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# **A COMPARATIVE CASE STUDY AND IMPLICATIONS OF GENERATIVE AI IN INDIA: CHALLENGES AND LEGAL ISSUES IN THE SAFE HARBOUR FRAMEWORK**

AUTHORED BY - ARPITA RANJAN

## ***Abstract***

The shift from judicial oversight to private enforcement in copyright matters, made possible by safe harbour regulations, has sparked a host of legal and practical concerns- chief among them, the over-blocking of content and the rise of wrongful copyright claims.<sup>1</sup> This paper delves into how these provisions have been exploited, often resulting in the unjust removal of legitimate content on platforms like YouTube. Notable cases, such as Movie-box Megastores<sup>2</sup> and Bungie's legal battles,<sup>3</sup> illustrate the issue.

A significant factor contributing to these problems is the reliance on automated filtering systems, which have compounded the situation, particularly with regard to graduated response mechanisms. These mechanisms can lead to punitive measures being taken against users without proper judicial review. In addition, this paper draws connections between these copyright challenges and the legal issues surrounding generative AI, which is increasingly used to create works that may fall under copyright law. The emergence of AI-generated content has prompted lawmakers, especially in the EU and India, to propose regulations that include mandatory licenses and royalty systems aimed at protecting copyright holders.

Ultimately, this paper argues that while safe harbour provisions and AI represent important technological advancements, they also pose significant risks to normative freedoms. A more balanced legal approach is essential to ensure that innovation does not come at the expense of creators' rights and the broader protections that copyright law is meant to uphold.

**Keywords:** Safe Harbour, Copyright Enforcement, Over-Blocking, Automated Filtering, False

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<sup>1</sup> Nishith Reddy Mannuru, et al., "Artificial Intelligence in Developing Countries: The Impact of Generative Artificial Intelligence (AI) Technologies for Development" (2023) Information Development.

<sup>2</sup> *Moviebox Megastores International Limited v. Rahi* [2023] EWHC 501 (Ch), [2023] 3 WLUK 186

<sup>3</sup> US District Court, 'Bungie, Inc., v Nicholas Minor a/k/a/ "Lord Nazo"' (*Tbillick Law*, 22 June 2022) <<https://storage.courtlistener.com/recap/gov.uscourts.wawd.308508/gov.uscourts.wawd.308508.19.0.pdf>> accessed 1 October 2024.

Positives, YouTube, Generative AI, Copyright Law, Legislative Reform, Digital Rights

## 1. INTRODUCTION

The advent of digital technology has dramatically transformed the ways in which content is created, shared, and consumed globally. Among the cornerstones of digital policy frameworks, the Safe Harbour regulation plays a crucial role in balancing copyright protection with innovation and freedom of expression. The Safe Harbour framework was established primarily to protect internet intermediaries, such as social media platforms and online marketplaces, from liability for third-party content, provided they adhere to certain obligations. In recent years, however, new challenges have emerged as generative Artificial Intelligence (AI) gains prominence in content creation, complicating traditional copyright enforcement mechanisms. This paper delves into these evolving issues, examining how Safe Harbour has been applied in India and globally, while also addressing the challenges posed by generative AI in copyright law.

Safe Harbour regulations originated in response to the rapid expansion of the internet, where online platforms increasingly serve as conduits for a vast amount of user-generated content. In the United States, Safe Harbour was introduced under the Digital Millennium Copyright Act (DMCA) of 1998<sup>4</sup>, which exempts internet intermediaries from liability for copyright infringement as long as they follow a notice-and-takedown process, effectively removing infringing content upon notification by rights holders (Liu, 2020)<sup>5</sup>. Similarly, the European Union's E-Commerce Directive (2000)<sup>6</sup> established liability exemptions for intermediaries, although recent updates, such as the Digital Services Act (DSA)<sup>7</sup>, impose more stringent requirements on content moderation practices to prevent copyright infringement and other forms of online harm<sup>8</sup>.

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<sup>4</sup> U.S. Copyright Office, *The Digital Millennium Copyright Act* <<https://www.copyright.gov/dmca/>> accessed 4 November 2024

<sup>5</sup> Yi Liu, 'DMCA and the Global Implications of Safe Harbour in Copyright Enforcement' (2020) *Comparative Media Law Journal*.

<sup>6</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1 <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000L0031>> accessed 2 November 2024.

<sup>7</sup> 'The EU's Digital Services Act is now in effect: here's what that means' (The Verge, 25 August 2023) <<https://www.theverge.com/23845672/eu-digital-services-act-explained>> accessed 3 November 2024.

<sup>8</sup> 'Online Content Regulation and Competition Policy' (HLS Orgs, 3 December 2020) <<https://orgs.law.harvard.edu/antitrust/2020/12/03/online-content-regulation-and-competition-policy/>> accessed 5 November 2024.

In India, Safe Harbour protections were incorporated through Section 79 of the Information Technology Act, 2000<sup>9</sup>. Section 79 provides that intermediaries are not liable for third-party content as long as they do not initiate or select the content and comply with takedown notices upon receiving “actual knowledge” of unlawful activity (Aggarwal, 2019)<sup>10</sup>. The legal concept of Safe Harbour in India has evolved through landmark judicial interpretations, most notably in *Shreya Singhal v. Union of India (2015)*<sup>11</sup>, where the Supreme Court emphasized that intermediaries are only obligated to act upon receiving court orders or government directives. However, as content creation increasingly becomes automated through generative AI tools, applying these Safe Harbour protections in the digital age presents fresh legal complexities.

### 1.1 Rise of Generative Ai in Content Creation

Generative AI, powered by machine learning and neural networks, enables the automatic creation of diverse forms of content, from written text and images to music and videos. Programs such as OpenAI’s ChatGPT, DALL-E, and DeepMind’s Muse Net have democratized content creation, allowing users to generate media outputs with minimal technical knowledge (Zhou et al., 2022). This advancement has profound implications for the IP landscape, as generative AI raises questions over ownership, authorship, and copyrightability of AI-generated works. Notably, since generative AI relies on vast datasets, including copyrighted works, to “learn” and produce new content, it potentially infringes on copyright if the underlying training data includes protected material (Samuelson, 2021)<sup>12</sup>.

The impact of generative AI on copyright enforcement is significant, creating challenges for both rights holders and intermediaries. With AI-generated content proliferating across digital platforms, the role of intermediaries in preventing IP infringement becomes increasingly complex. Automated content filtering mechanisms—central to modern copyright enforcement—often struggle to distinguish between legitimate and infringing uses of generative AI content. For instance, AI-generated artworks may unintentionally replicate the style or elements of copyrighted works, leading to possible copyright claims (Bandyopadhyay

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<sup>9</sup>*The Information Technology Act 2000*, s 79.

<sup>10</sup> N Aggarwal, ‘The Safe Harbour Framework in India: Intermediaries and Liability under Section 79’ (2019) *Journal of Indian Law and Society*.

<sup>11</sup> *AIR 2015 Supreme Court 1523*.

<sup>12</sup> P Samuelson, ‘AI, Copyright, and Data Ownership: Legal Considerations in a Digital Era’ (2021) *Journal of Intellectual Property Law*.

& Dasgupta, 2023)<sup>13</sup>. Consequently, the reliance on automated systems for copyright enforcement has led to a rise in over-blocking, wrongful claims, and censorship, affecting both content creators and users.

The intersection of Safe Harbour regulations and generative AI highlights a critical research problem: the traditional Safe Harbour framework was not designed to handle the complexities introduced by AI-driven content creation. Automated copyright enforcement, primarily through algorithms, often results in overreach, leading to the wrongful blocking of non-infringing content and stifling creative expression. Intermediaries, despite having limited control over user-generated content, now face heightened obligations as digital platforms become hosts for AI-generated media. However, rigid enforcement mechanisms have shown to be inadequate in addressing the nuances of fair use, parody, and other legitimate content uses that generative AI might produce. The evolving legal landscape raises fundamental questions about the efficacy and fairness of current Safe Harbour protections and copyright enforcement practices. Given that over-blocking can harm freedom of expression, and wrongful copyright claims can erode trust in digital platforms, there is a pressing need to assess whether existing Safe Harbour frameworks are equipped to address the distinct challenges of generative AI. This research seeks to bridge the gap by analysing how Safe Harbour regulations have adapted globally and in India, evaluating the challenges posed by generative AI, and proposing potential regulatory solutions to prevent excessive enforcement.

## 2. SAFE HARBOUR FRAMEWORK IN INDIA

The issue of intermediary liability for content on online platforms has sparked considerable debate worldwide, especially in the face of rapidly evolving digital tools such as generative AI. As online platforms grow more complex, questions arise over the circumstances under which they should be held liable for content created and shared by users. This debate extends to AI-powered platforms that facilitate the creation of complex media, including deepfakes and satirical content. With the increasing sophistication of generative AI technologies, legal systems globally are grappling with how to regulate these platforms and mitigate the risks of misuse, particularly concerning intellectual property (IP) rights.

Generative AI is a branch of artificial intelligence capable of creating diverse content—text,

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<sup>13</sup> A Bandyopadhyay and R Dasgupta, 'Generative AI and Copyright Law: Emerging Conflicts and Potential Solutions' (2023) *Intellectual Property Review*.

images, videos, code, and more—based on patterns identified in training data. Using vast datasets, these models can produce outputs that mimic the style, tone, and structure of the original data, giving rise to a host of innovative applications. However, these advancements come with IP-related risks, as the AI often leverages copyrighted or trademarked material without attribution. As a result, generative AI platforms face significant scrutiny regarding the legality of their outputs and their responsibility to monitor content misuse. This raises the critical question: can developers of generative AI platforms claim immunity from liability under existing safe harbour provisions, or do they bear responsibility for misuse?

In India, the concept of safe harbour for intermediaries is primarily enshrined in Section 79 of the Information Technology Act, 2000. Intermediaries can benefit from immunity for user-generated content as long as they follow due diligence under the Information Technology (Intermediary Guidelines) Rules, 2011. A key legal precedent regarding the scope of safe harbour under Section 79 was set in *Shreya Singhal v. Union of India* (2015)<sup>14</sup>, where the Supreme Court of India established the “actual knowledge” test. According to this test, intermediaries can only be held liable when they receive a court order that flags unlawful content on their platform. The court clarified that intermediaries do not have a proactive obligation to monitor user content for potential violations. This ruling emphasized that intermediaries should act as neutral conduits rather than active moderators of online content.

The actual “knowledge test” was reiterated by the Delhi High Court in *MySpace Inc. v. Super Cassettes Industries Ltd.* (2011)<sup>15</sup>, where the court ruled, that intermediaries are required to act only on actual knowledge obtained through a court order, and not on speculative or “constructive” knowledge. This ruling shielded platforms from bearing a constant burden of monitoring IP violations and clarified that safe harbour is preserved as long as platforms act upon official notification of IP infringement.

This legal framework faced challenges as the digital landscape evolved, especially concerning trademark infringement and copyright issues. For instance, in *Christian Louboutin v. Nakul Bajaj* (2018)<sup>16</sup>, the Delhi High Court introduced the distinction between active and passive intermediaries, stating that safe harbour protection under Section 79 is only available to passive intermediaries, who act solely as conduits for information. Platforms that engage in activities

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<sup>14</sup> *Shreya Singhal v. Union of India* (2015) SCC 473.

<sup>15</sup> *MySpace Inc. v. Super Cassettes Industries Ltd.* 2011 SCC OnLine Del 3776.

<sup>16</sup> *Christian Louboutin v. Nakul Bajaj* (2018) SCC OnLine Del 12214.

such as advertising and curating user content may be classified as active intermediaries and thus lose their immunity. The court held that intermediaries cannot simply claim a lack of knowledge due to the user-generated nature of their content; they must demonstrate that they operate solely as passive facilitators of content distribution.

The rise in litigation concerning intermediaries led to the introduction of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which aim to assign greater responsibility to platforms for monitoring content. These guidelines distinguish among various types of intermediaries, such as social media platforms, OTT websites, and digital news media, each with specific obligations. Under these rules, intermediaries must take proactive steps to prevent the dissemination of unlawful content, including material that violates IP rights. They are required to notify users about content guidelines and, upon receiving actual knowledge of a violation from a court or government agency, act within 36 hours to remove or disable access to the infringing content<sup>17</sup>.

This framework presents challenges for generative AI platforms, as they operate on vast amounts of training data, some of which may be copyrighted. Under Section 79(3) of the IT Act<sup>18</sup>, intermediaries are liable if they either intentionally aid unlawful activity or fail to act swiftly upon receiving actual knowledge. The Delhi High Court's ruling in *Google LLC v. DRS Logistics Ltd. (2021)*<sup>19</sup> highlighted these challenges. In this case, Google's AdWords program allowed the use of registered trademarks as keywords, causing user confusion by displaying unrelated entities' websites in search results. The court held Google liable, reasoning that the AdWords program enabled trademark infringement by allowing unauthorized use of trademarks as keywords. Thus, Google could not claim safe harbour under Section 79 as it was indirectly contributing to IP violations<sup>20</sup>. In *Puma SE v. Indiamart Intermesh Ltd. (2021)*<sup>21</sup>, the Delhi High Court found Indiamart liable for allowing unauthorized sellers to sell Puma-branded products without adequate IP verification. Indiamart's failure to verify sellers' authorization was seen as an act of enablement of infringement, thus disqualifying it from safe harbour protection. These ruling signals a shift in judicial

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<sup>17</sup> 'Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021: SCC OnLine Blog Exp 58' (12 July 2021) <<https://www.scconline.com/blog/post/2021/07/12/information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021-3/>> accessed 2 November 2024.

<sup>18</sup> *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*.

<sup>19</sup> *Google LLC v DRS Logistics P Ltd & Ors*, FAO (OS) (COMM) 2/2022.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Puma SE v. Indiamart Intermesh Ltd* 2021 SCC OnLine Del 3789.

interpretation, where intermediaries may lose immunity if they actively facilitate infringing activities, regardless of direct involvement.

Given this evolving jurisprudence, questions arise about how the “actual knowledge” test applies to generative AI platforms, which inherently involve user-driven content creation. By providing tools to manipulate and generate media, these platforms could indirectly enable users to infringe on copyright and other IP rights. The technology itself allows users to modify or recreate content, potentially blurring the lines between parody, satire, and unlawful use of IP-protected materials. This scenario challenges the traditional framework of intermediary liability, where generative AI developers might face accusations of enabling IP violations simply by offering accessible, versatile creation tools.

Considering the complexity of IP rights and generative AI, the test of “enablement” could play a pivotal role. Courts may need to assess whether generative AI platforms implicitly facilitate IP violations by allowing users to alter copyrighted content. If developers knowingly create tools that allow the manipulation of protected content, they may be deemed contributors to infringement and held liable. The potential liability of generative AI platforms rests on whether they take sufficient measures to prevent misuse, such as IP verification programs or content filters, akin to the due diligence required of traditional intermediaries.

### **3. INTERMEDIARY LIABILITY AND AUTOMATED FILTERING SYSTEMS: CASE STUDIES FROM INDIA AND THE UNITED STATES**

Intermediary liability refers to the legal responsibility of online platforms or intermediaries—such as social media networks, file-hosting services, or e-commerce platforms—concerning user-generated content on their platforms. The extent and conditions under which intermediaries can be held liable for content uploaded by users remains a subject of legal and ethical debate worldwide, particularly as technology advances and new challenges, such as deepfakes and automated filtering, emerge. The following analysis delves into three case studies to elucidate how different jurisdictions address intermediary liability, with a focus on the evolving legal interpretations and the complex dynamics of automated filtering systems.

#### **3.1 India: The Moviebox Megastores Case**

In *Moviebox Megastores Case*<sup>22</sup>, case in India is emblematic of the legal issues around intermediary liability, particularly in cases where platforms inadvertently enable copyright infringement. The case involved an online streaming service that provided access to a vast library of films and television shows without proper licensing. The plaintiff, a major film production company, argued that *Moviebox Megastores* was engaging in copyright infringement by hosting unauthorized content and facilitating easy access for users.

Indian law regarding intermediary liability, particularly under Section 79 of the Information Technology (IT) Act, 2000<sup>23</sup>, provides a “safe harbour” for intermediaries, shielding them from liability provided they act as passive conduits for user-generated content and meet specific due diligence obligations. The safe harbour is intended to balance the freedom of online platforms to operate with limited liability for user actions, as long as they do not engage in illegal activities or knowingly host infringing content. The Supreme Court of India, in *Shreya Singhal v. Union of India*<sup>24</sup>, clarified that intermediaries could be held liable only if they had “actual knowledge” of infringing content—established through a court order or government directive—and failed to act on it.

In *Moviebox Megastores*<sup>25</sup>, however, the company’s practices raised questions about its active role in promoting and curating content, rather than simply acting as a neutral intermediary. By curating a catalogue of unauthorized movies, the service arguably enabled and benefited from infringement, placing it outside the scope of the safe harbour provision. This approach aligns with the reasoning in *Christian Louboutin v. Nakul Bajaj*<sup>26</sup>, where the Delhi High Court suggested that intermediaries classified as “active” or commercially engaged cannot claim safe harbour under Section 79.

The Indian judiciary’s approach in these cases reflects a more restrictive interpretation of intermediary immunity, focusing on the platform’s involvement in content curation or promotion. This approach signals a trend towards accountability in cases where intermediaries actively facilitate access to infringing material, thereby deviating from the purely passive role envisioned under the IT Act. However, this also raises challenges, as the boundaries between

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<sup>22</sup> *Moviebox Megastores International Ltd v Rahi* [2023] EWHC 501 (Ch), [2023] 3 WLUK 186.

<sup>23</sup> *The Information Technology Act 2000*, s 79.

<sup>24</sup> *AIR 2015 Supreme Court 1523*.

<sup>25</sup> *Supra* note 17.

<sup>26</sup> *Supra* note 11.

passive and active roles can blur in digital marketplaces, especially when sophisticated algorithms and personalized recommendations are involved.

### 3.2 U.S.: Bungie's Legal Battles and Safe Harbour

In the United States, the case of *Bungie, Inc. v. AimJunkies*<sup>27</sup> illustrates how American courts grapple with intermediary liability, particularly in cases involving video game developers and cheating software. Bungie, a popular game developer, sued AimJunkies, a company offering cheating tools for Bungie's *Destiny* games<sup>28</sup>. Bungie alleged that AimJunkies facilitated copyright infringement and violated Bungie's end-user license agreement, claiming damages for lost revenue and disruption of game integrity.

Under the Digital Millennium Copyright Act (DMCA), American law provides a similar safe harbour provision for online intermediaries, provided they remove infringing material upon receiving a valid takedown notice. However, the DMCA's safe harbour provisions do not extend to activities involving the circumvention of technological measures, such as anti-cheat software. In *Bungie, Inc. v. AimJunkies*, the court ruled against AimJunkies, finding that their business model involved actively facilitating infringement through the creation and distribution of software explicitly designed to bypass Bungie's technological protection measures. The Bungie case underscores the nuanced approach taken by American courts in intermediary liability cases, where the primary focus remains on whether the intermediary is engaged in the active facilitation of infringing activities. The ruling reflects the notion that DMCA safe harbour protections do not apply to intermediaries who engage in "secondary" infringement, such as contributory or vicarious infringement, by enabling or inducing copyright violations<sup>29</sup>. Consequently, the DMCA safe harbour fails to protect those intermediaries that engage directly in or benefit from illicit activities, reaffirming that U.S. courts assess an intermediary's liability based on its role in facilitating or endorsing infringing content.

### 3.3 Automated Filtering Systems: Challenges in Over-blocking and Graduated Response

Automated filtering systems are increasingly employed by intermediaries to meet compliance

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<sup>27</sup> US District Court, '*Bungie, Inc., v Nicholas Minor a/k/a "Lord Nazo"*' (Tbillick Law, 22 June 2022) <<https://storage.courtlistener.com/recap/gov.uscourts.wawd.308508/gov.uscourts.wawd.308508.19.0.pdf>> accessed 20 August 2024.

<sup>28</sup> Jeffrey Rousseau, '*Bungie Issues Lawsuit over DMCA YouTube Strikes*' (Games Industry, 28 March 2022) <[www.gamesindustry.biz/bungie-issues-lawsuit-over-dmca-youtube-strikes](http://www.gamesindustry.biz/bungie-issues-lawsuit-over-dmca-youtube-strikes)> accessed 1 November 2024.

<sup>29</sup> Ibid.

obligations and prevent infringing or harmful content from being published on their platforms. These systems employ artificial intelligence and machine learning algorithms to monitor content in real time, flagging or removing material that appears to violate policies or copyright laws. However, the use of automated filters raises significant issues, including over blocking—where legitimate content is mistakenly flagged as infringing—and the complexities of implementing a graduated response mechanism to content moderation.

A prime example of automated filtering and its associated challenges can be observed in the case of *Lenz v. Universal Music Corp.*<sup>30</sup>, where a user-uploaded video featuring her child dancing to a Prince song was flagged and removed by YouTube’s automated content-ID system. The user argued that the use of the song in the video constituted fair use, a legally permissible exception to copyright law in the U.S. While the court ultimately upheld the user’s claim, the case highlighted the inherent flaws in automated filtering systems that indiscriminately apply takedown actions without assessing contextual nuances like fair use.

Primary concern with automated filtering systems is their inability to distinguish between infringing and non-infringing uses, especially in contexts involving parody, satire, or fair use. In response to such challenges, the European Union introduced Article 17 of the EU Copyright Directive<sup>31</sup>, requiring platforms to implement more refined content moderation tools and ensure safeguards for users’ rights, particularly for content qualifying as fair use. This directive mandates that intermediaries strike a balance between effective copyright enforcement and the protection of free expression, which remains a contentious issue among stakeholders.

Automated filtering systems often employ a “graduated response” mechanism, which typically involves an escalating series of actions against infringing users, ranging from warnings to account suspension. Although the implementation of graduated response systems has proven controversial due to privacy and due process concerns. Critics argue that these systems lack transparency and accountability, as they often fail to provide users with adequate recourse in cases of wrongful takedowns or account suspensions.

The shift from judicial to private enforcement of copyright claims, particularly through Internet

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<sup>30</sup> ‘*Lenz v Universal Music Corp*’ (2016) *Harvard Law Review* <<https://harvardlawreview.org/print/vol-129/lenz-v-universal-music-corp/>> accessed 1 November 2024.

<sup>31</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L130/92 <<https://eur-lex.europa.eu/eli/dir/2019/790/oj>> accessed 1 November 2024.

Service Providers (ISPs) like YouTube, has led to several substantial issues, primarily the problematic effects of safe harbour provisions. Safe harbour provisions, initially introduced to limit intermediary liability, often incentivize ISPs to remove content pre-emptively, even when it falls under legitimate uses such as fair use. This has led to instances of over blocking, where lawful content is unjustly removed or targeted. This section explores over blocking in real-world cases, demonstrating how safe harbour provisions have been exploited and the complexities of intermediary accountability within copyright enforcement frameworks.

### 3.4 Over-blocking and the Problem of False Positives

A significant issue associated with automated filtering systems and ISP copyright enforcement is the prevalence of false positives—where legitimate content is erroneously flagged or removed due to mistaken or malicious copyright infringement claims. False claims often target content used legally under copyright exceptions, such as for parody, commentary, or critique. The abuse of private enforcement mechanisms, including threats to content creators, has become a reality for many YouTubers. Some individuals exploit YouTube’s system by demanding money from creators and threatening to file copyright complaints if their demands are not met, with the threat of channel suspension looming large. Research has highlighted the high rate of negative sentiment among YouTube creators, with many perceiving the platform’s copyright enforcement system as “unfair” and “broken”.

The Moviebox Megastores case is illustrative of these issues within the Indian legal framework. In this case, the claimants pursued a copyright claim through the tort of causing loss by unlawful means<sup>32</sup>, underscoring the complexity of relying on safe harbour provisions in copyright enforcement. The court found that a false copyright infringement allegation had been made but concluded that YouTube was not liable for mistakenly removing lawful material after receiving a complaint. YouTube’s terms allow it to take action based on a third-party claim, provided the content appears to violate copyright, even after only a “cursory examination”<sup>33</sup>. This practice absolves the platform of responsibility for confirming the validity of complaints, leaving it up to the creators to dispute wrongful takedowns or seek compensation. Creators affected by wrongful copyright claims face an arduous process to recover damages, with

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<sup>32</sup> Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but not liable?* (Cambridge University Press 2017) 5.

<sup>33</sup> ‘Criminal Prosecution for Copyright and Trademark Violation’ (Khurana & Khurana, 26 May 2022) <<https://www.khuranaandkhurana.com/2022/05/26/criminal-prosecution-for-copyright-and-trademark-violation/>> accessed 1 November 2024.

limited assurance that YouTube will reinstate their content even if they prove the legitimacy of their material. Thus, while individuals may have recourse against those who make false allegations, there remains a lack of accountability for ISPs like YouTube when it comes to reinstating legitimate content post-dispute.

### **3.5 The Bungie Case: Abuse of the DMCA Takedown System**

The DMCA takedown system has also been exploited to create reputational and financial risks for individuals and companies alike. In June 2022, video game developer Bungie filed a lawsuit illustrating these concerns. Bungie was not the party filing infringement complaints, nor the ISP taking down the content, nor the content owner whose material was removed.<sup>34</sup> Rather, it filed against an individual who made false copyright infringement claims targeting videos with legitimate use of Bungie's copyright-protected material. Interestingly, suspicions emerged that this individual's behaviour stemmed from retaliatory motivations after they were targeted by DMCA takedown demands in 2021<sup>35</sup>.

The Bungie case underscores the broader ramifications of safe harbour provisions: Bungie had to resort to legal action against a third party to protect its reputation from allegations of DMCA abuse. This exemplifies the extent to which safe harbour provisions can enable malicious actors to manipulate copyright enforcement mechanisms, impacting both individual creators and corporations.

#### **3.5.1 Graduated Response Mechanisms and Their Consequences**

Graduated response mechanisms, employed by platforms such as YouTube, represent another layer of complexity within private copyright enforcement. These systems typically operate on an escalating series of sanctions, from warnings to suspensions or even account termination after multiple infringement complaints. YouTube, for example, employs a "three-strike" system in which users who accumulate three copyright strikes risk permanent account deletion. Similar graduated response schemes have been adopted in various jurisdictions, including

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<sup>34</sup> Paul Tassi, 'Bungie Now Suing "Destiny 2" Cheaters, Copyright Trolls, Ban Evaders and Serial Harassers' (Forbes, 19 July 2022) <<https://www.forbes.com/sites/paultassi/2022/07/19/bungie-now-suing-destiny-2-cheaters-copyright-trolls-ban-evaders-and-serial-harassers/>> accessed 5 November 2024.

<sup>35</sup> Ibid.

Ireland, France, South Korea, and New Zealand<sup>36</sup>. Unlike judicial enforcement, where penalties for copyright violations are clearly defined and can be appealed, private enforcement mechanisms often operate without the same procedural safeguards. This raises concerns about proportionality and the rule of law, as ISPs possess considerable discretion over punitive actions. Critics argue that severe actions like account termination, especially for repeat infringement claims, may violate principles of free expression and access to the internet. These restrictions highlight potential conflicts between private copyright enforcement and fundamental rights, including freedom of speech and legitimate use of copyright-protected material.

### 3.6 ISP Power and Potential for Abuse

Large ISPs, particularly platforms like YouTube, hold considerable power over content moderation and copyright enforcement. There are concerns that some ISPs may exploit this power, such as selectively enforcing copyright claims or retaliating against users who attempt to take legal action against them. A recent lawsuit alleged that YouTube might implement its copyright system in a biased manner, favouring larger copyright owners over individual or smaller creators, with the court thus far refusing to dismiss the case. Such selective enforcement could disadvantage smaller creators and independent copyright holders, who lack the resources or influence to secure fair treatment within these systems.

Also, YouTube's Content ID system, which aids uploaders in identifying copyright infringements, is only available to channels meeting specific criteria, typically those with substantial followings or established histories on the platform. Critics argue that this tiered access restricts smaller creators from using the same tools to protect their content, contributing to an uneven playing field. Reports also suggest that obtaining human review of content flagged by automated systems is difficult without direct contacts at YouTube, indicating a lack of transparency and accessibility in the platform's review process.

The rapid rise of generative AI has sparked significant legal and practical concerns, particularly around copyright infringement and the balance between fostering innovation and protecting creators' rights. This discussion explores the challenges these technologies pose, as well as the implications of existing legal frameworks in addressing these issues.

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<sup>36</sup> Rebecca Giblin, 'Evaluating Graduated Response' (8 September 2013) SSRN [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2322516](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516) accessed 2 November 2024.

## 4. COPYRIGHT INFRINGEMENT RISKS

Generative AI systems, such as those used to create art, music, text, and other forms of creative output, are often trained on vast datasets, which may include copyrighted works. When these systems generate new content, it can sometimes closely resemble or even replicate portions of the original copyrighted material, raising questions about copyright infringement. This creates two primary concerns:

Many generative AI models are trained on extensive datasets that may include copyrighted works. If copyrighted content is used without proper authorization, the rights holders may argue that this constitutes a breach of their copyright. This raises complex questions around “fair use” or “fair dealing” exceptions, which vary significantly across jurisdictions. While some argue that using copyrighted material in training data can fall under fair use, this claim is contentious and remains largely untested in courts.

Generative AI can produce outputs that are similar to or derivative of the copyrighted works on which they were trained, raising the risk of inadvertent copyright infringement. For example, a generative music model might create a melody that closely mirrors a copyrighted song. The difficulty lies in determining the threshold at which generated content ceases to be transformative or original and instead becomes a copyright violation. Courts may need to develop new standards or guidelines for assessing these cases, especially in instances where AI-generated content borrows stylistic or structural elements from its training data.

The legal ambiguity surrounding these issues has led some copyright holders to call for clearer regulations or licensing requirements that address the use of copyrighted works in training AI models. Without such frameworks, generative AI developers face increased risk of litigation, potentially hindering innovation due to legal uncertainties and the cost of compliance with diverse copyright laws.

### 4.1 Balancing Innovation and Creators' Rights

Significant challenge posed by generative AI is balancing the encouragement of technological innovation with the need to protect creators' rights. This dilemma is multifaceted:

1. *Encouraging Innovation and Technological Advancement:* Generative AI has the potential to drive substantial innovation across various industries, from creative arts to healthcare and beyond. By automating content generation, these tools enable creators and companies to produce new works more efficiently and at a larger scale. In some

fields, generative AI can open doors to creative expressions and opportunities that were previously unattainable. Overregulation or excessively stringent copyright restrictions may stifle this potential, slowing progress and discouraging investment in AI research and development.

2. *Protecting the Rights and Livelihoods of Human Creators:* Conversely, many human creators argue that generative AI unfairly competes with their work, potentially devaluing human-created content by flooding the market with AI-generated material. This can diminish opportunities for traditional artists, musicians, and writers. Copyright is intended to safeguard creators' rights to their intellectual property, ensuring that they are fairly compensated for their work. Therefore, if AI-generated content continues to infringe on these rights, creators may feel financially disadvantaged or deprived of recognition for their work. There is also a concern that the widespread adoption of generative AI could erode the perceived value of human creativity, reducing the demand for and appreciation of human-produced art.

The balance between these opposing goals requires a careful recalibration of copyright law to account for the unique challenges posed by AI. Possible solutions include the development of licensing regimes tailored to AI training datasets, which would allow creators to retain control over their work's use in AI models. Another approach could involve creating new categories of copyright that recognize and reward AI-assisted or AI-generated works while differentiating them from purely human-made creations. Such approaches could enable fair compensation for creators without unduly limiting the growth of generative AI technologies.

## **5. MOVING FORWARD: LEGAL AND REGULATORY IMPLICATIONS**

Addressing these legal and practical concerns calls for both legislative and judicial responses. The rapidly evolving nature of AI technology suggests that new, flexible regulatory frameworks may be necessary. Potential legal solutions might include:

1. *Data Licensing for AI Training:* Governments and industry stakeholders could establish standardized licensing schemes that allow copyrighted content to be used in AI training data in exchange for a fee. Such a system would ensure that rights holders are compensated for their contributions while allowing AI developers to access the data they need to improve model performance.

2. **New Copyright Guidelines for AI-Generated Content:** Courts may need to consider specific guidelines for evaluating AI-generated works to determine whether they infringe on existing copyrights. These guidelines could address the degree of similarity between AI-generated content and its source material, as well as factors such as the purpose and transformative nature of the AI's use of copyrighted data.
3. **Transparency and Accountability in AI Development:** Increased transparency in AI model training processes could help clarify how copyrighted works are being used and potentially infringing uses could be identified more readily. For instance, developers might be required to disclose training datasets or ensure that their models do not reproduce copyrighted material verbatim.

While these technologies hold great potential for innovation, there is a pressing need for clear legal frameworks that protect the rights of content creators without stifling technological advancement. Achieving this balance will require careful consideration of copyright law's purpose and principles, as well as collaboration between lawmakers, industry stakeholders, and the public to craft forward-thinking solutions that reflect the realities of the digital age.

### **5.1 Policy Implications: Legislative Reforms and Safe Harbour Provisions**

The rapid development of generative AI has exposed the limitations of existing copyright frameworks, prompting calls for legislative reforms to better balance the rights of creators with the need for innovation. Key policy considerations include the adoption of mandatory licensing schemes and royalty systems for AI-generated content, as well as an evaluation of safe harbour provisions in India and globally.

One of the most pressing issues in generative AI is the potential for copyright infringement when AI models are trained on copyrighted works. To address the issue in generative AI is the potential for copyright infringement when AI models are trained on copyrighted works., policymakers have proposed a range of solutions, including mandatory licensing schemes and royalty systems.

1. **Mandatory Licensing:** Under a mandatory licensing regime, AI developers would be required to obtain licenses to use copyrighted materials in training datasets. This system could standardize access to copyrighted works, ensuring that rights holders are fairly compensated while providing AI developers with the data they need. This approach has seen support in the EU, where discussions around mandatory licensing for AI training

data have gained traction as part of broader efforts to regulate AI under the EU's Artificial Intelligence Act.

2. **Royalty Systems:** A royalty system would impose fees on AI-generated content that draws heavily from copyrighted materials, allowing original creators to receive a portion of the revenue generated by such content. This could be implemented as a usage-based fee, which scales with the commercial success of the AI-generated work. This model is akin to existing royalty systems in the music industry, where artists receive royalties for the use of their works in digital streaming platforms.

These proposed reforms would help protect the economic interests of creators while offering a predictable framework for AI developers. However, challenges remain in determining how licensing fees or royalties should be calculated, especially for models trained on vast datasets comprising both copyrighted and public domain content. Policymakers would also need to ensure that licensing requirements do not impose prohibitive costs, especially on smaller AI developers or startups, which could stifle innovation and limit market competition.

## 5.2 Evaluating Safe Harbour Provisions: India and Global Comparisons

Safe harbour provisions, which limit liability for intermediaries such as internet service providers (ISPs) and content-hosting platforms, are crucial in copyright enforcement. While originally designed to protect platforms from liability for user-generated content, these provisions face new challenges in the age of AI-generated content<sup>37</sup>. In this context, it is important to assess the adequacy of India's safe harbour provisions compared to those of other jurisdictions.

In India, Section 79 of the Information Technology Act provides safe harbour protections to intermediaries, provided they follow certain due diligence requirements. However, the Act does not specifically address AI-generated content, leaving room for interpretation and potential uncertainty in cases involving copyright infringement by AI models. India's safe harbour framework is narrower compared to the United States' Digital Millennium Copyright Act (DMCA)<sup>38</sup> in that it lacks explicit protections for fair use in automated copyright

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<sup>37</sup> 'Analysis and Initial Legal Responses to Generative AI Concerns' (25 April 2023) *Law, Innovation and Technology* <<https://www.tandfonline.com/doi/full/10.1080/17579961.2024.2313800>> accessed 8 November 2024.

<sup>38</sup> U.S. Copyright Office, *The Digital Millennium Copyright Act* <https://www.copyright.gov/dmca/> accessed 1 November 2024.

enforcement, a key consideration given the potential for over blocking or misuse of copyright claims.

In the United States, the DMCA's safe harbour provisions provide a clearer framework for copyright enforcement while allowing users to appeal wrongful takedowns under a "notice and counter-notice" system<sup>39</sup>. This process provides an additional layer of protection for legitimate uses such as parody, commentary, or fair use. The European Union's recent Digital Services Act (DSA)<sup>40</sup> takes a step further by establishing responsibilities for platforms to counteract automated over-blocking and provide more transparency in content removal processes.

India could benefit from adopting some of these additional safeguards. Incorporating counter-notice mechanisms and enhancing transparency requirements would address concerns around automated over-blocking and misuse of copyright complaints in the AI context. Ensuring that legitimate, non-infringing uses of copyrighted works are protected would also help balance creators' rights with users' rights to access information and express themselves.

## 6. RECOMMENDATIONS

As generative AI and related technologies continue to evolve, lawmakers face the challenge of crafting laws that accommodate technological advancements without stifling innovation or curtailing fundamental freedoms. Key considerations for future legislative approaches include: One of the primary concerns in regulating emerging technologies like AI is the pace of technological change. Laws should be designed with sufficient flexibility to accommodate unforeseen developments. This could involve establishing regulatory sandboxes, where AI developers can test new technologies under temporary legal frameworks, allowing policymakers to gather insights and refine regulations based on real-world usage.

Generative AI raises ethical concerns related to freedom of expression and access to information. Overly restrictive copyright laws may inadvertently limit the rights of users to create, share, and access knowledge, particularly if these laws do not adequately distinguish between infringing and non-infringing uses. Laws should prioritize proportionality, ensuring

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<sup>39</sup> 'Section 512 of Title 17: Resources on Online Service Provider Safe Harbours' (U.S. Copyright Office) <https://www.copyright.gov/512/> accessed 8 November 2024.

<sup>40</sup> European Commission, 'The EU's Digital Services Act' [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en) accessed 8 November 2024.

that enforcement measures are balanced and do not disproportionately impact legitimate, socially valuable uses of copyrighted works.

As part of their regulatory approach, lawmakers can promote ethical AI development practices, such as transparency in training data sources and the inclusion of bias-mitigation measures. Incentives, such as tax credits or grants, could be offered to companies that adopt best practices in responsible AI use, promoting a culture of accountability while encouraging innovation.

Given the global nature of AI and digital content, harmonizing copyright laws across jurisdictions could help reduce legal complexities for AI developers and foster a more predictable legal environment. International organizations, such as the World Intellectual Property Organization (WIPO), can play a leading role in establishing global standards and best practices for the regulation of AI-generated content<sup>41</sup>.

## 7. CONCLUSION

Generative AI challenges traditional copyright frameworks, highlighting the need for policy adaptations that recognize the distinct nature of AI-driven creativity. By implementing flexible licensing models, enhancing safe harbour provisions, and ensuring that copyright enforcement is both fair and balanced, lawmakers can foster an environment where technological innovation and creators' rights coexist. As technology advances, future legal frameworks will need to evolve to address the ethical and economic implications of AI, ensuring that laws safeguard both innovation and individual rights.

This paper has explored the complex intersection of generative AI, copyright law, and intermediary liability, highlighting the unique challenges posed by AI-generated content to traditional copyright enforcement. Key findings demonstrate that while generative AI has the potential to drive innovation across various sectors, it also brings about significant copyright risks, such as unauthorized use of copyrighted materials and over blocking due to automated enforcement systems. Comparative analysis of India's safe harbour provisions and global standards underscores the need for more robust protections against wrongful claims, while also ensuring fair opportunities for creators to safeguard their intellectual property.

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<sup>41</sup> World Intellectual Property Organization, 'WIPO Overview' (WIPO) [https://www.wipo.int/edocs/pubdocs/en/general/1007/wipo\\_pub\\_1007.pdf](https://www.wipo.int/edocs/pubdocs/en/general/1007/wipo_pub_1007.pdf) accessed 1 November 2024.

The discussion has emphasized the pressing need for a balanced legal framework that fosters technological progress without compromising creators' rights. A tailored approach that incorporates proposals for mandatory licensing and royalty systems could help strike this balance, providing creators with compensation while allowing generative AI to continue evolving. Moreover, as private enforcement mechanisms increasingly handle copyright claims, it is essential to implement judicial oversight and safeguards to prevent abuses, like over blocking, and maintain users' rights to free expression.

Ultimately, a balanced legal approach will need to prioritize adaptability, ensuring that copyright law can evolve alongside AI advancements. This approach will serve to support both innovation in AI technologies and a fair, transparent system for copyright enforcement, fostering an environment where creative and technological growth can thrive in harmony.

