

**IT'S ABOUT TIME WE ADDRESSED TIKTOK'S PROBLEMATIC IP
STRATEGY**

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ABSTRACT

Social media applications have changed the way the people of today consume digital content. Whether it is a 15 second viral video or a feature length film, the evolution of the internet has created avenues for talent to be showcased all over the world. An application that is at the forefront of this evolution is Tiktok. Tiktokhas gained worldwide popularity over the years. With millions of videos created every day on the app, creative content plays a vital role. A massive catalogue of music titles is available for users to incorporate in their videos. In this article, we will discuss in detail the Intellectual Property strategy used by Tiktok. We will aim to answer how creators on Tiktok are able to incorporate copyrighted music in their videos, whether Tiktok's current Intellectual Property model is sufficient. We will further look at how such a model affects the artists whose creative works are utilized. This topic will be discussed with the help of legal provisions and case laws pertaining to both India and abroad. Finally, we will also discuss ways to improve the Intellectual Property strategy that is beneficial for all concerned parties.

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On 29th June 2020, Amidst rising tension between India and China at the Line of Actual Control, The Government of India decided to ban 59 mobile apps of Chinese origin. A prominent name among those, is Tiktok¹. The recent Coronavirus outbreak has made us all restructure our lifestyle considerably. With more time spent at home than ever before, people have directed their already short attention span to the app that has gained a lot of interest in recent times. Whether it's creating choreographed dances to viral hits like 'Old Town Road' and 'Renegade', making 'dank memes' or even the umpteen social media challenges out there; Tiktok as an app is slowly turning into a household name. For those uninitiated, TikTok is a video sharing application that lets users create and share short-form videos. It is owned by the Chinese company ByteDance and came to prominence after merging with its predecessor- Musical.ly. The app allows its users to record videos and further edit them with filters, music, animation and other special effects. Like all other social applications, users can share, follow, like and comment on everything that fellow creators make.

While the Indian government cited security and data privacy concerns as the primary reasons for the recent ban, India isn't the first country to allege that the app poses a threat to sovereignty and integrity of the country. In the U.S, Tiktok has faced criticism from lawmakers over allegations of censorship, improper data sharing and cybersecurity alerts. US Armed Forces personnel have been forbidden from using the app owing to these concerns.² Elsewhere, Israeli cybersecurity company, CheckPoint, investigated the app and concluded that it has major vulnerabilities as well as overall security issues³. While the technological issues of the app have been highlighted and discussed extensively in recent times, a component that is often overlooked in the process is the creative side of Tiktok, especially its Intellectual Property. An interesting observation to be noted whilst rummaging

¹*TikTok Banned: Government Bans 59 Chinese Apps Including Shareit, UC Browser, and WeChat available at <https://gadgets.ndtv.com/apps/news/government-blocks-59-chinese-apps-meity-tiktok-shareit-mi-community-help-likee-2254160> (last visited at 30.06.20)*

²*TikTok: Beneath Its Fun Exterior Lies A Sinister Purpose, <https://www.forbes.com/sites/enriquedans/2020/06/28/tiktok-beneath-its-fun-exterior-lies-a-sinisterpurpose/#5ac552b83b79> (last visited on 30.06.20)*

³*Id.*

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through the app is that with around 800 million active users⁴ on a monthly basis as on June 2020, music plays an integral part in the app's appeal. Unlike platforms such as Instagram and YouTube that takedown videos containing certain songs on grounds of copyright infringement, a massive catalogue of song titles are freely available on Tiktok for users to incorporate in their videos. That begs the question, how does Tiktok get to share music that is already copyrighted?

The extensive catalogue of titles that Tiktok provides, offers an immense appeal to the users of the app. Tiktok has amassed a majority of these songs by partnering with some of the biggest names in the music industry. Record labels such as Sony, Warner and Universal have all struck deals with the social media app in the past, subsequently making the titles under these labels free to use for Tiktok's users without any legal ramifications. This is an interesting approach by which Tiktok obtains copyrighted titles for its users. Such a practice further helps in enhancing Tiktok's legitimacy, with brands preferring to work with companies that take their copyright policy seriously. In Tiktok's first transparency report⁵, it was revealed that over 3000 notices were issued by copyright holders between January and June 2019. These notices requested infringing content on Tiktok to be removed and further led to 85% of the videos in question being taken down from the platform. Tiktok has created its own Intellectual Property Policy which prohibits the posting, sharing or sending any content that violates or infringes someone else's copyrights, trademarks or other intellectual property rights. In another innovative step taken to expand the licensed library of tracks on the app, Byte Dance, Tiktok's parent company are also developing its own music streaming service, Resso. By increasing its footprint in India, Byte Dance would be able to further establish themselves in the lucrative Indian subcontinent market. Though the Indian market

⁴TikTok Statistics – Updated June 2020, <https://wallaroomedia.com/blog/social-media/tiktok-statistics/> (last visited on 30.06.20)

⁵ TikTok says it received 3,345 copyright takedown notices in 2019, <https://musically.com/2020/01/02/tiktok-says-it-received-3345-copyright-takedown-notices-in-2019/> (last visited on 30.06.20)

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played a vital role in the platform's initial plans, it remains to be seen how the recently imposed ban will affect the development of the streaming service.

Granted, these innovative steps helped amass a plethora of titles, but it hasn't ensured fool-proof security in terms of Intellectual Property. Several copyright experts speculate that a large fraction of music that is used in the app is still unlicensed. Moreover, as copyrights in the music business are commonly separated, there continues to be an added logistical obstacle. The faction that pertains to recorded music, which represent the actual tracks and the publishing of these tracks, and the faction that pertains to the song writing are considered as two different entities. Thus, a refined approach to detect such videos and additional legal action should be taken to compact this issue.

When discussing the legality of the music that is used in Tiktok, it is also necessary to approach this theme from the viewpoint of the artist. For up and coming musicians, apps like Tiktok are the perfect platform to showcase their work. Tiktok is well aware of this and in the process of developing their extensive catalogue of songs, they often undermine and strong-arm these independent creators. According to Jeff Price, the CEO of Audiam, a company that specializes in licensing, collecting, and distributing royalties from digital platforms, there's a fundamental disconnect in the way the music industry and tech industry conduct their business. He further goes on to say the following;

“The music industry and artists—songwriters and publishers and composers—all traditionally make money off of the sale or license of pre-recorded music. Technology companies make their money from valuations on Wall Street or venture capital or private equity, which are based on market share, and that's based on their number of users. They don't actually have to make money off of music to make money”⁶

Although standard copyright protection is available for artists in such scenarios; mainly *the right to public performance* and *the right to mechanical reproduction*, regulations such as the Digital Millennium Copyright Act (DMCA) in the US often end up being counterproductive and detrimental to artists. One such problematic provision, in particular, is *Section 512 of the*

⁶ *How TikTok Gets Rich While Paying Artists Pennies*, <https://pitchfork.com/features/article/the-great-music-meme-scam-how-tiktok-gets-rich-while-paying-artists-pennies/> (last visited 30.06.20)

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*DMCA*⁷ which protects tech companies from copyright claims so long as they give fair warning and aren't necessarily aware of individual violations as such. The company just has to take the files down once someone tells them to. But for independent artists who are not represented by big record labels and IP law firms, this may prove to be too big of a task. As a result, these independent artists are often left with no choice but to sign licensing deals which in most cases are not even beneficial to these creators. The general rhetoric of these companies during such negotiations are simple; artists are given the choice of either signing the contract and getting paid a token sum or rejecting the offer but risk having to deal with the troubles of DMCA takedowns without any monetary benefits. This is how several social media and tech companies have avoided thousands of lawsuits from such creators.

In the Indian context, *The Copyright Act, 1957* normally caters to concerns regarding Tiktok's Intellectual Property. The songs that are used in Tiktok trigger both moral rights, which is owned by the songwriter or composer and economic rights, which in most cases is owned by the record label. *Section 38 of the Copyright Act*⁸, gives exclusive right and authority to the performer in any act in context to the performance to receive a royalty.

It is interesting to note that this isn't the first time India has banned Tiktok. The app came into the Indian legal spotlight in 2019 when the Madras High Court banned the app in response to a Public Interest Litigation filled (PIL) citing safety concerns for women and children.⁹This ban, however, was lifted shortly after based on the grievance mechanism of the law and self-regulatory mechanism of Tiktok. Representatives of the app claimed that it was merely a platform for sharing content and was further categorised under the term 'intermediary' according to the Information Technology Act, 2000. On careful comparison of the definition of an intermediary according to the user interface of Tiktok and that under *Section 2(w) of the Information Technology Act, 2000*¹⁰, we can see a wide gap in interpretation. An intermediary as stated under *Section 2(w) of the Information Technology*

⁷*Section 512 of the DMCA*, <https://www.copyright.gov/title17/92chap5.html#512>(last visited at 30.06.20)

⁸*Section 38 of the Copyright Act*,<https://indiankanoon.org/doc/1667421/>(last visited at 30.06.20)

⁹"Ban Tiktok": Madras HC to Centre, <https://www.thehindubusinessline.com/info-tech/madras-hc-asks-centre-to-ban-video-app-tiktok/article26730326.ece> (last visited at 30.06.20).

¹⁰*Section 2(w) of the Information Technology Act, 2000*<https://indiankanoon.org/doc/33134261/> (last visited 30.06.20)

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*Act, 2000*¹¹; is only supposed to be a platform wherein users exhibit their content and act as facilitators having no role in providing any other resource. The landmark case of *Christian Louboutin Sas v Nakul Bajaj*¹² further established the same. In the above-mentioned case, the defendant was operating a website in the name of *www.darvey.com* and was offering for sale of different products including luxury shoes in the brand name of “Christian Louboutin”. In the argument presented by the plaintiff, Christian Louboutin SAS, they claimed that the defendant’s website gives an impression to their visitors that it is affiliated, sponsored, or in some manner been approved by the plaintiff for the selling of plaintiff’s luxury products through their website. Therefore, it was claimed by the plaintiff that there is an infringement of the trademark rights of the plaintiff. It was observed that it is not only a link formed between the customer and the seller but also provided other services. Therefore, it was established that in order to constitute as an intermediary, you need to be a passive platform, similar to the likes of Amazon, Facebook, etc. When the platform starts providing a value-added service and plays an active role in providing such services as is the case with Tiktok, it is no longer an intermediary, and therefore, is not liable to be covered by the protections given under Section 2 (w) of the Information and Technology Act, 2000.

The current Intellectual Property strategy used by Tiktok might work in the short run but to avoid further infringement of Intellectual Property Rights, it is imperative that the company looks beyond merely the economic rights they obtain from record labels. The moral rights of the songwriters and artists should also be given equal importance by striking respectable deals with relevant authorities. Transparency from the company’s side is integral if they hope to expand further. With this said expansion, it is also important that they answer to the local laws of the country that they operate in. With the current uncertainty that looms over Tiktok, only time will tell when or if Indian users will have access to the global video-sharing app again. Regardless of the outcome, Tiktok must further their Intellectual Property strategy in order to find a solution to these pressing issues.

¹¹ *Id.*

¹²Christian Louboutin Sas v Nakul Bajaj, *CS(COMM) 344/2018*, <https://indiankanoon.org/doc/99622088/> (last visited (30.06.20)

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