – through the DSM Copyright Directive and the DSA – have sought to clarify the responsibilities of online platforms. At the same time, the CJEU has also sought to do the same through a series of decisions (including the YouTube/Cyando decision as explained above).</td>
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<tr>
<td><strong>INDIA</strong></td>
<td>Despite interpreting safe harbor provisions by various courts, there remains uncertainty resulting in misuse of these provisions.</td>
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UNINTENDED CONSEQUENCES OF SAFE HARBOR PROVISIONS

GLOBAL LANDSCAPE
The global recorded music industry observed a significant dip in total revenues from $23.6 billion in the year 2001 to $14 billion in 2014. The recorded music industry has only recently started observing a steady recovery on account of the advent of legitimate streaming services which do not rely on safe harbor protection. The dramatic fall in revenues was caused by a number of factors but rampant digital piracy – caused partly by unclear online liability rules – was one of the main reasons.

**GLOBAL MUSIC RECORDING INDUSTRY REVENUES**

**2001 - 2019 ($ Billions)**

The chart above illustrates the total revenue in the global music recording industry from 2001 to 2019. The revenue trend shows a significant decline from 2001 to 2014, followed by a steady recovery in recent years.

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*Source: IFPI GMR Report 2021.*
RECOMMENDATIONS
The creative sector has been recognized as one of the most prominent sectors globally in terms of revenue growth, employment generation and overall GDP. The Indian copyright-related industries accounted for $11.8 billion in terms of value added in the year 2016-2017, i.e., around 0.58% of the Indian GDP. Further, India's copyright-related industries also created employment opportunities for approximately 1.1 million workers in terms of employment in the same year.⁹³

However, existing safe harbor protection granted to intermediaries and its subsequent misuse by platforms, such as interactive UGC hosting services, has led to a situation wherein digital platforms that host UGC content are in a position to dictate the value of the copyright protected content instead of allowing the market to take its own course. According to the Global Innovation Index 2021, the Entertainment and Media market, ranked 59th, was observed as one of the key weaknesses for India in terms of creative output.⁹⁴ Therefore, it is essential for India to fix the existing safe harbor provisions in order to ensure a fair digital market place in the UGC era.

Key recommendations in order to fix the existing intermediary liability regime and to ensure a level playing field for the copyright owners are as follows:

**POLICY RECOMMENDATIONS**

1. **Review and update the Indian online liability regime**

As explained through the paper, interactive intermediary platforms such as short form video apps, UGC services, etc. in India and across the globe have evolved into breeding grounds for unauthorized sharing and blatant misuse of copyright protected content. In fact, across major democracies, the need to tighten the existing intermediary liability framework for interactive platforms is being recognised. For instance, on May 21, 2020, the US Copyright Office published its report⁹⁵ to analyze whether section 512 is working effectively and as intended. The final Report concluded that “the balance Congress intended when it established the section 512 safe harbor system is askew”.

Further, owing to global digitization and online opportunities, the EU Commission also introduced the Digital Single Market Strategy (DSMS).⁹⁶ As part of the DSMS, the EU Commission also began a public consultation including the evaluation and modernization of the legal framework for the enforcement of intellectual property rights.⁹⁷ The final communication highlighted the need to review existing online intermediary liability framework leading to the adoption of a new ‘Directive on Copyright in the Digital Single Market’ in the year 2019.

The negative economic impact due to the misuse of existing safe harbor regimes to the creative sectors in the US and the EU has been indicated by the aforementioned studies conducted there. India’s safe harbor regime has substantial similarities with the safe harbor regime prevalent in both these markets. Thus, it would be prudent for the government of India to take note of the negative economic outcome to the creative sector in India arising due to the misuse of the safe harbor regime by interactive platforms.

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⁹⁵ https://www.copyright.gov/policy/section512/.
⁹⁶ A strategy to ensure free movement of goods, persons, services and capital and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.
Therefore, we urge the Ministry of Electronics and Information Technology to take into account the aforementioned extensive studies while reviewing the current intermediary liability regime under Section 79 of the Information Technology Act, 2000 in India.

2 **Address the issue of rampant digital piracy**

Digital piracy has caused a significant loss of revenues ultimately hampering the creative sector's growth. In light of the same, **we urge the government to take active measures to ensure that the menace of digital piracy is brought under control.** We recommend the following steps to address the issue of digital piracy:

i. Introduction of well-rounded training programmes for judicial members and administrative authorities involved in deciding copyright disputes to strengthen the enforcement of intellectual property rights;

ii. Extension of support by the Centre for the establishment of cyber departments, in all states and union territories, to enforce intellectual property rights. Reference models for this purpose could be the Maharashtra Intellectual Property Cyber Unit (MIPCU)⁹⁸ and Telangana Intellectual Property Cyber Unit (TIPCU); and

iii. Promotion and awareness of Intellectual Property Rights protection by conducting relevant and extensive awareness campaigns for the public in general and also specialised sessions for Civil society.

3 **Need for financial transparency or detailed financial reporting by interactive intermediary platforms which use copyright protected content, to help estimate the actual share of revenues accruable to the Indian creative sector**

Intermediary platforms operating in India do not adequately disclose their financial accounts. This creates a serious hurdle for copyright owners to access financial data to help determine the revenues earned by these platforms through copyright protected works including recorded music. Such a data-gap makes it difficult for copyright owners to determine the appropriate value of their work while negotiating licensing deals. **Therefore, we urge the government to address the issue of lack of financial transparency in the case of interactive intermediary platforms operating in India especially those using copyright protected content to power their interactive apps.**

4 **Administrative site blocking as a remedy for copyright infringement**

To ensure a robust anti-piracy mechanism, we urge MeitY to introduce a separate proviso under Section 79 of the Information Technology Act, 2000 to provide for prompt administrative blocking of websites and platforms involved in copyright infringement. The Government should consult with concerned industry stakeholders to prescribe procedures for its effective implementation and liability for non-compliance.

5 **Best practices for digital payment services and advertising networks**

We urge MeitY to implement a mechanism in order to prevent digital advertising and use of digital payment services from India on pirated websites. Therefore, **we recommend that MeitY, in collaboration with National Payments Corporation of India and Advertising Agencies Association of India, formulate a policy to address the same.**

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⁹⁸ Maharashtra Intellectual Property Crime Unit (MIPCU) is a public-private initiative, set up under the aegis of Maharashtra Cyber, which engages with Anti-Piracy groups, law enforcement agencies (Indian and global) for integrated tactical response against IP related crimes.
"Take-Down means Stay-Down"

The Indian safe harbor regime provides for a notice-and-takedown mechanism. However, policy makers should strive to implement a meaningful and robust process to ensure that once infringing content is taken down, the same content does not re-appear on the same service, thereby putting an end to the ‘whack-a-mole’ era of UGC services. In order to implement an effective take-down mechanism, take-down must mean stay-down. Given that the shelf life of a song is short, the new mechanism must ensure that the take-down is done expeditiously by the intermediary otherwise the losses caused will be unrecoverable.

The implementation of an efficient notice-and-stay-down mechanism can be adopted in two ways:

a) By introducing a notice-and-stay-down mechanism as part of a new policy based on a sector specific approach i.e. a liability regime targeting copyright-protected content; or

b) By introducing a notice-and-stay-down mechanism as a part of the existing safe harbor regime.

a) Sector specific approach dealing with liability of copyright infringement

Given the difficulty and limited scope of a one-size-fits-all intermediary liability regime, it is pertinent to address the challenge of copyright infringement by implementing a sector-specific approach, i.e., introducing a separate legislation pertaining to intermediary liability for copyright infringement.

A notice and stay-down mechanism must be one of the key provisions under such a legislation. For instance, the EU has adopted the new copyright directive in the year 2019⁹⁹ placing an additional obligation on online content sharing platforms to ensure the unavailability of infringing works and make best efforts to prevent future uploads as well.

In India, the regulation of intermediaries is spread across various laws and sub-legislations. However, the issues faced by copyright owners have not been resolved adequately. Hence, we recommend MeitY to consider introducing specific legislation to deal with intermediary liability for copyright infringement while providing appropriate safeguards to copyright owners in the digital ecosystem. This can be achieved in the form of an effective notice-and-stay down mechanism.

b) Notice-and-stay-down mechanism as part of the existing safe harbor regime

Despite the revision of intermediary guidelines via IT (Intermediary Guidelines) Rules 2021, these Rules fail to provide for an efficient notice-and-take down mechanism; providing a temporary remedy to the copyright owners without so much as addressing the real possibility of hydra headed mirror websites popping up in the place of those websites that initially get taken down. This leads to a watered-down mechanism that acts as no real deterrent for further infringement.

Therefore, we recommend the introduction of a “notice-and-stay-down” mechanism as part of the existing safe harbor regime.

We recommend the following amendment to Rule 3 (1) (d) of the 2021 Rules – “An intermediary, upon receiving actual knowledge or awareness in the form of an order by a court of competent jurisdiction”.

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jurisdiction or on being notified by the appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act or a notification sent by an intellectual property right holder or their authorized representative, shall not host, store or publish, and shall prevent the future availability of information which is identical in content to, any information prohibited by any law in relation to the interests of the sovereignty and integrity of India: the security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence, infringing any patent, trademark, copyright or other proprietary rights or information which violates any law for the time being in force."

2. Appropriate amendments to the Information Technology Act, 2000 to deal with Interactive platforms

Owing to the active monitoring and surveillance of content by UGC hosting platforms, it becomes important to draw a distinction between the types of intermediaries i.e., active and passive intermediaries. Pursuant to the same, we urge policy makers to consider the following suggestions:

a) Amend provisions of the IT Act, 2000 to distinguish between active and passive intermediaries

The original intent for providing intermediary liability exemptions was to protect neutral and passive intermediaries from liability arising as a result of user activity. However, existing provisions under the Information Technology Act do not clearly distinguish between the types of intermediaries. Therefore, we recommend an appropriate amendment to Section 2 of the aforesaid Act to clarify the distinction between active and passive intermediaries.

b) Add an explanation to appropriate provisions of the IT Act stating that the liability limitations under section 79 only apply to the activities of passive intermediaries and do not cover active intermediaries such as UGC hosting platforms.

c) Include a clarification under the IT Act that the compliance with the intermediary guidelines does not prejudice the need for Intermediaries that assume an active role to get proper authorization before communicating the work to the public.
Appropriate amendments to the Intermediary Guidelines

The intermediary liability exemption under the IT Act should not provide broad and unjustified immunity to active platforms. It must instead introduce effective due diligence obligations on intermediaries. Therefore, we suggest the following recommendations:

a) Implementation of an effective “repeat infringer policy” as a pre-requisite to realise safe harbor benefits

It is necessary to place an obligation on platforms to adopt and effectively implement a “repeat infringer” policy that allows the platforms to terminate the accounts of users who repeatedly infringe third parties’ rights. Therefore, we urge MeitY to introduce an effective repeat infringer policy for platforms as a pre-condition to avail safe harbor protection under the Act. We recommend the following text to be inserted under Rule 3 of the IT (Intermediary Guidelines) Rules 2021 – “The intermediary shall immediately terminate the access of the users as well as remove the infringing material in case of non-compliance with the rules more than once.”

b) Implementation of Know Your Business Customer (KYBC) norms as a pre-condition to realise safe harbor benefits

The implementation of an effective “KYBC” policy would improve transparency vis-à-vis business users operating on intermediary platforms. Therefore, we recommend MeitY to include implementation of an effective KYBC policy by the platforms as a pre-condition to avail safe harbor protection under the IT Act. The following text is recommended to be inserted under Rule 3 of the IT (Intermediary Guidelines) Rules 2021 – “The intermediary shall collect and maintain appropriate data in order to implement an effective KYBC procedure identifying their business users.”

c) Constructive knowledge and notice from right holders/their authorized representative as grounds to remove access to infringing material

In order to curb digital piracy, it is essential that copyright owners are granted the ability to protect their work from any act of infringement and are able to ensure speedy removal of infringing content from platforms. Thus, we recommend MeitY to include constructive knowledge and notice received from copyright owners/their authorized representatives regarding infringement as sufficient grounds to remove access or disable infringing material. We recommend the following amendment to Rule 3 (1) (d) of the 2021 Rules – “An intermediary, upon receiving actual knowledge or awareness in the form of an order by a court of competent jurisdiction or on being notified by the appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act or a notification sent by an intellectual property right holder or their authorized representative, shall not host, store or publish, and shall prevent the future availability of information which is identical in content to, any information prohibited by any law in relation to the interests of the sovereignty and integrity of India: the security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence, infringing any patent, trademark, copyright or other proprietary rights or information which violates any law for the time being in force.”

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d) Pre-condition that the platforms adopt industry standard technological protection measures

Advancement of technology has led to new forms of digital piracy such as stream ripping sites and cyberlockers which host unauthorised copyright protected content. These services give unauthorised access to their users by circumventing the technological protection measures that are employed by legitimate streaming services. This would be in line with recent CJEU case law on this which confirmed, inter alia, that when it comes to music copyright infringements, automated tools are not only effective but, in some cases, required as appropriate and balanced measures to counter copyright infringements. Therefore, we recommend MeitY to include a prerequisite stating that the safe harbor protection must be granted only to those platforms who adopt industry standard technological protection measures used to protect works in which copyright subsists.

¹⁰⁰ the YouTube/Cyando case.
People of erudition have always stated that history and statistics talk to us and always help in resetting existing rules of engagement especially where the rules need fixing. It’s a mistake though, to assume that technological changes, even path breaking ones, render history irrelevant. Historically, corporations or industry bodies are always held responsible for their actions. If oil and mining companies in the extraction business were made to pay and are always made to pay market prices for products they didn’t create, for example crude oil and iron ore, why shouldn’t interactive platforms pay fair prices for the copyright protected content used by them to power their platform, copyright protected content is the crude oil and iron ore for these interactive platforms. When industry in the drive for maximum profits takes unwarranted risks and creates multi-dimensional problems for society and stakeholders, for example extensive environmental damage via oil spills or health hazards, industry is always heavily fined and stakeholders impacted are adequately compensated. Till date there is no debate amongst policy makers in India of the need to assure that copyright owners can license their rights on fair commercial terms to online platforms that use creative content to power interactive intermediary platforms.

Music, film and television producers have always kept reinventing themselves and at every reinvention the rules of engagement have been rewritten to fix the loopholes and ensure adequate compensation for all stakeholders across the value chain.

Waiting for interactive platforms to reform and fix the problem created by outdated liability rules has been the biggest mistake till date. Globally, especially in the EU, attempts are being made to address the problem. Interactive tech platforms won’t reform of their own accord, hence, changes in regulation are needed. Interactive social media companies using copyright protected content should not be allowed to operate under a liability shield that isolates them from paying fair compensation for copyright protected content they use or take effective action to ensure unauthorized content does not appear on their services. In particular, amending Section 79 of the IT Act, 2000 that specifically deals with the liabilities of interactive platforms is the key towards an Atmanirbhar creative sector economy in India.