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The Intersection of AI Creativity and Copyright Law: Evaluating Protections for Performers on Video Sharing Platform

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ABSTRACT

A performer is a person who creates something by his own hard work and performs it for an audience. Therefore, it's critical to preserve their creations. Artists and performances are protected by the copyright statute. Numerous artists have been embraced by AI's creative potential, which has also given them the means to produce cultural works. Additionally, AI technology opens up new avenues for improving human performance. The swift development of artificial intelligence (AI) technology poses important queries about who is responsible for copying artist performances on video-sharing websites. Even while the Copyright Act in India offers performers a high level of protection, the current legal system still has flaws when it comes to large AI imitations on YouTube and other video-sharing websites. In order to determine whether current legal frameworks sufficiently handle the complexity of AI-based performance imitations, this study explores the concepts of culpability of AI and vicarious liability as they relate to AI developers and operators .

Keywords: *Infringement, Performer's rights, Video Sharing Platforms, Substantial Imitations, Artificial Intelligence Systems.*

I. INTRODUCTION

When³ the copyright legislation came into effect during British control, the performer's rights were not acknowledged. Performer's rights were not addressed in the 1957 Copyright Act, which was passed after independence. In *Fortune Films v. Dev Anand* (1979), the Bombay High Court ruled that performers' rights are not safeguarded by copyright since the Copyright Act fails to acknowledge them. After this ruling, it was believed that the copyright rules ought to incorporate the performer's right. In order to recognise the rights of performers, Sections 38, 39, and 39A were inserted when the copyright amendment was passed in 1994. The Indian Copyright Act recognises more performers than what TRIPS and the Rome Convention

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³ Artificial Creativity? A Case against Copyright Protection for AI-Generated Works, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ujlt25§ion=5

demand. Actors, dancers, musicians, singers, acrobats, conjurers, snake charmers, jugglers, lecturers, and anybody else who puts on a performance are all considered performers, as specified in Section 2(qq). On the other hand, athletes cannot be regarded as ⁴ performers as they must play by the rules, which limits their inventiveness, and since sports are competitive with unexpected results. Because of this, athletes are not considered entertainers.

In *Neha Bhasin v. Anand Raj Anand*, the court addressed the issue of what qualifies as a live performance. It held that, in the first instance, both live performances—whether recorded in a studio or in front of an audience—are considered to be such, and that the performer's rights are violated if they are used without their consent.

One of the earliest cases where the rights of the actor were questioned was *Fortune Films International v. Dev Anand*, when the court denied the performer's right in the cinematograph film. In this instance, the court determined that an actor lacked the authority to control how their performance was used in the film. The producer was free to use the money anyway they saw fit, and the actors received payment for their labor. However, following the 1994 amendment to the Copyright Act, performers' rights were acknowledged.

With the advent of AI technologies in the 21st Century, some visual artists have embraced the creative potential of AI technology, and in other places, AI has been heralded as democratizing creativity by giving everyone the means to produce cultural creations. Additionally, AI technology opens up new avenues for improving human performance, such as in the production of video games, which in turn opens up new career paths for performers. Human writers and performers are losing their jobs as AI increasingly replaces them. An excellent illustration of this can be found in the audio-visual performance industry on social media sites such as YouTube, Spotify, and others, where AI-generated content (such as audio books, sharing videos, or voice-overs at minimal cost) is used in situations where a professional actor would have been used in the past.

Although AI can take the place of human writers and entertainers, it also regularly uses their earlier creations. AI gains knowledge by identifying trends in an existing corpus of information, or "data-set." Large amounts of copyright-protected visual images that have been scraped from the internet without permission may be used in the data-set for AI-generated visual images. The data-set for AI-generated voices could be a compilation of human voice recordings that were taken by actors for an unrelated reason (such as a casting or audition) and added to the data-set without their permission. Before artificial intelligence (AI), there were fewer and more

⁴ Id.

restricted situations in which a performance might be replicated without directly stealing from a recording such as in the case of *Sim vs Heinz*. On the other hand, current AI technology paves the way for the possibility of using technology to replicate a performance or parts of a performance without really copying from the recording. In her article "Artificial Intelligence and Performers' Rights," author Mathilde Pavis calls these new methods of performance copying using "digital sound and look-alike" "performance synthesization."

(A) Literature Review:

In the article, "Authorship in the Age of Algorithms: Adapting Copyright Law for AI-Generated Content", it was found that the current copyright laws and Fair Use Doctrine are insufficient to address the challenges posed by AI-generated content, particularly regarding the unauthorized use of artists' works by AI companies. It highlights significant market effects and **financial harm to human creators due to AI's ability to replicate artistic styles without proper licensing**. The article calls for a reevaluation of copyright regulations to better protect intellectual property rights in the age of AI.

This article, "AI AND PERFORMERS' RIGHTS IN HISTORICAL PERSPECTIVE", deals with the research problem revolving around **the inadequate legal protection for performers' rights in the context of emerging AI technology**, which leaves them less equipped to address challenges posed by AI compared to authors rights. It highlights the need for legislative reform to **enhance performers' rights and ensure they are not overshadowed by the broader scope of protection afforded to authors**. The article calls for a critical examination of the historical and current legal frameworks governing performers' rights in light of technological advancements.⁵

In this article, "Filling the Enforcement Gap: Alternative Dispute Resolution as an Approach to Solving "Copyright" Disputes for AI-Generated Content", it was found that the current legal framework inadequately protects AI-generated content under copyright law, as the U.S. Copyright Office does not recognize such works without significant human contribution. It suggests that alternative dispute resolution (ADR) can effectively fill this enforcement gap by providing a means for resolving disputes over ownership and rights related to AI-generated⁶ content. Ultimately, the article advocates for the integration of ADR as a practical approach while the legal landscape adapts to the challenges posed by AI technologies.

⁵ Id.

⁶ Liability of video sharing platforms – ECJ's decision on the YouTube case and article 17 of the DSM Directive, <https://www.reedsmith.com/en/perspectives/2021/06/liability-of-video-sharing-platforms--ecjs-decision-on-the-youtube-case>

This article on, "YOUTUBE AS THE GREAT COMMUNICATOR AND COPYRIGHT INFRINGER", examines YouTube's legal challenges regarding copyright infringement, particularly the lawsuit by Viacom. YouTube's user-generated content often violates copyright laws. Viacom claims YouTube enables widespread infringement and seeks over \$1 billion in damages. YouTube defends itself under the DMCA's safe harbor provisions, asserting it removes infringing content upon request. It highlights the ongoing legal challenges surrounding user-generated content and the evolving nature of copyright law in the digital age. The article suggests that courts should carefully consider the implications of expanding copyright doctrines, emphasizing the constitutional goal of promoting creativity and innovation⁷.

This article, "SOCIAL MEDIA AND ITS EFFECTS ON PERSONALITY RIGHTS: THE CASE FOR A DEFINED LEGAL FRAMEWORK ON PERSONALITY RIGHTS IN KENYA", examines that social media companies can also be the infringers of their users' personality rights. The study also discussed emerging trends and found that use of social media by corporate entities in ways such as pinning and unauthorised endorsement via hashtag can amount to violation of personality rights. Digital technologies pose unique challenges to personality rights and as well as platforms on which infringement can take place⁸.

The article, "PROTECTION OF RIGHTS OF PERFORMERS IN INDIA", analyzes the protection of performers' rights under the Copyright Act in India, highlighting the need for stronger legal frameworks compared to those in the U.S. and U.K⁹. It discusses key legal cases that emphasize the importance of artists' consent and fair compensation for their¹⁰ performances.

(B) Research Problem:

This research paper specifically focuses on the infringement of performers rights by AI through video sharing platforms. The paper also analyses the liability of AI for substantial imitation of copyrighted performances and challenges involved in making the AI liable.

⁷ Delhi High Court's Landmark Order: Protecting Anil Kapoor's Persona in the Age of AI – An Indian Legal Perspective, <https://www.theipress.com/2023/10/09/delhi-high-courts-landmark-order-protecting-anil-kapoors-persona-in-the-age-of-ai-an-indian-legal-perspective/>

⁸ Delhi High Court addresses the idea-expression distinction in copyright dispute, <https://www.iam-media.com/article/delhi-high-court-addresses-the-idea-expression-distinction-in-copyright-dispute>

⁹ SpicyIP Tidbit: Union Minister of State for Commerce and Industry clarifies Current IPR Regime Sufficient for AI Works Protection, <https://spicyip.com/2024/02/spicyip-tidbit-union-minister-of-state-for-commerce-and-industry-clarifies-current-ipr-regime-sufficient-for-ai-works-protection.html>

¹⁰ Supra 6

(C) Research Objective:

1. To explore how existing performer rights under copyright laws apply to AI-generated content and identify gaps that need addressing.
2. To assess whether current legal frameworks adequately protect performers from unauthorized imitation and the potential need for specific imitation rights.
3. To advocate for fair compensation and control for performers over their likeness and performances in the face of AI advancements.¹¹

(D) Research Question:

1. Whether or not current legal definitions of copyright and performer rights adequately apply to AI-generated content that resembles existing performances, particularly on video-sharing platforms like youtube ?
2. Whether or not specific criteria should be established to differentiate between imitation and copying in the context of AI-generated works shared on video platforms like youtube?
3. Whether or not existing legal precedents will significantly influence future liability decisions related to AI-generated imitative works, especially in the context of content uploaded to video-sharing platforms youtube?

(E) Research Methodology:

In this study we have used a qualitative method to justify our research question. we gathered data from various articles and secondary sources to provide a possible answer for the challenges that are pointed.

(F) Scope & Limitations:**a. Scope**

This study focuses on protecting performers' rights as outlined in Sections 38, 39, and 39A of the Copyright Act. It examines how these provisions safeguard performers against unauthorized imitations and copying, providing a legal framework for their protection. The concept of substantial imitation under the Copyright Act is analyzed to understand its implications for both human and AI-generated imitations. Specifically, the distinction between human imitation and AI imitation is explored, particularly in cases where AI replicates the

¹¹ Enrico Bonadio & Luke McDonagh, Artificial intelligence as producer and consumer of copyright works: evaluating the consequences of algorithmic creativity, https://eprints.lse.ac.uk/105272/1/Bonadio_McDonagh_IPQ_2020.pdf

performances of artists and publishes them on video-sharing platforms specifically in youtube. Various legal cases are discussed to substantiate these points, with particular emphasis on the Anil Kapoor case, where an injunction was granted, highlighting the legal challenges and precedents related to performers' rights in the context of digital content.¹²

b. Limitations¹³

This study falls short in addressing several significant limitations of AI in social media platforms such as Instagram, Facebook, and various video-sharing sites beyond YouTube. Additionally, it does not undertake a comparative analysis of the legislations governing AI across different countries, including key examples from the United States and the United Kingdom. This gap suggests a need for further research that encompasses a more comprehensive examination of both the limitations of AI across a wider array of platforms and the comparative legal landscapes that influence its development and use.

II. UNDERSTANDING PERFORMERS' RIGHTS

Performers' rights are the legal safeguards afforded to artists, musicians, and dancers, among others, who engage in artistic performance. In order to guarantee that individuals are acknowledged and paid for their labour, these rights usually include the ability to restrict how their performances are used, copied, or shared. Protecting the integrity of their performances and avoiding unapproved exploitation are the goals of performers' rights.

AI can violate performers' rights in a number of ways. AI tools, for example, have the ability to mimic a performer's voice or appearance without the performer's permission, which could diminish the value of their original work. AI systems may mimic distinct vocal inflections, gestures, or mannerisms when they analyse and recreate performances. This could result in illegal copies being shared on social media and video-sharing websites, among other platforms. The market for the original performance may be diluted by this unauthorised use, and the artist may not receive credit or payment.

Furthermore, complicated legal issues of ownership and accountability are brought up by the quick development of AI. Determining culpability for infringement gets difficult when an AI system produces a performance that closely resembles an already-existing one because it becomes difficult to distinguish between imitation and original production. This circumstance

¹² Filling the Enforcement Gap: Alternative Dispute Resolution as an Approach to Solving "Copyright" Disputes For AI-Generated Content, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jdisres2024§ion=23

¹³ Vishnu S, Navigating the Grey Area: Copyright Implications of AI Generated Content, <https://or.niscpr.res.in/index.php/JIPR/article/view/1205>

highlights the necessity of modern legal frameworks that can successfully handle how AI affects performers' rights, guaranteeing that artists are suitably safeguarded in the digital era.

III. LIMITATIONS OF AI IN MIMICKING HUMAN NUANCE

The techniques and environments of replication are where AI imitation differs from human imitation. Human imitation is the deliberate copying of another person's characteristics, actions, or performances; this is frequently motivated by emotional intelligence, cultural influences, and personal experiences. This process might involve subtleties that come from a person's emotional resonance and lived experience, such as tone, expression, and subtlety. AI imitation, on the other hand, uses algorithms and data analysis to mimic traits or actions, frequently producing results based on patterns found in huge datasets. Even if AI is capable of producing remarkable imitations, such voice or fashion impersonation, these results fall short in terms of human emotional resonance and contextual awareness. Furthermore, because AI imitations may readily replicate the creations of innumerable creators without the sophisticated comprehension that human imitation naturally possesses, they may give rise to ethical and legal questions about originality and ownership. This distinction highlights the continuous discussion on the importance and consequences of creativity in the era of artificial intelligence.¹⁴

IV. LEGAL CHALLENGES

AI has the potential to violate copyright and performers' rights on video-sharing websites in a number of important ways. First, videos that closely resemble original works can be produced without permission thanks to AI's ability to analyse and imitate voices, performances, and graphics. The market for the original content is weakened by this illegal duplication. Furthermore, without the performers' permission, voice-cloning technologies can create audio mimics of them, which could be abused and misrepresented on websites like YouTube and TikTok. By altering or replacing a performer's likeness, AI-generated deep fake videos make things even more difficult and produce lifelike but illegal representations that can harm reputations and deceive viewers. Furthermore, videos that already exist can be remixed by AI algorithms, which can take significant parts of live performances and reframe them without consent. AI-enabled rapid distribution of copied or modified content hinders original producers' ability to safeguard their work and reduces their capacity to profit from their performances. The market's overabundance of AI-generated knockoffs makes it difficult for original artists to

¹⁴ Artificially Intelligent Copyright: Rethinking Copyright Boundaries, <https://yorkspace.library.yorku.ca/items/6bbf8427-8778-46a1-83de-ac5b0a594c04>

keep their following. Last but not least, the swift advancement of AI technologies raises difficult legal issues about ownership and responsibility, making it more difficult to protect performers' rights on these platforms. All of these elements combine together to show how urgently new legal frameworks are needed to safeguard creators in the rapidly changing digital environment.

V. CASE REPORTED FOR SUBSTANTIATING THE RESEARCH QUESTION

The case of **Fraley v Facebook** is discussed at length, and the author is concerned that some social media platforms fail to notify users of amended terms and conditions. The author discusses use of social media platforms by companies, which may infringe social media users' personality rights through acts such as protected attributes in advertising. The author recommends that companies should have in place procedures to ensure informed consent through agreements which have clear terms of use, which users can easily access and plainly understand as license of their publicity rights. Additionally, such companies need to be prepared to comply with take down notices promptly.

The case of **Alfred Ombudo K'ombudo v Jane W Odewale & another** is one that not only acknowledged the concept of personality rights but also outlined the current legal regime on infringement of personality rights in Kenya. The applicant claimed that his constitutional rights to privacy and religion had been violated through the airing, broadcasting and publication of the applicant's wedding videos and images on social media platforms without prior consent. The applicant had not signed a talent or model release which would have authorised the respondents to commercially exploit the applicant's personality rights. Consequently, the applicant sought an injunction to bar the respondents from airing, broadcasting and publishing the videos and images in question as well as costs of the suit. According to the judge, no amount of damages is sufficient to redeem the exploited image of a person and it is for that reason that an injunction is necessary to mitigate that loss and damage.

European Court of Justice, Bench held that YouTube and other such intermediaries cannot be made liable for copyright infringement unless the intermediary/operator had specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it.

The issue before the Court was regarding several infringements of the intellectual property rights held by Mr Peterson and Elsevier committed by users of the video-sharing platform operated by YouTube and the file-hosting and -sharing platform operated by Cyando, respectively.

PETERSON VS YOUTUBE:

Mr Peterson, a music producer and owner of the Nemo Studios had entered into a worldwide exclusive artist contract with the performer Sarah Brightman covering the use of audio and video recordings of her performances; including a licence agreement, covering the exclusive distribution of the recordings and performances. On 4 November 2008, Sarah Brightman began a tour called the ‘Symphony Tour’ in which she performed the works she had recorded for the album Winter Symphony. Noticing that some private recordings from those concerts could be accessed on the YouTube online platform, Mr Paterson issued cease-and-desist declarations under threat of penalties to the owner of Youtube, Google Germany. Though the access to those videos was blocked initially, some audio recordings from Sarah Brightman’s performances, accompanied by still and moving images once again reappeared on YouTube’s online platform. Consequently, Mr Peterson brought an action against Google and YouTube seeking an injunction, disclosure of information and a declaration that they were liable to pay damages.

ELSEVIER VS CYANDO:

Elsevier, an international specialist publisher, held the exclusive rights to use the works at issue namely Gray’s Anatomy for Students, Atlas of Human Anatomy and Campbell-Walsh Urology. On being aware that Cyando, an operator of ‘Uploaded’ file-hosting and -sharing platform, had uploaded three works in respect of which it (Elsevier) held exclusive rights, Elsevier had send a notice to Cyando. Later on, Elsevier brought an action against Cyando for prohibitory injunction, as the party responsible for the copyright infringements in the alternative, as a participant in those infringements and, in the further as an interferer.

VI. RECOMMENDATION

- First, future research should broaden its scope to include a comprehensive analysis of AI's limitations across various social media platforms, such as Instagram, Facebook, TikTok, and others, to provide a holistic understanding of the challenges faced by users and creators.
- Additionally, conducting a comparative analysis of AI-related legislation in different countries, including the United States and the United Kingdom, will help identify best practices and potential areas for legal reform.

VII. CONCLUSION

The rise of artificial intelligence (AI) and its integration into video-sharing platforms presents

significant challenges for performers' rights¹⁵. This research highlights the alarming potential for AI to infringe upon these rights through the substantial imitation of copyrighted performances, raising crucial questions about the liability of AI systems. While the Indian union cabinet minister asserts that existing copyright legislation is sufficient to address these issues, this position overlooks the complexities of modern technology and the unique challenges posed by AI. To protect performers effectively, a nuanced approach is necessary—one that considers the rapid evolution of AI and its implications for copyright law.

¹⁵ Id.