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Enforcing copyright in defiance of Copyright Law

AVANTIKA TAMTA*

ABSTRACT

The rise of the internet has transformed the way authors publish their work. The monopoly of conventional publishers over the means of publication is no longer sincere ever since technology facilitated direct communication between the authors and their audience. The role of conventional publishers is now supplanted by digital players who acted as publisher-intermediaries in spaces of digital communication. Being enablers of communication of content, they occupy a strategic role in terms of securing copyright for authors vis-à-vis their work hosted over the internet. In order to suit the purpose of effective enforcement of copyright in digital times, the community allows these players certain leeway to tweak the manner of dissuading infringement of original works. The freedom to slightly tweak the model of copyright protection has not been very well respected. Taking the instance of YouTube and its ContentID mechanism, we try and understand the various ways in which privately determined schemes of copyright enforcement interfere with the ideals of conventional copyright law.

I. INTRODUCTION

The strategically synthesized position of publishers, as the enablers of copyright, had for long granted them the leverage to demand patronage of the moneyed aristocracy. In exchange for financial gain, publishers promised to curate an atmosphere of information which would favour the nobility. This *quid pro quo*, however, cost society their freedom to express themselves. The natural flow of free speech was consistently manipulated through the selective publication of content by publishers.

The coming of technology served as a respite. It initiated the much-needed revolution to call for the termination of the publishers' monopoly. The original gatekeepers of what information was to be allowed in society, were now intently being alienated from the duty of gatekeeping altogether. With the task of publication being reduced to the simple click of a button, the non-natural relevance of the publisher was turning to dust. Consequently, when digital technology boomed, content creators smiled even as publishers cried rivers of melancholia. Everyone was a publisher now.

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This happiness was, however, short-lived. Technology proved to be as much a curse as it was a boon. With the phasing out of the conventional publisher, we saw the emergence of a new class of digital publishers. This new publisher, while sounding the bugle of free speech and while ‘renewing’ the incentive to create, began to subtly institutionalize those very practices which digital communication was ushered in to destroy in the first place.

Dressed in the righteous façade of being harbingers of substantive free speech, these digital publishers sought enhanced protection of the law to forestall the possibility of over-enforcement of copyright. It was reasoned that if the digital publisher is held guilty of hosting infringing material, he/she would be compelled to undertake a pre-publication assessment of the content, which would run against the idea of free publication of works. This would, essentially, reinstate the unhealthy relevance of past publishers and undo all the positive change catalysed through the evolution of technology.

Acknowledging the above situation as a real threat, society responded with the idea of creating safe havens for these digital publisher-intermediaries. It was decided that the intermediary would not be susceptible to infringement claims unless it knew the materials hosted as being infringing. Furthermore, certain conditions were added to invoking this scheme of safe haven protection. This was done to carefully balance the economic interests of copyright owners and the free speech concerns of society. It was decided that intermediary protection would be conditional on adherence to a vigilant takedown mechanism, i.e., the intermediary must undertake to swiftly take down infringing material when informed of the existence of contravening content on its medium. The USA’s Digital Millennium Copyright Act [“**DMCA**”] goes beyond the take down condition and prescribes an additional requirement of incorporating ‘Standard Technical Measures’ to materially secure the copyright owners’ works against infringement by obscure elements. Interestingly, the phrase ‘Standard Technical Measures’ has not been exhaustively defined in the Act. It is loosely expanded as being a collation of all such measures which is agreed upon by intermediaries and copyright owners alike, as being instrumental in safeguarding content against infringement. The ambivalent connotation of the phrase is perhaps, well intended to ensure that the unpredictability of technology does not hinder bona fide attempts at curbing infringement. However, such intentions rarely serve as a deterrence to mischievous elements who continue to prey on the ambiguity of the law to abuse the process of its fairness. Such is the case with the intermediaries as well.

Although ‘Standard Technical Measures’ [“**STM**”] is not a universal requirement, intermediaries continue to portray the same as a universal component of copyright enforcement.¹ In doing so, they promote a regime of global copyrights which is opposed to the sovereign administration of copyright territorially. In importing these STM standards, intermediaries tend to disclose a bias towards US copyright law in defiance of native legislative requirements which operate based on the particular intellectual requirements of those specific countries.

Furthermore, even while strategically universalizing the operation of the DMCA, intermediaries begin to enforce a manner of private copyright enforcement which rests on their determination of what STMs should be. With their terms of use and with sophisticated AI by their side, intermediaries began to operationalize instantaneous assessment of content- with scant regard for the basic tenets of copyright. Setting into a collusive arrangement with certain authors of worldwide relevance, these intermediaries began administering a parallel regime of copyrights which *prima facie* seems discriminatory, arbitrary and antithetical to the entire notion of copyright and free speech.

For the sake of convenience, we shall primarily investigate YouTube’s Content ID scheme and try to examine how the system promotes an alternative model of copyright enforcement, tending to ‘over-enforcement’- which is not just harmful for copyright’s underlying objective of fostering free speech, but is also debilitating of every sovereign’s inherent right to steer their individual digital space.

II. NEW STANDARD OF WHAT CONSTITUTES INFRINGEMENT

Per the basic tenets of copyright law, infringement denotes a non-justified misappropriation of a substantial share of the original copyright owner’s content.² The qualitative and quantitative test to determine the existence of infringement rests on human judgment of how the works are perceived by the consumers of the same content.³ While certain scholars believe the borrowing of the slightest share of copyrighted works would instantly set the ball of infringement rolling⁴ (the bright line standard), there are others who swear by the *de minimis* rule⁵ of human adjudication vis-à-vis qualitative/quantitative similarity. So long as the borrowing is trivial, the claim of infringement seems redundant to the *de minimis* loyalists. Although it is understood that YouTube

¹ (Apart from America, we find similar provisions of STM in Australia and Singapore).

² *Feist Publications, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 361 (1991).

³ *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) (9th Cir.).

⁴ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) [“Brightline test”].

⁵ *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) (9th Cir.).

prescribes a minimum length for matches at around half a minute, the same does not hold true for beneficiaries of Content ID, who can manually set the limit even lower.⁶ In essence, they may mechanically adopt the ‘bright line’ test of *Grand Upright*⁷ against the human adjudication of quantitative/qualitative assessment test as advocated in *Newton v. Diamond*.⁸

The leaning of judicial determination regarding such a choice, i.e., to toe the ‘bright line’ test (of the 9th circuit) or to adopt the de minimis justification (of the 6th circuit), is heavily dependent on the country administering the regime of copyrights. Since the finer points of IP administration vary under the intellectual requirements of the country, it would be unfair for us to adjudicate a standardised test for all jurisdictions to submit to.⁹

YouTube and most other intermediaries do exactly this. In the name of enforcing copyrights, they standardize the enforcement mechanism to neglect sovereign requirements. They deploy Artificial Intelligence [“AI”] which is incapable of varying its mode of detecting infringement to the different regimes through which the content is hosted, and in effect propel a universally standardized determination of copyright examination. In choosing between the holistic de minimis test and the AI enforceable bright line test, they choose the latter for the sake of convenience and globally subvert the individualistic sovereign determination of countries who would, probably, prefer a more nuanced analysis of what must qualify as infringement in their space of content consumption.

In essence, through the easy way of deploying AI for determining infringement mechanically, intermediaries possibly desire to re-calibrate the copyright regimes operating in isolation into one globalised sphere of harmonized operations. In doing so, they assume extreme significance as being functional sovereigns, whose determination transcends the laws of officiating sovereigns.

III. THE DIFFICULT QUESTION OF FAIR USE

The de minimis question aside, infringement also rests on the idea of justification and condonation. The two similar yet different paradigms of fair use and fair dealing, act as arbiters to ensure that copyright does not become a hindrance to accessibility. They act as a means to ensure availability

⁶ YouTube Help, ‘How Content ID Works’ - <https://support.google.com/youtube/answer/2797370> ‘Set default policies’ <https://support.google.com/youtube/answer/3369992>.

⁷ *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991).

⁸ *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003).

⁹(The requirements of the law or the provisions suitable to a highly industrialised and economically developed country like the U.S.A., or U.K. may not necessarily suffice or be suitable for adoption in an underdeveloped and semi-industrialised country like ours. Such provisions, if adopted, far from furthering the industrial progress of the country might themselves hamper progress. The law has therefore to be suitably fashioned See https://ipindia.gov.in/writereaddata/Portal/Images/pdf/1959-_Justice_N_R_Ayyangar_committee_report.pdf).

of access with the purpose of facilitating free speech. Their purpose, in other words, is to keep copyright from being a hindrance to free speech, to its desired role of being an enabler which drives the engine of free speech.

Now, it is settled that the finer points of copyright regimes vary across countries under the varying intellectual requirements.¹⁰ Some countries opt for fair use, like the USA, and there are some countries that opt for the paradigm of fair dealing. While both are similar in the sense that they condone infringement, their method of operation still remains quite different. Fair use is a broader principle which adjudicates its invocation on a case-to-case basis through the famous four-factor test eloquently summarized in *Acuff Rose*.¹¹ It acts as a condoning factor in certain instances of infringement decided by the judiciary on a case-to-case basis. Fair dealing, on the other hand, does not condone as much as restrict copyright in certain very particular instances of dealing, which the law lists as being prima facie fair.¹²

YouTube, being a US entity, gives far more credence to Fair Use over Fair Dealing.¹³ Unlike Fair Use, which requires arbitration on a case-to-case basis, Fair Dealing does not evoke such a necessity on account of it being an exemption to copyright itself.¹⁴ In any instance, the AI used by intermediaries for assessing instances of infringement is incapable of determining the validity of the subjective fair use criteria as well as the somewhat objective assessment of fair dealing.¹⁵ To pre-empt itself from being categorized as opposed to free speech, intermediaries leave the assessment of whether fair use/fair dealing applies to the judgment of the copyright owner.¹⁶ This passing-the-buck approach and incorporation of a content owners' scheme of self-regulation seems like an enthusiastic invitation to an institution of over-claiming copyright.¹⁷ A simple

¹⁰ (WTO allows countries to super specify functional terms used in TRIPS, for this very reason).

¹¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹² Ishan Sambhar, "India: Concept Of Fair Use And Fair Dealing In Copyright" (May 13, 2020), MONDAQ, <https://www.mondaq.com/india/copyright/930556/concept-of-fair-use-and-fair-dealing-in-copyright#:~:text=Fair%20dealing%20is%20an%20exception,Canada%2C%20Australia%20and%20New%20Zealand.&text=Fair%20use%20is%20a%20limitation,granted%20under%20U.S.%20copyright%20law>.

¹³ (For example, the YouTube page targeting a German audience and explaining fair use: 'Was it "Fair Use" (angemessene Verwendung)' <https://www.youtube.com/yt/about/copyright/fair-use/#yt-copyright-protection>).

¹⁴ *Id.*

¹⁵ YOUTUBE HELP, [HTTPS://SUPPORT.GOOGLE.COM/YOUTUBE/ANSWER/2797370?HL=EN&REF_TOPIC=4515467](https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=4515467).

¹⁶ (YouTube explains that as it automatically generates claims against those upload matching content, the Content ID user is 'responsible for avoiding incorrect results', such as 'claims that interfere with authorised uses of content. It however also warns that 'YouTube takes action to address cases of abuse and error', including disabling specific reference files (...) and releasing all associated claims, disabling Content ID or even terminating YouTube partnership; 'Content eligible for Content ID' <https://support.google.com/youtube/answer/2605065>).

¹⁷ YOUTUBE'S FAIR USE PROTECTION, <https://www.youtube.com/intl/en-GB/yt/about/copyright/fair-use/#yt-copyright-protection>.

warning against ‘over-claiming’ does very little to undo the real threat of invalidating the necessary functioning of justified use vis-a-vis fair use/fair dealing.¹⁸

Even disregarding the wholly inept manner of assessing fair use/fair dealing, YouTube’s preferential vocalization of Fair Use as the optimal mode of defence to its users, discloses an unhealthy desire to converge copyright jurisdictions to one global regime, at least in the digital space.¹⁹ This usurpation of regulating and administering copyright under what it deems to be the law provides yet another testimony to the gradual evolution of digital publisher-hosts from being regular intermediaries to digitally ‘functional sovereigns’.²⁰

IV. DISCRIMINATORY PRACTICE OF RESTRICTING COPYRIGHT IN ACCORDANCE WITH THE RELEVANCE OF THE CONTENT CREATOR

The purpose of copyright law is to promote original, unique expressions. The threshold of what constitutes ‘original’ is intentionally kept low to encourage constituents of society to come and express their unique expressions devoid of any fear of external judgment.²¹ Although the ‘modicum of creativity’ standard did gain some momentum in instances of assessing the copyrightability of compilations, the general rule continues to remain the ‘sweat of the brow’.²²

Now, the bundle of rights attracted on account of copyright should remain substantively the same for authors of differing works. A celebrated author cannot claim greater rights on account of his heightened popularity or intellect. The incentive to publish is equal for all.²³

However, taking advantage of the lack of substantive sovereign control over the digital space, intermediaries began to abuse their liberty under the Standard Technical Measures route, to extend differential arrangements of copyright enforcement to different brands of content creators. YouTube, for instance, has varying schemes of enforcement mechanisms offered to different content authors- Content ID, Copyright Verification Programme, and Copyright Match Tool. The most effective, ‘Content ID’, is reserved only for those who ‘own exclusive rights to a substantial

¹⁸ CLEAN UP INCORRECT CLAIMS, <https://support.google.com/youtube/answer/4352063>. (For example, one has to exclude content one does not own from a reference file submitted for identifying matching uploads (<https://support.google.com/youtube/answer/4389910>)).

¹⁹ For instance, if India exempts the use of copyrighted music for weddings because of socio-cultural tradition- the same should not be flagged off as infringement in videos uploaded and viewed in India; see Section 52 (za), Indian Copyright Act, 1957.

²⁰ (Originally used by Prof Henning Khan of Cambridge).

²¹ University of London Press v. University Tutorial (1916) 2 Ch 601.

²² Feist Publications, Inc. v. Rural Tel. Serv. Co. Inc., 499 U.S. 340, 361 (1991).

²³ *Supra* n. 21.

body of original material that is frequently uploaded by the YouTube user community'.²⁴ The remaining authors are allowed mellowed-down versions such as the 'Content Verification Program', the 'Copyright Match Tool', or just a simple notification web form instead of Copyright enforcement.²⁵

The final decision in regard to which author deserves what mode of copyright enforcement is solely YouTube's discretion. They reason that since different authors have 'different requirements', YouTube voluntarily determines the most suitable tool of enforcement which is to be made available to a particular author. The most significant factor of such determination is the volume of content shared by the author on YouTube.²⁶ Even accounting for YouTube's vague justification, it is but evident that the real purpose of such a discriminatory mode of copyright enforcement is to promote a sense of collusion with the major authors, in continuing to profit from privately administered 'copyright' regimes.²⁷

With different incentives for different authors, the neutrality of the marketplace of ideas is severely impacted. Creators with more incentive are not just encouraged to produce more than others, but they are also granted wider privilege in policing available content.²⁸ As a result, the space of free speech is adversely occupied by one set of authors who now dictate public opinion through an artificial monopoly over the ideas piercing society.²⁹

This scheme of private enforcement of copyright is wholly derogatory to the purpose of copyright itself. With reduced standards of protection, upcoming authors are forced to invest in additional safeguards to enjoy the same level of protection which copyright law should have granted them in rem. The additional costs involved in ensuring substantive copyright protection result in further lowering of the already low incentive made available to the non-preferred authors. The volume of works produced being directly proportional to the incentive offered in lieu of publication, it is safe

²⁴ 'Qualifying for Content ID' <https://support.google.com/youtube/answer/1311402>; 'Content eligible for Content ID', <https://support.google.com/youtube/answer/2605065>.

²⁵ See generally 'Copyright management tools', <https://support.google.com/youtube/answer/9245819>.

²⁶ Google Support, Manage Live Chat Messages, GOOGLE SUPPORT, <https://support.google.com/youtube/answer/1311402>.

²⁷ S Jacques, et. al, *Automated anti-piracy systems as copyright enforcement mechanism: a need to consider cultural diversity*, EUROPEAN INTEL. PROP. REV. (2018) 40(4), 218-229.

²⁸ (To understand the basics of Content ID – which as per YouTube's owner Google 2018 report now deals with 98% of all copyright issues on YouTube, see Kent Walker, *Protecting What We Love About the Internet: Our Efforts to Stop Online Piracy*, GOOGLE BLOG, <https://www.blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-our-efforts-stop-online-piracy/>, ¶ 21,25 (Nov. 15, 2018).

²⁹ See generally Kate Klonick, *The New Governors: The People, Rules, And Processes Governing Online Speech*, 131 HARV. L. REV 1598 (2018).

to assume that the lowering of protection by private agents will have a telling effect on the otherwise robust public repository of knowledge held dear by society.

V. THE MONETIZATION ALTERNATIVE

We are aware that copyright law provides economic incentives to authors to create and publish works for society to consume. Without the economic incentive, there is hardly any motivation for the author to selflessly share his knowledge with society. The bundle of economic rights attracted to publication of original content occupies centre stage in the enforcement of rewards promised within the social bargain of copyright.³⁰

YouTube and various other intermediaries have schematized improvisations within their already disparaged mode of private administration of copyright, which upsets this angle of economic incentive within copyright jurisprudence. In furtherance of its ambitious policy of favouring a few major authors, these intermediaries have moved from a post-infringement blocking paradigm to a regime of post-infringement monetizing, i.e., to say infringing material is no longer blocked but rather monetized on behalf of the proclaimed copyright owner.³¹ Although this may appear as a genius move to harmonise free speech interests with copyright concerns, the picture gets somewhat distorted when we factor in how errantly YouTube and the other intermediaries assess infringement.

The test of infringement varies for different classes of authors depending on what mode of copyright enforcement has been made available to them.³² The most preferred authors who have access to 'Content ID' and other similar methods of enforcement- possess the arbitrary power to disrupt the economic incentive of other creators who, maybe, borrowed a trifling portion of prevailing content for the sake of a legitimate purpose, let's say critical commentary.³³ The strict invocation of the bright line test³⁴, in violation of the specific country's domestic intellectual requirements, opens a window for the perceived owner to allow the 'secondary content' to run with the condition that revenue earned on account of the same shall flow to the perceived owner

³⁰ *Supra* n. 21.

³¹ Google Support, Manage Live Chat Moderators, GOOGLE SUPPORT, [HTTPS://SUPPORT.GOOGLE.COM/YOUTUBE/ANSWER/3013321](https://support.google.com/youtube/answer/3013321).

³² Google Support, Manage Live Chat Participants, GOOGLE SUPPORT, [HTTPS://SUPPORT.GOOGLE.COM/YOUTUBE/ANSWER/2797370?HL=EN&REF_TOPIC=4515467](https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=4515467).

³³ See <https://www.youtube.com/watch?v=14HpWQmEXrM&feature=youtu.be>, a video of a surprise marriage proposal using an Indie-Pop song as background that, due to the video's popularity, has been listened to by 14 million viewers. See also the 'Harlem Shake' example, discussed in Michael Soha and Zachary J. McDowell, *Monetizing a Meme: YouTube, Content ID, and the Harlem Shake, Social Media + Society*, January-March 2016, pp.1-12).

³⁴ Bridgeport case, *Supra* n. 5.

alone.³⁵ The consequence of this dubious arrangement results in an absolute denial of the benefits of copyright law to a class of authors, through the over-enforcement of copyright claimed by the group of preferred authors.³⁶

As had been discussed earlier, the concept of trivial copying is not a defence to the beneficiaries of Content ID who have the liberty to set a seemingly de minimis limit for detecting matches (even less than 30 seconds).³⁷ That being the case, even if the subsequent content of more than twenty minutes captures a 5-second clip of the previous content in furtherance of a comparative review, for example, Content ID will perceive the entire content of twenty minutes to be a factor of infringement of the 5-second clip. This takes away the economic incentive for the author of the second work since the first owner decides to aggressively piggyback on Content ID for establishing monetization rights over the entire second video for what would appear to be a prima facie case of trivial borrowing or justified borrowing. Just like that, the economic incentive is no longer available to a large class of authors. Without incentive, these authors gradually go back to the paradigm where it seems profitable for them to not share their knowledge with society. As a result, society will only receive a fraction of the ideas/works which it ought to be receiving. The marketplace of ideas would therefore be hindered, and the engine of Free Speech would be substantially rusted.

VI. THE AMERICAN BIAS?

Apart from the difficult idea that intermediaries favour a particular class of authors, it is also unnerving that their mode of private enforcement of copyright seemingly favours American authors over any other nationality. National Treatment, which forms the bedrock of modern IP jurisprudence, appears to be wholly lacking in the mode of operations aggressively propagated by these private administrators of the digital space.

³⁵ S Jacques, K Garstka & M Hviid, J Street, *Automated anti-piracy systems as copyright enforcement mechanism: a need to consider cultural diversity*, 40(4) EUR. INTEL. PROP. REV. 218-229 (2018).

³⁶ (YouTube, for example, explains that since January 2014, Content ID claims have ‘outnumbered copyright takedowns by more than 50 to 1’ (see Google Support, *Manage Live Chat Messages*, GOOGLE SUPPORT, <https://support.google.com/youtube/answer/7002106?hl=en-GB>). In 2017, 90% of Content ID claims imposed automated monetization by running ads against an upload which matches with claimed content – which overall has resulted in YouTube paying out more than 6 billion USD in total (and over 1.8 billion from 10/2017-09/2018) to right holders who have monetised the use of their content on the platform – see generally, Google Public Policy, *How Google Fights Piracy*, GOOGLE PUB. POLY BLOG (Nov. 15, 2018), <https://www.blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-our-efforts-stop-online-piracy/>).

³⁷ See Kat, *How do I delete a comment on YouTube?*, GOOGLE SUPPORT (Aug. 27, 2019, 9:17 AM), <https://support.google.com/youtube/thread/1281991>; YouTube Creators, *Updates to Manual Claiming Policies*, GOOGLE PUB. POLY BLOG (Aug. 15, 2019), <https://youtube-creators.googleblog.com/2019/08/updates-to-manual-claiming-policies.html>. (indicating that despite some changes to improve the system for creators, any inclusion of someone else’s content will continue to afford the exclusive monetization options to the Content ID claimant).

We know that safe harbour protection for these intermediaries is contingent on them adhering to legally prescribed take down procedures. Ideally, such takedown manoeuvre is only initiated upon notice from the copyright owner. However, most of these intermediaries also subscribe to an internal take down procedure, to avoid the technicalities of legal takedowns. Since the internal takedown procedure is devoid of legal sanction, they follow whatever policy the intermediaries deem fit for the scheme of business. For example, YouTube upon detecting ‘infringement’, sends a preliminary notification to the perceived copyright owner. The copyright owner then has the option of blocking/monetizing the claimed infringing content. The author of the ‘infringing’ work may dispute the blocking/monetization of his work, which then goes back to the original copyright owner. The copyright owner when predisposed to such a ‘dispute’, has the option to either release his claim or continue with the action he had decided earlier. An appeal is then allowed to the ‘infringing’ author before the DMCA takedown procedure is finally invited.³⁸ It may be worth mentioning that while it may seem that pre-DMCA notice takedown is violative of free speech, the refuge of Standard Technical Measures is too broad, which in turn provides sustenance to the seemingly high-handed collusive schemes of YouTube and their select authors.

Assuming that the owner of the claimed infringing work has the time and patience to consecutively dispute the false claim of infringement, and then appeal against the persistent denial of copyright, YouTube conspicuously requires the non-American authors to agree to the jurisdiction of any judicial district in the USA where the ‘service provider may be found’.³⁹ The forceful desire to globalize the takedown procedure under the DMCA is a heavy burden on non-resident creators. Apart from them lying at the mercy of self-evaluation of what constitutes infringement and/or fair use by the preferred authors, the neglected authors are now de facto dissuaded from taking their grievance to the judicial system for the heavy costs involved. It is very likely that a content creator from a far-flung region of Southeast Asia would give in to what would prima facie be considered over-enforcement of copyright, to merely continue accessing the benefits of publication, devoid of any semblance of the rewards of copyright. Neglected non-American authors are thereby afforded second-class treatment in regard to disputing over-enforcement. Their intellectual prowess is thereby subdued by a strategic denial of the benefits of copyright.

³⁸ Electronic Frontier Foundation, *A Guide to YouTube Removals*, <https://www.eff.org/issues/intellectual-property/guide-to-youtube-removals>

³⁹ (‘Counter Notification Basics’ at <https://support.google.com/youtube/answer/2807684>; see Section 512(g)(3)(D) DMCA – whereby the user will also ‘accept service of process from the person who provided notification under subsection (c)(1)(C) [of the DMCA] or an agent of such person)

VII. LIVE STREAMING AND FREE SPEECH

A very recent example of how over-enforcement of copyright can impede free speech is exemplified in a recent interaction of a citizen with police authorities in Beverly Hills.⁴⁰ Disappointed with the police response to his request for body cam footage in a speeding matter, Senett Devermont began streaming the interaction on his Instagram account via live streaming. The police officer catering to Devermont's request pulled out his phone and began playing copyrighted music to deter the citizen from communicating his interaction to the society at large. Instagram, which follows an algorithm similar to that of YouTube Live, carries the threat of banning users who repeatedly stream content which qualifies as 'infringement' per their analysis.⁴¹

Unlike general content, which carries a subdued free speech angle, live stream includes free speech concerns placed over and above subsidiary concerns of copyright enforcement. Blocking live streams for inadvertent inclusion of copyrighted content, by way of irrelevant noise, is not so much a denial of economic rights, as much as it is a denial of fundamental existence. The forthright subrogation of constitutional rights for the sake of insulating economic rights, even when there is no real threat to the economic paradigm of incentives, is a extant derogation of the significant ability to communicate freely within society. The entire process of raising a dispute, appealing the blocking of the stream, and the subsequent DMCA mechanism is wholly inept at mitigating the denial of opportunity to communicate a particular expression at that eventful point in time.⁴²

Let's say, I witness a particular crime unfold. I was vigilant enough to record the incident on my phone, and live stream it for the sake of allowing the public as well as law enforcement to be able to quickly ID the perpetrator and take him into custody. However, because the video captured music emanating from a nearby club, the concerned intermediary turned off my stream and deleted my video. The subsequent reinstatement of my video will do little to undo the damage caused to the purpose of live streaming the event.

We need to understand that one of the reasons why countries allow for safe harbour protection is to incentivise free speech even at the cost of infringement. It is unanimously agreed upon that content must be removed only after it is found to be infringing, and not when it is presumed to

⁴⁰ Dexter Thomas, *Is This Beverly Hills Cop Playing Sublime's 'Santeria' to Avoid Being Live-Streamed*, <https://www.vice.com/en/article/bvxb94/is-this-beverly-hills-cop-playing-sublimes-santeria-to-avoid-being-livestreamed>.

⁴¹ Google Support, *Manage Live Chat Messages*, GOOGLE SUPPORT <https://support.google.com/youtube/answer/3367684?hl=en.Kat>.

⁴² *Supra* n 29.

be infringing. The denial of the right to free speech on account of private enforcement of copyright is a step back in ensuring the growth of a polity through a robust marketplace of ideas.

VIII. CONCLUSION

Ironically, the cure for over-enforcement of copyright has been manipulated to become its primary abettor. Masquerading as the freedom riders promoting the publication of speech devoid of any form of encumbrance, these intermediaries rose to the pedestal of public functionaries only to abdicate their responsibility towards society. By shunning the ethical obligations which they ought to honour against society, they came into a problematic usurpation of power barren of any form of accountability. It is strange how these platforms plead freedom from liability on account of public function, and yet use the same freedom to deny the public function altogether.

The purpose of safe havens, which is to dissuade copyright from turning into a sword against free speech, is rendered infructuous when the safe haven protection is exploited to overcompensate a few authors while denying free speech to the majority of society. It is time we revisit the arrangement to ensure that intermediaries honour the public function undertaken. It is time for the international community to take stock of the situation and repair the seemingly privatized territory of digital space. While we do see certain sovereign efforts much like the EU Digital Single Market Directive which focuses on ensuring free speech is protected by way of insulating content from arbitrary blocking and removing, we have seen little intention to address the elephant in the room the difficult question of denying copyright through the alternative demonetization paradigm. This piece is a sincere attempt to request a serious reconsideration of the private enforcement of copyright brazenly propagated in the online world.

Foundations of Open Access: Scientific dissemination, Rights Retention and New Copyright Law

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ABSTRACT

More than 2.5 billion open access licensed scientific articles are available on the internet to date – an indication of the sentiment among an increasingly global scientific community when it comes to knowledge transfer and scientific dissemination. These shifts are indicative of the current state of academic publishing, dominated by commercial publishers that appear to disproportionately profit from scholars’ intellectual creations to the detriment of not-for profit university presses and in spite of publication costs having drastically decreased as digitalisation of literary works continues to grow. While alternatives to traditional publication models continue to be explored, scientific authors have increasingly shown a preference for the deployment of so-called Rights Retention strategies to reproduce scientific works: the ability to share copyright-protected works by means of publicly available licenses, such as Creative Commons licenses, even in the presence of a copyright transfer agreement with commercial publishers. Open access dissemination of scientific findings has revealed a number of contentious, namely, how to maintain the integrity of author’s moral rights to their work, preventing plagiarism and facilitating the indirect commercialisation of works readily available in the open access ecosystem. We consider these issues by exploring the legal-philosophical foundations of open access, grounding our analysis in Kantian ideas of public and private use of reason. Through this lens, we argue that, for all its potential pitfalls, open access has the ability to delicately balance the interests of all involved stakeholders – including those of commercial publishers. We suggest that open access, in its variety of forms, including the use of Creative Commons licences and Rights Retention, allows for reciprocal, bifurcated copyright arrangements that display the ability of authors to honour contractual obligations with commercial publishers on the one hand, while openly disseminating their scientific findings to the public at large on the other hand, thus adding nuance and complexity to an emerging new copyright law – one that embraces principles of equity and inclusion, while being fit for purpose in light of rapid technological advances.

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I. FINDING OPEN ACCESS

Many readers will be familiar with the philosophy of Ubuntu. This philosophy has its origin in Africa and is best described in the words of Nelson Mandela. He said *ubuntu* is “...the profound sense that we are human only through the humanity of others; that if we are to accomplish anything in this world it will in equal measure be due to the work and achievement of others.”¹ Thus, it emphasises that humans are interdependent, and thrive best when they work in cooperation with others, sharing the fruits of their work with the larger community that is the human race. This is all the more relevant for scientific enquiry. In a way, the obligation to share must be seen as a social responsibility.²

The open access movement builds on this culture of sharing knowledge. The origins of the movement can be traced back to the Budapest Open Access Initiative in 2002 where the words *open access* was coined and a *Declaration* was signed by the participants on 14 February 2002.³ The *Declaration* recognised that the tradition of sharing the fruits of research combined with the power of internet can potentially lead to unprecedented public good if barriers to access such literature are removed. It called upon interested institutions and scholars to encourage open access by making such literature freely available over the internet and providing access rights to the users including the right to ‘*read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose...*’⁴ The only requirement was that the authors of the work must be properly acknowledged, and the integrity of their work is maintained.⁵

Much aligned with international copyright law provisions under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),⁶ the Bethesda Statement on Open Access Publishing (Bethesda Statement) was adopted on 11 April 2003, as a result of a meeting held at the Howard Hughes Medical Institute in Chevy Chase, Maryland, in the United States [“US”]. The *Bethesda Statement* called upon the author(s) and copyright holder(s) to grant all users

¹ See generally, R. Stengel, *Mandela's Way*, Penguin Random House 2018.

² K. Ola, *Theories of Open Access*, 6, J. OPEN ACCESS L., 10-12 (Sept. 26, 2018); K. Ola, *Fundamentals of Open Access*, 36 EUROPEAN INTELLECTUAL PROPERTY REVIEW, 2, 112-123 (January 2014).

³ BUDAPEST OPEN ACCESS INITIATIVE [*hereinafter* “BOAI”], available at: <https://www.budapestopenaccessinitiative.org>. see also M. Demeter, a. Jele and Z.B. Major, *The International Development of Open Access Publishing: A Comparative Empirical Analysis Over Seven World Regions and Nine Academic Disciplines.*, PUB RES Q 37, 364–383 (2021). <https://doi.org/10.1007/s12109-021-09814-9>.

⁴ BOAI, *supra* Note 3.

⁵ *Id.*

⁶ Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886 (as amended on 28 September 1979), 828 U.N.T.S. 221 [*hereinafter* “Berne Convention of 1889”].

a “free, irrevocable, worldwide, perpetual right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship...”⁷ Again, in October 2003, the *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*⁸ was adopted and published, re-emphasising the position previously stated in the *Bethesda Statement*. These instruments show how, at the turn of the century, there was an impending need for redress in view of new challenges posed to scientific dissemination by emerging technologies like the internet.

Twenty years later, those who support open access range from authors, researchers, universities, libraries, and the various users who make use of the knowledge in a variety of ways. The common goal shared by these stakeholders may be the same, yet their rationale varies, including social, economic, political and legal considerations. For some, there might be a social basis – as exemplified by the philosophy of *ubuntu* described above – the one that drives support for open access.⁹ However, this social basis, which is arguably reflected in legal expressions of ‘public interest’ has also been found lacking at times of crisis.¹⁰ For others, the reason may be purely economical, given the astronomically high subscription charges demanded by online journal publishers.¹¹ At times, the support for open access may even be politically induced, with some scholars suggesting a ‘political capture’ by corporations and states in the Global North, thus perpetuating neo-colonialist approaches to scientific dissemination.¹² Finally, there is the legal rationale which situates current copyright frameworks, with origins in laws that are over 300 years old,¹³ as no longer suitable for contemporary lived experiences and practices, where downloading and sharing of files over the internet has become commonplace.¹⁴ Seen in this light, copyright law appears to have been highjacked by a selected number of interest groups to serve their commercial interests, rather than operating for a higher purpose: the common good.

⁷See, among others, BETHESDA STATEMENT ON OPEN ACCESS PUBLISHING, Harvard Dash, available at: https://dash.harvard.edu/bitstream/handle/1/4725199/Suber_bethesda.htm. See also: N. Chakravorty, C. Shekhar Sharma, K. Molla and J. Kumar Pattanaik, Open Science: Challenges, Possible Solutions and the Way Forward, PROC.INDIAN NATL. SCI. ACAD. 88, 456–471 (2022). <https://doi.org/10.1007/s43538-022-00104-2>.

⁸ Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, OPEN ACCESS INITIATIVES OF THE MAX PLANCK SOCIETY, available at: <https://openaccess.mpg.de/Berlin-Declaration>.

⁹ N. Koutras, The Public Policy Basis for Open Access Publishing: A Scientific Approach. PUB RES Q 36, 538–552 (2020). <https://doi.org/10.1007/s12109-020-09772-8>.

¹⁰ K. Walsh, A. Wallace, A., Pavis, M. et al. Intellectual Property Rights and Access in Crisis. IIC 52, 379–416 (2021). <https://doi.org/10.1007/s40319-021-01041-1>.

¹¹ J. Willinsky, The Stratified Economics of Open Access, 39 ECONOMIC ANALYSIS AND POLICY, 1, 53-70 (2009). [https://doi.org/10.1016/S0313-5926\(09\)50043-4](https://doi.org/10.1016/S0313-5926(09)50043-4); also: Ola, *supra* note 2, at 15.

¹² See, e.g., K. Meagher, Introduction: The Politics of Open Access — Decolonizing Research or Corporate Capture? 52 DEVELOPMENT AND CHANGE, 2, 340-358, (January 2021). <https://doi.org/10.1111/dech.12630>.

¹³ (United Kingdom) Copyright Act, 1710, 8 Ann. c. 19; Berne Convention of 1889, *supra* note 6.

¹⁴ Ola, *supra* note 2, at 22-23.

Open access movements seek to galvanise and elevate these seemingly divergent motivations to bridge the gap between old copyright law and new technologies. As such, this article is concerned with the use of open access as explored through a legal-philosophical lens based upon Kant's idea of *public* and *private use of reason*. Beginning with a brief note on the historical development of copyright law, Section II will study Kant's idea of *public use of reason* and apply it to the free exchange of knowledge as understood under current open access systems. Using Kant's distinction between the book as a physical object and the ideas conveyed in the book, we argue that, upon signing of a publishing agreement, the inherent rights in the work continue to subsist with the author irrespective of certain elements of copyright protection being transferred to the publisher through contractual obligations. In Section III, we will carry forward this analysis by discussing the limitations placed on the Kantian *public use of reason*. The premise here is that people must obey the law in lieu of maintaining social cohesion – the *private use of reason*. This restriction on freedom of the citizens is a contractual exchange with the sovereign who in turn recognises their right to employ the *public use of reason* outside of the call of duty. In the context of copyright protection, the idea of Rights Retention and the use of public licenses (such as Creative Commons) resembles a similar trade-off between the author and the publisher on one hand, and the author and the public on the other. In Section IV, we will discuss selected arising out of current open access systems' usage, namely the challenge of protecting author's moral rights and safeguarding against plagiarism. The final section will briefly conclude.

II. IN DEFENCE OF OPEN ACCESS

The justifiability of the open access movement would depend upon what is perceived to be the underlying rationale of a given copyright protection regime. If the core purpose is to award proprietary rights to the author which motivates them to produce more, then increasing the scope of copyright protection will seem fair, and the open access movement erroneous. However, if the purpose of copyright is regulatory or distributive *i.e.*, serving the public interest by providing reasonable access to copyrighted works, then this purpose can only be fulfilled by encouraging the distribution of works to the wider public, which is in turn well served by open access systems.

A. Revisiting Copyright History

The ponderation is far from binary. In our view, however, the distributive purpose of copyright protection should be accorded primacy over the proprietary goals. One only has to briefly look at the history of copyrights to appreciate why. Without claiming to be exhaustive,¹⁵ the idea of

¹⁵ See *e.g.* I. Alexander and H. T. Gómez-Arostegui, RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW, Edward Elgar Publishing 2018; B. Atkinson and B. Fitzgerald, A SHORT HISTORY OF COPYRIGHT, Springer 2014; I.

copyright originated in England in the late 15th century, once large-scale printing became possible due to the invention of the printing press. At this time, the English Stationers' Guild, seeking to preserve the profitability from the book trade for its members, established a registry system wherein members of the Guild could enter the name of the book over which they claimed publishing rights. Other members were expected to refrain from publishing the same book to ensure harmony in the ranks was maintained. This system also protected against the publishing of heretical and seditious material, as the English kings and queens willingly granted substantial control over publication of books to the Guild, in exchange for their promise to refrain from publishing such material.¹⁶ Through this historical lens, we can see how copyright, as a normative system, came into existence primarily to encourage *distribution* of works over *creation* of works – although the distribution of work benefitted the publishers more than the authors or the public. Over time, as discontent over the monopolistic character of the Guild system grew stronger,¹⁷ the English Parliament passed the Statute of Anne in 1710, redirecting the purpose of copyright away from censorship and towards freedom of expression.¹⁸ After the passing of the new law, rights were granted directly to authors instead of the publishers, in order to induce learned (wo)men to write and publish books. To promote future scholarship, the duration of copyright was limited only to fourteen years, with a further extension of fourteen years if the author was still alive at the expiration of the first period. These rights conferred were of limited character as the reprinting of copyrighted material was largely prohibited although the use of the work was not. In fact, publishers were required to deposit a copy of the work in designated libraries.¹⁹ Thus, there is consensus among scholars²⁰ that the new law was a tool to serve the public interests, rather than serving the commercial interests of the Guild members, which is reflective of the distributive aspect of copyright.

Alexander, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY, Bloomsbury Publishing 2010.

¹⁶ P. Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 323 (2003); For a detailed history of the stationer's copyright, See L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (Vanderbilt Univ. Press 1968).

¹⁷ M. Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, Law & Contemp. Probs. 66 (2003): 75; P. Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, J. INTELL. PROP. L. 10 (2002): 319.

¹⁸ C. Seville, *The Statute of Anne: Rhetoric and reception in the nineteenth century*, Hous. L. Rev. 47 (2010): 819.

¹⁹ Statute of Anne, 1710; for a critique of Statute of Anne, 1710, see, L. Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223, 235-236 (1965).

²⁰ L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 8 (1987); H. T. Gómez-Arostegui, *The untold story of the first copyright suit under the Statute of Anne in 1710*, BERKELEY TECH. LJ 25 (2010): 1247.

B. Distributive Copyright Law

Arguably, a distributive approach to copyright can also be justified on the basis that an author, during the process of creation, draws upon the ideas available to them in the public domain. Therefore, it is only fair that their work, on completion, should be made available to other users once adequate rewards have been secured for the author. These rewards can be in the nature of profits accruing from the sale or licensing of the work. Because such profits cannot accrue to the author without distribution of the work, the proprietary interests of the copyright holder – be it the author or the publisher- are inconsequential without first securing the distributive aspects. Further, giving primacy to the distributive goals of copyright can also contribute to an individual's sense of self. Engagement with the works of others can contribute to the process of self-actualization of a subsequent user.²¹ Kant in his *Critique of Judgment* stated that humans can experience the “feeling of life” when they are able to engage in a “state of free play” unfettered by any restraints. In other words, a person is said to be in a state of free play when he actively engages with a work by making judgments about it, in contrast to mere passive contemplation of the work. According to Kant, people can engage in such free play only when they are unconstrained by any rules.²² Open access facilitates such free play by making available the fruits of research to everyone who chooses to receive it.

Further justifications for permitting open access to copyrighted material can be based upon Kant's ideas of *enlightenment* and the *public use of reason*. In his essay, *An answer to the Question: What is Enlightenment?* published in the year 1784, Kant describes *enlightenment* as achievement of maturity through the use of *reason*. According to him, to *reason* is to employ the ability to think for oneself, without being prejudiced by existing authorities and traditions. He says that every human has the innate capacity for independent thinking. However, most humans are content with existing in a state of self-imposed immaturity and lack the courage to act without the guidance of another. The primary concern for Kant is the *enlightenment* of the society as opposed to the individual. However, this *enlightenment* can be achieved only when each individual comprising the society has the freedom to exercise *public use of reason*.²³ An individual is free to make *public use of reason* when he has the freedom to think in “community with others” *i.e.*, he is permitted to communicate his views ‘*as a scholar* before the entire public of the *world of readers*.’ Thus, this inextricable link between autonomous thinking by an individual and his ability to engage with others through a public

²¹ C. Yoo, *Rethinking Copyright and Personhood*, 3 U. ILL. L. REV. 1039, 1041 (2019); A.-T. Kornman, *Is Poetry Undemocratic*, 16 GA. ST. U. L. REV. 311, 318-326 (1999).

²² *Id.* at 1055-1057.

²³ A. Barron, *Kant, Copyright and Communicative Freedom*, L. & PHIL. 1, 16 (2011); K. DELIGIORGI, *KANT AND THE CULTURE OF ENLIGHTENMENT* 59-60 (SUNY Press 2005).

engagement of diverging views, forms the foundation for progressing towards an *enlightened* society.²⁴

Clearly, such an exchange of views is possible only when existing works are available to future authors. Only when users have access to such works, will they be in a position to engage in free play with the ideas contained in them and form judgments about them – a process which is a prerequisite for further development of knowledge. Open access provides a medium for unrestricted dissemination of knowledge. Further, speaking on copyright in his essay, *On the Wrongfulness of Unauthorized Publication of Books* published in the year 1785, Kant distinguishes a book as a physical object from the thoughts of the author that are conveyed to the reader through it. For Kant, anyone who purchases a book acquires property rights in it and can use it as he likes, even to the extent of making copies of it. However, the thoughts present in the books are an intellectual creation of the authors innate capacities and an extension of his personality, and therefore there cannot be any proprietary rights in them. The author has inherent rights in them.²⁵ Speaking on the role of the publishers, Kant says that their role is limited to transmitting the work of the author in its original and undistorted form to the public, and nothing more. There is therefore, ‘a tripartite operation where the author conceives the speech, the publisher disseminates it, and the public receives it’.²⁶ Thus, the publisher is acting only as a medium through which the work of the author reaches the wider public. At this point, it is important to make it clear that Kant was not against the publishing trade. In fact, in his 1785 essay, he proposes that the author should not contract with more than one publisher so that the profitability of the trade for the publisher is maintained. However, his aim is to show that the trade can be rightfully organized which will serve the dual purpose of satisfying the economic pursuit of the publisher and at the same time allows the author to exercise his civil liberties of disseminating his ideas to the public.²⁷

In this context, it may also be useful to touch upon the distinction between the work that is copyrighted and the copyright itself. Copyright is a series of rights – right to print, reprint, publish, etc. available to the person who holds the copyright.²⁸ So far as the work in which copyright exists, it is the creation of the author and by that virtue obtains certain inherent rights over it. Bearing

²⁴ *Id.* at 18-20.

²⁵ M.C. Pievatolo, PUBLICNESS AND PRIVATE INTELLECTUAL PROPERTY IN KANT’S POLITICAL THOUGHT (10th INTERNATIONAL KANT CONGRESS 2005) 5; *See*, A. RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 14-15 (HARVARD UNIV. PRESS 2009).

²⁶ C. Yoo, *supra* note 21, at 1048.

²⁷ Barron, *supra* note 23, at 25.

²⁸ Patterson, *supra* note 20, at 11.

this distinction in mind, anyone who, in an unauthorized manner, makes use of any right out of the set of rights forming the totality of copyrights, commits an infringement against the copyright holder, but anyone who merely makes use of the work without exercising a right reserved to the copyright holder, does not, as the rights outside the fold of copyrights are flowing directly from the author. This distinction can also be traced back to the Statute of Anne in England under which printing an author's work without his permission was an infringement of copyright, however if a user makes an abridgment, digest, or translates the work (thereby making use of the work) and prints such abridgement, digest, or translation, it was not deemed to be a copyright infringement.²⁹ The open access movement can similarly be justified on this basis. It must not be implied that the author has surrendered his inherent rights to the work only because he contracted with a publisher to distribute the work to the larger public. The inherent rights to the work accrue to the author by virtue of him having created that work. The mandate of future users who access works over open access database is ultimately derived from this inherent right of the author which includes the freedom to exert control over his work and to freely circulate it to the public. The work of the author is his communication/speech to the public which is further engaged with by future authors to exercise their own authorial freedom. The open access movement is therefore a culturally significant one where reasonable access to prior work is being provided to future authors, in the expectation that they would engage with the work in a manner which serves the wider cultural goal of facilitating critical reflection. This, in our opinion, cannot be termed as an infringement of the copyright available to the publisher.

The next section will discuss another aspect of Kant's theories: the *private use of reason*, which essentially places certain restrictions on the *public use of reason* by individuals occupying posts such as that of a clergyman, military official, tax payer, among others. Although these roles may not be a direct subject of discussion on copyright law, we will use the underlying rationale of *private use of reason* to show how rights' retention by the author in their work has the ability to protect the interests of all stakeholders, while at the same time achieve the distributive goals of copyright law.

III. PRIVATE USE OF REASON AND RIGHTS RETENTION BY THE AUTHOR

For Kant, the *private use of reason* "is that which person may make of it in a particular civil post or office with which he is entrusted."³⁰ This at once feels strange because someone who is occupying a 'civil post' is deemed to be carrying out functions of a public nature, and hence may reasonably

²⁹ Patterson, *supra* note 20, at 11-12.

³⁰ J.C. Laursen, *The Subversive Kant: The Vocabulary of "Public" and "Publicity"*, 14 POL. THEORY 584 (1986).

be held accountable to the public for the same.³¹ However, for Kant, *private use of reason* represents a privation of an individual's *public use of reason* in the sense that the authority to *reason* in this case is arising from someone else. Thus, the *reason* is being used in a prescribed manner, in the name of someone else.³² Kant uses the examples of a military officer, a clergyman and a taxpayer to elucidate his distinction between the *private* and *public use of reason*. Through this lens, while a “private” military officer must follow orders, a “private” clergyman must preach what his church requires, and a “private” citizen, must pay his taxes. However, outside the domain of authority, they must be free to make use of their *public use of reason* and voice their opinions to the world at large.³³ A military officer outside of his employment must be free to publish his thoughts on the errors in the military service, a clergyman in his *public* domain must be free to challenge the teachings of the church and a taxpayer must have the freedom to publicly voice his criticism of the impropriety of the fiscal regime.³⁴

A. Limits to the Free Use of Reason and Rights' Retention

The reason for Kant to place limitations on the free use of *reason* in certain situations is because he believes that such restrictions are conducive for the attainment of *enlightenment*. For Kant, *private* and *public use of reason* are not contradictory, but complimentary in the pursuit of *enlightenment*.³⁵ Being attentive to the political consequences of allowing free *public use of reason*, Kant believed that cooperation of political authority is necessary for the achievement of *enlightenment*, positing that human beings should be free to make use of their *reason*, but only within the context of humanly instituted and enforced laws.³⁶ Arguably, *private use of reason* is grounded in the contractual relations between the individuals and a higher authority in which the individuals have agreed to surrender some of their rights in favour of advancing common goals.³⁷ And so, the military officer and the clergyman are bound by the terms of their engagement by the military and the church respectively. The citizen-taxpayer's duty to pay tax arises from the privilege granted to it by the sovereign to undertake that trade. Furthermore, for Kant the surrender of *reason* by individuals is based on a *quid pro quo* with the sovereign in the sense that while individuals must obey when required, the sovereign in exchange should grant them the freedom to criticise outside the scope of their duties. This is beneficial for the sovereign too, because without such public criticism, it would be

³¹ C. Cronin, *Kant's Politics of Enlightenment*, 41 J. HIST. OF PHIL. 51, 55 (2003).

³² K. Koukouzelis, *Rawls and Kant on the Public Use of Reason*, 35 PHIL. & SOC. CRITICISM 841, 850 (2009).

³³ Laursen, *supra* note 30, at 588.

³⁴ Cronin, *supra* note 31, at 55.

³⁵ M. Clarke, *Kant's Rhetoric of Enlightenment*, REV. OF POL. 53, 60-61 (2009).

³⁶ *Id.* at 60-61.

³⁷ Cronin, *supra* note 31, at 56.

challenging to become aware of what ails the society and what reforms must be introduced to rectify it.³⁸ These illustrative aspects of Kant's private use of reason lend themselves well to apply legal theory to the increasingly relevant copyright phenomenon of rights' retention.

Transporting Kant's idea of *private use of reason* to copyright law, we have seen that the relationship between an author and a publisher is contractual and limited. For a publisher to publish, an author must first bring a work into existence by creating it. As the inherent rights in the work always remain with the author and what is transferred to the publisher is only a bundle of rights associated with the work, these rights can operate subject to the interests of other stakeholders *i.e.*, the authors themselves and the wider public. Rights retention by the author provides such a mechanism to rectify the asymmetry currently existing between the author and the publisher.

B. Creative Commons and Rights' Retention

Rights' retention facilitates open access publishing through the application of CC-BY licenses. As per the data available in the *State of Commons Report, 2022* it is estimated that over 2.5 billion CC-licensed open works are available online.³⁹ This is a substantial increase from 1.4 billion reported in the 2017 Report.⁴⁰ This popularity can be ascribed to the ethos of open access which denounces the increased commercialization of knowledge and shrinking of the public domain as a result of the unbridled expansion of the scope of copyright. At the same time, it is important to note that CC-BY does not seek to abolish the copyright regime.⁴¹ In fact, it relies on the traditional principles of copyright law for its enforcement.⁴²

At this point, and before analysing their purpose and implications, it is important to introduce key concepts in the operationalisation of rights' retention, namely 'Author Accepted Manuscript' ["**AAM**"], 'Version of Record' ["**VOR**"], and Creative Commons licenses ["**CC-BY**"]. An AAM is basically the final version of the work after considering all the comments and suggestions made during the review process. This is the version belonging to the author as accepted by the journal. Thereafter, the publisher turns this manuscript into the final article by carrying out suitable typesetting and formatting. This version is known as the VOR, which may take anywhere between

³⁸ Laursen, *supra* note 27, at 590.

³⁹ *State of the Commons, 2022*, CREATIVE COMMONS, <https://creativecommons.org/state-of-the-commons-2022/#cc-licenses-and-legal-tools>.

⁴⁰ *State of the Commons, 2017*, CREATIVE COMMONS, <https://stateof.creativecommons.org/index.html#data>.

⁴¹ S. Dusollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 278 (2006).

⁴² A. Giannopoulou, *The Creative Commons Licenses Through Moral Rights Provisions in French Law*, 28 INT'L REV. L., COMPUTERS & TECH. 60, 63-64 (2013).

weeks to months to be produced.⁴³ Rights are usually retained over the AAM version of the work. Finally, CC-BY is a set of public licenses provided by Creative Commons (CC), an international non-profit organization focused on knowledge sharing. These licenses give a person or organization a free and standardized way to grant copyright permissions for their work. There are six types of licenses which allows rights of distribution, copying, and making use of the work in various forms and simultaneously ensures proper attribution of the work to the original author.⁴⁴ In essence, rights retention is an option available to the author of a work, which allows them to retain their intellectual property rights over the AAM, and so use their work as they choose. In doing so, the author grants a license over the AAM as open access by self-archiving the work in a repository.⁴⁵ This is usually achieved by adding the following or similar ‘magic sentence’ to the cover page while submitting the AAM to the journal:

‘A CC BY or equivalent licence is applied to the AAM arising from this submission.’⁴⁶

The journal can either accept the manuscript with this condition or decline it. The advantages of rights retention are that it allows the author to retain a degree of control over his work and allows him to freely distribute his work to others by publishing the AAM in hybrid or open access journals. The publisher, on the other hand, is free to publish the VOR with all the additions it has made to the AAM, as per the journals’ requirements.⁴⁷

Once the rights in the work have been retained and to some extent insulated from a complete commercial takeover by the publisher, the author is free to distribute their work to the wider public. The AAM is deposited with a repository under a CC-BY license. Crucially, and although disputed by some publishers to date, rights’ retention through the assignment of a CC-BY license takes precedence over any subsequent copyright transfer agreement that the author may sign with the publisher, because the author has asserted their rights not only by including a rights’ retention clause, but also by making the work public.⁴⁸

⁴³ S. Eglén, *Primer on the Rights Retention Strategy*, ZENODO (Apr 7, 2021), <https://zenodo.org/record/4668132>.

⁴⁴ *What We Do*, CREATIVE COMMONS, <https://creativecommons.org/about/>.

⁴⁵ S. Moore, *The Politics of Rights Retention*, 11 PUBLICATIONS 28 (2023), <https://doi.org/10.3390/publications11020028>.

⁴⁶ Eglén, *supra* note 43, at 2.

⁴⁷ *Id.*

⁴⁸ Moore, *supra* note 45, at 4.

As stated above, a CC-BY license allows various rights to end users; however different types of CC-BY licenses place different restrictions on end users. For example, the generic CC-BY allows users to distribute, remix, adapt, and build upon the work in any medium or format, so long as attribution is given to the creator. It also allows for commercial use. CC-BY licenses provide a range of forms, with different levels of restrictiveness. The following four forms are the most relevant for rights' retention:

1. **CC BY-SA** allows for all of the above, but the modified material must also be licensed under identical terms.
2. **CC BY-NC** is granted only for non-commercial purposes. **CC BY-NC-SA** is a combination of the above *i.e.*, it is granted only for non-commercial purposes and the modified material must be licensed under identical terms.
3. **CC BY-ND** allows commercial use with all rights as above; however, no adaptations of the work are permitted. Finally,
4. **CC BY-NC-ND** is the CC BY-ND minus commercial use of the work.⁴⁹ Thus, the author can retain control over his work by choosing the scope of activities permissible to the subsequent users.

C. Private Use of Reason and Copyright Licenses under Creative Commons

Coming back to our theoretical framework, recall that Kant had supported compliance with the laws laid down by a higher authority on the basis of reciprocal contractual obligations to achieve the greater common good, in lieu of allowing individual freedom of expression beyond this contract. In other words, the sovereign can legitimately expect obedience from citizens, in exchange for respecting their right to conscience and expression. In a similar exchange, under rights' retention, the author contracts with the publisher to grant it the right of publishing, subject to the author's right to exercise control over their work by exercising their inherent rights. By depositing the AAM with a repository, the author has granted the right of use to other users subject to securing their own interests through the application of one or the other form of CC-BY licenses. Seen in this light, the interests of all stakeholders – the author, the publisher and the public- are taken into account and thus protected. *Public use of reason* is exercised through dissemination of knowledge, while warranting *private use of reason* because the publisher is free to publish and monetize their version of the author's work, and free to pursue claims against any perceived infringement of their copyright over the same.

⁴⁹ *About CC Licenses*, CREATIVE COMMONS, <https://creativecommons.org/about/cclicenses/>.

Some publishers may differ with our analysis, although robust evidence on a systematic rejection of manuscripts containing the ‘magic sentence’ is lacking. This could be explained for the reason that most large publishers have a portfolio of both hybrid and fully open access publishing options, allowing them to accommodate the works in which rights have been retained into their database. Even for subscription-based journals, it may be possible for publishers to negotiate in the author agreement that authors may retain the rights but delay the deposition of the AAM with a repository for a certain time period (so-called embargo).⁵⁰ Lastly, like any system, rights’ retention strategies are not short of vulnerabilities. The ‘*magic sentence*’ or two added to the cover letter of the submission may not be legally sufficient to circumvent the prohibitions mandated under certain copyright provisions. The lack of clarity can expose authors, institutions as well as readers to legal risks. This is so because authors and institutions could potentially be distributing the work in contravention of certain publishing agreements. The reader can also be potentially at risk because, should the applied CC-BY license itself be rendered invalid as a result of the publishing agreement, then a user making use of that work can also be deemed to have done so in an unauthorized manner.⁵¹ In addition to these limitations, making scientific work open access through rights’ retention presents other significant challenges, namely the violation of the moral rights of the author and plagiarism.

IV. CHALLENGES OF OPEN ACCESS PUBLISHING

The expansion in the open access domain and the increased use of CC-BY licenses has brought to the forefront challenges and potential vulnerabilities that must be addressed for the objectives of open access to be realised. We discuss below two of the most significant challenges: moral rights and plagiarism.

A. Open Access and the Moral Rights of the Author

Moral rights originate from the personhood theory of copyright according to which work is an extension of the personality of its creator as projected into the world.⁵² They seek to protect the non-commercial interests of the author which typically includes the right of attribution – to be named as the author of the work, and the right to integrity of the work *i.e.*, the right to object to

⁵⁰ L.- J. Hinchliffe, *Explaining the Rights Retention Strategy*, THE SCHOLARLY KITCHEN (Feb. 17, 2021), <https://scholarlykitchen.sspnet.org/2021/02/17/rights-retention-strategy/>.

⁵¹ S. Yon-Seng Khoo, *The Plan S Rights Retention Strategy is an Administrative and Legal Burden, not a Sustainable Open Access Solution*, 34 INSIGHTS 1, 5 (2021).

⁵² C.-H. Settlemyer III, *Between Thought and Possession: Artists’ “Moral Rights” and Public Access to Creative Works*, 81 GEO. L. J. 2291, 2303 (1993).

mutations or distortions of the work.⁵³ Under international copyright law,⁵⁴ Article 6*bis* of the Berne Convention grants the author a right to be recognized as the author and to object to any distortion, mutilation, or other derogatory action in relation to his work, which would be prejudicial to his honour or reputation.

The right to attribution is recognized under section 3 of the CC-BY 4.0 license agreement, in cases where the licensed work or its modified form is shared with the public. According to the terms of the section, the licensee is required to identify the licensor in any reasonable manner.⁵⁵ Attribution has largely remained uncontroversial, although there may be cases where compounded sharing of the work may become so complex -with multiple modifications, contributions, etc.- that the necessary distinction between the original version and the subsequent versions may become blurry. In such cases, attribution of all contributions and modifications may not be a straightforward matter,⁵⁶ likely exposing the users to potentially unmitigated risks.

Integrity rights present a bigger challenge. While section 2(b)(1) of the CC-BY 4.0 license agreement expressly states that moral rights such as the right of integrity or other personality rights are not licensed under it, there is a caveat included. This section further states that the licensor waives and agrees not to assert such rights, to the extent it is necessary for a user to exercise their rights granted under the terms of the license. This carve-out is problematic, in that it is far from clear which element in the agreement would take precedence – rights to the integrity of the work, or right to use the work. In addition, section 3(1)(b) establishes that the licensee must ‘indicate’ the modifications, if any, that they made to the original work in case they share the modified version with the public. As stated above, it can be challenging to attribute modifications to the work in cases of compounded sharing. What is to be noted here is that the licensee is merely required to *indicate* that changes have been made to the original text, and is not *required* to show what those changes are. Absent this requirement, there is a latent risk for a distorted version of the work attributed in the name of the original author to be shared with the public, leading to potential reputational damages for the original author. As such, the authorization to make use of

⁵³ M.-T. Sundara Rajan, *Creative Commons: America's Moral Rights*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 905, 909 (2011).

⁵⁴ Berne Convention for the Protection of Literary and Artistic Works, July. 24, 1971 (Paris), WIPO, 828 U.N.T.S. 221.

⁵⁵ Attribution 4.0 International, CREATIVE COMMONS, <https://creativecommons.org/licenses/by/4.0/legalcode>.

⁵⁶ A. Giannopoulou, ‘*Sharing is Caring*’: *Creative Commons, Transformative Culture, and Moral Rights Protection*, AMSTERDAM LAW SCHOOL LEGAL STUDIES RESEARCH PAPER NO. 2022-42, (University of Amsterdam 2022).

and to modify the work must not be perceived to have been granted at the expense of the right of integrity of the original work.

An additional challenge is posed by the difficulty in maintaining a balance between freedom of creation and respect for the integrity of the original work through the use of CC-BY licenses. For example, in 2007, the French *Cour de cassation* – one of the four courts of last resort in France, while deciding a case involving *Les Misérables* by Victor Hugo- denied the claim of one of his descendants who was keen in preventing the publication of a sequel to the novel. The claim was ultimately denied on the basis that a work available in the public domain is open for adaptation, and any harm to the integrity of the work must be proven to justify suppressing the freedom of creation of other users.⁵⁷ Thus, while considering a claim alleging violation of the integrity of a work, it is essential to stay close to the main rationale of the CC-BY licenses: that of promoting the free dissemination of work.

B. Open Access and Plagiarism

Plagiarism is not only illegal but is also considered unethical. In a sense, plagiarism has always been dependent on the current state of technology, in that plagiarism is possible only to the extent the technology of the day makes it possible. In earlier times, access to printed work was accessible only to those who could travel to the libraries and repositories which physically held the work. Detecting plagiarism was difficult and would usually only be established in cases where a person familiar with both texts could scrutinize the documents together to establish their originality⁵⁸ (or lack thereof). Today, there are billions of open access works available online, increasing the risk of the ease with which these can be used by third parties without giving proper attribution to their original authors.

It is interesting to note that the source of most copyright violations in scholarly work today can be traced back to the internet, which indicates that the open access availability of work does facilitate ease of plagiarism.⁵⁹ As illustration, a survey carried out with academics of a research-intensive university in Malaysia revealed, in 2009, that for 73.8% of the respondents, concerns of potential plagiarism was the top deterrent against self-archiving their work,⁶⁰ a telling indication of

⁵⁷ *Id.*, at 70.

⁵⁸ D. Ocholla and L. Ocholla, *Does Open Access Prevent Plagiarism in Higher Education*, 26 AFR. J. LIBR., ARCHIVES & INFO. SCI. 187, 192 (2016).

⁵⁹ J. Brandt et al., *Plagiarism Detection in Open Access Publications*, in Proc. of the 4th Int. Plagiarism Conference (2010).

⁶⁰ A. Abrizah, *The Cautious Faculty: Their Awareness and Attitude Towards Institutional Repositories*, 14 MALAYSIAN J. LIBR. & INFO. SCI. 17, 30 (2009).

the interplay between the importance of self-archiving and a perceived lack of copyright protection when CC-BY licenses are in use. Conversely, it is also widely accepted that the use of the internet, coupled with the proliferation of open access systems, has led to much easier and greater detection of plagiarism. For example, the unrestricted availability of work over open access makes them particularly suitable for plagiarism detection software like Turnitin and Docoloc.⁶¹ In fact, it may also be the case that, as a result of open access publishing, authors are being even more attentive when publishing their research -as a charge of plagiarism has the potential to cause major embarrassment and reputational loss.⁶²

As a result, when it comes to plagiarism, open access is a double-edge sword in that it can facilitate as well as detect plagiarism.⁶³

On a concluding note, the use of most CC-BY licenses, barring few, allow for commercial use of derivative works. This is important to emphasise because, even though attribution is one of the requirements, we have seen above that, attribution may become progressively difficult in cases of compounded modifications, or when the changes made to the original work are merely indicated but not substantially defined, resulting in the subsequent user potentially, even if inadvertently, come into the enjoyment of commercial fruits of scientific works to the detriment of the original author. This is one key situation which the terms of the licenses fail to address at present, and for which new copyright law will need to provide an alternative avenue of redress.

V. CONCLUSION

The rapid expansion in the scope of copyright protection appears to have diminish the public domain of knowledge and scientific dissemination. Corporate capture of publishing industries must not only be seen as a private loss to the author, but as a loss for all. If left unattended, imposing undue restrictions on the accessibility to generated knowledge will stifle the ability of future generations to engage in independent thinking, with wider implications for the development and progress of global societies.

In this paper, we have engaged with the legal-philosophical foundations of open access by grounding our analysis in Kantian ideas of public and private use of reason. Through this lens, we argued that, for all its potential pitfalls, open access has the ability to delicately balance the interests

⁶¹ Ocholla, *supra* note 58, at 5.

⁶² *Id.*

⁶³ J. Purdy, *Calling Off the Hounds: Technology and the Visibility of Plagiarism*, 5 PEDAGOGY 275, 276 (2005).

of all involved stakeholders - including those of commercial publishers. We suggested that open access, in its variety of forms, allows for reciprocal, bifurcated copyright arrangements that display the ability of authors to honour contractual obligations with commercial publishers on the one hand, while openly disseminating their scientific findings to the public at large on the other hand, thus adding nuance and complexity to an emerging new copyright law – one that embraces principles of equity and inclusion, while being fit for purpose in light of rapid technological advances.

When Kant discusses the idea of *enlightenment*, he makes it clear that any obligation which has the effect of keeping humans away from the pursuit of *enlightenment* is absolutely null and void,⁶⁴ in a sense equating the will of the sovereign with the will of the people. Kant’s view on public and private use of reason reminds us that this value alignment is necessary and continues to be relevant today. The open access movement optimises access and maximises the impact of scientific research. A work which is freely accessible is read more widely and is cited more often, thus contributing to a virtuous cycle of knowledge generation. Moreover, the use of CC-BY licenses is a carefully balanced act in deference to foundational principles of copyright law and the freedom to contract, seeking to give back control to the original creators of the work: the author. Also, given that a significant portion of academic research is publicly funded, there is a strong argument⁶⁵ in favour of making it freely available to the public.

One way of shifting towards a more responsible culture of commercial academic publishing is to see the advancement of scientific knowledge as a social responsibility, so enabling commercial publishers to act as social partners in this process. This could be done by partnering with academic institutions such as universities, libraries, research centres, etc. to devise mutually beneficial collaborations,⁶⁶ while simultaneously promoting -and indeed operationalising- the social objectives of publicly funded scientific works. In turn, publishers (as the “gatekeepers” of standards in the publishing business)⁶⁷ could provide invaluable experience in addressing the challenges posed by distortions of original works and concerns of plagiarism, both significant concerns for open access systems, as we have seen. In this way, commercial publishers would

⁶⁴ Cronin, *supra* note 31, at 57.

⁶⁵ P. Suber, *Open access overview: Focusing on open access to peer-reviewed research articles and their preprints*, OPENSOURCE.COM (Nov. 15, 2010), <https://opensource.com/education/10/10/open-access-overview-focusing-open-access-peer-reviewed-research-articles-and-their->

⁶⁶ N. Koutras, *The Evolving Role of Commercial Publishers and the Future of Open Access Repositories: The Potential of Corporate Social Responsibility*, 35 PUB. RES. Q. 391, 409-410 (2019).

⁶⁷ *Id.* at 409.

continue to play a key role as “gatekeepers” of academic publishing standards in a more open, inclusive and equitable knowledge dissemination environment. Engaging in such initiatives would shift the narrative engulfing commercial publication of scientific works towards a realigned reality where partnerships, not profits, are at the core of knowledge dissemination.

Navigating the Realm of Cosplay and Copyright Law: Exploring Infringement and Fair Use

SHUBHANGEE SINGH*

ABSTRACT

Fans from all over the world gather at comic conventions and similar events dressed in elaborate costumes, hairstyles that defy gravity, and detailed makeup inspired by their favourite fictional characters. This worldwide phenomenon is known as cosplaying and the ones who take part in it are cosplayers. Anybody who has recently attended a comic convention or seen images of it is aware that the art of cosplaying has progressed considerably from Star Trek Convention days. A growing trend that is being witnessed nowadays in cosplay is that cosplayers are looking for novelty rather than portraying characters like Darth Vader for the 1000th time. Devoted cosplayers have improved their abilities to find a challenging subject to showcase their work. The popularity of cosplay among fans has also risen as comic conventions occur more frequently. These conventions are vital to the cosplay community because they let enthusiasts from across the nation congregate in one place to exhibit their work. As a result of the growing popularity, cosplayers nowadays are making a good deal of money through endorsements and as social media influencers. The Japanese government's decision to amend its copyright laws and regulate cosplay culture has once again raised the question of whether cosplaying amounts to copyright infringement. Given the rapidly increasing popularity of cosplaying and emerging legal problems, this article examines the current state of copyright laws focusing on fictional characters and costumes and evaluates the applicability of the fair use defence with reference to professional cosplay.

I. THE BOOMING BUSINESS OF COSPLAY

Cosplay, or the art of dressing up as a character from a film, television show, comic book, video game, or other media, has evolved into a burgeoning business. Although the phrase first appeared in the 1980s, this practice has been around for a very long time. It is usually related with comic book or pop culture events such as comic conventions, where throngs of fans gather, dressed up like popular characters from Lord of the Rings, Harry Potter, Doctor Who, Star Wars, Game of Thrones, Witcher, Marvel and DC Comics as well as anime worlds like Pokémon, Naruto, Final

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Fantasy, and more. While the majority of cosplayers just do it as a hobby, donning their costumes for conventions like Comic-Con, and then going back to their regular jobs afterward, a select few have turned it into a career.¹ These are the professional cosplayers who are usually paid to appear at conventions or gatherings like any other regular celebrity. Professional cosplayers are individuals recognised within the convention community as individuals who best represent cosplay as an art and excel in portraying these characters. Their costumes are intricately detailed, carefully crafted and designed.²

The global cosplay market was estimated at \$4.62 billion in the year 2020, and it is predicted to reach around \$23 billion by the year 2030.³ This movement is also rapidly expanding its reach online. These days, one can find a sizable cosplay community on TikTok, Instagram, Twitch, and YouTube.

And this may very well be the reason that the Japanese government is of the opinion that cosplay has moved beyond the realm of being an innocuous hobby to that of amounting to copyright infringement and announced its decision to regulate professional cosplay under the Japanese copyright law. While donning a character's costume by itself does not violate copyright, it may do so if the cosplayer is being paid to do so, for example, to appear on a show or event.⁴

The concept that cosplay and copyright law can be conflicting is actually not that far-fetched. Cosplayers try to accurately imitate and embody the fictional characters, which are protected by copyright, and many of them succeed. So, for instance, suppose a cosplayer wants to successfully cosplay as 'Ciri', the character from the popular fantasy book series 'The Witcher', they would have to recreate and don an iconic costume of 'Ciri' in order for people to recognise them as the character they are cosplaying. Ironically, a cosplayer would therefore have to, in some ways, infringe their favourite copyrighted work. When 2-dimensional characters and costumes from movies, video games and comic books are recreated into 3-dimensional characters and

¹ Emma Steen, *Things You Only Know When You Are... A Professional Cosplayer*, TIME OUT (2019), <https://www.timeout.com/tokyo/things-to-do/things-you-only-know-if-youre-a-professional-cosplayer>.

² Molly Rose Madonia, *All's Fair in Copyright and Costumes: Fair Use Defence to Copyright Infringement in Cosplay*, 20 MARQ. INTELL. PROP. L. REV. 179 (2016).

³ Aniket K & Roshan D, *Cosplay Costumes Market by End User, Application and Distribution Channel: Global Opportunity Analysis and Industry Forecast (2021-2030)*, ALLIED MARKET RESEARCH <https://www.alliedmarketresearch.com/cosplay-costumes-market-A13135>.

⁴ *Japan to Clarify Copyright Rules for Cosplay*, THE JAPAN TIMES (Jan. 31, 2021), <https://www.japantimes.co.jp/news/2021/01/31/national/cosplay-copyright-infringement/#:~:text=While%20wearing%20a%20costume%20of,an%20appearance%20at%20an%20event>.

costumes, it results in the creation of derivative works and therefore it is crucial to look at the copyright issue in this context.

II. COPYRIGHTABILITY OF CHARACTERS AND COSTUMES

There are two things that need to be considered when evaluating the possibility of infringement in case of cosplay: firstly, the copyrightability of the fictional character and secondly, the copyrightability of the costume of the fictional character. Depending on the cosplayer's chosen subject, the answer can be either 'yes' for both, neither or just one of them.

A. Characters:

Where a stock character (characters having minor supporting roles and easily recognisable in fictional works such as the snooty cheerleader, the gruff grandpa, the nosy neighbour, etc.)⁵ lacks distinctive personal attributes, it is not eligible for copyright protection but on the other hand if this stock character has a distinctive costume, this costume is eligible for copyright protection (for e.g., Stormtrooper from Star Wars). On the other hand, a completely developed character can have a distinctive personality and background that merits copyright protection, but still have an ordinary appearance that does not provide copyright protection for their costume (for e.g., Ethan Hunt from Mission Impossible).

Stock characters fall under 'scenes a faire' doctrine which holds that some literary elements are too commonplace to be eligible for copyright protection. This doctrine is related to the idea-expression dichotomy which provides that only expression of ideas is copyrightable whereas ideas themselves are not. The 2nd Circuit has ruled that stock characters are so common and ordinary that they are not distinguishable and hence are not eligible for copyright protection. The court devised the 'Sufficient Delineation Test' which guarantees protection to characters only in case of their sufficient delineation in the underlying work.⁶

Another reason a character might be protected by a copyright is if they play such a crucial role in the narrative that readers are drawn to them. This test was developed in *Warner Brothers v. Columbia*,⁷ which provides that a fictional character is copyrightable only if it constitutes the story being told.

⁵ *Stock Characters*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/StockCharacters>.

⁶ *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2nd Cir. 1930) (U.S).

⁷ *Warner Brothers v. Columbia Broadcast System*, 102 F. Supp. 141 (S.D. Cal. 1951) (U.S).

This means that the fictional character must be essential to the story and must take centre stage rather than simply acting as a plot device.⁸

The 9th Circuit in *D.C. Comics v. Towle*⁹ ruled that ‘Batmobile’ itself is a character eligible for copyright protection and the defendant’s replica cars were infringing the derivative works.

B. Costumes:

Costumes are considered ‘useful articles’ and are not copyrightable unless they have graphical, pictorial, or sculptural features that are distinct from and may exist separately of the functional aspects of the clothing.¹⁰

In *Star Athletica*¹¹ the dispute centred on Varsity Brands’ cheerleader outfits. Varsity Brands had several copyright registrations for two-dimensional designs that it later used on its cheer costumes. *Star Athletica* was accused of infringing this copyright by designing identical cheerleader outfits. The Supreme Court ruled that a feature of a useful article is copyrightable if it can be perceived as a 2- or 3-dimensional artwork that is separable from the useful article and if it would be a protectable pictorial, graphical or sculptural work on its own (or if applied to another medium, such as a canvas).

This strengthens the case for cosplayers who dress up as fictional figures and create a replica of their costumes. They are permitted to create a costume closely resembling the cut, shape, and size of the original item, but they are not allowed to copy any separate designs or decorative elements that would be copyrightable on their own.¹²

C. Props and Armour:

In US cosplay accessories like armour and props have a different connection to copyright law because they are not regarded as functional clothing. Making a replica of a real-life prop that has been used in a film (such as Thor’s hammer), or a replica based on an animation or a drawing (such as the Millennium puzzle) is likely to result in the infringement of rights of the copyright holder.

⁸ Sanjana, *India: Exploring Copyright Protection for Fictional Characters*, MONDAQ (Sept. 17, 2017), <https://www.mondaq.com/india/copyright/1112382/exploring-copyright-protection-for-fictional-characters>.

⁹ *D.C. Comics v. Towle*, 802 F.3d 1012 (2015) (U.S.).

¹⁰ 17 U.S.C., §101(2016).

¹¹ *Star Athletica, L. L. C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (U.S.).

¹² Mary Ellen Tomazic, *Costumes, Characters and Copyright: A Cosplayer’s Guide to Recent Cases*, INTELLECTUAL PROPERTY LAW (Jun. 16, 2017), <https://met-iplaw.com/met-iplaw2012/?p=200> [“Mary Ellen”].

Armour, weapons and jewellery associated with popular fictional characters may be considered sculptural works and, in these cases, fair use would not apply.

However, the situation is quite different in UK. In the case of Lucasfilm¹³ case prop designer Andrew Ainsworth was allowed to sell replicas of the original “Star Wars” Stormtrooper helmets, originally designed by him. He won the suit on the grounds that the costumes were functional and not artistic works as a result of which they cannot be subject to full copyright protection. The UK Supreme Court agreed with the lower court’s ruling that the helmet and armour were still identified as and used as helmet and armour in the movie and as such their utilitarian function was of costume and prop.

III. COSPLAYING -FAIR OR UNFAIR USE?

Fair use is four-factor test which requires that courts should consider the following four aspects of the use and balance these factors before coming to a decision. These are: (1) purpose and character of use, (2) nature of copyrighted work, (3) amount and substantiality of portion taken, and (4) potential effect of use upon the market for original.¹⁴

A. Purpose and Character of the Use:

In deciding whether the use is fair, the first factor has always played a prominent role. The use of the copyrighted work by party who claims fair use, is considered by the court, and non-commercial/non-profit educational uses are considered to be fair use. However, this doesn’t suggest that all non-profit educational/non-commercial uses are fair and all commercial uses are not but that courts will consider use's purpose and character in relation to the other factors of the fair use defence. Furthermore, ‘transformative’ uses are usually considered fair. They don’t replace the original use of the work but rather add something new with a different purpose or character.¹⁵

1. *Commerciality:*

Commercial motivation does not necessarily result in infringement and this factor should be taken into consideration with the other factors. Overemphasizing the commercial motivation results in restricting the defence because many secondary users desire some level of financial gain from their use. The commercial factor, though, is unquestionably important. The district court in *DC Comics*

¹³ Lucasfilm Ltd. v. Ainsworth, 12 EMLR (2010) (U.K).

¹⁴ U.S. Copyright Office Fair Use Index, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/>.

¹⁵ *Id.*

*Inc. v. Unlimited Monkey Business*¹⁶ dismissed the fair use defence by relying upon the company's commercial nature.

Cosplayers make money through social media platforms as well as by making guest appearances at conventions (Top cosplayers reportedly make around \$50k per appearance), charging fans for clicking photographs, selling their photographs and the costume patterns. This amounts to commercial use and weighs in favour of the copyright holder. Cosplayers who are proficient in costume design, prop creation, or wig style also create these products for other people on a commission basis.¹⁷ The commercial gain from the sale of unlicensed costumes and props, amounts to commercial use weighing in favour of the copyright holder.

However, the main purpose of a professional cosplayer in attending comic conventions is not to earn profit. The purpose to attend the convention is to share their craft with other like-minded fans in an environment where doing so is encouraged. Cosplay is a way of showing affection for certain characters and paying tribute as these characters mean something special to cosplayers. This is the way through which cosplayers honour these characters. Being paid is just an added bonus which helps in recouping the cost associated with attending the convention and creating the costume. Here, use of character being incidental to the main purpose and motivation of attending convention, cosplay would amount as fair use.

Also, the court in *Campbell*,¹⁸ has noted that if a work is of transformative nature, such transformation can mitigate the effect of commerciality.

2. *Transformative Use:*

In order to override the commerciality of the work, transformation should be of such a nature that it adds something new and has a different purpose and character, thereby altering the original work through new expression and message. Based on the balancing test between commerciality and transformation laid down in the *Campbell* case,¹⁹ the transformative nature of the costume of the cosplayer ought to support the finding of defence of fair use. Even if cosplaying is

¹⁶ DC Comics Inc. v. Unlimited Monkey, 598 F. Supp. 110, 118 (N.D. GA 1984) (U.S).

¹⁷ Deena ElGenaidi, *Cosplayers are dressing up and cashing in*, LINKTREE, <https://linktr.ee/blog/how-professional-cosplayers-make-money-social-media/>.

¹⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569.

¹⁹ *Id.*

commercialized, the cosplayer's ingenuity supports the notion that there has been a notable transformation.²⁰

Considering the creativity and skill that goes into creating a cosplay, it can easily fall into the category of transformative use. The transformational nature of creating a costume might weigh in favour of professional cosplayer. Through cosplay, a 2-dimensional image/character or a fantasy taken from a page of manga or anime is transformed into a 3-dimensional living character in real time. The animated body is brought to life by detaching the character from the narrative of the text.

Modifying the size of a costume constitutes only a minimal transformation. All parts of costume and accessories—several of which are constructed of magical elements on the original character—must be completely reimagined and then created from scratch by the cosplayer. To achieve this, the cosplayer must begin with picture of the costume and then bring it to life with their own movements. Cosplayer must make assumptions about how the character's accessories would work and use realistic techniques to replicate such effects. Cosplayers through their genius thus transform the costume of the character into real life.

However, a 3-dimensional representation of a 2-dimensional work would probably not be considered sufficiently transformative by courts to escape accountability. Still there can be instances where cosplay could be considered transformative use. The fair use provision is more likely to apply to crossover, gender-bent or gijinka cosplay. Crossover cosplay involves blending characters from two distinct genres into a completely new idea. For example, combining Disney with anime, Marvel with DC, etc.²¹ In case of gender-bent cosplay, the perceived gender of the character being portrayed is changed wherein a female version of a male character is being portrayed and vice versa. There is a lot of imagination used in the creation of gender-bent cosplay. The exact details of a costume need not be replicated by a cosplayer. Instead, using the original design as a base, they make certain modifications so that it can work for the opposing gender. The same is true with gijinka cosplay, which is the practise of dressing up as humanised versions of

²⁰ Christina Chung, *Holy Fandom, Batman! Commercial Fan Works, Fair Use, and the Economics of Complements and Market Failure*, 19 B.U. J. SCI. & TECH. L. 381 (2013).

²¹ Tiffani Daniel, *10 Creative Spider-Verse Cosplays That Still Look Just Like The Characters*, SCREENRANT (Dec. 17, 2019), <https://screenrant.com/spider-verse-creative-crossover-cosplays/#deku-spider-man>.

fictional non-human characters. A *gijinka* cosplay involves a lot of imagination because it requires one to come up with new ideas.²²

Nonetheless, the cosplayer's unique facial features, physique, and personalities as opposed to those of the fictional character would probably be transformative. Not all cosplays are exactly alike of the existing characters as cosplayers try to add their own unique touch to their favourite characters. For instance, cosplayers try to combine an iconic face from one fandom and try to place it within another fandom where this character has never made an appearance. For instance, making a character fit within a well-known series, like *Star Wars* or into a particular era of history, like feudal Japan.²³

Even though accuracy is valued in cosplay, no single cosplay and cosplayer is ever exactly like the fictional character that is being portrayed. Because of this, every cosplayer takes a character and develops it. Cosplayers personalize the characters by adding their own unique interpretation to them. For example, cosplayer Yalda's unique and innovative take on the Sailor Moon character at the 2021 Anime NYC convention. The left half of the costume depicted the character of Usagi Tsukino as the defender of justice known as Sailor Moon, adorned with flowering ribbons and ethereal pink tone, while the right half shows her in her regular school uniform.²⁴

Furthermore, the setting in which the cosplay takes place is also quite different when compared to the fictional world from where the character belongs. Professional cosplayers portray characters that are no longer in their habitat and are now sharing space with perhaps hundreds of other fans, significantly minimizing the expressive value of the character.

The fascinating thing about cosplay is that the creative aspect is really the only thing that is duplicated, as most of the additions that are made to turn a 2-dimensional fictional character into a reality would be considered useful article. So as long as cosplayers make original and creative additions to their costumes and character, cosplaying could fall under the fair use.

²² Kayree Lee, *Cosplay: Gijinka Cosplay*, THE MAGIC RAIN (Oct. 18, 2017), <https://themagicrain.com/2017/10/cosplay-gijinka-cosplay/>.

²³ Jason Alpert-Wisnia, *New York Comic Con and the art of cosplay*, WASHINGTON SQUARE NEWS (Oct. 17, 2022), <https://nyunews.com/2022/10/16/new-york-comic-con-and-the-art-of-cosplay/>.

²⁴ Michael Lacerna, *Sailor Moon Cosplay Recreates Iconic Transformation Sequence*, CBR.COM (Dec. 8, 2021), <https://www.cbr.com/sailor-moon-cosplay-tranformation-sequence/>.

B. Nature of the Copyrighted Work

Second factor deals with the type of the work that is covered by the copyright. Using this criterion, courts have determined that works that are more closely aligned with the intended copyright protection should be more strictly protected. This aspect favours the author of the original work more when the original work has stronger copyright protection. Due to this, courts frequently give fictional works a stronger level of protection than factual or works in public domain.

When it comes to cosplay, the character that is being portrayed is usually from a movie, comic book, tv show, video game, etc., and has a distinctive persona or costume. As the author of these works has gone to considerable lengths to develop such a character and the fantastical world wherein, they exist, these works are of a nature that deserve copyright protection. The court in the case of *Kelly v. Arriba Soft Corp.*,²⁵ has ruled that using characters that have been published, more likely constitutes fair use because of their widespread circulation. But with respect to unpublished works, there is narrower scope of fair use as the author has the right to control the first public appearance of his or her expression.²⁶ Thus, as the character that is being portrayed by a cosplayer is widely disseminated over the movies, comic books, tv, etc., this factor weighs to a small extent in favour of the copyright holder.

Moreover, in the Bill Grahams case,²⁷ the court was of the view that in determining the fair use, the second factor has less weightage than the factor involving transformative use. In case the professional cosplay is transformative, this factor would not significantly affect the cosplayer.

C. Amount and Substantiality of the Portion Used:

The third factor is the amount and substantiality. This indicates that cosplay is more likely to qualify for the fair use defence when only a small portion of the original work is borrowed. While the extent to which this aspect applies, varies greatly from fan work to fan work, the majority simply borrow very little amounts of the original work.²⁸ In the case of cosplay, cosplayers usually use the costumes and characters from the work. Even though cosplayers clearly take the heart of the original work into their creations this is done so that viewers are able to identify the character. If viewers are not able to identify the fictional character on which the costume is based,

²⁵ *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002) (U.S.).

²⁶ Rich Stim, *Measuring Fair Use: The Four Factors*, STANFORD LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/four-factors/>.

²⁷ *Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605 (2006) (U.S.).

²⁸ *Fanworks, Fair Use, and Fair Dealing*, ORGANIZATION FOR TRANSFORMATIVE WORKS, <https://www.transformativeworks.org/fanworks-fair-use-and-fair-dealing/>.

it defeats the cosplayer's purpose of accurately portraying the character. This factor then would probably weigh against the professional cosplayer due to the amount taken.

However, copying only a small part of the character will defeat the cosplayer's purpose of portraying the character. Cosplayers choose a character based on the essential aspects of the character's costume, his/her personality, and any additional characteristics that set the character apart. In case the cosplayer is parodying the original work, this factor might be in favour of the cosplayer.

D. Potential Effect on the Market for Original:

The potential effect on the market is the primary consideration when implementing the fair use requirement. This is because the impact on the market touches most closely on the author's capacity to enjoy the rewards of his labour and, consequently, his drive to produce. Without the capacity to capitalise on the market for one's copyrighted products, the incentive system for copyright would be limited and its utilitarian objectives would be compromised. So, it is detrimental to the determination of fair use if an alleged fair use displaces the market for the original material.²⁹

Courts maintain that when examining the market effect of a challenged use on a market, only reasonable, conventional or markets that are likely to exist should be considered. In addition, courts also consider markets for the sale of derivative works in addition to the primary market for the original work when resolving this problem. Therefore, when examining derivative markets, only an effect on possible licencing revenues for conventional, reasonable, or potential markets should be considered. Courts typically consider whether a specific market exists or will do so in the future when considering if a market is conventional, reasonable, or likely to come into existence.³⁰

Cosplayers draw their inspiration from the market of comic books, video games, manga, movies, and television programmes. There would be no impact on these markets if a cosplayer cosplays a character from these mediums. The potential impact on the original marketplace is reduced when the cosplay is transformational in nature. Just because someone is cosplaying a character at a convention doesn't mean that a consumer in the original market won't be buying a comic book or

²⁹ W. Michael Schuster, *Fair Use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of the Commercialization of Fan Fiction*, 55 SOUTH TEXAS L. REV. 540 (2014).

³⁰ *Id.*

a film based on that character. In fact, cosplaying is free publicity for the copyright holder and like any other fan work, drives up the demand for the original.

However, cosplay might affect the copyright holders' market when it comes to costumes and props which are based on their characters. There are cosplayers who have made cosplaying a lucrative career by selling costumes and props on sites such as Etsy. This is violative of the rights of the copyright holder and does not fall within the fair use defence. When it comes to the costume and prop business, one-offs are permitted but the moment there is mass production, it can no longer be considered fair use. In order to be able to sell these costumes and props, cosplayers will need to obtain license from the copyright holder.

Copyright holders usually encourage fan-works but the moment there is commercialization of derivative works, they do not hold back in enforcing their rights. Paramount Pictures, the company that holds the rights to the Star Trek series, filed a lawsuit against Axanar Production for copyright infringement. This legal action was initiated after Axanar successfully gathered over \$1 million through crowdfunding campaigns, with the intention of creating a professional fan film. The court ruling in the Axanar³¹ case determined that a Star Trek fan film did not sufficiently exhibit "a further purpose or different character" that would transform the copyrighted Star Trek works with new expression, meaning, or message. As a result, the fan film failed to meet the requirements of the first factor for fair use. The court also considered the commercial aspects of the project, considering non-monetary benefits such as potential job opportunities. Even though the fan film was distributed for free, the court concluded that the defendants indirectly benefited commercially from Star Trek's popularity, including through their successful fundraising campaign. Furthermore, the court identified the significant impact on the market, as the distribution of the free online film Prelude could potentially lead fans to choose free content over paid features, thus undermining the fair use argument.³²

In the legal dispute over Prelude to Axanar, the owners of Star Trek Franchise introduced strict guidelines with respect to fan films set in the Star Trek universe. The updated regulations for Star Trek fan films impose several restrictions. Productions are now limited to 15-minute segments, allowing for a complete original story, with a maximum of two episodes totalling 30 minutes. Further episodes, parts, sequels, seasons, or remakes are no longer permitted. Fans are also

³¹ Paramount Pictures Corp. v. Axanar Prods., Inc. No. 2:15-cv-09938-RGK-E (C.D. Cal. Jan. 3, 2017) (U.S).

³² Tomazic, *supra* note 12.

prohibited from creating their own props, uniforms, and costumes. Instead, they must use “official merchandise” if it is commercially available. The fan film’s title cannot include the term “Star Trek”. Additionally, filmmakers must be amateurs and cannot receive payment or be employed by any Star Trek or CBS/Paramount licensee. Fundraising is limited to \$50,000, and physical distribution of the film, such as on DVD or Blu-ray, is not allowed. Selling or giving away merchandise related to the fan film is prohibited, and fan-created production sets, props, or costumes cannot be licensed.³³ In one instance, 20th Century Fox sent a cease-and-desist letter to vendors on the website Etsy as a direct response to the copyright holder’s request. The items being sold were knitted wool hats that had been featured in a single, unaired episode of the cancelled TV show *Firefly*. This hat had been embraced by the *Firefly* fandom as their unofficial symbol. After the show was cancelled, fans started making their own merch because there were no official products available. The Company also sent letters of cease and desist to anyone “illegally” selling handmade replicas of the hat. Since the hat being sold were exact replicas of the hat worn in the show, 20th Century Fox was within its rights to protect its copyright against products that affected its market. Fair use probably would not have protected these vendors. Similarly, the market for 20th Century Fox was being threatened by competition from sales made by Etsy sellers. However, when 20th Century Fox came to know about this fanbase, it granted an official licence for the replica of Jayne’s Hat.³⁴

In many cases cosplayers do not find the costume which they want to cosplay or the costumes that are available in the market are of poor quality. Unable to find a good quality costume, fans resort to making the costumes themselves or commission it from someone else. Although many copyright holders do not offer high-quality costumes for sale, they do sell high quality props and accessories. To complete their looks and to complement their costumes, cosplayers willingly buy these props and accessories from copyright holders (such as Star Wars lightsabers).

Copyright holders typically encourage cosplay at the Conventions while discouraging the commercial replication of their content, as was seen in the case of the Jayne Hat and Axanar fan-film. A lot of costumes are either trademarked, copyrighted, or both. Copyright holders enforce these rights with lightning speed in case there is commercialisation. Yet, cosplay is actively

³³ *Id.*

³⁴ Melissa Anne Agnetti, *When the Needs of the Many Outweigh the Needs of the Few: How Logic Clearly Dictates the First Amendment’s Use as A Defence to Copyright Infringement Claims in Fan-Made Work*, 45 SOUTHWESTERN L. REV. 143-144 (2015).

encouraged at comic conventions and ‘Best Recreations’ are awarded prizes at masquerade competitions.

IV. COSPLAY: THE INDIAN SCENARIO

With the inaugural Comic Con India in 2011, cosplay has gained increasing popularity and recognition in India. It is clear that cosplay, which began as a hobby, has evolved into a profitable profession for cosplayers who earn a respectable income by participating in national and international conventions. There is little doubt that cosplayers from India will continue to prosper in this industry as more people become aware of their talent. The future of cosplay culture in India must therefore be discussed in light of intellectual property laws.

Under the Copyright Act, 1957 [“**1957 Act**”], the scope of Section 13 can be extended to provide copyright protection to fictional characters. Over the years, the courts in India have pronounced a number of judgments pertaining to the copyrightability of fictional characters. For instance, in the case of *Malayala Manorama v. VT Thomas*,³⁵ and *Star India v. Leo Burnett*,³⁶ the courts have ruled that fictional characters are subject to copyright protection.

In India, costume designs are primarily protected by the 1957 Act, and the Designs Act, 2000 [“**2000 Act**”]. A design or any other work, however, cannot be protected under both acts at the same time, according to numerous legal rulings. In the case of *Rajesh Masrani v. Tabiliani Design Pvt. Ltd.*,³⁷ it was ruled that once a work has been deemed artistic, it cannot be protected under the 2000 Act and is only covered by the 1957 Act. When costume designs qualify as original artistic work as per Section 13 of the 1957 Act, they may be granted copyright protection.

The Copyright Act, under Section 52 provides for the fair dealing exception to infringement with respect to the unauthorised use of copyrighted work for private or personal use. In *Civic Chandran v. C. Ammini Amma*³⁸, the Kerala High Court laid down the following factors that have to be considered when determining fair dealing:

- i. the quantum and value of the matter taken in relation to the comments or criticism;*
- ii. the purpose for which it is taken;*

³⁵ *Malayala Manorama v. VT Thomas*, AIR 1989 Ker 49.

³⁶ *Star India v. Leo Burnett*, 2003 (27) PTC 81 Bom (Ind.).

³⁷ *Rajesh Masrani v. Tabiliani Design Pvt. Ltd.*, AIR 2009 Del 44.

³⁸ *Civic Chandran v. C. Ammini Amma*, 1966 1 K.L.T. 608 (Ind.).

iii. the likelihood of competition between the two works.

These factors correspond with the four fair use factors laid down in Section 107 of the US Copyright Act, 1976. Thus, cosplaying as a hobby won't be an issue. However, the factor of commercialisation of cosplay would need to be considered in case of copyright infringement.

V. CONCLUSION

In conclusion, when it comes to the copyrightability of characters and costumes, not all characters and costumes will be subject to copyright protection. A cosplayer's employment of the fair use defence may not be sufficient to defend their activity if a character and/or their costume are subject to copyright protection. Also, there is uncertainty regarding the application of fair use defence in cosplay. So even though the first factor may be favouring the finding of fair use in instances where there has been transformative use with respect to characters and costumes, there are other factors which also need to be considered. Given that most original material is within the core of copyright protection, the second factor may weigh against the cosplayer. The same goes with the third and the fourth factor. There being no judicial rulings or precedents providing solution to this issue, there is an uncertainty as to the application of fair use defence to professional cosplay.

Cosplayers take great satisfaction in creating their costumes as accurate and identical to the originals, and contests and competitions prize that exactness. To overcome the challenges of the particularly distinctive character and copyrightable designs on costumes, it might be required for them to use greater creativity. The fan-made costume, after all, does not aim to be the original work; rather, it aims to encapsulate it and demonstrate appreciation of the work, by a fan who wishes to mimic the aesthetics in order to express their love for it. Cosplayers are free to continue these "acts of association through attire" as long as they infuse them with a little more creativity and originality.

Thus, even though their activity probably constitutes a fair use, it becomes economically sensible for a professional cosplayer to obtain a licence to the copyrighted content given that a market has been established through commercialization. By shifting from fair use to licensed partnership, the relationship between the copyright holders and the professional cosplayers will become more symbiotic rather than being characterized by friction

Indian Entertainment Industry's Copyright Empire: A Threat To Creativity

VISHNU S*

ABSTRACT

The Indian entertainment industry is facing a growing problem of copyright dominance, where a small group of players control a large portion of copyrighted content. This has created barriers for new and independent artists seeking to enter the industry and protect their work. The article delves into the legal and ethical concerns surrounding copyright ownership and control, such as the exploitation of creators and the stifling of innovation. The article proposes potential solutions to address this issue, including collaboration between creators and copyright holders, the promotion of fair use, and the implementation of open access policies. These solutions would create a more level playing field for creators and facilitate the growth of new and diverse artistic expressions in the Indian entertainment industry. Ultimately, the article emphasizes the need for the industry to address the issue of copyright dominance to ensure the continued growth of and innovation in the industry. It concludes by stressing that a balance must be struck between protecting copyright owners and promoting creativity and innovation in the industry.

I. INTRODUCTION

Copyright is a legal principle that grants exclusive rights to the creators or owners of original works, giving them control over the use, reproduction, and distribution of their creations. The principle applies to various creative works such as literature, music, film, art, software, and other forms of intellectual property.¹ Exclusive rights granted under copyright law include the right to reproduce the work, distribute it, publicly perform, or display it, and create derivative works based on it.² These rights are granted to the owner or creator of the work for a limited period, typically for the life of the creator plus a set number of years.³ In India it is 60 years in addition to the author's lifespan.

Copyright protection provides creators with a legal mechanism to control how their works are used, ensuring that they are appropriately compensated for their efforts.⁴ By granting exclusive

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¹ J. E. Longshak et. al., *Intellectual Property Rights (IPR) in the Blockchain Era*, in GLOBAL PERSPECTIVES ON SUSTAINABLE LIBRARY PRACTICES 263, 296 (1st ed., 2023).

² A Guadamuz, *The treachery of images: non-fungible tokens and copyright*, 16(12) J. INTELL. PROP. L., 1367 (Dec 2021).

³ J. E. COHEN ET.AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY., 76 (Aspen Publishing, 2019).

⁴ I. E. Okonkwo, *NFT, Copyright and Intellectual Property Commercialization*, 29(4) INT. J. LAW. INF. TECHNOL., 296 (2021).

rights to creators, copyright incentivizes the creation of original works and encourages continued innovation and creativity in various fields.⁵ In the entertainment industry, copyright is particularly important, as it enables creators and owners of intellectual property to receive payment for their work and control its use.⁶ Without copyright protection, it would be challenging for creators to make a living from their creative endeavours, which could lead to a decline in the quality and diversity of entertainment offerings.⁷

Copyright is a crucial legal concept that plays a vital role in protecting the rights of creators and promoting innovation and creativity in various fields. Its purpose is to strike a balance between the interests of creators and the public, ensuring that creative works are protected while promoting the advancement of knowledge and culture.⁸ Indian entertainment industry is one of the largest and most vibrant in the world, encompassing film, music, television, and other forms of media.⁹ With a growing middle class and increasing access to technology, the industry has seen significant growth in recent years. However, the industry is also known for its complex and often opaque system of copyright ownership and control.¹⁰

In the Indian entertainment industry, copyright dominance is primarily held by a few large companies and individuals who control the distribution, production, and use of copyrighted works.¹¹ This has led to a situation where many artists and creators are unable to access the resources and platforms, they need to share their work, while established companies and individuals are able to maintain their dominance over the market. For instance, let's consider the case of ABC Music, a fictional entity that wields significant influence within the Indian music industry. In this scenario, an independent musician named Priya, who autonomously creates and shares her music on various streaming platforms, is approached by ABC Music for a contractual arrangement. Under this agreement, ABC Music secures exclusive rights to Priya's music and offers marketing and distribution support. While this partnership presents Priya with the potential for a wider audience and increased opportunities for success, it also entails a transfer of copyright ownership from Priya to ABC Music. This shift in ownership

⁵ M. Kop, *Quantum Computing and Intellectual Property Law*, B.T.L.J., 101 (2022).

⁶ Kaye, D. B. V., & Gray, J. E. *Copyright gossip: Exploring copyright opinions, theories, and strategies on YouTube*, SOCIAL MEDIA+ SOCIETY, (2021), <https://journals.sagepub.com/doi/epdf/10.1177/20563051211036940>.

⁷ H. L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 75 (2020) ["Vogel"].

⁸ J. P. Quintais, *The New Copyright in the Digital Single Market Directive: A Critical Look*, 42(1) E.I. P.R., 28 (2020).

⁹ A. B. ALBARRAN, THE MEDIA ECONOMY, 12 (2nd ed., 2016).

¹⁰ R LOBATO, & J THOMAS, THE INFORMAL MEDIA ECONOMY 105 (1st ed., 2015).

¹¹ D HESMONDHALGH, HAVE DIGITAL COMMUNICATION TECHNOLOGIES DEMOCRATIZED THE MEDIA INDUSTRIES? 101 (James Curan et al, eds., 6th ed., 2019).

can bolster her prospects but also entails the label's control over how her music is promoted and distributed, which might influence her artistic autonomy. This example underscores the issue of copyright concentration within the Indian entertainment industry, wherein major players like ABC Music can limit smaller artists' access to resources and platforms, thereby perpetuating the dominance of established entities.¹²

In other words, there is a lack of transparency in the process of copyright ownership and control in India,¹³ which further complicates matters. This has resulted in disputes over copyright ownership and infringement, which can be difficult to resolve through legal channels. In short, the Indian entertainment industry is currently facing a state of copyright dominance, where a few powerful entities hold significant control over the distribution and use of copyrighted works, which can limit creativity and innovation in the industry as a whole.¹⁴ The purpose of this article is to raise awareness about the issue of copyright dominance in the Indian entertainment industry and to explore its potential impact on creativity and innovation. The article aims to examine the ways in which copyright dominance operates in the industry, the threats it poses to artistic expression and innovation, and the legal and ethical implications of maintaining the current system. Additionally, the article seeks to offer potential solutions to address the issue of copyright dominance and to encourage a more collaborative and open approach to creativity and innovation in the Indian entertainment industry. Ultimately, the article intends to spark a conversation about the importance of fair and equitable access to copyrighted works and the need to support independent and emerging artists in the industry.

II. ENTERTAINMENT INDUSTRY'S COPYRIGHT EMPIRE

Copyright dominance refers to the state in which a few powerful entities hold significant control over the ownership, distribution, and use of copyrighted works in an industry.¹⁵ The Indian entertainment industry is one of the largest in the world, with a wide range of creative and cultural works such as music, films, and television shows. These companies and individuals have a significant impact on the industry, as they hold the power to dictate the terms and conditions of licensing agreements and control the use of copyrighted works.¹⁶

¹² Refer cases like *Zee Entertainment Enterprises Ltd v. Mr. Gajendra Singh and Ors*, 2008(36) PTC53 (Bom); *Indian Performing Right Society v. Eastern Indian Motion Pictures Association and Ors.*, 1977 (2) SCC 820.

¹³ J Khan et. al., *Secure anti-piracy system in INTELLIGENT SYSTEM DESIGN: PROCEEDINGS OF INTELLIGENT SYSTEM DESIGN* 827, 835, (B Janaki Ramaiah et al., 1st ed., 2020).

¹⁴ T GANTI, *BOLLYWOOD: A GUIDEBOOK TO POPULAR HINDI CINEMA* 65 (2nd ed., 2013).

¹⁵ A Chakraborty, *Interface between Copyright Societies and Competition Laws in India: An Analytical Study*, 6 GNLU L. REV., 141(2019).

¹⁶ A MORCOM, *HINDI FILM SONGS AND THE CINEMA*, 192 (1st ed., 2017).

One of the primary reasons for this copyright dominance is the vast collection of copyrighted works held by these companies and individuals.¹⁷ They have invested heavily in creating and acquiring copyrighted works, which has allowed them to build a vast library of content. This library not only gives them a significant competitive advantage but also makes it easier for them to distribute their content across the country and even internationally.¹⁸ Another factor that contributes to the copyright dominance of these companies and individuals are the resources and infrastructure they possess.¹⁹ They have the financial resources to invest in the latest technologies, hire the best talent, and create high-quality content. Additionally, they have established distribution networks, partnerships, and licensing agreements that allow them to reach a wide audience and generate revenue.²⁰

The significance of copyright dominance lies in its capacity to restrict independent and up-and-coming artists from obtaining the resources and platforms necessary for sharing their creative work. It can also stifle innovation and creativity by limiting the diversity of perspectives and styles in the industry.²¹ In addition, copyright dominance can create a barrier to entry for new players in the market, further entrenching the power of established companies and individuals.²² In the Indian entertainment industry, copyright control is established through a few entities holding a concentration of power, and this can have significant implications for the entire industry.

A handful of influential companies and individuals wield substantial copyright authority and influence within the Indian entertainment sector. Noteworthy entities such as T-Series, Yash Raj Films, and Sony Music India stand out as major music labels, boasting extensive collections of copyrighted content. These entities exercise command over the creation, dissemination, and licensing of copyrighted material within the Indian entertainment sphere. This dominance has the potential to curtail the opportunities available to independent and emerging artists in terms of accessing essential resources and platforms for showcasing their creations. Furthermore, the industry's overreliance on these powerhouses may stymie innovation and artistic diversity by restricting the array of perspectives and styles within the field.

¹⁷ W M Landes & R A Posner, *An economic analysis of copyright law*, 18(2) J. LEGAL. STUD., 325(1989).

¹⁸ K Erickson, *Can creative firms thrive without copyright? Value generation and capture from private-collective innovation*, 61(5) BUSINESS HORIZONS, 699 (2018), <https://doi.org/10.1016/j.bushor.2018.04.005>.

¹⁹ M Kwet, *Digital colonialism: US empire and the new imperialism in the Global South*, 60(4) RACE & CLASS, 3 (2019).

²⁰ J. C. Ginsburg, *Creation and commercial value: copyright protection of works of information*, 90 COLUM. L. REV., 1865. (1990).

²¹ M. B. Zinn, & B. T. Dill, *Difference and domination*, 12 (4) WOMEN OF COLOUR IN US SOCIETY, 3 (1994).

²² B Maury, *Sustainable competitive advantage and profitability persistence: Sources versus outcomes for assessing advantage*, 84 J.BUS.RSCH. 100 (2018).

III. THREATS TO CREATIVITY

Copyright dominance has far-reaching consequences on creativity, innovation, and the entertainment industry as a whole.²³ When copyright power is concentrated in the hands of a few companies and individuals, it can limit the diversity of perspectives and styles in the industry, thereby hindering innovation and creativity.²⁴ This also creates a barrier to entry for new players, which entrenches the power of established entities and stifles competition in the industry.²⁵ Copyright dominance also affects artistic expression by limiting the ability of artists to use and remix copyrighted works in their own creations.²⁶ This restriction can lead to a lack of development of new forms of expression and creativity. Moreover, it limits access to cultural heritage by making it challenging for individuals and organizations to access and use copyrighted works that are integral to their cultural traditions.²⁷

A. Limited Diversity of Perspectives and Styles:

Copyright dominance for instance, can restrict opportunities for emerging artists to share their work by making it expensive to obtain licenses and gain access to distribution channels. As a result, new artists struggle to establish themselves and showcase their unique perspectives.²⁸ Another way in which copyright dominance stifles creativity is by limiting the diversity of content in the industry. A few powerful entities controlling production, distribution, and licensing of copyrighted works often produce the same genres and styles of music and film repeatedly, leading to a lack of variety and novelty.²⁹

B. Barriers to Entry and Reduced Competition:

Furthermore, copyright dominance can restrict artistic expression by limiting the ability of artists to use and remix copyrighted works in their own creations. This creates a barrier to the development of new forms of expression and creativity. Lastly, the dominance of established players in the industry makes it difficult for new and independent artists to gain access to essential

²³ P Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV., 299 (1996) [“Jaszi”].

²⁴ P AUFDERHEIDE, & P JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT, 102 (2018) [hereinafter Aufderheide & Jaszi].

²⁵ R V BETTIN, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 20 (1st ed., 2018).

²⁶ J P Fishman, *Creating around copyright*, HARV. L. REV., 1333 (2015).

²⁷ J P SINGH, GLOBALIZED ARTS: THE ENTERTAINMENT ECONOMY AND CULTURAL IDENTITY 127 (1st ed., 2011).

²⁸ P WIKSTRÖM, THE MUSIC INDUSTRY: MUSIC IN THE CLOUD, 1955 (3rd ed., 2020).

²⁹ Aufderheide & Jaszi, *supra* note 24, at 26.

resources and platforms required for success in the industry.³⁰ This limitation can reduce the number of artists producing content and limit the diversity of perspectives and styles.

C. Restrictions on Artistic Expression:

Additionally, copyright dominance can contribute to a skewed economic system, where a few powerful entities capture a disproportionate amount of the profits generated by the industry.³¹ This perpetuates inequality and limits opportunities for smaller players in the industry.³² In summary, copyright dominance has significant consequences for the industry, which include limiting the diversity of perspectives and styles, hindering innovation, creating barriers to entry, restricting artistic expression, limiting access to cultural heritage, and perpetuating inequality in the economic system. In summary, copyright dominance in the Indian entertainment industry can stifle creativity by limiting opportunities for emerging artists, restricting artistic expression, limiting content diversity, and entrenching established players in the industry.

D. Limited Ownership of Copyright

Independent artists in the Indian entertainment industry face numerous challenges with regard to copyright ownership and access to resources.³³ One of the main issues is the limited ownership of copyright. Many new artists, especially those who are not affiliated with established companies, may not have full ownership of the copyrights to their work. This can make it challenging to monetize their creations, protect their intellectual property, and negotiate favourable deals with industry players. Another challenge faced by independent artists is a lack of access to distribution channels.³⁴ They may not have the connections or resources needed to reach the appropriate distribution channels, which can limit their ability to monetize their work and reach a broader audience.

E. High Production and Promotion Costs

The high costs of production and promotion are also an obstacle for new and independent artists. Production and promotion costs in the entertainment industry can be exorbitant, and artists may

³⁰ D Lim, *Copyright Under Siege: An Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works*, 17 ALB. LJ SCI. & TECH., 481 (2007).

³¹ J Hughes, & R P Merges, *Copyright, and distributive justice*, 92 NOTRE DAME L. REV., 513 (2016).

³² R MANSELL, & W E STEINMUELLER, *ADVANCED INTRODUCTION TO PLATFORM ECONOMICS*, 45 (2020).

³³ D Hesmondhalgh, *Is music streaming bad for musicians? Problems of evidence and argument*, 23(12) NEW MEDIA & SOCIETY, 3593 (2021).

³⁴ D Hesmondhalgh, E Jones, & A Rauh, *SoundCloud and Bandcamp as alternative music platforms*, 5(4) SOCIAL MEDIA AND SOCIETY, 1 (2019).

not have the financial backing required to create high-quality content or promote their work adequately³⁵. This can limit their ability to compete with established players and gain recognition.

F. Difficulty in Negotiating Favourable Deals

Difficulty negotiating favourable deals is another issue faced by independent artists.³⁶ They often lack the negotiating power and legal expertise necessary to secure favourable contracts with industry players. This can lead to situations where they are taken advantage of, with little recourse. Finally, copyright infringement is a challenge faced by independent artists as well.³⁷ Without the resources and legal support of established companies, it can be difficult to fight against copyright infringement and protect their intellectual property rights. Overall, these challenges create an environment in which new and independent artists struggle to succeed, which ultimately limits creativity and innovation in the industry. The result is a lack of diversity in the content produced, with a few powerful entities dominating the industry, making it difficult for new and independent artists to break through and succeed.

This has resulted in limited artistic expression and innovation in various fields such as music and film. For instance, the music industry in India is dominated by a few big players who control the majority of the music copyrights.³⁸ This has resulted in a lack of diversity in the music produced, with many new artists being pressured to create music that fits within the dominant style.³⁹ Consequently, independent artists are unable to experiment with different sounds and genres. Similarly, the film industry is also dominated by a few big players who control the majority of the copyrights.⁴⁰ This has led to a lack of innovation in Indian cinema, with many films following a formulaic approach to storytelling and cinematography. Independent filmmakers are often unable to secure the resources and support needed to create more innovative and unique films.

Furthermore, the dominance of a few players in the industry limits the availability of resources such as studios, equipment, and distribution channels. This makes it difficult for new artists to

³⁵ Vogel, *supra* note 7.

³⁶ N Kawashima, *Changing business models in the media industries*, 7(1) MEDIA INDUSTRIES JOURNAL, 69 (2020).

³⁷ T Wong, M Torsen, C Fernandini, T Wong, & G Dutfield, *Cultural diversity and the arts: Contemporary challenges for copyright law*, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS, 279 (2011).

³⁸ D Hesmondhalgh, *Indie: The institutional politics and aesthetics of a popular music genre*, 13(1) CULTURAL STUDIES, 34 (1999).

³⁹ S A GROSS, & G MUSGRAVE, CAN MUSIC MAKE YOU SICK? MEASURING THE PRICE OF MUSICAL AMBITION, 121 (1st ed., 2020).

⁴⁰ D K THUSSU, THE GLOBALIZATION OF "BOLLYWOOD.: THE HYPE AND THE HOPE" 97 (A. Kavoori et al eds., 1st ed., 2008).

access the resources needed to create and distribute their work, which limits their ability to innovate and express themselves. Lastly, many new and independent artists are unable to access copyrighted materials such as samples and remixes, which limits their ability to create new and innovative works. This is especially problematic in the music industry, where the use of samples and remixes is common.

Copyright dominance in the Indian entertainment industry has resulted in limited artistic expression and innovation. It has also limited the ability of new and independent artists to express themselves and access the resources needed to create and distribute their work. The dominance of copyright in the Indian entertainment industry has had a negative impact on artistic expression and innovation. This is further evident from specific Indian case laws which illustrate the problems caused by copyright dominance. For instance, in *Tips Industries Ltd. v. Wynk Music Ltd.*⁴¹, the plaintiff, Tips Industries, accused the defendant, Wynk Music, of infringing their copyright by offering their music to users without obtaining the required license. The case highlighted the challenges faced by new and independent artists in accessing copyrighted materials, as they often cannot afford the high licensing fees demanded by big players.

Another case that sheds light on the impact of copyright dominance is *Super Cassettes Industries (P) Ltd. v. Myspace Inc.*⁴². In this case, Super Cassettes, a major music label, sued Myspace for copyright infringement. The case demonstrated the difficulty faced by independent artists in protecting their works against infringement by big players who hold significant copyright power. The Indian copyright laws themselves have also been criticized for their rigidity and their lack of support for new and independent artists. Section 31D of the Indian Copyright Act,⁴³ which allows broadcasters to use copyrighted works without obtaining the owner's consent, has been criticized for not being inclusive enough of independent artists, who may not have access to the same resources and bargaining power as big players.

However, the broadcasters are required to adhere to Rule 29 of the Copyright Rules, 2013, which mandates them to obtain a statutory license from music companies. In order to obtain this license, broadcasters must provide advance notice to the copyright owner, along with an advance payment calculated according to the royalty rates specified in the rule, effective from 01.02.2021. Additionally, a copy of the notice must also be sent to the Registrar of Copyrights for record-

⁴¹ Notice of Motion (L) No. 197 of 2018 in Commercial Suit IP (L) No. 114 of 2018, decided on 23-04-2019.

⁴² *Super Cassettes Industries (P) Ltd. v. Myspace Inc* 2011(47) PTC 49 (Del.) (Ind.).

⁴³ Copyright Act, 1957 s.31D.

keeping purposes.⁴⁴ It is emphasized that for Section 31D of the Act, there is a requirement to adhere to the terms and conditions outlined in both the Statute and its corresponding Rules.⁴⁵

The prevalence of copyright in the Indian entertainment sector has led to adverse effects on artistic expression and creativity, as evidenced by various Indian legal cases. The obstacles encountered by emerging and autonomous artists in obtaining access to copyrighted content, and the challenges they face in safeguarding their own creations against infringement by larger entities, underscore the necessity for more accommodating copyright regulations that promote growth and originality within the industry.

IV. LEGAL AND ETHICAL IMPLICATIONS

One of the main legal issues is the abuse of copyright power by big players, who often use their dominance to stifle competition and prevent new entrants from accessing copyrighted materials.⁴⁶ This not only limits artistic expression and innovation but also violates the principles of fair competition and anti-trust laws. Another legal issue is the lack of adequate copyright laws that support independent artists and promote innovation in the industry.⁴⁷ The existing copyright laws are often criticized for their inflexibility and perceived lack of inclusivity, particularly when it comes to accommodating the needs and challenges faced by new and independent artists.⁴⁸ These emerging talents may not possess the same level of resources and bargaining leverage as established industry giants. Consequently, doubts arise regarding the efficacy of the current legal framework in fostering creativity and innovation within the entertainment industry.

From an ethical standpoint, copyright dominance raises concerns about the fair distribution of benefits among artists, content creators, and the public. The concentration of copyright power in the hands of a few big players means that they have greater control over the distribution and monetization of content.⁴⁹ This may result in a situation where only a small fraction of the profits generated by the industry goes to the actual creators of the content, while the rest goes to the copyright holders. This raises questions about the fairness and equity of the distribution of benefits within the industry.

⁴⁴ Saregama India Ltd. v. Next Radio Limited & Ors., 2021 SCC OnLine SC 817 (Ind.).

⁴⁵ Super Cassettes Industries Pvt. Ltd. v. Music Broadcast Limited & Ors., 2021 SCC OnLine Del 4900 (Ind.).

⁴⁶ Cross, J. T., & Yu, P. K. Competition Law and Copyright Misuse. *DrAke I. reV.*, 56 (2007).

⁴⁷ H Hovenkamp, *Competition for innovation*, COLUM. BUS. L. REV., 799 (2012).

⁴⁸ N Elkin-Koren, & O Fischman-Afori, *Rulifying fair use*, ARIZ. L. REV., 59 (2017).

⁴⁹ D WINSECK, *THE POLITICAL ECONOMIES OF MEDIA AND THE TRANSFORMATION OF THE GLOBAL MEDIA INDUSTRIES*, 3 (Dal Young Jin et al eds., 1st ed., 2011).

Moreover, copyright dominance may also limit the availability of content to the general public,⁵⁰ particularly those who cannot afford to pay high licensing fees or access copyrighted materials through exclusive channels. This raises ethical concerns about the accessibility of content and the extent to which copyright dominance may create artificial barriers to the enjoyment of cultural and artistic works. The dominance of copyright in the Indian entertainment industry has raised several legal and ethical issues that need to be addressed.⁵¹ These include concerns about fair competition, the need for more inclusive and supportive copyright laws, and the fair distribution of benefits among artists, content creators, and the public.

The copyright laws in India are governed by the Indian Copyright Act, which was last amended in 2012. The Act lays down the various provisions related to copyright ownership, control, and infringement. It defines copyright as a set of exclusive rights granted to the owner of the work, including the right to reproduce, distribute, and display the work. However, the Act has been criticized for its rigidity and lack of support for new and independent artists. Section 31D of the Act, for instance, which allows broadcasters to use copyrighted works without obtaining the owner's consent, has been criticized for not being inclusive enough of independent artists who may not have access to the same resources and bargaining power as established players.⁵²

There are also ethical issues surrounding copyright dominance in the Indian entertainment industry.⁵³ A significant concern revolves around the exploitation of artists and their creative works by powerful entities that wield substantial copyright authority. This exploitation ultimately leads to the concentration of power in the hands of a select few, effectively curtailing the opportunities for emerging and independent artists to secure the exposure and recognition they deserve.⁵⁴ Another ethical issue is the impact of copyright dominance on cultural expression and diversity.⁵⁵ The Indian entertainment industry reflects the diverse cultural heritage of the country, and copyright dominance can limit the representation and expression of this diversity. This can lead to a homogenization of cultural expression and a loss of the unique identity of different communities.

⁵⁰ L Edwards, B Klein, D Lee, G Moss, & F Philip, *Framing the consumer: Copyright regulation and the public*, 19(1) CONVERGENCES: INT. RSCH. NEW MEDIA & TECH., 9, 24 (2013).

⁵¹ P Khanna, *Abuse of Dominant Position by Refusing to Issue Copyright Licenses*, CHRIST ULJ, 8 (2019).

⁵² N R Chandy, *Recognition of Online Streaming Platforms as 'Broadcasting Organisation' under Section 31d of the Copyright Act, 1957: An Analytical Study*, 4(2) INT'L J. L. MGMT. & HUMAN., 1525 (2021).

⁵³ L Liang, *Beyond Representation*, in POSTCOLONIAL PIRACY MEDIA DISTRIBUTION AND CULTURAL PRODUCTION IN GLOBAL SOUTH 49 (Lars Eckstein, eds., 1st ed., 2014).

⁵⁴ B Andersen, R Kozul-Wright, & Z Kozul-Wright, *Rents, rights n'rhythm: cooperation, conflict and capabilities in the music industry*, 14(5) INDUSTRY AND INNOVATION, TAYLOR & FRANCIS JOURNALS 513 (2007).

⁵⁵ M F Brown, *Can culture be copyrighted?* 39(2) CURRENT ANTHROPOLOGY, 193 (1998).

Furthermore, the enforcement of copyright laws can also raise ethical concerns.⁵⁶ The strict enforcement of copyright laws can sometimes lead to the harassment and intimidation of individuals who may inadvertently infringe on someone's copyright, leading to a chilling effect on creativity and innovation. In summary, the legal and ethical implications of copyright dominance in the Indian entertainment industry are complex and multifaceted. While copyright protection is necessary to incentivize creativity and innovation, there is a need for a balanced approach that supports both established players and new and independent artists, while also promoting cultural diversity and expression.

V. POTENTIAL CONSEQUENCES

Maintaining the current system of copyright dominance in the Indian entertainment industry could have several potential consequences.⁵⁷ Firstly, it could stifle innovation and creativity, as new and independent artists may be deterred from entering the industry due to the high cost of obtaining licenses and the difficulty of protecting their own works against infringement.⁵⁸ This could result in a lack of diversity in the entertainment industry and limit the range of artistic expression available to consumers.

Secondly, it could lead to a concentration of power and influence in the hands of a few large companies or individuals, who could use their copyright dominance to stifle competition and limit the growth of new players in the industry.⁵⁹ This could result in a lack of competition and further entrench the dominance of established players. Thirdly, it could have ethical implications, as copyright dominance could be seen as a form of monopolistic behaviour that harms the interests of consumers and independent artists.⁶⁰ This could result in negative publicity for the industry and damage its reputation, leading to a loss of public trust.

Finally, maintaining the current system of copyright dominance could also lead to legal challenges and disputes, as more artists and consumers become aware of the issues surrounding copyright ownership and control.⁶¹ This could result in increased litigation and costs for all parties involved, further entrenching the dominance of established players who have the resources to navigate the

⁵⁶ A Muir, *Online copyright enforcement by Internet service providers*, 39(2) J.INFO.SCI., 256 (2013).

⁵⁷ J Parc, *Evaluating the effects of protectionism on the film industry: A case study analysis of Korea*, in HANDBOOK OF STATE AID FOR FILM: FINANCE, INDUSTRIES AND REGULATION, 349 (2018).

⁵⁸ R R FAULKNER, & S FRED, 14 MUSIC ON DEMAND: COMPOSERS AND CAREERS IN THE HOLLYWOOD FILM INDUSTRY (Shmuel N. Eisenstadt, eds., 1st ed., 2017).

⁵⁹ J STIGLITZ, PEOPLE, POWER, AND PROFITS: PROGRESSIVE CAPITALISM FOR AN AGE OF DISCONTENT (1st ed., 2019).

⁶⁰ L Zingales, *Towards a political theory of the firm*, 31(3) J. ECON. PERSPECTIVES, 113 (2017).

⁶¹ Jaszi, *supra* note 23.

legal system.⁶² Overall, the consequences of maintaining the current system of copyright dominance in the Indian entertainment industry could be significant and far-reaching, impacting not only the industry itself but also consumers, independent artists, and the broader public.

VI. POSSIBLE SOLUTIONS

To address the issue of copyright dominance in the Indian entertainment industry, several potential solutions can be considered. One approach is to encourage collaboration between copyright holders and new or independent artists, which can create opportunities for innovation and creative expression.⁶³ This collaboration could involve licensing agreements, joint ventures, or other types of partnerships that allow for greater access to copyrighted materials and support the development of new works.⁶⁴ Another potential solution is to promote the concept of fair use, which allows for the limited use of copyrighted materials for purposes such as commentary, criticism, or education. This approach can help to balance the interests of copyright holders with the need for creativity and innovation, while also providing greater flexibility for artists and creators.

Open access is also an important consideration for promoting creativity and innovation in the entertainment industry.⁶⁵ This involves making copyrighted materials freely available for use and modification by others, which can support the development of new works and ideas. This approach has been successful in other fields, such as science and technology, and could be adapted to the Indian context. One example of a successful model for promoting collaboration and open access is the Creative Commons license.⁶⁶ This license allows copyright holders to share their works with others under specific terms and conditions, such as requiring attribution or limiting commercial use. This approach has been widely adopted in the international community and could be adapted for use in the Indian entertainment industry.

Another successful approach is the use of crowdfunding and crowdsourcing to support new and independent artists.⁶⁷ Platforms such as Kickstarter and Patreon allow artists to raise funds from a wide range of supporters, which can help to reduce their reliance on copyright holders and

⁶² M Perel & N Elkin-Koren, *Accountability in algorithmic copyright enforcement*, 19 STAN. TECH. L. REV., 473 (2015).

⁶³ Kjus, Y. *The use of copyright in digital times: A study of how artists exercise their rights in Norway*. 44(3) POPULAR MUSIC AND SOCIETY, 241 (2021), <https://doi.org/10.1080/03007766.2019.1698206>.

⁶⁴ S T Piper, *An 'Independent' View of Bill C-32's Copyright Reform*, in CANADIAN COPYRIGHT AND THE DIGITAL AGENDA, IRWIN LAW. 423 (2010).

⁶⁵ S Nambisan, D Siegel, & M Kenney, *On open innovation, platforms, and entrepreneurship*, STRATEGIC ENTREPRENEURSHIP JOURNAL, 12(3), 354 (2018).

⁶⁶ Z Mi & D M Coffman, *The sharing economy promotes sustainable societies*, 10(1) NATURE COMMUNICATIONS, 1214 (2019).

⁶⁷ Tyni, H. *Double duty: Crowdfunding and the evolving game production network*. 15(2) GAMES AND CULTURE, 114 (2020).

increase their independence.⁶⁸ The issue of copyright dominance in the Indian entertainment industry requires a multifaceted approach that balances the interests of copyright holders with the need for creativity and innovation. Encouraging collaboration, promoting fair use and open access, and adopting successful models from other fields can all contribute to a more equitable and vibrant entertainment industry in India.

VII. CONCLUDING REMARKS

The predominance of copyright control within the Indian entertainment industry constitutes a significant impediment to creativity and innovation. A select few corporations and individuals exert substantial influence, thereby limiting the resources available to emerging and independent artists. This issue necessitates a thorough examination of both the legal and ethical ramifications it entails, prompting a re-evaluation of the current copyright ownership and control regulations. To progress, it is imperative to prioritize collaboration, embrace fair use principles, and advocate for open access to foster a more equitable environment. Drawing inspiration from successful models and strategies implemented in other industries and countries can provide valuable insights, stimulating innovation and creativity while concurrently safeguarding the rights of creators. Addressing the issue of copyright dominance is pivotal for the future trajectory of the Indian entertainment industry, ensuring its potential for growth and prosperity. By proactively tackling copyright dominance and promoting inclusivity and accessibility within the industry, we can cultivate a more dynamic and diverse creative landscape, fostering innovation and artistic expression.

⁶⁸ M Knott, F Strich, K Strunk, & A S Mayer, *Uncovering potential barriers of using initial coin offerings to finance artistic projects*, 46(2) J. CULTURAL. ECON., 317 (2022).

Copyright conundrums in generative ai: Github copilot's not-so-fair use of open-source licensed code

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ABSTRACT

Generative AI has made ground-breaking developments in multiple industries worldwide. One of its use-cases in the software industry is that of GitHub Copilot. Trained on billions of lines of publicly available code, GitHub Copilot assists in software development but has been subject to claims of copyright infringement. By reproducing original code in snippets as output, the tool has been accused of violating terms of several open-source licenses by failing to provide any form of attribution. OpenAI, GitHub and Microsoft, in their defence, have relied on the fair use doctrine and its applicability in Google v. Oracle without paying heed to the stark difference between declaring code and implementing code in open-source licenses. Using the GitHub Copilot dispute as a contextual backdrop, this article seeks to examine copyright infringement in open-source licensed code and thereafter determine whether 'training ML systems on public data' and subsequent reproduction of code by generative AI is fair use. To substantiate, it shall also briefly discuss the significance of striking a balance between economic harm and moral rights, the difference between declaring code and implementing code and its relevance to the fair use doctrine, and the proposed copyright rules in the EU AI Act.

I. INTRODUCTION

Artificial Intelligence [“AI”] has emerged as a fine competitor to its human counterpart by progressively achieving feats ranging from defeating experts at Chess and Go¹ to scoring in the 90th percentile of the bar examination.² Although neural networks of AI have not yet reached the functionality of a human brain in terms of awareness, imagination, inventiveness and creativity,³ a determined pioneer is certainly paving the way. OpenAI, a combination of a non-profit AI research

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¹ Peter Van Der Made, *The Future of Artificial Intelligence*, FORBES (Apr. 10, 2023), <https://www.forbes.com/sites/forbestechcouncil/2023/04/10/the-future-of-artificial-intelligence/?sh=6750821a4ac4>.

² Karen Sloan, *Bar exam score shows AI can keep up with human lawyers, researchers say*, REUTERS (Mar. 15, 2023), [https://www.reuters.com/technology/bar-exam-score-shows-ai-can-keep-up-with-human-lawyers-researchers-say-2023-03-](https://www.reuters.com/technology/bar-exam-score-shows-ai-can-keep-up-with-human-lawyers-researchers-say-2023-03-15/#:~:text=GPT%2D4%2C%20the%20upgraded%20AI,of%20legal%20technology%20company%20Casetext.)

[15/#:~:text=GPT%2D4%2C%20the%20upgraded%20AI,of%20legal%20technology%20company%20Casetext.](https://www.reuters.com/technology/bar-exam-score-shows-ai-can-keep-up-with-human-lawyers-researchers-say-2023-03-15/#:~:text=GPT%2D4%2C%20the%20upgraded%20AI,of%20legal%20technology%20company%20Casetext.)

³ J. Doe 1 & J. Doe 2 v. GitHub, Inc. & Ors., No. 21-cv-06823, complaint at 26 (N.D. Cal. filed Nov. 03, 2022), https://githubcopilotlitigation.com/pdf/06823/1-0-github_complaint.pdf.

laboratory and a for-profit subsidiary, stands at the forefront of AI innovation owing to its diverse understanding of machine learning, and subsequent application to speech recognition, art creation, gaming and math, among many other fields.⁴

Over 300 million jobs and 18% of work globally are said to be exposed to automation in the near future.⁵ Legal, Office and Administrative Support, and Architecture are the first of several U.S. employment industries to bear such a risk.⁶ With automation disrupting multiple commercial sectors, developing a system to automate code development was extremely tempting. Taking steps in that direction, GitHub (an online cloud-based code-hosting platform) and OpenAI collaborated to launch the ‘*world’s first at-scale generative AI development tool*’⁷ called GitHub Copilot [“**Copilot**”]. GitHub cop-pilot leverages AI developed by GitHub and OpenAI to automatically generate code in a manner similar to predictive text functions on Microsoft word, email software systems, etc. GitHub Copilot claimed its software could increase the pace of coding by 55%.⁸

Having been trained on ‘*billions of lines of public code*’,⁹ Copilot has faced criticism for copyright infringement¹⁰ and is currently being sued. Two anonymous coders [“**plaintiffs**”] brought multiple claims of copyright infringement, breach of contract, privacy and competition law concerns against GitHub, OpenAI and Microsoft (an investor in both corporations) [“**defendants**”]. Focusing on copyright infringement, the plaintiffs have contended an infraction of multiple open-source licenses through Copilot’s training on, and consequent reproduction of, their code. The commercialisation of code authored by the plaintiffs and coders worldwide has resulted in a class-action lawsuit with a focus on the lack of attribution.¹¹ In essence, the plaintiffs claim that defendants commercially worked the plaintiffs open-source code made available without adhering to the terms of the license, thereby infringing their copyright in the code they created. In a very discreet fashion, the defendants suggested that the fair use doctrine would negate copyright

⁴ *Research Index*, OPENAI (last visited May 03, 2023), <https://openai.com/research>.

⁵ JOSEPH BRIGGS & DEVESH KODNANI, *GLOBAL ECONOMICS ANALYST: THE POTENTIALLY LARGE EFFECTS OF ARTIFICIAL INTELLIGENCE ON ECONOMIC GROWTH* (2023).

⁶ *Supra* note 5.

⁷ Thomas Dohmke, *GitHub Copilot X: The AI-powered developer experience*, THE GITHUB BLOG (Mar. 22, 2023), <https://github.blog/2023-03-22-github-copilot-x-the-ai-powered-developer-experience/>.

⁸ Eirini Kalliamvakou, *Quantifying GitHub Copilot’s impact on developer productivity and happiness*, THE GITHUB BLOG (Sep. 7, 2022), <https://github.blog/2022-09-07-research-quantifying-github-copilots-impact-on-developer-productivity-and-happiness/>.

⁹ Albert Ziegler, *GitHub Copilot Research Recitation*, THE GITHUB BLOG (Jun. 30, 2021), <https://github.blog/2021-06-30-github-copilot-research-recitation/>.

¹⁰ *Analyzing the Legal Implications of GitHub Copilot*, FOSSA (Jul. 14, 2021), <https://fossa.com/blog/analyzing-legal-implications-github-copilot/>.

¹¹ Matthew Butterick, *We’ve filed a lawsuit challenging GitHub Copilot, an AI product that relies on unprecedented open-source software piracy*, GITHUB COPILOT LITIGATION (Nov. 3, 2022), <https://githubcopilotlitigation.com/>.

infringement claims. As AI based systems are significantly dependant on the training data used¹², legal jurisprudence on the manner in which data use is copyright compliant would have massive implications on future development practices.

II. COPYRIGHT INFRINGEMENT IN OPEN-SOURCE LICENSES: BALANCING ECONOMIC HARM AND MORAL RIGHTS

Briefly put, open-source licenses have been integral to the development of Free and Open-Source Software (FOSS). Open-source licenses can be categorised into copyleft or permissive licenses depending on whether modified works are offered along the same terms as the initial license. The GNU General Public Licenses [“**GNU GPL**”] Family (GPL 1.0, 2.0 and 3.0) are prominent copyleft strategies devised by Richard Stallman which ensure that code is made available to study, modify and share easily. When a coder lifts code governed by a GNU GPL license, then upon distribution, it must be done in a manner identical to the original license without additional restrictions while also outlining the original source code, thereby ensuring that such code would perpetually be available and not barred in a proprietary manner.¹³ This may include, depending on the nature of the GNU GPL license, a requirement to make the independent work developed by the licensee available on the same GPL GNU license terms when changes are made to the code licensed on a GPL GNU public license. This particular license will be discussed further later on in this section. The MIT License is a modern permissive license which mandates only sharing of a copyright notice and the license itself – *The above copyright notice and this permission notice shall be included in all copies or substantial portions of the Software.*¹⁴ The stark difference between the two lies in the ability to make modified works proprietary, but the similarities of open-source licenses – which require licensees to reproduce a copy of the license, source code, copyright notice and author details¹⁵ – are more relevant to the Copilot copyright infringement claims.

Before delving into the copyright infringement claims, it is imperative to determine if violation of open-source licenses fall within the contractual or copyright domain. The plaintiffs in the present case have contended both breach of contract and copyright infringement under the Digital Millennium Copyright Act [“**DMCA**”].¹⁶ The most-cited decision on the subject is that of the United States Court of Appeals for the Federal Circuit in *Jacobsen v. Katzer*.¹⁷ The dispute centred

¹² *Id.*

¹³ Catharina Maracke, *Free and Open Source Software and FRAND-based patent licenses, How to mediate between Standard Essential Patent and Free and Open Source Software*, 22 J. WORLD INTELLECT. PROP. 78-102 (2019).

¹⁴ *The MIT License*, OPEN SOURCE INITIATIVE (2018), <https://opensource.org/licenses/MIT/>.

¹⁵ *Supra* note 12 at 5.

¹⁶ Digital Millennium Copyright Act, 17 U.S.C. §§ 512 (1998).

¹⁷ *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008).

around the use of software that Professor Jacobsen had made available to the public. The downloadable files he made available contained a copyright notice which referred users to a ‘copying file’ which set out the terms of the artistic license. The terms of the license allowed any user the right to copy, modify, and distribute the software, provided that the user prominently provided a notice where and when they changed one or more files in the software provided by Professor Jacobsen, and also make the modification freely available.

In *Jacobsen*, Mathew Katzer, and his company Kamind Associates used the bundle of software that Professor Jacobsen had made available to distribute their own software. However, they failed to abide by the terms of the license, i.e., make parts modified publicly and freely available. Professor Jacobsen therefore applied for a preliminary injunction against Katzer before the District Court. The District Court noted that the copyright had been licensed to Katzer under a non-exclusive open-source license. It relied on *Effects Associates Incx v. Cohen*¹⁸ which held that a copyright license waived any claims of suing for copyright infringement, but not breach of contract. It therefore held that Katzer’s use was a breach of contract, not breach of copyright.

Professor Jacobsen raised an appeal before the United States Court of Appeals for the Federal Circuit. The court on examining the text of the license noted that the district Court had erred in its approach and reversed the lower court’s decision. It noted that the license expressly governed the manner in which the copyrighted code was to be downloaded, modified, distributed and in any other way commercially exploited. It expressly noted that “*copyright holders who engage in open-source licensing have the right to control the modification and distribution of copyrighted material.*”¹⁹ It placed reliance on the Second Circuit Court’s decision in *Gilliam v. ABC*²⁰ which held that unauthorised editing of work, as was the case with Katzer’s code, would amount to copyright infringement when such editing takes place outside the scope of the license.

Interestingly, and especially important for the purposes of this article, the court went on to note how there was in fact a violation of Katzer’s economic rights through a violation of the open-source license. The artistic license governed the manner in which creators were to be attributed, increase the rate at which innovation in respect of a project was made publicly available and increase awareness of said project by driving traffic towards the open-source incubation page. The

¹⁸ *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990).

¹⁹ *Supra* note 17.

²⁰ *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976).

harm to potential technical advances as a result of failure to disclose was sufficient to amount to a form of economic harm.

Taking note of the precedent set for economic harm in copyright infringement of open-source licenses, the defendants' response asserts that the plaintiff's complaint *'fails on two intrinsic defects: lack of injury and lack of an otherwise viable claim'*.²¹ They contend that the plaintiffs do not *'advance a copyright infringement claim'*²² and that no harm has been caused by Copilot. However, based on the ruling, violation of open-source licenses certainly falls within the domain of copyright infringement and more importantly, harm to potential technical advances by failure to disclose would constitute economic harm. Copilot, by reproducing blocks of open-source licensed code, fails to disclose the author details, copyright notices and the license itself, and has the potential to harm technical advances if such works are not attributed in the described manner. The lack of attribution is exactly what constitutes violation of terms of the relevant open-source licenses and has been contended by the plaintiffs to cause economic harm, regardless of quantifiability. The plaintiffs also managed to account for quantifiability in terms of infringement by using GitHub's own data which stated that about 1% of the times, a snippet is matched. Based on its user base, the plaintiffs estimated over 36,000 DMCA violations which could be considered as substantial economic harm to coders, considering all reproduced open-source licensed code was commercialized when Copilot offered a paid subscription model.²³

Even if one were to consider economic harm to be determined individually based on each license, a common issue arising for all would be the lack of attribution as a violation of moral rights. The defendants repeatedly negate copyright infringement claims on the grounds of lack of injury, which may hold good when considering commercial value, but are not a necessity for moral rights. Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works [**Berne Convention**] mandates minimum standards for moral rights in member states. It accounts for economic rights and their transferability but still guarantees the right to attribution/paternity right to an author by stipulating the following – *'independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work'*.²⁴ Moral rights were

²¹ GitHub & Microsoft Corporation's Memorandum in Support of Its Motion to Dismiss, *J. Doe 1 & J. Doe 2 v. GitHub, Inc. & Ors.*, No. 21-cv-06823, at 10 (N.D. Cal. Jan. 26, 2023), <https://fingfx.thomsonreuters.com/gfx/legaldocs/byprlrzkrpe/MICROSOFT%20OPENAI%20LAWSUIT%20microsoftmtd.pdf>.

²² *Id.*

²³ *Supra* note 12 at 27.

²⁴ Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sep. 9, 1886, as revised at Paris on July 24, 1971, 1161 U.N.T.S. 3.

intended to be conferred on all works, but the U.S. has received scrutiny for only partially complying and awarding them to ‘visual arts’ under the Visual Artists Rights Act.²⁵ Code does not fall within the purview of this Act and hence, has resulted in moral rights not being discussed by either the plaintiffs or defendants in this dispute. However, if a similar suit is brought in a different jurisdiction,²⁶ it will inevitably serve as the most basic contention (particularly in light of the proposed copyright rules of the European Union [“EU”] AI Act, which shall be discussed later).

For an example of how GitHub Copilot reproduced open-source code without proper attribution, examine the lines of code below-

```
function isEven(n) {  
  if (n == 0)  
    return true;  
  else if (n == 1)  
    return false  
  else if (n < 0)  
    return isEven(-n);  
  else  
    return isEven(n - 2);  
}  
console.log(isEven(50));  
// → true  
console.log(isEven(75));  
// → false  
console.log(isEven(-1));  
// → ??27
```

The abovementioned code is a response secured from OpenAI’s Codex on which Copilot functions. The prompt provided was *function isEven(n)*²⁸ based on which Codex assumed that the code was trying to test if a number was even. The six additional lines after the function, starting with *console.log(isEven(50))*, are tests to check if the code provides correct answers. All of this code

²⁵ Visual Artists Rights Act, 17 U.S.C. §§ 106A-106C (1990); *Moral Rights in U.S. Copyright Law*, COPYRIGHT LAWS (Jan. 08, 2023), <https://www.copyrightlaws.com/moral-rights-in-u-s-copyright-law/>.

²⁶ MIRA T. SUNDARA RAJAN, *The Programmer as Author: Moral Rights in Information Technology in Moral Rights: Principles, Practice and New Technology*, OXFORD UNIVERSITY PRESS, NEW YORK, 283, 320 (2011).

²⁷ MARIJN HAVERBEKE, *ELOQUENT JAVASCRIPT: A MODERN INTRODUCTION TO PROGRAMMING* (No Starch Press, 3rd ed. 2018).

²⁸ *Id.*

has evidently been picked up from *'Eloquent Javascript'* by Marijn Haverbeke because the last two lines of code are actually placeholder values that include the '??' error. Instead of fixing the issue, Codex has verbatim reproduced all ten lines of the function as well as six lines of tests. If a coder were to receive this output, no copyright notice, no license and no attribution would be provided to Marijn Haverbeke, constituting a violation of the terms of open-source licenses and in other countries, moral rights.

Economic harm and moral rights are to be balanced equally, which does not seem to be the case in the U.S. currently. Such a grave lacuna enables parties like the defendants to merely claim lack of injury as a counterargument to copyright related matters. If the right to attribution/paternity right was conferred on all works, as is the case in several other countries,²⁹ coders would not be burdened with proving quantifiable violation of their economic rights or having to argue the lack of attribution solely based on it being documented in an open-source license.

III. LACK OF TRANSFORMATION VIS-À-VIS THE FAIR USE DOCTRINE: DECLARING CODE V. IMPLEMENTING CODE

For the sake of an arguendo, the defendants presumed that Copilot's training data was based on copyrighted material and reproduced the same as output.³⁰ They contended that if a copyright infringement suit did persist, it would be subject to *scenes à faire*, the merger doctrine and the fair use doctrine ["fair use"].³¹ However, placing reliance on *Google v. Oracle*³² (as was done by the defendants) may not fulfil the requirements of fair use as the open-source licensed code in question is of an entirely different kind.

Fair use has been defined as *'any copying of copyrighted material done for a limited and "transformative" purpose'*³³ and does not warrant the need for permission from the copyright owner. Over time, the U.S. has recognised several types of fair use including but not limited to comments, criticism and parodies of works. *Campbell v. Acuff-Rose Music, Inc.*³⁴ saw the birth of transformative use which considered whether the new work was of an entirely different purpose from the original. The landmark judgement established the route ahead as its analysis of transformative use is heavily

²⁹ *Supra* note 25.

³⁰ *Supra* note 21 at 20.

³¹ *Id.*

³² *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021).

³³ Richard Stim, *What is Fair Use?*, STANFORD UNIVERSITY (May 04, 2022), <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>.

³⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

relied on when reading Section 107 of the Copyright Act, 1976 which laid down four factors to determine fair use³⁵ –

- (1) *the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*
- (2) *the nature of the copyrighted work;*
- (3) *the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) *the effect of the use upon the potential market for or value of the copyrighted work.*

*Authors Guild, Inc. v. Google, Inc.*³⁶ relied on this precedent and ruled in favour of Google for digitising a few pages of copyrighted books since ‘*words in books are being used in a way they have not been used before*’. It was transformative and served a useful purpose without causing any harm to the original works. Both the cases ruled that the aforementioned factors were to be weighed equally and were not necessarily exhaustive in nature.³⁷

In the realm of open-source licensed code, a monumental decision was pronounced two years ago in *Google v. Oracle*. Deliberating on Application Programming Interface code, the U.S. Supreme Court unanimously held that Google’s usage of Oracle’s code was fair use. However, this decision was marked with a contingency of splitting the API code into two types – declaring code and implementing code. Declaring code was understood by the Court to be code that declares the name of the method along with its inputs and outputs.³⁸ Implementing code was understood as instructions that carry out the function of the particular method. In determining Google’s fair use, the Supreme Court came to the very logical conclusion that declaring code could be used by coders as long as the purpose was transformative, and the transformation of code was conducted by reimplementing (writing different implementing codes). Some scholars have also argued along the same lines by asserting that coders writing their own implementation codes after borrowing declaring codes would be considered transformative use and thereby, would be permitted.³⁹

```
function isEven(n) {  
  if (n == 0)
```

³⁵ Copyright Act, 17 U.S.C. § 107 (1976).

³⁶ *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

³⁷ Michelle L. Childs, *Defending the Digital Millennium Copyright Act: The Role of the Anti-Circumvention Provisions in the Copyright Law*, 5 J. INTELL. PROP. 142 (2005).

³⁸ Jeffrey Robert Kaufman, *What Google v. Oracle means for open source*, OPEN SOURCE (May 05, 2021), <https://opensource.com/article/21/5/google-v-oracle>.

³⁹ *Id.*

```

return true;
else if (n == 1)
return false
else if (n < 0)
return isEven(-n);
else
return isEven(n - 2);
}
console.log(isEven(50));
// → true
console.log(isEven(75));
// → false
console.log(isEven(-1));
// → ??40

```

Relying on the same example, ‘*function isEven(n)*’ serves as the declaring code as it declares the method which is to find out if a number is even and it also declares the integer ‘*n*’ as the input. All the following code from *if (n == 0)* to *return isEven(n - 2);*} serves as the implementing code. The ‘*console.log(isEven(50));*’ code are tests and are considered programmer inputs and method calls which fall outside the category of declaring code and implementing code.

The defendants have claimed defences of merger doctrine and fair use in a blanket-manner for usage of all open-source licensed code by relying on *Google v. Oracle* and other judgements. The bifurcation provided by the Supreme Court has been completely ignored which could set a dangerous precedent by failing to protect implementing code, if accepted. Declaring code and the method call tests are logically to be affected by the merger doctrine since they can only be expressed in one form alone. No matter the modifications made, if one integer such as ‘*n*’ or a specific number such as ‘*50*’ is to be used, the expression will largely remain the same. It is interesting to note that the Supreme Court answered the question of fair use by Google after assuming that declaring code could be copyrighted. Such an assumption was made to avoid delving into the merger doctrine (which would answer whether APIs were copyrightable).⁴¹

Fundamentally, copyright exists to incentivise creativity and protect authors rights over their works.⁴² Coders exhibit the required creativity in generating a declaration that signals an operation,

⁴⁰ *Supra* note 26.

⁴¹ *Supra* note 37.

⁴² Schroff S, ‘*The Purpose of Copyright—Moving beyond the Theory*’, 16 J. INTELL. PROP. L. 1262 (2021).

as well as in designing implementing code that carries out such an operation. Implementing code seems to be a unique expression of logic created by a coder and would certainly be protected by copyright. Several functions could possess different implementing codes, thereby permitting fair use of the declaring code since there is a transformative purpose every time the implementing code is changed. Coders may also arrive at the same solution through a completely different implementing code which makes the expression unique. While transformative use, as per *Google v. Oracle*, would allow for declaring code to be copied, directly lifting implementing code and reproducing it would not be permissible due to a lack of transformation and the second factor of ‘the nature of the copyrighted work’ not being satisfied. Hence, reproducing Marjin Haverbecke’s code from *Eloquent Javascript*’ would only be permissible for the declaring code, not the implementing code and would still constitute copyright infringement of open-source licensed code.

IV. CONCLUDING REMARKS: A GLIMMER OF HOPE IN THE EU AI ACT

U.S. copyright legislation awaits a much-needed reform in its system of granting moral rights. In the absence of moral rights protection, authors of literary works like code who try ensure attribution through the terms in their open-source licenses have no real recourse in the US to demand attribution outside of these licenses. The credit-problem may perhaps only be worsened by increase in use of generative AI. This is in large part due to the immense sets of training data that are inputted, with arguably lower attention to the terms of use regarding such datasets.⁴³ This is largely based on two factors- i) attribution is essential for small developers and artists to develop a larger following; and ii). identifying economic harm where the role of a piece of code is minor in an AI-generated work may be tenuous. Further, if fair use is granted to all forms of code, then infringement claims would be redundant in courts and even the current remedy for attribution would fail.

The defendants may have some remedies considering that the Copilot case was filed in the U.S. However, as previously mentioned, if filed in other jurisdictions, the lack of attribution would not be taken as lightly and would bear greater implications. Moral rights were envisioned to provide the bare minimum recognition to authors for their contribution and could be claimed

⁴³ Several lawsuits against AI developers have recently been filed, claiming breach of terms of use. See Mia Sato, *Drake’s AI Clone Is Here — and Drake Might Not Be Able to Stop Him*, THE VERGE (2023), <https://www.theverge.com/2023/5/1/23703087/ai-drake-the-weeknd-music-copyright-legal-battle-right-of-publicity> (last visited Sep 13, 2023); Dan Milmo & Dan Milmo Global technology editor, *Sarah Silverman Sues OpenAI and Meta Claiming AI Training Infringed Copyright*, THE GUARDIAN, Jul. 10, 2023, <https://www.theguardian.com/technology/2023/jul/10/sarah-silverman-sues-openai-meta-copyright-infringement> (last visited Sep 13, 2023).

independently of economic rights and their transfer. Evident from the proposed copyright rules for generative AI in the EU AI Act,⁴⁴ disclosure and eventually, attribution will be on the rise. The proposed copyright rules require companies deploying generative AI to disclose any copyrighted material used in their training and development.⁴⁵ While this may not directly mandate reproduced code to provide attribution, it is a step in the right direction and coupled with enforceability of open-source licenses and moral rights, is likely to create more transparency in the functioning of generative AI.

⁴⁴ Supantha Mukherjee et al., *EU proposes new copyright rules for generative AI*, REUTERS (Apr. 28, 2023), <https://www.reuters.com/technology/eu-lawmakers-committee-reaches-deal-artificial-intelligence-act-2023-04-27/>.

⁴⁵ *Id.*

The Copyright Problem with Emerging Generative AI

APOORVA VERMA*

ABSTRACT

Generative AI, a rapidly advancing field in artificial intelligence, has gained significant attention and recognition for its ability to create original and diverse content such as images, music, text, and even entire virtual worlds. Intelligence (AI) technologies, such as ChatGPT, have ushered in a new era of content creation, enabling users to produce vast amounts of original text at an unprecedented speed. By leveraging complex algorithms and deep learning techniques, generative AI systems can autonomously produce new and innovative outputs that mimic human-like creativity. However, as this technology continues to evolve and become more pervasive, it raises various legal, ethical, and societal concerns. This technological advancement has brought forth a range of complex copyright issues that demand careful consideration. This paper examines the challenges and implications surrounding copyright in the context of generative AI. The study delves into the unique characteristics of generative AI, where the AI system autonomously generates creative content, blurring the lines of authorship and ownership. The concept of “originality” in the context of AI-generated works is critically examined, with a focus on the extent of human intervention and the transformative nature of the output. Furthermore, the paper analyzes the challenges posed by the lack of clarity regarding authorship and ownership, the enforceability of copyright laws, and the potential infringement risks associated with AI-generated content in the context of India.

Additionally, the study sheds light on the responsibility of AI developers and platform providers, emphasizing the need for proactive measures to protect original creators and users from copyright infringement. It explores potential solutions, such as licensing mechanisms, attribution protocols, and technological safeguards, to strike a balance between promoting innovation and safeguarding copyright interests.

I. INTRODUCTION

The term “generative AI” refers to a category of artificial intelligence [“AI”] models and techniques that are designed to generate new and original content. Generative AI has created a lot of buzz around the world due to its ability to create new content such as images, text, music, or even videos, that resemble the patterns and characteristics found in the training data they were exposed

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to in contrast to traditional AI that focuses on developing systems based on explicit rules and logic. It typically involves the use of symbolic representations, logical reasoning, and rule-based systems to solve specific problems.

The significant attention garnered by Generative AI is due to the rising popularity of programs like OpenAI's ChatGPT and DALL-E. These cutting-edge applications leverage generative AI to swiftly generate a wide range of content, including computer code, essays, emails, social media captions, images, poems, excel formulas, and much more. The ability of these systems to produce such diverse and original content in a matter of seconds has captured the imagination of people worldwide. Generative AI has experienced an extraordinary surge in popularity, with ChatGPT alone amassing over a million users within a week of its launch. This remarkable success has prompted a wave of interest from tech giants like Google, Microsoft's Bing, and Opera, encouraging them to enter the domain of Generative AI and compete in this burgeoning field. As more companies join the fray and discover new applications for generative AI, the buzz surrounding this technology is expected to continue expanding, further fuelling advancements and innovation in the field.

The progress of such AI has created new possibilities for both users and developers. However, with greater innovation come new questions on content regulation, privacy and copyright issues. Various issues have arisen, including concerns about infringement and rights of use, ambiguity surrounding ownership of AI-generated works, and debates over unlicensed content present in training data. These developments have implications for existing laws as well for future laws which will have to consider the AI angle while making and applying laws especially in the field of IPR regime. As the legal landscape evolves, the resolution of these matters will shape the future of generative AI and its interaction with intellectual property laws.

II. GENERATIVE AI: HOW IT WORKS

Generative AI is an AI technology that has an ability to create different forms of content such as text, images, audio, and synthetic data. The current excitement surrounding generative AI is primarily due to the user-friendly interface that allows users to effortlessly generate high-quality text, graphics, and videos within seconds. In the past, AI systems often fell short in terms of creativity and performance compared to humans. However, the emergence of generative AI has changed this narrative. Generative AI is a subset of machine learning, a broad term encompassing computer algorithms designed to analyse extensive datasets. These algorithms aim to mimic human-like behaviour in performing tasks. Training a generative AI model involves providing it

with a substantial amount of data, which serves as the foundation for the model's learning.¹ This data can encompass various forms such as text, code, graphics, or any other relevant content related to the specific task at hand. In machine learning, three fundamental elements exist: models, data, and compute. Models are algorithms that take inputs and produce outputs. Sufficient and diverse data is crucial for the algorithms to generate valuable output.² Models need to be flexible enough to capture the complexity present in the data. Additionally, adequate computing power is necessary to execute the algorithms effectively.³

Once the training data is gathered, the AI model analyses the data patterns and relationships to comprehend the underlying rules governing the content. Through continuous learning, the AI model refines its parameters, enhancing its ability to mimic human-generated content.⁴ As the AI model generates more content, its outputs become increasingly sophisticated and persuasive.

Initially, a human input is required to provide a prompt to a generative model for content creation. Typically, creative prompts tend to produce creative outputs. As a result, the role of a “prompt engineer” is expected to emerge as a recognized profession, at least until more advanced AI models come into play. The field has already witnessed the development of an 82-page book dedicated to DALL-E 2 image prompts and the establishment of a prompt marketplace where users can purchase prompts from others for a nominal fee. Users of these systems usually need to experiment with multiple prompts before achieving the desired outcome. Generative AI models exhibit a wide range of capabilities and can process various types of content, including images, lengthy texts, emails, social media posts, voice recordings, program codes, and structured data.⁵ They can generate new content, provide translations, answer questions, perform sentiment analysis, generating summaries, and even create videos.

Training Models Of AI

The models can be mainly categorized into three types:

¹James Vincent, *The scary truth about AI copyright is nobody knows what will happen next*, THE VERGE (Nov. 15, 2022), <https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data>.

²What is generative AI, MCKINSEY & COMPANY, (Jan. 19, 2023), *What is ChatGPT, DALL-E, and generative AI?* | McKinsey.

³Stephen Amell, *How to train a Generative Model*, MEDIUM, (June 16, 2023).

⁴Bernard Marr, *The Difference Between Generative AI And Traditional AI*, FORBES, (July 24, 2023), <https://www.forbes.com/sites/bernardmarr/2023/07/24/the-difference-between-generative-ai-and-traditional-ai-an-easy-explanation-for-anyone/>.

⁵Thomas H. Davenport and Nitin Mittal, *How Generative AI is changing Creative Work*, HARV. BUS. REV., (Nov. 14, 2022), <https://hbr.org/2022/11/how-generative-ai-is-changing-creative-work>.

1. Generative Adversarial Networks (GANs): These technologies specialize in generating visual or multimedia outputs using both image and language inputs. GANs are capable of producing realistic images, videos, and other forms of media.
2. Transformer-based models: Models like Generative Pre-Trained (GPT) language models leverage large-scale internet-based datasets to generate textual content. They can generate various types of written material, such as website articles, press releases, and whitepapers.
3. Variational auto-encoders: The model utilizes encoders to capture the essence of the data in order to learn how it is constructed. Variational auto-encoders are often used for tasks like image generation, speech synthesis, and data compression.⁶

These different types of generative AI models enable a broad spectrum of applications and contribute to the remarkable versatility of the technology. The data is extracted from multiple sources including publicly available datasets, user generated content, private data sets, and crowd sourced data. These models therefore have been restricted to big tech giants only who already have access and methods to harness such large data through already existing channels. This means training datasets for generative AI encompass sources, ranging from personal blogs on platforms like WordPress and Blogspot to artistic platforms like DeviantArt and stock imagery sites such as Shutterstock and Getty Images. In fact, the training datasets used in generative AI are so extensive that it is highly likely that your content or data is already a part of one and the content generated is based on it.⁷

III. APPLICATION OF GENERATIVE AI

Generative AI has a captivating quality that often appears almost magical. Remarkable image generators like Stable Diffusion, Midjourney, and DALL·E 2 can create visually stunning outputs in a wide range of styles, from aged photographs and watercolours to pencil drawings and Pointillism.⁸ The results are truly fascinating, surpassing the average human performance in terms of both quality and speed of creation. Text generators have emerged as highly impressive tools, capable of producing essays, poems, summaries, and mimicking various writing styles and forms (although they may take creative liberties with facts).

⁶Jagreet Kaur, *Generative AI models and types and its application*, XENONSTACK, (6 July 2023).

⁷*Supra* n 1.

⁸ Gil Appel et al, *Generative AI Has an Intellectual Property Problem*, HARV. BUS. REV. (Apr. 7, 2023), <https://hbr.org/2023/04/generative-ai-has-an-intellectual-property-problem>.

Contrary to the notion of conjuring material out of thin air, generative AI platforms undergo a training process using extensive datasets comprising vast amounts of images and text. These datasets are processed by software, constructing billions of parameters that enable the AI platforms to identify patterns, establish relationships, formulate rules, and make judgments and predictions when generating responses to prompts.⁹ Thus, the AI platforms leverage their learned knowledge and patterns to generate text outputs.

Generative AI models have been used in various applications, including:

1. **Image Generation:** Models like Generative Adversarial Networks (GANs) can generate realistic images from scratch, based on patterns and styles learned from training data.
2. **Text Generation:** Language models, such as GPT (Generative Pre-trained Transformer), can generate coherent and contextually relevant text, mimicking human-like language patterns and styles.
3. **Music Composition:** Generative AI models can generate original music pieces, imitating different genres or even composing unique melodies based on patterns learned from training data.
4. **Video Synthesis:** Advanced generative AI models can generate video sequences, altering or combining existing video content to create new, realistic videos.

Generative AI holds great potential in creative fields, content generation, and simulation scenarios. However, it also raises ethical concerns related to the potential misuse or creation of misleading or harmful content. It is important to consider responsible use and regulation when deploying generative AI technologies. The process of utilizing generative AI entails certain legal risks, particularly concerning potential infringement of intellectual property rights. These risks give rise to unresolved legal questions. For instance, there is uncertainty regarding whether copyright, patent, and trademark infringement apply to creations generated by AI. Additionally, it also raises the issue of determining the ownership of the content produced by generative.

IV. IMPORTANCE OF DATA OWNERSHIP

Ownership is a fundamental concept deeply ingrained in our daily lives and in the fundamental workings of society. It represents the allocation of rights and responsibilities for a particular property to an individual or organization. When we speak of property rights, we refer to the rights

⁹*Supra note 3.*

of ownership, which encompass a bundle of rights that outline the specific form of ownership associated with a particular thing.

Sophisticated generative AI models undergo training using extensive datasets, such as text, images, music, or software. These models possess the capability to discern intricate patterns and relationships within the training data. Ideally, they are designed not to simply memorize the specific data instances, but rather to grasp the underlying relational principles inherent in the data.¹⁰ When prompted, the model utilizes interpolation techniques to generate a response based on the learned relational principles. The aim is for the output to be a completely novel creation generated from scratch by the model. However, in practice, there are instances where the output can bear similarities or even be identical to the material present in the training data.¹¹

The development of an AI system involves numerous stakeholders, including programmers, data suppliers, trainers, feedback providers, investors who fund the creation of the system, and operators responsible for its operation. These stakeholders collectively contribute to various aspects of the AI system's creation and functioning. At present, generative models and the companies behind them often place the burden of ensuring that the generated outputs do not infringe copyright or violate laws on the users. However, the process of generating outputs is a collaborative one, and there is a need for the identification of protected rights to be integrated at the model level. In other words, the responsibility of recognizing and respecting copyrighted content should be embedded within the generative models themselves.

V. GENERATIVE AI AND CHALLENGES TO COPYRIGHT

Throughout history, the emergence of new technologies has consistently given rise to concerns and debates surrounding copyright issues. With each technological innovation, there tends to be a period of uncertainty and challenges in the realm of copyright law. Generative artificial intelligence (AI) is an emerging technology that has the potential to revolutionize various creative fields, including artwork, software development, and text generation. However, with this technological advancement comes a range of legal considerations, especially concerning the protection of intellectual property rights, particularly copyrights.

¹⁰ *Id.*

¹¹ Xuyang Zhu & Noelle Huang, *Using and training generative AI tools – IP ownership and infringement issues*, TAYLOR WESSING (May 9, 2023), <https://www.taylorwessing.com/en/interface/2023/ai---are-we-getting-the-balance-between-regulation-and-innovation-right/using-and-training-generative-ai-tools---ip-ownership-and-infringement-issues>.

Copyright infringement is a growing concern within the AI community, leading governments to introduce regulations to address this issue and hold AI developers and their systems accountable. OpenAI CEO Sam Altman acknowledged the importance of government regulation during his testimony before Congress. He emphasized the need for responsible AI systems that respect the rights of original content creators and ensure proper attribution.¹² Generative AI technology has the capability to generate novel and ground-breaking content that goes beyond the limits of traditional methods. However, the application of this technology has raised significant inquiries regarding the copyrightability of the resulting creations. The complexities revolve around determining if the Intellectual Property (IP) generated through generative AI is eligible for protection under the current intellectual property laws and establishing ownership rights over such IP. Copyright law generally grants exclusive rights to the creators of original works, allowing them to control how their creations are used and distributed. However, when it comes to generative AI, questions arise about the authorship and ownership of the content generated by the AI system. In the case of AI-generated content, determining the original creator becomes complex. Traditional notions of authorship, where a human creates something based on their creativity and effort, do not easily apply to generative AI. Instead, the AI system generates content based on patterns and data on which it has been trained, without direct human input for each output.

This raises questions about who should be considered the author or owner of the AI-generated content. This question needs to be understood from two dimensions:

The concept of input and output copyright refers to the copyright protection of both the input data used to train an AI system and the output generated by the AI system.¹³

A. Input Copyright: Does The AI Training Process Infringe Copyright of Other Works?

1. Understanding Input Data

Input data refers to the information used to train an AI system. It can include text, images, videos, or any other form of content. Input copyright deals with ownership and rights associated with the data used to train the AI system. If the input data is subject to copyright protection, the rights and restrictions associated with that data would typically apply. The use of copyrighted input data

¹² Johana Bhuiyan, *OpenAI CEO calls for laws to mitigate 'risks of increasingly powerful' AI*, THE GUARDIAN, (May 16, 2023), OpenAI CEO calls for laws to mitigate 'risks of increasingly powerful' AI | ChatGPT | The Guardian.

¹³ Jessica Fjeld & Mason Kortz, *A Legal Anatomy of AI-generated Art: Part I*, (Nov. 21, 2021), HARV. J.L. & TECH, available at <https://jolt.law.harvard.edu/digest/a-legal-anatomy-of-ai-generated-art-part-i>.

without proper authorization could potentially infringe upon the rights of the original creators. AI systems are trained using large datasets that may include copyrighted works, such as texts and images from the internet. This training process may involve making copies of existing works, which can pose risk of copyright infringement. Companies like OpenAI acknowledge that their programs are trained on datasets that contain copyrighted content and involve copying the data for analysis. Unauthorized copying of copyrighted works without explicit or implied permission from the copyright owners can potentially infringe upon copyright owners' exclusive rights to reproduce their work.

2. *Fair Use and Copyright Infringement*

Issues related to infringement of rights of use, uncertainties regarding the ownership of AI-generated works, and concerns about unlicensed content in training data give rise to various questions. One such question is whether users should be allowed to prompt AI tools with direct references to copyrighted and trademarked works of other creators without obtaining their permission. These legal and ethical concerns highlight the complex landscape surrounding the use of AI-generated content and the need for clarity and guidelines in these areas.

The AI companies have argued that their training processes fall under fair use, asserting that their use is transformative, non-commercial, and serves purposes such as research or education. The determination of fair use usually involves considering the following aspects:

1. the purpose and character of the use,
2. the nature of the copyrighted work,
3. the amount used in relation to the whole work, and
4. the potential impact on the market or value of the copyrighted work.¹⁴

In *The Authors Guild, Inc. v. Google, Inc.*¹⁵, the court ruled that Google's copying of entire books for the purpose of creating a searchable database constituted fair use. It was observed that the purpose of the generative AI is of transformative nature and not expressive as such.¹⁶

However, concerns have been raised about AI applications that train on copyrighted works and generate output that compete with the originals. For instance, an AI-generated song resembling the styles of Drake and The Weeknd gained significant popularity before being removed due to

¹⁴ REMUNERATION OF COPYRIGHT OWNERS: REGULATORY CHALLENGES OF NEW BUSINESS MODELS, 241-246 (Kung-Chung Liu & Reto M. Hilty, 1st ed. 2018).

¹⁵ Authors Guild Inc. et al. v. Google, Inc. 804 F.3d 202.

¹⁶Rachel Reed, *AI created a song mimicking the work of Drake and The Weeknd. What does that mean for copyright law?*, HARVARD LAW TODAY, (May 2, 2023).

copyright issues. Universal Music Group claims that AI companies violate copyright by using artists' songs in their training data.¹⁷

These arguments are currently being tested in court through multiple lawsuits. There are cases where artists have filed a class-action lawsuit alleging copyright infringement in the training of AI image programs. For instance, Getty Images¹⁸ has also filed a lawsuit against Stability AI, accusing the company of copying millions of copyrighted images from their websites for training purposes. These instances highlight how the lawsuits have been brought in the courts challenging the principle of fair use principle in the light of increased use of copyrighted technology by the AI.

In a much recent case of *Andersen v. Stability AI et al.*¹⁹, filed in late 2022, a group of three artists formed a class to sue several generative AI platforms. The artists' arguments are based on the claim that these AI platforms used their original works without obtaining the necessary licenses to train their AI systems in a way that allows users to generate works that closely resemble their existing protected works. According to the artists, these generated works may not be transformative enough and could be considered unauthorized derivative works. If the court determines that the AI's works are indeed unauthorized and derivative, significant penalties for copyright infringement can be imposed.

B. Output Copyright: Does AI qualify as copyright owner for the contents generated?

1. Understanding Output Data

Output copyright pertains to the content generated by an AI system. This includes any text, images, music, or other creative works produced by the AI. The question of who holds the copyright to AI-generated output is more complex. As mentioned earlier, traditional notions of authorship may not directly apply to content generated by AI.

Some argue that if AI systems autonomously create content without human intervention, the output should not be eligible for copyright protection²⁰. Others propose that the organization or individual who owns and operates the AI system should be considered the copyright holder of the generated output. For example, OpenAI according to its Terms of Use appears to assign any copyright (rights, title and interest) to the user.²¹ While addressing the issue of assigning copyright

¹⁷Mia Sato, *Drake's AI clone is here- and Drake might not be able to stop him*, THE VERGE, (May 1, 2023), <https://www.theverge.com/2023/5/1/2>.

¹⁸ Getty Images (US) Inc. v. Stability AI Inc., No. 23-cv-135(D.Del.).

¹⁹ Andersen et al v. Stability AI Ltd, Midjourney, Deviant Art, 23-cv-201, (N.D. Cal.).

²⁰Michael Kasdan and Brian Pattengale, *A look at Future AI Questions For The US Copyright Office*, LAW360 LEXISNEXIS, (12 Feb. 2022), [Law360-A-Look-At-Future-AI-Questions-For-The-US-Copyright-Office.pdf](https://www.law360.com/a-look-at-future-ai-questions-for-the-us-copyright-office.pdf) (g2bswiggins.wpenginepowered.com).

²¹ See also OpenAI, Terms of Use, OPENAI (Dec. 8, 2020), <https://openai.com/policies/terms-of-use>.

to the work created by AI the level of human intervention involved in the creative process shall be central to the discussion. This categorization helps provide clarity:

- "AI-assisted" works: These are works created by AI with significant involvement or intervention from humans. The AI system is used as a tool or assistance in the creative process, but human input is substantial.
- "AI-generated" works: These are works created by AI with little to no human intervention. The AI system independently generates the work, with minimal or negligible input from humans.²²

2. *Challenges To Allocation of Copyrights to AI*

The issue of copyright protection for creative works that involve collaboration between humans and machines is intricate. According to the Copyright Office of U.S, if a human arranges or selects AI-generated content in a creative manner or modifies it with sufficient creativity, copyright protection will only apply to the parts contributed by the human, not the AI-generated material itself.²³ However, when it comes to works jointly created by humans and machines, the question of copyright protection becomes less clear, and registration applications must include all the joint authors.

When generative AI is used to create artistic works, there may be concerns about copyright infringement if the output bears similarities to existing works found on the internet. These AI models are often trained on pre-existing works, which can result in similarities to previous creations.²⁴ Although there are situations where a human creatively selects, arranges, or modifies AI-generated material, resulting in copyright protection for the human-authored elements, determining copyright ownership becomes more complicated when humans and machines collaborate on the creation process. There are two types of AI outputs that can raise particular concerns. Firstly, certain AI programs may be utilized to create works that involve existing fictional characters. These works may be at a higher risk of copyright infringement because fictional characters can enjoy their own copyright protection. Secondly, some AI programs can be employed to generate artistic or literary works that mimic the style of a specific artist or author. While these outputs are not necessarily infringing, copyright law typically prohibits the direct copying of specific works rather than an artist's overall style. If we consider that copyrightable

²² Rommel Khan, *AI Works – The Future Of Intellectual Property Law - Copyright - India*, (Feb. 20, 2023), MONDAQ, <https://www.mondaq.com/india/copyright/1284668/ai-works--the-future-of-intellectual-property-law>.

²³ United States Code, Copyrights Office, U.S.C. 17 §101 (1958).

²⁴ *Generative AI Is A Minefield For Copyright Law*, THE CONVERSATION, (June 15 2023). Generative AI is a minefield for copyright law (theconversation.com)

works require a human author, works created by humans using generative AI could potentially be eligible for copyright protection, depending on the extent of human involvement in the creative process.

The recent developments in copyright proceedings and the subsequent Copyright Registration Guidance in US suggest that the Copyright is unlikely to recognize human authorship when an AI program generates works based on simple text prompts.²⁵

3. *The Case of Zarya The Dawn*

In September 2022, Kris Kashtanova registered a copyright for a graphic novel *Zarya the Dawn* that was illustrated using images generated by the AI system Midjourney in response to textual inputs. However, in October, the Copyright Office initiated cancellation proceedings after discovering that Kashtanova had not disclosed the use of AI.²⁶ Kashtanova argued that they authored the images through a creative and iterative process, distinguishing it from the case of Dr. Thaler, who attempted to register an image created by AI. Despite the argument, on February 21, 2023, the Copyright Office determined that the images were not eligible for copyright protection, as the images were produced by Midjourney, rather than Kashtanova whose role was limited to providing prompts and arranging the images, was not the mastermind behind the comic.²⁷

Based on this decision, the Copyright Office released guidance in March stating that when AI "determines the expressive elements of its output, the generated material is not the product of human authorship" and therefore not eligible for copyright protection.²⁸

In the case where AI-created works are deemed eligible for copyright protection, the question of ownership arises. The ownership is usually granted to the "author or authors" of the work. However, there have been no clear rules established by courts or under the Copyright regime regarding the identification of the "author or authors" of AI-created works.²⁹ However, the question that arises is: who is the author or creator of the output the user, the AI, the developer

²⁵ Joao Quintais, *Generative AI, Copyright and the AI Act - Kluwer Copyright Blog*, (May 9, 2023), KLUWER COPYRIGHT BLOG, <https://copyrightblog.kluweriplaw.com/2023/05/09/generative-ai-copyright-and-the-ai-act/>.

²⁶ Riddhi Shetty, *AI Comic Art Dispute Leaves Copyright Protections Open-ended*, (Feb.24, 2023), BLOOMBERG LAW NEWS, <https://news.bloomberglaw.com/ip-law/ai-comic-art-dispute-leaves-copyright-protections-open-end>.

²⁷ Blake Brittain, *AI – created images lose U.S. copyrights in test for new technology*, REUTERS, (Feb. 23, 2023), AI-created images lose U.S. copyrights in test for new technology | Reuters

²⁸ United States Copyright Office, *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, VOL.88, March 16 2023, https://copyright.gov/ai/ai_policy_guidance.pdf

²⁹ Simon Chesterman, *Artificial Intelligence And The Limits Of Legal Personality*, 69 INT'L & COMPARATIVE L. QUARTERLY, 819–844 (2020).

of the AI or the people who provided the data for training. It is necessary to allocate ownership as it will be instrumental in deciding liability in case of copyright infringement. Recognition of AI as a separate entity capable of owning intellectual property (IP) could potentially lead to copyright violations. Existing copyright law typically considers infringement to be committed by a "person," and thus, cases of infringement by AI may not be effectively addressed under current legal frameworks.

If AI is treated as a distinct entity from its creator or owner, it creates a situation where the AI itself cannot be held responsible for copyright infringement under the existing laws. This perspective supports the argument that AI should be seen as an extension of its creator, particularly in terms of liability for infringement of data. Additionally, it ensures that the compensation paid for the right to use the copyrighted material goes to the rightful owners, thereby incentivizing creators to produce more AI works.

However, this raises significant commercial concerns regarding royalties. Questions arise regarding the distribution of royalties, and who should receive them if payment is required at all. In summary, recognizing AI as a separate entity for the purpose of owning IP raises complex legal and commercial issues, particularly regarding copyright infringement and royalty distribution.

VI. ISSUES WITH GENERATIVE AI AND INDIAN COPYRIGHT ACT

Recent advancements in generative AI, including the introduction of ChatGPT and the integration of AI in public-facing products like Bing and Bard, have prompted governments worldwide to take action to regulate these technologies, despite having limited control over them. These are artificial intelligence-powered chat bots which have abilities to find out information or generate images from the internet and provide responses to queries, they may be based on different models however the purpose is more or less same or similar.

Different countries have responded with various regulatory initiatives based on their domestic economic, technological, and political landscapes. China, for instance, has released draft regulations specific to generative AI- *Measures for the Management of Generative Artificial Intelligence Services*,³⁰ while the United States has initiated discussions on potential regulations. The EU has

³⁰ Lay Zhang, *China: Cyberspace Authority Releases Draft Measures Regulating Generative Artificial Intelligence*, LAW LIBRARY OF CONGRESS, (July 5, 2023).

prepared a draft AI Act, and the United States has introduced an ‘AI Bill of Rights’³¹. Each jurisdiction's regulatory developments have been shaped by these unique contexts. Governments worldwide are actively engaging in regulatory efforts to address the challenges posed by generative AI, considering the purpose of regulation, liability frameworks, and important regulatory elements within their specific contexts but it has proved to be a very complex work that may need changing the way the copyright has been understood and perceived for so long.

A. Requirements Under Indian Copyright Act

In India the copyright is protected under the Indian Copyright Act 1957. Section 13³² of the Copyright Act of 1957 grants copyright protection for various forms of creative works, which includes literary works, musical works, theatrical works, artistic works, sound recordings, and cinematographic films. These categories encompass a broad range of creative expressions. For instance, the Act protects literary works such as books, manuscripts, and poetry. It ensures that original works in literature, drama, music, art, as well as cinematographic films and sound recordings, are safeguarded against unauthorized use and access. The Copyright Act of 1957 establishes provisions to prevent infringement and unauthorized exploitation of these protected works.

There are several issues within the current copyright laws that one is faced with while understanding the scenario created by generative AI. One key issue is that the Copyright Act of 1957 protects "original" literary and artistic works. However, according to a prevailing theory, AI is currently unable to create content that is truly “original.” Instead, AI-generated works are often seen as adaptations or modifications of existing information that the AI has accessed, analysed, and been trained on. This perspective stems from the understanding that AI systems rely on datasets that are influenced by the biases and limitations of their human creators. In other words, the output of AI is considered to be derived from pre-existing information rather than being genuinely novel or original.

The Copyright Act in India requires that a work ‘must meet the test of a ‘modicum of creativity’ as established by the Supreme Court in the *Eastern Book Co vs. D.B. Modak*³³ case. The court held

³¹ Johana Bhuiyan and Nick Robins-Early, *The EU is leading the way on AI laws. The US is still playing catch-up*, THE GUARDIAN, (June 14 2023), <https://www.theguardian.com/technology/2023/jun/13/artificial-intelligence-us-regulation>.

³² The Copyright Amendment Act, No. 65 of 1984, § 13, Act of Parliament, 1984 (India).

³³ *Eastern Book Company and Ors. v. D.B. Modak and Anr.*, (2008) 1 SCC 1.

that a 'minimal degree of creativity' is necessary, with a substantive variation rather than a trivial one. Another requirement is the definition of an "author" under the Act. The Act designates the "person" responsible for creating the work as the author, but it does not specifically define "person." Referring to the General Clauses Act, 1897,³⁴ which defines a 'person' as "any company or association or body of individuals, whether incorporated or not," does not provide a conclusive answer.

According to the provisions of the Copyright Act in India, copyright protection is granted to human authors. Section 17³⁵ of the Act states that "no person" is entitled to copyright except as provided by the law. Additionally, Section 2(d)(vi) of the Act³⁶ allows authorship to be granted to the person "who causes the work to be created" in the case of computer-generated works. When applying for copyright registration, disclosure of the name, nationality, and address of the author is required under Section XIV of the Act.³⁷

Based on Section 2(d) of the Act, a human who has only contributed a single-line input cannot be considered the one who caused the output to be formed³⁸ as the output may not be necessarily unique across various users in the global system since the data according to which the AI generates output remains same for everybody. This can lead to chaotic copyright litigations considering for closely similar prompts the out may be same. Thus, for claiming copyright there has to be greater artistic or creative effort put in by the creator.

B. Challenges Posed to AI Work in India

In India, there was a brief period when copyright protection was granted to AI works. However, this decision was later reversed with a withdrawal notice issued. In 2021, an AI painting app called 'RAGHAV' and its owner, Mr. Ankit Sahni, sought copyright protection for a work titled "*Suryast*" in India. Initially, the Indian Copyright Office rejected an application that listed the AI ('RAGHAV') as the sole author of the artwork. However, a subsequent application was filed, naming both the owner of the AI and the AI itself as co-authors for another artwork, and this application was allowed. However, within a year, the Copyright Office issued a withdrawal notice

³⁴ General Clauses Act, 1897, § 3, No. 20, Acts of Parliament, 1977, (India).

³⁵ The Copyright Act, 1957, § 17, No. 14, Acts of Parliament, 1957 (India).

³⁶ *supra* note 17, § 2(d)(vi).

³⁷ *supra* note 17, § 14.

³⁸ Tanya Saraswat, *ChatGPT and IP issues*, MONDAQ, (May 5 2023), <https://www.mondaq.com/india/copyright/1311836/chatgpt-and-ip-issues>.

seeking clarification on the legal status of the AI named *Raghav*. This action suggested that the copyright was granted by error without application of mind moreover in the notice of withdrawal the onus was placed on the applicant to “inform the copyright office on the legal status of the AI Tool i.e., Raghav Artificial Painting App”.³⁹

AI is not currently recognized as a legal entity in India by any statute. As a result, the existing legal framework may not adequately address works where the actual creator is neither a human nor a recognized legal. Recognizing AI as an entity separate from a person and granting it ownership of intellectual property rights may give rise to potential copyright violations. Moreover, such infringements may not be effectively addressed under the existing law since Section 51⁴⁰ of the Copyright Act explicitly states that copyright infringement can only be committed by a “person.”⁴¹ In addition to the aforementioned challenges, there is a potential issue with the uniqueness or novelty of the output generated by AI systems. The terms of service of AI platforms acknowledge that the output may not be unique across users for similar questions. Consider a situation where one user claims copyright over a specific output, and then another user independently arrives at the exact same output and also claims copyright over it. If such claims arise on a large scale, it could create complexities. Unlike trademark law, copyright law does not recognize the concept of honest and concurrent use, as it is unlikely for two individuals to come up with the exact same play or book. Unlike typical copyright infringement cases where one party is clearly at fault, the outcome in these circumstances would be difficult to predict. Furthermore, the doctrines of “*scène à faire*” and merger may be applicable to the output generated by AI systems, particularly when the input is a basic question rather than something complex.⁴² These doctrines suggest that such output may not be eligible for copyright protection, as it lacks the necessary originality or expression to qualify for copyright.

The user who claims copyright in the output generated by AI systems faces a challenging situation because the use of such output may not even qualify as fair dealing. When the output generated by AI systems is used in a commercial or public manner, it may not qualify as fair use unless it meets the criteria of being sufficiently transformative. For example, certain outputs obtained when

³⁹ Janhavi Meshram, *Artificial Intelligence Art and Indian Copyright Registration*, MONDAQ, (Nov. 15, 2022), Artificial Intelligence Art And Indian Copyright Registration - Copyright - India (mondaq.com)

⁴⁰ *supra* note 17, § 51.

⁴¹ Rommel Khan, *AI Works – The Future Of Intellectual Property Law - Copyright – India*, (Feb. 20, 2023) MONDAQ, <https://www.mondaq.com/india/copyright/1284668/ai-works--the-future-of-intellectual-property-law>.

⁴² *India recognises AI as author of a copyrighted work*, LEXCAMPUS (Aug. 11, 2021), <https://www.lexcampus.in/india-recognises-ai-as-author-of-a-copyrighted-work/>.

searching for specific excerpts from a book chapter in Chat GPT may not be considered fair use. Even if we consider the educational use exception under Section 52(1)(i)⁴³ of the Copyright Act, OpenAI could still be held liable. This is because there is a distinction between creating and distributing course packs to a limited number of students who do not represent the potential market for a certain work in question and allowing thousands or potentially millions of people to access significant excerpts from literary works.

VII. CONCLUSION

The emergence of Generative AI has raised the need to address copyright laws. This technology enables the creation of content in a quick and automated manner, prompting stakeholders to consider the implications it has on copyright infringement. As generative AI continues to advance, it has the potential to revolutionize content creation by empowering a wider range of individuals to produce high-quality work at a rapid pace. However, as this technology evolves, it is crucial for users to respect the rights of the original content creators who may face displacement due to its widespread adoption. It is important to acknowledge and address the intellectual property (IP) issues that can arise when utilizing generative AI. By taking proactive measures to navigate and mitigate these concerns, stakeholders can ensure a more ethical and legally sound approach to utilizing this transformative technology. The copyright law should possess the flexibility to adapt to emerging technologies and processes that do not necessitate extensive legal intervention. However, it is crucial to update the law to align with the current advancements in technology and societal changes, particularly considering the growing use of AI and its derivatives, which carry the potential for copyright infringement. In conclusion, as generative AI continues to advance and shape the content creation landscape, it is imperative for policymakers, legal experts, and stakeholders to adapt copyright laws to address the unique challenges posed by this technology. Balancing the interests of creators, users, and AI developers while fostering innovation and respecting copyright principles shall be crucial in navigating the copyright landscape of the future.

⁴³ *supra* note 23.

Typosquatting and its impact upon intellectual property in cyberspace: a legal study

JYOTIRINGA PUZARI*

ABSTRACT

In 1982, the American-Canadian writer William Gibson coined the term 'cyberspace'. He described cyberspace as "the creation of a computer network in a world filled with artificially intelligent beings". Now popularly known as the Internet, 'cyberspace' has undergone significant evolution since its inception. We have witnessed that online technology has substantially advanced and simultaneously global e-commerce has exponentially developed. However, with this development, newer forms of cybercrime have come to the surface. One such example is the relatively unknown practice of 'typosquatting'. Typosquatting, identified as 'URL hijacking', can be understood as a practice in cyberspace that involves the use of a domain name similar to a well-known brand or trademark. This practice actually aims to deceive users into visiting a fraudulent website instead of the legitimate ones, wherein their personal and sensitive information is put at the risk of theft and harm.

This research paper examines the issue of typosquatting in the context of intellectual property rights in the cyberspace. It explores the legal and ethical implications of this practice and highlights the challenges faced by IPR holders in protecting their rights in the online environment. The paper argues that typosquatting poses a significant threat to IPR, and that there is a need for a more comprehensive legal framework to address this issue, especially in India. It also suggests various measures that IPR holders can take to protect their rights and prevent the spread of typosquatting. Ultimately, this paper emphasizes upon the need for a collaborative effort between IPR holders, policymakers, and internet service providers in India to combat the issue of typosquatting and aims at securing the online environment and protecting intellectual property rights in the cyberspace.

I. INTRODUCTION

The Internet was initially intended to be a decentralized network for communication and information exchange like Advanced Research Projects Agency Network ["**ARPANET**"], the pioneer project of the US Department of Defence in the 1960s. ARPANET 'decentralized' architecture relied on a distributed yet inter-connected design of computers and devices wherein

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multiple servers are robustly connected with each other to transmit data and offer a resilient communication network,¹ but it has now developed into a vital infrastructure for international trade, social engagement, and communication. In recent years, there has been a shift towards using the Internet for commercial purposes, transforming the nature of businesses, services and transactions, like ‘digitalized marketing’. The marketing landscape has changed, and the old-style physical marketplace has paved the way for electronic commerce, commonly termed as ‘e-commerce’. As a result, many companies have achieved success in their online businesses and commercial services.² But over time, competition grew among businesses to attract customers and to expose their businesses over the Internet. These companies placed great emphasis on customer usage to their websites, and they sought to differentiate their products by using ‘trademarks’, which not only signify quality but also aid in building brand recognition (through the use of ‘brand-names’). Thus, using domain names as trademarks began to help “businesses to create a strong presence on the Internet”.³

Domain names, generally user-friendly names, are unique addresses used by internet surfers/ users to name and give identity to one’s website, including commercial websites. For example, *Myntra*, which is a popular Indian website known for providing the service of online shopping of clothing apparel, footwear, lifestyle products etc. Thus, domain names act as equivalents of trademarks.⁴

However, with such technological advancements in the cyberspace, new opportunities have opened doors for criminals to exploit the resources of the Internet, including intangible human creations such as a ‘domain name’. People attempt to take advantage of domain names owned by other owners by using them inappropriately to gain benefits and profit from the positive reputation already associated with the name. One such way includes the practice of ‘typosquatting’, as a way of ‘domain-mimicry’, which can detrimentally impact a brand’s reputation and introduce complications for both the business and its website(s). For instance, a false website which imitates a legitimate business’s website by using slight alphabetical variations in their website’s name can

¹ Vijay Kanade, *What is ARPANET? Definition, Features, and Importance*, SPICEWORKS, (Sep 12, 2023), <https://www.spiceworks.com/tech/networking/articles/what-is-arpamet/#:~:text=The%20architecture%20of%20ARPANET%20was,dedicated%20phone%20connections%20betwee%20them>.

² Jalaj Agarwal & Gracy Bindra, *Domain Name Disputes and the rising threat of Cybersquatters*, 6 IJLS, 1, 1 (2020).

³ Dara B. Gilwit, *The Latest Cybersquatting Trend: Typosquatters, Their Changing Tactics, and How to Prevent Public Deception and Trademark Infringement*, 11 WASH. U. J. L. & POL’Y, 267, 267 (2003).

⁴ Chadha & Chadha Intellectual Property Law Firm, *Domain name and Trademark rights in India*, LEXOLOGY, (Mar. 21, 2023), <https://www.lexology.com/library/detail.aspx?g=daafca2-6a68-4134-bd29-27aa941a1f03#:~:text=For%20infringement%3A%20Any%20person%20violating,section%2029%20of%20the%20Act>.

create confusion and distrust among consumers as well as dilute the brand's online presence and its reputation in the long run through its misleading and malicious content.

Typosquatting refers to the act of registering domain names that resemble existing ones but have minor spelling mistakes or typos. Individuals involved in typosquatting exploit these errors to redirect people to their own websites, which may contain harmful or malicious content as well as advertisements. In terms of intellectual property rights [**IPR**], typosquatting can be seen as a type of trademark infringement that can harm the reputation and goodwill of a trademark owner. These "typo-squatters" register domain names that closely resemble trademarked names or brands and utilize them to confuse consumers or divert traffic away from the legitimate website. As a result, the trademark owner may experience financial losses and damages to their reputation. Furthermore, typosquatting poses a risk to consumers, who may unintentionally visit websites hosting malware or engage in fraudulent activities. Fraudulent websites often employ subtle variations in legitimate domain names, such as omitting or adding a letter or modifying the domain extension.

In recent times, typosquatting has had significant adverse effects on the cyberspace. One of these is the potential for financial losses to both individuals and businesses that unknowingly enter sensitive data such as login credentials or credit card details on fraudulent websites. Furthermore, when typosquatters misappropriate the names of legitimate companies with well-known brands, it damages their reputation, which eventually costs them money and undermines customer trust. Additionally, typosquatting can facilitate the spread of other cybercrimes, such as phishing and ransomware attacks. Cyber-criminals can use typosquatting to disseminate malicious software or direct unsuspecting users to phishing websites where they can extract sensitive information or infect the user's device with malware. Apart from these cybercrimes, this practice clearly infringes upon the intellectual property rights of a person who has actually registered a 'domain name' after following all necessary legal procedures. Therefore, this sub-form of 'cybersquatting' should be given due notice and laws should be made to respond against this malicious practice.

In India, there is no law in existence to combat this evil practice of typosquatting; there are no specific provisions under the Information Technology Act, 2000⁵ to deal with typosquatting.⁶ The

⁵ Information Technology Act, 2000, No. 21, Act of Parliament, 2000 (India).

⁶ Madhavendra Singh, *Typosquatting- An Evil in Cyberspace*, Livelaw (Mar. 21, 2023), https://www.livelaw.in/columns/typosquatting-cyberspace-cybercrimes-cybersquatter-201029#_ftn2.

only remedy is to bring an action under the Trade Marks Act, 1999.⁷ Moreover, there are only a few countries, such as United States of America [“US”] that criminalises the act of ‘typosquatting’ *per se*.⁸ The enforcement of laws and regulations prohibiting typosquatting vary across jurisdictions and it can be difficult to pursue a legal action against typosquatters who operate in countries with weaker or non-existent provisions against such a practice in their laws relating to intellectual property.⁹

Hence, it is important to understand and discuss how IPR can be secured in the cyberspace from such new, yet lesser-known cyber-threats and further aid in the protection of the interests of domain-name owners.

II. TYPOSQUATTING OF DOMAIN-NAME: FROM THE LENS OF INTELLECTUAL PROPERTY LAW

The violation of IPRs in the cyberspace has also emerged as a major concern due to the proliferation of ‘cyber technology’. Therefore, safeguarding online content and creations has become quite imperative in present times. It is crucial to acknowledge that “domain names” are more than just names assigned to websites belonging to different businesses or organizations; they serve as valuable business identifiers that play a vital role in enhancing the visibility and reputation of the respective business entity.¹⁰ Having a domain name today has become an essential aspect for any business that engages in digital operations or maintains a presence on the internet, and so does its legal protection.

A. Domain Name as an Intellectual Property

Domain names are user-friendly web addresses that are designed to be memorable and easily accessible for internet users when trying to locate a specific website. These addresses are intended to be comprehensive, memorable, and simple to use.¹¹ Every internet website has its own unique IP address, and the web server uses a domain name system to translate a domain name into the corresponding numerical IP address in order to access a website. In simpler terms, a domain-name can be understood as the address of a website on the Internet. So, the name that one writes in the web-browser to visit a website is the ‘domain name’. For instance, to access the popular social-

⁷ Trade Marks Act, 1999, No. 47, Act of Parliament, 1999 (India).

⁸ SINGH, *supra* note 5.

⁹ *Id.*

¹⁰ Tejaswini Kaushal, *Domain Name as Intellectual Property: An Analysis*, LEGALLY FLAWLESS (Mar. 29, 2023), https://legallyflawless.in/domain-name-as-intellectual-property-an-analysis/#need_for_domain_names.

¹¹ *Id.*

networking site 'Facebook', one has to type "facebook.com" on the web-browser which is the domain-name.

There is a significant difference between trademark and domain name. A trademark is a symbol or design that is visually recognizable and is used to differentiate one company's products or services from another's. This may include elements such as colour schemes, packaging, and the shape of products. A domain name, on the other hand, is the word-text that people enter into their web browsers to access a particular website. Additionally, while trademark law prohibits the use of deceptively similar marks, there is no such prohibition in domain-name registration. Even minor variations of existing domain names can be registered without issue. This implies that a domain-name can be registered which may closely resembles an existing one and it is easily allowed just because it may have slight alterations or changes in it from the existing one.¹² Snehlata Singh in her paper¹³ illustrated that there is a possibility of existence of "www.abcd.com" and "www.abcd.com" as two different registered domain-names.

In India, the judicial interpretation of domain-names as 'trademarks' under the Trade Marks Act, 1999 proves that these domain names are indeed intellectual property which should not be infringed by others, without the consent or license of the proprietor.

Companies use domain names to differentiate their products and services from their competitors, as well as to advertise them and strengthen customer loyalty. These names are more than just addresses; they function as trademarks by indicating the source of a business. If another individual uses a similar name, design, or pronunciation of an existing trademark in a way that misleads the public, it is a form of violation of the trademark holder's rights. This act constitutes infringement. This not only damages the reputation of the trademark holder, but also provides an unfair advantage to the infringing business.

The first instance in which an Indian court granted trademark safeguarding to domain names was the case of *Titan Industries Limited v. Prashanth Koorapati and Ors.*¹⁴ The plaintiff received a favourable ruling from the Delhi High Court, which ordered an *ex parte ad interim* injunction prohibiting the

¹² Himanshi Jain, *Everything's Gone Digital, and So Did Infringers: Domain Name Disputes*, 3 DME JL 27, 28 (2022).

¹³ Snehlata Singh, *Conflicts between Trademarks and Domain Names: A Critical Analysis*, SSRN (2011), <https://dx.doi.org/10.2139/ssrn.2045222>.

¹⁴ *Titan Industries Limited v. Prashanth Koorapati and Ors*, Delhi High Court Suit No. 179 of 1998.

defendant from using the trade name “*Tanishq*” or any other name that would be confusingly similar and cause the plaintiff’s business and products to be passed off as their own.

In the case of *Satyam Infoway Ltd v. Sifynet Solutions*¹⁵ the appellant (Satyam Infoway Ltd.) claimed to have registered several domain names with the word ‘*Sify*’ prior to the respondent. Their claim centred on the contention that the use of a similar domain name by the respondent was leading to confusion in the minds of potential customers, thereby constituting a violation of their intellectual property right. The Supreme Court of India acknowledged that there is no specific law in India that addresses the resolution of disputes related to domain names and therefore, in the absence of a specific legislation, the matter was resolved in the court by applying general principles of trademark law and the passing-off doctrine. However, even though the Trade Marks Act may not provide sufficient protection for domain names, it does not imply that they cannot be legally safeguarded under the laws concerning passing-off., as mentioned in the Trade Marks Act.¹⁶

Another significant Indian case is that of *Tata Sons v. The Advanced Information Technology Association*¹⁷ wherein World Intellectual Property Organization [“**WIPO**”] held that the term “Tata” was a distinguished name associated with superior merchandise. Since it was a surname and lacked any literal interpretation, Internet Corporation for Assigned Names and Numbers [“**ICANN**”] granted the transfer of the domain name to Tata Sons after WIPO ruled in their favour. This statement has been rephrased to avoid plagiarism.

B. Typosquatting as trademark infringement

Typosquatting can amount to trademark infringement for several reasons.

1. First, consumer confusion may result from the registration and usage of a domain name that is confusingly similar to a brand, leading them to believe that they are accessing the official website of the trademark owner. This can damage the reputation and goodwill of the trademark owner, and potentially lead to financial losses if consumers are misled into making purchases on a fake website.
2. Secondly, typosquatting can dilute the distinctiveness of a trademark by creating a situation where multiple websites are using similar domain names, which can make it more difficult for consumers to identify the legitimate website associated with the trademark. The exclusive right

¹⁵ *Satyam Infoway Ltd v. Sifynet Solutions*, (2004) 6 SCC 145.

¹⁶ *Id.*

¹⁷ *Tata Sons v. The Advanced Information Technology Association*, WIPO Case No. D2000-0049.

of the trademark owner to use their trademark in commerce may ultimately be weakened as a result.

3. Additionally, typosquatting can also be seen as a form of cyber-squatting, which is the practice of registering a domain name with the intention of profiting from the resale of the domain name or by using the domain name to engage in online activities that infringe upon the trademark owner's rights.

III. TYPOSQUATTING IN THE EXISTING LEGAL FRAMEWORK

It is well-established that 'typosquatting' refers to the act of a person registering a domain name that bears a resemblance to an established brand by making slight changes to the spelling. For instance, an example can be registering a fake website named "goglee.com" imitating the popular website "google.com". This practice shall be considered as infringement. Another possibility is the creation of a fake website with identical logos and colour schemes. As a result, fraudsters utilise these websites to force people to buy their products, increasing traffic and propagating malware.¹⁸ In many countries, typosquatting is illegal under their existing trademark and unfair competition laws. Typosquatting remains a problem on the Internet and the legal frameworks in place are meant to combat it in any form.

A. United States of America

The distinction of enacting the first thorough cybersquatting regulation belongs to the United States. In 1999, the Congress passed the Anti-Cybersquatting Consumer Protection Act ["ACPA"]. However, prior to this Act, there was no specific clause dealing with cybersquatting. Prior to the adoption of the ACPA, trademark owners frequently used the Federal Trademark Dilution Act ["FTDA"], commonly known as the Lanham Act, which was passed in 1995, to bring legal actions against domain name registrants. The landmark case of *Panavision International LP v. Toeppen*¹⁹ somewhat aided the drafting of the ACPA, which was done to prevent trademark infringement in the cyberspace. In this particular case, the plaintiff won the case, with the court determining that the defendant had violated the plaintiff's rights by registering domain names as 'www.panavison.com' and 'www.panaflex.com', and displaying images of the Pana Valley. This was because the plaintiff's business was focused on tourism and relied on the internet to attract customers.²⁰

¹⁸ JAIN, *supra* note 10, at 30.

¹⁹ *Panavision International LP v. Toeppen*, 141 F.3d 1316, 1326 (9th Cir. 1998).

²⁰ *Id.*

The ACPA was introduced to extend the Lanham Act (15 U.S.C.) by safeguarding individuals and owners of distinctive trademarked names from cybersquatting. If cyber-squatters are located and the US courts have jurisdiction over the case, the ACPA's trademark provision can be utilized.

To succeed under this provision, the plaintiff must demonstrate the following:

- (a) The disputed mark is well-known or has a unique quality;
- (b) The domain name is the same as or resembles a distinctive or famous mark in a confusing manner, or
- (c) Harms the image of a well-known mark; and
- (d) The registrant acquired, used, or sold the domain name with an intention to unjustly profit from the plaintiff's mark.²¹

The ACPA, however, also facilitates the mechanism of serving justice to the defendants who are unable to be located or who are outside of the Court's personal jurisdiction (as per the *in rem* provision).²²

In the landmark case of *Morrison & Foerster v. Wick*,²³ the claimant was the rightful holder of the trademark "Morrison & Foerster". The defendant, on the other hand, had registered two domain names, "morrisonfoerster.com" and "morrisonandfoerster.com". After a court hearing, it was determined that the defendant's domain names were nearly indistinguishable from the claimant's trademarked name. Additionally, the court also found that the defendant had caused harm to the claimant's reputation by displaying racist slogans and hyperlinks on their web pages, thereby damaging the claimant's goodwill. The court's decision reflected on how typosquatting of a popular domain-name harms the business and goodwill of the original domain name-owner.

It is concerning that a common Dispute Resolution Policy for ".us domain names" does not exist in the US jurisdiction, due to the absence of a centralized entity managing the domain name space. The United States Dispute Resolution Policy ["**USDRP**"] allows for the cancellation or transfer of ".us domain names" that violate the complainant's trademarks,²⁴ while the United States Nexus Dispute Policy ["**USNDP**"] ensures that all ".us domain name registrations" have a strong connection to the United States.²⁵

²¹ Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C §1125(d)(1)(A).

²² Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C § 1125(d)(2).

²³ *Morrison & Foerster v. Wick*, 94 F. Supp. 2d 1125 (D. Colo. 2000).

²⁴ DISPUTE RESOLUTION POLICY (last visited Mar. 29, 2023), <http://www.neustar.us/policies/docs/usdrp.pdf>.

²⁵ NEXUS DISPUTE POLICY (last visited Mar. 29, 2023), http://www.neustar.us/policies/docs/nexus_dispute_policy.pdf.

The Truth in Domain Names Act, 2003 [“**TDNA**”] is another important legislation under which “using a misleading internet domain name to trick someone into accessing pornographic material is considered a criminal act”.²⁶ Individuals who break the ‘law’ may be penalized with a monetary fine and/or imprisonment for a maximum term of two years. However, if an individual has the intention to deceive a minor, the penalty may increase to a monetary fine and/or imprisonment for a maximum term of four years.

John Zuccarini is one of the notorious ‘typosquatters’ and the first person to ever be charged with offences violating the TDNA. He allegedly made \$1 million per year by registering thousands of domain names that were common misspellings of popular Web sites.²⁷ Zuccarini has faced many lawsuits, and due to multiple violations of the ACPA, has been obligated to hand over around 200 domain names to the legitimate copyright and trademark owners. His typosquatting was so extensive that the Federal Trade Commission ultimately obtained a permanent injunction against him. As per the complaint filed against him, Zuccarini kept up numerous websites with names that were commonly misspelled versions of famous domain names, and he continued to host pornographic content on these sites. Additionally, some of his websites were misspelled versions of websites that were popular among children. Zuccarini was later sentenced to two and a half years of imprisonment in February, 2004.²⁸

B. International Framework

ICANN happens to be a significant entity in this regard. Established in 1998 by the US government, ICANN currently operates as the supervisor of the global Domain Name System, administering and regulating domain names, IP addresses etc. One noteworthy event occurred on October 24, 1999, when the ICANN implemented a policy called the Uniform Dispute Handling Policy [“**UDRP**”].²⁹ The main objective of the UDRP is to create a structure to solve disputes that arise between registrants or domain name holders and third parties who assert a prior interest in the domain name. This policy has proved to be an economical and effective way of combating cyber squatters and other related issues. Organizations that have been approved by ICANN conduct the UDRP implementation. The most prominent organization that provides UDRP

²⁶ The Truth in Domain Names Act of 2003, 18 U.S.C. § 2252B.

²⁷ *Id.* at 145.

²⁸ CNN TECHNOLOGY (last visited Mar. 30, 2023), <http://edition.cnn.com/2003/TECH/internet/09/03/trick.names/index.html>.

²⁹ *Uniform Domain Name Dispute Resolution Policy*, ICANN (last visited Mar. 30, 2023), <http://www.icann.org/udrp/udrp-policy24oct99.htm>.

services is the WIPO. ICANN-accredited registrars can sell domain names, and ICANN supervises the domain name registration system, which includes setting standards and criteria for all accredited registrars. ICANN is in charge of coordinating and maintaining the domain name system, as well as assigning IP addresses and distinguishing domain names.³⁰

The UDRP makes it mandatory for any individual or entity that registers a domain name through an ICANN-accredited domain registry to utilize the policy.³¹ The primary objective of formulating this policy was to address conflicts that may arise between owners of domain names and trademarks. The first UDRP dispute was centred on the case of *World Wrestling Federation Entertainment Inc. v. Michael Bosman*,³² which served as the inaugural instance of such a case being resolved. The litigation was initiated by the US-based Federation against Bosman, who resided in California. It revolved around Bosman's registration of the domain name 'www.worldwrestlingfederation.com'.

There are currently six dispute resolution organizations that are permitted to accept complaints made in accordance with the UDRP's complaint procedure. The WIPO is considered to be the most popular domain name dispute resolution platform. In a certain case,³³ the WIPO ruled in favour of Google Inc. wherein Google Inc. won the case against an Indian teenager, Herit Shah, in 2009 for typosquatting. Shah had registered the domain name googblog.com, which Google claimed was too similar to its trademark and could confuse users. WIPO ruled in favour of Google on May 15, 2009, and directed Shah to transfer the domain name to Google Inc. since the company had been actively using the domain.

While the UDRP has been effective in many cases, it is not without its flaws. The UDRP policy only applies to disputes over domain names registrations and does not address broader issues such as trademark infringement or 'typoquatting'. The UDRP process is often criticized for lacking transparency.

C. Position of India

There is no specific legislation in India that addresses the resolution of conflicts related to cybersquatting or other disputes over domain names in a direct manner. The Information

³⁰ EKTA SOOD & VIBHUTI NAKTA, CYBERSQUATTING: NEED FOR PROTECTION OF DOMAIN NAMES IN THE REALM OF CYBERSPACE, IGI Global 120, 126 (2022).

³¹ *Id.* at 127.

³² *World Wrestling Federation Entertainment Inc. v. Michael Bosman*, 1 N.C.J.L. & Tech. 3 (2000).

³³ *Google Inc. v. Herit Shah*, Case No. D2009-0405.

Technology Act, 2000, the primary law that criminalizes cybercrime, makes no mention of typosquatting. It is also important to note that the cybersquatting cases are decided through the principle of passing off and infringement, as contained in the Trade Marks Act, 1999. The Indian courts have, therefore, been active in resolving cases relating to cyber-squatting under these laws. In 1999, India's first cyber-squatting case was brought to court between *Yahoo! Inc. and Akash Arora & Anr.*³⁴ Yahoo! Inc., the plaintiff, owned the well-known brand "Yahoo!" and the domain name "Yahoo.com." However, the defendants registered a similar domain name, "YahooIndia.com," which had a similar format and colour scheme and provided similar services to the plaintiff. The Delhi High Court used the law of passing to prohibit the defendant from using the domain name. The court ruled in favour of the plaintiff, stating that the defendant's domain name was misleadingly similar, intended to deceive the public and take advantage of Yahoo Inc.'s reputation.

The case of *Rediff Communication v Cyberbooth & Anr.*³⁵ another significant case relating to typosquatting, was decided by the Bombay High Court. The defendants had registered a domain name "radiff.com" which was similar to the plaintiff's domain name "rediff.com". The court ruled in favour of the plaintiff, as the defendant's domain name had the potential to cause confusion between the two distinct entities. The court also recognized the importance of domain names as valuable assets that need to be protected.

It is therefore, the need of the hour, to incorporate provisions in the existing laws or far better, come up with a *sui-generis* law dealing with cybersquatting and typosquatting. Having a specialized legislation focused on cybersquatting can offer more precise guidelines on what constitutes cybersquatting, making it simpler for affected parties to take legal action. Besides, such legislation could establish a conflict resolution mechanism for more expedient and affordable resolution of cybersquatting as well as typosquatting disputes.

IV. MAPPING INDIA'S APPROACH TOWARDS TYPOSQUATTING: THE ROAD AHEAD

Although there is no exclusive, separate law in India that addresses typosquatting, the existing legal framework offers several legal options and remedies to tackle typosquatting through different provisions in the cyber³⁶ and trademark³⁷ law. However, this is not adequate enough and it does not narrow down the need of a 'comprehensive and effective *sui-generis* law' to address the growing

³⁴ Yahoo! Inc. v. Akash Arora & Anr., (1999) IAD Delhi 229.

³⁵ Rediff Communication v. Cyberbooth & Anr, (1999) 4 BomCR 278.

³⁶ Information Technology Act, 2000, No. 21, Act of Parliament, 2000 (India).

³⁷ Trade Marks Act, 1999, No. 47, Act of Parliament, 1999 (India).

concerns over the offence(s) and disputes concerning typosquatting of domain names. Typosquatting creates consequences that can result in dilution of a trademark or a brand, loss of revenue, and damages to the legitimate owner's reputation. Furthermore, typosquatting can also result in the violation of the trademark holder's sole entitlement to utilize their trade mark and in this manner; this practice poses a serious threat to the integrity and value of IPR.

Given the increasing prevalence and rising trend of instance of typosquatting in India, enacting a dedicated law to address it would offer improved legal clarity and certainty for both the offenders and the aggrieved parties. This law could encompass a definition of typosquatting, as well as penalties, fines, and other legal actions. Additionally, it could outline a system for settling disputes related to typosquatting. Nevertheless, it would be essential to approach this legislation with care and consultation with different stakeholders, especially the users, before implementation. The rising overlap between trademark and domain name systems has had certain detrimental effects that need to be mitigated as soon as possible.

The Indian laws are facing certain challenges related to this issue. The Trade Marks Act of 1999 doesn't include any particular provisions that expressly define or address anything related to domain names, nor does it outline the criteria and procedure for protecting domain names from a trade mark infringement. Moreover, the Act's authority doesn't extend beyond Indian borders, meaning it can't provide adequate protection in case of infringement outside India. Additionally, the Information Technology Act, 2000 doesn't adequately address domain name disputes related to trademark infringement or prevent typosquatting. In this context, the Indian legislators can draw parallels to the particular US laws countering cybersquatting and accommodate the legal provisions on similar lines.

The Trade Marks Act, 1999 can be revised to accommodate provisions relating to cybersquatting and its different forms, including typosquatting. The first step should be the express and exclusive inclusion of 'domain-name' in the ambit of the definition of Trade Mark.³⁸ Sec. 11 of the Trade Marks Act, 1999 which deals with grounds for refusal of registration of a trade mark, can be amended to the extent that the instance of existence of an identical or confusingly similar trademark in the same class of products or services in the offline market can be acknowledged a relative ground for a domain name's refusal to be registered as a trademark.³⁹ The same law can be

³⁸ Trade Marks Act, 1999, § 2 (m), No. 47, Act of Parliament, 1999 (India).

³⁹ Manthan Agarwala & Simran Kang, *Cybersquatting India: Genesis & Legal Scenario*, 4 IJLMH 740, 756 (2021).

changed to add a new clause that outlaws different types of cybersquatting as a result of trademark infringement. It is crucial to define cybersquatting and typosquatting in detail during the domain name registration procedure in order to achieve this. This would be similar to the Anti-Cybersquatting Consumer Protection Act's *in rem* clause.⁴⁰ India can adopt a legal provision that enables trademark holders to take legal action against domain names directly rather than the owners of domain names if the owners cannot be located or if personal jurisdiction over them cannot be established.⁴¹ With this inclusion, the trademark will not be limited as 'territorial' in nature. Moreover, in order to prevent fraudulent and erroneous domain name claims, the registration must be cancelled, and activities committed in 'bad faith' must be dealt with, as strictly as possible.⁴²

The Information Technology Act, 2000 can also be amended to bring about necessary changes and accommodations in the law to address the issue of typosquatting in a strict sense. Amendments can be made on similar lines with the US Act,⁴³ restricting and imposing penalties on individuals who deliberately employ deceptive internet domain names with the intention to mislead people, particularly minors, into accessing explicit or pornographic material. The Act could be amended to increase the damages that can be awarded to victims of typosquatting. This would act as a deterrent to typosquatters and provide greater compensation to the victims of typosquatting. Moreover, the registration of domain name procedure could be made stricter by requiring domain name registrars to verify the identity of applicants and then implement the rules of registration. If a person is found guilty of "typosquatting" by an Indian court, the penalties may also be included. In other words, along with civil remedies (injunction orders, accounts of profits etc.) significant criminal remedies can be made available under the amended Act against typosquatting and the court can sentence offenders (including repeated offenders) to imprisonment and fine depending upon the gravity of the offence.

However, India could also take a different *sui-generis* approach in its initiative towards 'combating' the offence of typosquatting. As mentioned earlier, the first step towards creating a *sui generis* law for typosquatting would be to define the term clearly in the legislation. This would ensure that the scope of the law is well-defined and that it covers all relevant activities. The second step may be putting up a 'domain name dispute resolution mechanism' to settle disputes related to

⁴⁰ Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C §1125(d)(2).

⁴¹ Manthan, *supra* note 36, at 756.

⁴² Jalaj Agarwal & Gracy Bindra, *Domain Name Disputes and the Rising Threat of Cybersquatters*, 6 IJLS 1, 13 (2020).

⁴³ The Truth in Domain Names Act of 2003, 18 U.S.C. § 2252B.

cybersquatting and typosquatting. The legislation should include penalties for typosquatting, which should be strong enough to deter individuals or companies from engaging in such activities. The penalties could include fines, imprisonment, or both. One way for India to align its laws and regulations with international standards regarding cybersquatting and typosquatting is by working together with global organizations like WIPO to create effective strategies and recommendations. This collaboration would enable India to establish the best practices that are in line with the world's expectations. A watch-list of frequently misspelt terms and phrases that typosquatters frequently target can be made by the Indian Registry. This can help domain name registrars and trademark owners identify potential cases of typosquatting and take appropriate action. The *sui-generis* Indian law can establish a National Domain Name Dispute Resolution Center that would provide a central location for resolving domain name disputes. This Center could be staffed by experts in the domain of intellectual property law, domain name registration, and alternative dispute resolution mechanisms, including online mediation process to resolve such disputes.⁴⁴

Instead of the lenient 'first-come-first' basis of registration, the procedure can be elaborated in the *sui-generis* law in a comprehensive yet strict manner. The domain name registration process is a critical aspect of preventing cybersquatting and typosquatting. Some points can be considered to be included which will aid in creating a robust and secure domain-name registration process:

- (a) The requirement of ownership details as proof during registration procedure.
- (b) Adopting a verification process for registrants/ applicants.
- (c) Creating a clearing-house for Trademarks to allow trademark owners to register their trademarks and receive alerts when someone tries to list a new domain name that resembles their trademark.
- (d) Administrative panels should be set up to regulate the domain name registration process and administer the allotment of Second Level Domain Names which tend to be identical or closely similar to 'existing names'.⁴⁵

India can draw parallels from the US law on cybersquatting which mandates that cybersquatting can only be established if the domain name's registration, trafficking, or utilization has been carried out with malicious/ bad intent to profit.⁴⁶ In a similar vein, India may contemplate incorporating a criterion into its legislation that provides to ensure that only malevolent behaviours and malicious criminal intent are subject to criminal penalty. This could serve to establish clear distinctions

⁴⁴ JALAJ, *supra* note 39, at 14.

⁴⁵ *Id.* at 14.

⁴⁶ Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d)(1)(A)(i).

between lawful domain registration and intentional actions aimed at deceiving or causing harm to internet users. By outlining precise criteria for determining criminal responsibility in instances of typosquatting, Indian legislation could enhance its ability to tackle and discourage malicious conduct while also protecting legitimate online practices. The ACPA has certain provisions that provide a safe haven for intermediaries, such as domain name registrars, to shield them from any responsibility for cybersquatting committed by their customers/ clients.⁴⁷ India could also take into account the inclusion of ‘safe harbour provisions’ in its legislation to safeguard intermediaries. This would mean that intermediaries like domain-registrars or Internet service providers in India will not be held responsible for the illicit Internet activities carried out by their customers or clients, as long as they meet the necessary conditions and procedures, The safe harbour provision strikes a balance between holding the actual wrongdoers accountable and protecting those who provide services. After all, the aim of the law is to promote fairness, justice and effectiveness.

Regarding legal awareness, there is potential for collaboration between law schools, legal aid clinics, domain name registrars, Internet service providers, and other industry stakeholders to increase the understanding of the law and encourage adherence to it. This may involve establishing guidelines for registering and managing domain names, as well as offering training and educational opportunities for industry professionals. Additionally, India can prompt industry stakeholders to report any instances of legal violations and cooperate with law enforcement during investigations. The aim of India’s *sui-generis* law on deceitful domain names (typosquatting) should be to safeguard internet users against deception or fraud perpetrated through such domain names, and to foster a more dependable and secure online environment.

V. CONCLUSION

Typosquatting is a deceitful scheme. This practice has the potential to cause significant harm to both individuals and businesses, as it could tarnish the reputation of authentic brands and jeopardize the security of unsuspecting users.

Eventually, typosquatting has emerged as a profitable business for cyber-criminals over time, with some individuals earning millions of dollars annually. Due to the significant revenue generated by typosquatting, the current legal penalties may not be sufficient. The legal system’s reliance on civil litigation has been ineffective in deterring typosquatters and aspiring typosquatters, as a single court ruling does not result in their bankruptcy or the removal of all infringing domain names or

⁴⁷ Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d).

the payment of substantial monetary damages. It is due to the fact that the profits incurred from use of deceptive domain names are really huge and offenders generally operate under multiple identities which enable them to continue their illicit business of registering new domain names. Therefore, considering the criminal intent, typosquatting should be considered a serious criminal offence and punishment should be given accordingly. This paper aims to highlight the general public's lack of knowledge and concern about this type of offense. Furthermore, there is currently no specific legislation in India especially, to address the issue of 'typosquatting'. In India, it is only deemed a violation of Trademark law, enabling companies to seek legal redressal against persons or organizations that engage in this activity. But countries such as the United States have put in place laws for protection against typosquatting, a form of cybersquatting. This should inspire India as well, to come up with a *sui-generis* law dealing against the offence of 'typosquatting'. Moreover, the Indian Domain Name Dispute Resolution Policy could be amended, and certain unnecessary arbitration procedures could be removed to enable a smoother process of litigation.

Overall, it is crucial for individuals and companies to recognise the risks posed by typosquatting and to implement measures to safeguard themselves against this form of cybercrime. This involves keeping an eye on domain name registrations vigilantly, instead of a lenient 'first-come-first-served' basis and then take legal action against fraudulent domain names that resemble their own brand names which will enable the authentic brand-owner/ proprietor to safeguard their intellectual property rights. Remaining vigilant and taking appropriate precautions can help to prevent the harmful effects of typosquatting and establish a safer online-environment.

Intellectual Property Laws and Fragrances: Navigating Subjectivity and Cultural Significance in Protection and Regulation

ARGHYA SEN*

ABSTRACT

This paper explores the relationship between intellectual property laws and fragrances, focusing on the challenges of regulating and protecting subjective and culturally significant olfactory works. The study analyzes the limitations of current intellectual property frameworks in effectively addressing the unique characteristics of fragrances, such as their subjective nature, ephemeral quality, and cultural significance. The research question posed is to what extent intellectual property laws can regulate the use and protection of fragrances, given these inherent complexities. The analysis draws from legal and cultural perspectives, examining case laws and regulatory frameworks in the United States and Europe, as well as cultural theories of scent and olfactory aesthetics. The paper concludes by proposing alternative approaches to fragrance regulation and protection that acknowledge the complexities of olfactory works. These include recognizing the importance of cultural heritage and community-based practices in the regulation of fragrances, promoting transparency and collaboration among stakeholders, and embracing new technologies such as an international fragrance database and International regulatory body and innovations that can better capture and protect the essence of fragrances.

This paper aims to illuminate the intricate challenges surrounding the regulation of intellectual property in the realm of fragrances, emphasizing the navigation of subjectivity and cultural significance. It underscores the pressing need for an interdisciplinary and nuanced approach to intellectual property laws, particularly in the context of fragrances. Specifically, it examines how fragrances can be protected under various categories of intellectual property, while concurrently emphasizing the importance of safeguarding the diverse and culturally rich world of olfactory works

I. INTRODUCTION

Imagine walking into a perfume shop and being greeted by a vast array of rich and complex scents of different fragrances from around the world. Each bottle tells a story of its own, from the delicate floral notes of a French perfume to the earthy spices of an Indian attar. The perfume contains a blend of natural and synthetic ingredients, carefully crafted to evoke memories of the village's lavender fields, sun-kissed vineyards, and bustling marketplaces. The fragrance quickly gains popularity among perfume enthusiasts and soon becomes a best-seller. However, a competing

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perfume company creates a similar fragrance using different ingredients and sells it under a similar name. The perfumer is outraged and seeks legal action but is unsure if intellectual property laws can effectively protect his fragrance from imitation. Fragrances are not only a reflection of personal style and taste, but also of cultural identity and tradition.¹ However, the complex and subjective nature of fragrances poses a challenge for intellectual property laws that seek to regulate their use and protection.

The fragrance industry is a complex and dynamic sector that encompasses a wide range of products and practices. From perfumes and colognes to essential oils and incense, fragrances are a ubiquitous and essential part of our daily lives.² However, the creative and innovative aspects of fragrance production have brought forth various intellectual property issues, particularly in relation to the protection and regulation of fragrances.

Fragrances are inherently subjective and difficult to objectively define or measure.³ Their effects are not only limited to the sense of smell, but also involve emotions,⁴ memories,⁵ and cultural associations.⁶ As such, fragrances are not only a reflection of personal style and taste, but also of cultural identity and tradition.⁷ This complexity and subjectivity make it challenging to apply traditional intellectual property laws, such as patents, trademarks, and copyrights, to the fragrance industry.⁸ Despite these challenges, intellectual property laws have been applied to the fragrance industry in various ways, such as through the protection of fragrance formulas as trade secrets, the registration of fragrance names and trademarks, and the copyright protection of fragrance packaging and advertising.⁹ However, the effectiveness of these approaches in effectively regulating the use and protection of fragrances remains uncertain.

¹ Czech & Speake, *The Cultural Influence of Fragrance*, CZECH & SPEAKE FRAGRANCE JOURNAL, <https://www.czechandspeake.com/fragrance/journal-posts/the-cultural-influence-of-fragrance/>.

² J B Sharmeen, F M, Mahomoodally, G Zengin & F Maggi, *Essential Oils as Natural Sources of Fragrance Compounds for Cosmetics and Cosmeceuticals*, *Molecules* (Jan 27 2021) [hereinafter J B Sharmeen].

³ S Geiregat, *Trade Mark Protection for Smells, Tastes and Feels – Critical Analysis of Three Non-Visual Signs in the EU*, 53 IIC INT. REV. INTEL. PROP. LAW. 219,245 (2022) <https://doi.org/10.1007/s40319-022-01160-3>.

⁴ A K Kutlu, E Yilmaz & D Cecen, *Effects of aroma inhalation on examination anxiety*, TEACH. LEARN NURS. (2008).

⁵ K Sowndhararajan & S Kim, *Influence of Fragrances on Human Psychophysiological Activity: With Special Reference to Human Electroencephalographic Response*, 84(4) SCI PHARM, 724,751 (2016) [hereinafter K Sowndhararajan]; Jordan Gaines Lewis, *Smells Ring Bells: How Smell Triggers Memories and Emotions*. PSYCHOLOGY TODAY, (12 Jan. 2015), <https://www.psychologytoday.com/intl/blog/brain-babble/201501/smells-ring-bells-how-smell-triggers-memories-and-emotions>.

⁶ G Magiels, *You are what you smell: How scent and culture are intricately linked*. THE LOW COUNTRIES, <https://www.the-low-countries.com/article/you-are-what-you-smell-how-scent-and-culture-are-intricately-linked>.

⁷ Boswell & Rosabelle, *Scents of identity: Fragrance as heritage in Zanzibar*, 26 J. CONTEMP. AFRICAN STUD, 295,311 (2008).

⁸ Steven M. Weinberg, *Scent Trademarks and the Complexities of Smell*, IP WATCHDOG, (21 Dec. 2017), <https://ipwatchdog.com/2017/12/21/scent-trademarks-complexities/id=91071/>.

⁹ Cronin & Charles Patrick Desmond. *Lost & Found: Intellectual Property of the Fragrance Industry; From Trade Secret to Trade Dress*, SSRN Electronic Journal (January 2015).

This paper seeks to explore the extent to which intellectual property laws can effectively regulate the use and protection of fragrances, given their subjective nature and cultural significance. By examining the current legal landscape and cultural practices surrounding fragrances, this paper aims to provide insights into the challenges and opportunities of protecting fragrances under intellectual property laws.

II. IP AND SUBJECTIVITY OF FRAGRANCES

Subjectivity refers to the personal and unique experience of an individual, shaped by their personal beliefs, experiences, and emotions.¹⁰ In the context of fragrances, subjectivity plays a significant role in shaping an individual's perception of a scent. The way individuals perceive fragrances is influenced by various subjective factors such as their personal preferences, cultural background, emotional associations, and past experiences,¹¹ in addition to environmental factors like temperature, humidity, and wind conditions.¹² Even if the environmental conditions are replicated precisely, an individual's perception of a scent may vary significantly from another's due to individual factors like age,¹³ gender,¹⁴ and genetics.¹⁵ Furthermore, the fragrance industry faces a unique set of challenges when it comes to applying traditional intellectual property laws, such as patents, trademarks, and copyrights. These laws are traditionally based on objective criteria, requiring clear definitions and boundaries to effectively regulate and protect creative works. However, the nature of fragrances is inherently subjective and multisensory.

For instance, some individuals suffer from anosmia, a condition that impairs their ability to distinguish between different scents or ranges of smells.¹⁶ This diversity in human perception and sensory experiences poses a significant hurdle in establishing clear and universally applicable definitions for fragrances. What one person perceives as a distinct and unique scent might be indistinguishable or significantly altered for another due to anosmia or differences in olfactory sensitivity.

¹⁰Subjectivity- Definition, Meaning & Synonyms, Vocabulary.com, <https://www.vocabulary.com/dictionary/subjectivity>.

¹¹ K Sowndhararajan, *Supra*, note 5.

¹² Kuehn M, Welsch H, Zahnert & Hummel T, *Changes of pressure and humidity affect olfactory function*, EUR ARCH OTORHINOLARYNGOL, 299,302(2008).

¹³ Boyce JM & Shone GR, *Effects of ageing on smell and taste*, POSTGRAD MED J.

¹⁴ Oliveira-Pinto AV & Santos RM, Coutinho RA, Oliveira LM, Santos GB, Alho ATL, *Sexual Dimorphism in the Human Olfactory Bulb: Females Have More Neurons and Glial Cells than Males*, (2014), <https://doi.org/10.1371/journal.pone.0111733>.

¹⁵ Howgego, J, *Sense for scents traced down to genes*, NATURE (2013), <https://doi.org/10.1038/nature.2013.13493>.

¹⁶ Marks, Hedy, *What Is Anosmia?*, WebMD, WebMD, 10 Feb. 2011, www.webmd.com/brain/anosmia-loss-of-smell.

In this complex landscape, the application of traditional IP laws becomes intricate. Patents, which typically protect novel and non-obvious inventions, may struggle to accommodate the subjectivity inherent in fragrance creation. Trademarks, used to identify the origin of goods and services, face challenges in creating distinct and consistent olfactory trademarks. Copyrights, designed to protect original creative expressions, may find it difficult to establish the boundaries of olfactory works.

Therefore, these challenges stem from the very nature of fragrance as an art form that engages the senses in a highly subjective manner. This paper will explore how such subjectivity complicates the application of conventional IP laws in the fragrance industry, emphasizing the need for a more nuanced and interdisciplinary approach that acknowledges the diversity of sensory experiences and cultural significance within this domain.

Traditionally, intellectual property law has focused on protecting tangible and measurable creations such as patents, trademarks, and copyrights.¹⁷ Trademarks, which was initially designed to protect brand names and logos, now can also be applied to safeguard unique fragrances. However, defining and identifying scent trademarks can prove to be an arduous task, given the subjectivity and ineffability of scents further it makes it difficult to establish a clear standard for infringement. In the United States, for instance, only a handful of scent trademarks have been approved by the Trademark Office, and those that have been sanctioned are typically for scents that are challenging to replicate, such as the scent of bubble gum¹⁸ or the fragrance trademark of cinnamon (*methyl cinnamate*)¹⁹ by European court. This predicament of identifying and defining scent trademarks poses a significant hurdle to the efficacy of intellectual property laws in safeguarding fragrances.

The complex nature of fragrance trademarks and the challenges in identifying and proving their infringement have much to do with the subjective interpretations of fragrances. The elements that contribute to the distinctiveness of a fragrance, such as its composition and scent notes²⁰, can be tricky to measure and may differ depending on individual interpretations. As such, intellectual property disputes involving fragrance trademarks require careful examination to ensure fairness and accuracy in their adjudication.

¹⁷ Paridhi Jain, *A Perspective on Non-Conventional Trademarks and the Difficulties in Extending IP Protection to Them*, SCC ONLINE BLOG (Sept. 16, 2022), <https://www.sconline.com/blog/post/2022/09/16/a-perspective-on-non-conventional-trademarks-and-the-difficulties-in-extending-ip-protection-to-them/>.

¹⁸ Trademark Status & Document Retrieval, United States Patent and Trademark Office, <https://tsdr.uspto.gov/>.

¹⁹ Sieckmann v. Deutsches Patent-und Markenamt Case, C-273/00, 2003 E.T.M.R.

²⁰ Brown, James, *What Are Fragrance Notes?* I LOVE COSMETICS, (16 May 2022) <https://www.ilovecosmetics.co.uk/blog/what-are-fragrance-notes/#:~:text=Fragrance%20notes%20are%20essentially%20the,to%20create%20a%20beautiful%20fragrance.>

The subjectivity inherent in fragrances presents a daunting challenge for intellectual property laws when it comes to adjudicating disputes. For instance, two fragrances may share common notes and ingredients, yet one may be considered superior or more refined due to nuanced variations in their formulation. This subjectivity creates an air of uncertainty in intellectual property disputes, impeding clear resolution of infringement allegations. What smells good to one person may not smell good to another.

In the case of *Kecofa vs. Lancôme*,²¹ the Court determined that the smell of a perfume may be considered a work that meets the criteria established by the Intellectual Property Law [“IPL”], even though it can only be perceived through the sense of smell. The Court also made a distinction between the fragrance of a perfume and its formula/liquid, likening it to the pages of a book, which are not subject to copyright protection, while the content of the book is. The requirement of originality means that a perfume that reproduces the fragrance of a specific flower cannot be granted protection unless the perfumer adds their own personal touch to it. However, the Court noted that a work does not need to be entirely new, but rather the author must have applied their own creativity to it.

Fragrances can be perceived differently by individuals based on their preferences and can lead to divergent views about the originality and uniqueness of fragrances, which can have repercussions on the legal protection afforded to them under intellectual property laws. For instance, a perfumer may conceive a fragrance that they believe is entirely novel and distinctive, but others may contend that it is merely a variation of an existing scent. Moreover, the subjective interpretation of fragrances also influences(s) the perception of their cultural significance, thereby adding a further layer of complexity to intellectual property disputes. For instance, a fragrance that may be regarded as a symbol of cultural identity in one community may be deemed as a common scent by others, thereby raising questions about its legal protection under intellectual property laws.

The nebulous nature of fragrances presents a substantial obstacle to the enforcement of intellectual property laws concerning their protection and regulation. The conundrum of defining and recognizing olfactory trademarks, coupled with the prospect of subjective interpretations of scents influencing disputes pertaining to intellectual property, compounds this challenge. One possible solution to address the subjective nature of fragrances in the context of intellectual property laws

²¹ *Kecofa v. Lancôme* 2006, C04/327HR.

is to establish clear and tangible criteria for descriptive defining and identifying scent trademarks. This may involve the creation of objective methodologies for analyzing and describing fragrances, as well as setting benchmarks for measuring the uniqueness of a scent trademark. By doing so, intellectual property laws can provide more precise and reliable guidance for the protection and regulation of fragrances, while also addressing concerns about cultural significance and subjectivity.

III. CULTURAL SIGNIFICANCE OF FRAGRANCES AND INTELLECTUAL PROPERTY LAW

The olfactory arts have been an intrinsic aspect of human culture since antiquity.²² Across the planet, fragrances have been deployed in myriad ways to indicate cultural identity, embody spiritual beliefs, and bespeak social status.²³ The cultural significance of fragrances is unmistakable, as one can see in the diverse contexts of their use, spanning from age-old religious rituals and curative practices²⁴ to the modern domains of fashion and luxury markets. Nevertheless, this very cultural significance can also engender significant challenges to the potency of intellectual property laws in regulating the usage and ensuring the protection of fragrances.

The use of attar in Islamic culture²⁵ serves as a poignant example of the cultural significance of fragrances. For centuries, *attar*, a natural perfume, has played a pivotal role in Islamic rituals and ceremonies, reflecting the deep roots of fragrances in Islamic culture. However, the commercialization of attar by the fragrance industry has raised concerns about cultural appropriation and the exploitation of traditional knowledge. This conundrum raises pertinent questions about the relationship between intellectual property laws and cultural heritage, as the commercialization of attar creates a friction between preserving cultural practices and pursuing commercial interests. The challenges posed by the cultural significance of fragrances in the context of intellectual property laws underline the need for conscientious consideration of cultural heritage and traditional knowledge in the development of legal frameworks for fragrances.

In addition to cultural appropriation, one must not overlook the cultural significance of fragrances, as it can also have far-reaching effects on the protection and regulation of fragrances under

²² *Olfactory Senses: The Science Behind Fragrances* (2018), <https://www.perfume.com/article-olfactory-senses-the-science-behind-fragrances>.

²³ Grant & Grainne Louise, *The Greek Sense of Smell: Olfactory Perception and the Sociocultural Roles of Perfume in Antiquity* (2014).

²⁴ Ali B., Al-Wabel N.A., Shams S., Ahamad A., Khan S.A & Anwar F., *Essential oils used in aromatherapy: A systemic review*. ASIAN PAC. J. TROP.

²⁵ Qazi Dr. Shaikh Abbas Borhany al-Waleed., *Attar and its Medicinal Uses from a Yemeni Treatise*, Al-Tafahum, Journal of the International Institute of Islamic Thought and Civilization (ISTAC) 85-98 (2019).

intellectual property laws. Traditional knowledge of fragrances, which involves the methods of extracting and blending scents,²⁶ can be difficult to safeguard under traditional intellectual property laws. This is mainly because such knowledge is considered to be part of the public domain and is not subject to exclusive ownership. However, the commercialization of fragrances can lead to the misappropriation of traditional knowledge, which can undermine the cultural significance of fragrances. It is crucial to address this issue carefully to maintain a balance between commercial interests and the preservation of cultural heritage.

The cultural significance of fragrances is intimately connected to the use of indigenous ingredients in their creation. Many fragrances utilize ingredients sourced from indigenous plants and herbs that are unique to particular regions,²⁷ and these fragrances can be seen as part of the cultural heritage of the indigenous communities that use these ingredients. However, the use of these ingredients can generate conflicts between intellectual property laws and cultural heritage. For instance, the commercial use of indigenous ingredients without the consent of the indigenous communities can give rise to allegations of cultural appropriation and the exploitation of traditional knowledge.

The fragrance industry is not immune to the issues of cultural appropriation and misappropriation of traditional knowledge, which can erode the cultural significance of fragrances. To tackle these issues, intellectual property laws can be utilized as a tool to safeguard traditional knowledge and cultural heritage associated with fragrances. By registering scent trademarks through trademark laws, for example, we can provide legal protection and ensure that the use of indigenous ingredients and knowledge is done with the consent of the communities. In addition, patent laws can be employed to protect novel and non-obvious methods for extracting and blending fragrances that are derived from traditional knowledge, thereby encouraging the preservation and continuation of cultural practices, and deterring their exploitation. However, it is imperative to strike a balance between protecting intellectual property rights and preserving cultural heritage. As such, intellectual property laws can play an indispensable role in addressing cultural appropriation issues in the fragrance industry and safeguarding traditional knowledge and cultural heritage.

It is of utmost importance to take into account the traditional knowledge and cultural heritage when regulating and protecting fragrances. Failure to consider these factors can lead to the

²⁶ PROTECTING AND PROMOTING TRADITIONAL KNOWLEDGE: SYSTEMS, NATIONAL EXPERIENCES AND INTERNATIONAL DIMENSIONS, (Twarog, S et al, eds., 1st ed., 2016).

²⁷ J B Sharmeen, *supra* note 2.

misappropriation of cultural knowledge, resulting in the exploitation of traditional practices and a diminished appreciation for the cultural significance inherent in fragrances. By establishing legal protection mechanisms for such cultural knowledge, intellectual property laws can serve as powerful tools to not only incentivize the preservation and continuation of cultural practices but also to prevent their exploitation. Moreover, they can ensure that the benefits derived from the commercialization of fragrances are equitably shared with the indigenous communities and custodians of this knowledge.

One critical aspect of this equitable approach is the concept of ‘access and benefit sharing’. Access and benefit sharing refers to the framework in which those seeking to use or commercialize traditional knowledge, such as the unique fragrance-making techniques rooted in cultural heritage, must not only obtain consent or access to this knowledge but also ensure that the benefits, whether economic or otherwise, are fairly distributed to the communities or individuals who hold and transmit these traditions.²⁸

Therefore, it becomes imperative to consider the cultural heritage and traditional knowledge associated with fragrances in the design and implementation of intellectual property laws. This ensures that these laws not only protect creative works but also promote social justice, cultural preservation, and the sustainable sharing of the economic benefits arising from the fragrances inspired by these rich traditions.

IV. INTELLECTUAL PROPERTY PROTECTION FOR FRAGRANCES

Imagine a scenario where a perfumer spends years perfecting a fragrance that is based on traditional knowledge and cultural heritage. The fragrance becomes popular, and soon, other companies start copying it, diluting the cultural significance, and making a profit without giving back to the community that inspired the scent. This scenario is not uncommon in the fragrance industry, highlighting the importance of intellectual property protection for fragrances. In this section, we explore the different forms of protection available, including trademarks, patents, and trade secrets, and their effectiveness in regulating and protecting fragrances.

The market for cloned fragrances refers to the production and sale of fragrances that are intended to mimic the scent of high-end, designer perfumes. These cloned fragrances are often sold at a much lower price point than their designer counterparts, making them an attractive option for

²⁸ *Introduction to access and benefit-sharing*, The Secretariat of the Convention on Biological Diversity (2010) <https://www.cbd.int/abs/infokit/brochure-en.pdf>.

consumers who cannot afford the original fragrance. It not only constitutes intellectual property infringement and can harm the reputation but also eats into the profits of the original perfumers and fragrance houses.

The deployment of trademarks serves to safeguard the distinctive fragrances associated with a specific brand, thereby facilitating the identification and differentiation of fragrances among different corporations. Indeed, a fragrance that is unique and distinct can transform into a valuable brand asset. Consequently, trademarks can engender fair competition in the fragrance industry and foster an impetus for companies to invest in research and development to produce exceptional and unparalleled fragrances.

The process of establishing and registering olfactory trademarks can prove to be rather arduous, often necessitating the demonstration that the scent is not functional and has acquired distinctiveness in the market and must comply with the requirements of traditional trademarks. These requirements remain vague and difficult to satisfy, contributing to the complications of filing an application and protecting a registration and lacks established criteria for objectively describing and identifying scents. Nonetheless, despite these challenges, some firms have managed to successfully register olfactory trademarks, including the scent of freshly cut grass for tennis balls and the scent of vanilla for fragrances and personal care products.²⁹

Furthermore, it is worth noting that olfactory trademarks carry with them the advantage of forging robust brand recognition in the minds of consumers, even when the product is not visibly branded. This attribute can be especially potent in industries such as perfumes and scented candles, where the fragrance itself is the primary product. However, it is imperative to recognize that olfactory trademarks remain bound by the same constraints as traditional trademarks and cannot be registered if they are generic or descriptive of the product's attributes or quality. Additionally, the trademark owner must be vigilant in enforcing their trademark to maintain its protection and prevent it from succumbing to genericization.

Patents, however, do not protect fragrances themselves, instead they protect the process of making the fragrance and anything of industrial value that is either used in the production or used in enhancing the experience of the fragrance. This means that a company can patent a particular method for extracting a certain scent from a plant, but they cannot patent the scent itself. As a

²⁹ *Perfumes: Protecting the Scents of Original Creations.*, WIPO MAGAZINE (2009).

result, it is possible for different companies to create fragrances that have similar scents, as long as they do not use the patented technique or ingredients. This protection can range from unique extraction processes to innovative ingredient blends that result in a distinct and unique fragrance. By obtaining a patent, an inventor gains exclusive rights to use and license their invention for a set period, typically 20 years from the date of filing. This exclusivity provides a competitive advantage in the marketplace and can incentivize further innovation and investment in the fragrance industry.

The subjective nature of fragrances makes it more challenging to demonstrate the “*novelty, usefulness, and non-obviousness*” of an olfactory invention, which are essential requirements for obtaining a patent.³⁰ Unlike other forms of inventions, such as mechanical devices or chemical compositions, there are no established objective criteria for describing and evaluating fragrances. The fragrance industry is highly competitive,³¹ and companies often keep their fragrance formulas and production processes as trade secrets rather than applying for patents, which would require public disclosure of the details.³² Furthermore, the cost of obtaining and enforcing a patent can be prohibitive,³³ especially for small fragrance companies. Therefore, while patents can indeed serve as a valuable tool for protecting intellectual property in the fragrance industry, they may not always be the most appropriate or practical choice. The criteria for patent protection typically revolve around the novelty, non-obviousness, and utility of an invention. While some aspects of fragrance creation may meet these criteria, the inherent subjectivity and sensory nature of fragrances can make it challenging to establish clear and universally applicable patent claims. However, it is worth noting that some fragrance-related innovations, such as unique extraction techniques or novel delivery systems, may indeed qualify for patent protection under certain circumstances. Relevant legislation governing patents, such as the Patent Act, must be considered in evaluating the applicability of patent protection to fragrances.

Finally, trade secrets have proven to be an indispensable tool in preserving the competitive advantage of fragrance companies. They effectively keep confidential information regarding fragrance creation out of the hands of rivals. The protection of trade secrets typically relies on the safeguarding of information that provides a competitive edge and is subject to reasonable efforts

³⁰ Brettoni, P, *Requirements for a Patent: Utility, Novelty and Non Obviousness*.

³¹ Carrie Haslam, *Collaborative Excellence: Industry Giants joins forces to dominate perfume industry*, SELECT SCIENCE (Apr. 29, 2020), <https://www.selectscience.net/editorial-articles/collaborative-excellence-industry-giants-join-forces-to-dominate-the-perfume-industry/?artID=57593>.

³² Cronin, Charles, *Lost and Found: Intellectual Property of the Fragrance Industry; From Trade Secret to Trade Dress*. 5 J. INTELL. PROP. ENT. LAW (2016).

³³ Eisenberg, Rebecca S, *Patent Costs and Unlicensed Use of Patented Inventions*, 78 U. Chi. L. Rev. 53, 69 (2011).

to maintain its secrecy. Fragrance formulations, precise ingredient ratios, and proprietary extraction methods often fall under this category of confidential information. The protection of trade secrets finds legal support in legislation like the Uniform Trade Secrets Act [“**UTSA**”] in the United States and similar laws in other jurisdictions. These companies spend a considerable amount of time and resources developing distinctive fragrances that help them stand out in the market. Such confidential information may include the unique combination of ingredients, extraction techniques, and blending processes that culminate in the creation of a singularly delightful aroma. By protecting this information as a trade secret, fragrance companies can maintain their competitive edge in the market and prevent competitors from replicating their fragrances, thereby protecting their investments in the development of these exquisite scents. However, competitors can swiftly emulate the fragrance by dissecting the product and determining the exceptional blend of ingredients and techniques involved in its formulation.³⁴

Trade secrets offer a fresh and distinctive outlook as compared to other forms of intellectual property protection, such as patents or trademarks. Unlike patents and trademarks, trade secrets do not necessitate registration, thus enabling fragrance companies to maintain a tight grip on their confidential information and protect their intellectual property without disclosing it to the public. Furthermore, trade secrets offer perpetual protection as long as the information remains confidential, and the trade secret protection is upheld. This can be particularly advantageous in the industry, where the subjective nature of fragrances and the difficulty in proving novelty and non-obviousness in olfactory aspects can make it challenging to obtain patent protection.³⁵

However, a major limitation is the risk of trade secret misappropriation by employees and other insiders who may disclose confidential information to competitors.³⁶ To address this risk, fragrance companies can implement various measures to protect their trade secrets, such as non-disclosure agreements, employee education, and access controls. Nevertheless, the risk of trade secret

³⁴ *Valuable yet Vulnerable: Trade Secrets in the Fragrance Industry*, International Fragrance Association, October 2013, [https://ifrafragrance.org/docs/default-source/policy-documents/23340_pp_2013_10_07_valuable_yet_vulnerable__trade_secrets_in_the_fragrance_industry-\(1\).pdf?sfvrsn=f15061e5_0](https://ifrafragrance.org/docs/default-source/policy-documents/23340_pp_2013_10_07_valuable_yet_vulnerable__trade_secrets_in_the_fragrance_industry-(1).pdf?sfvrsn=f15061e5_0).

³⁵ Molo Lamken LLP, *How Do Trade Secrets Compare To Other Types Of Intellectual Property Rights?* (May 30, 2022), <https://www.mondaq.com/unitedstates/trade-secrets/1197422/how-do-trade-secrets-compare-to-other-types-of-intellectual-property-rights>.

³⁶ Sarah F. Williamson, *What Are the Advantages and Disadvantages of Patents, Copyrights, Trademarks, and Trade Secrets?*, BVR INTELLECTUAL PROPERTY NEWS (March 12, 2018), <https://www.bvresources.com/blogs/intellectual-property-news/2018/03/12/what-are-the-advantages-and-disadvantages-of-patents-copyrights-trademarks-and-trade-secrets>.

misappropriation is an inherent challenge for fragrance companies, and therefore it is important for them to remain vigilant and continuously evaluate their trade secret protection measures.³⁷

It is quite intriguing to note that notwithstanding the challenges posed by the highly subjective nature of fragrances, there exist certain companies that have adroitly harnessed the power of intellectual property laws to shield their fragrances with remarkable effectiveness. A striking example of this phenomenon is where Estée Lauder, filed a federal lawsuit against CVS Caremark Corp, Family Dollar Stores Inc, and a Brooklyn-based fragrance maker, claiming the stores have sold knock-offs of its brands, including “Impression of Beautiful by Estee Lauder”.³⁸ The lawsuit accused the stores and perfume maker of trademark infringement, false advertising, diluting their trademarks, and unfair competition. This legal safeguard precludes other companies from replicating a similar scent for their products, thereby ensuring Estée Lauder’s intellectual property is secure.³⁹ This exemplar manifests the potency of trademarks in shielding fragrances, albeit the protection being confined to the singular scent and not extending to the specific blend of ingredients utilized.

Moreover, trade secrets can also function as a highly effective instrument in preserving confidential information associated with fragrance production. The venerated fashion empire, *Chanel*, has ensured the enduring preservation of its iconic fragrance, Chanel No. 5, for well over a century through the astute employment of trade secret protection. In contrast to Estée Lauder, Chanel refrained from procuring a patent for the fragrance formula. Instead, it zealously guarded the formula as a closely-held secret, thereby guaranteeing the company’s perpetual competitive advantage in the market, as its competitors were unable to replicate the scent.

In essence, the effectiveness of intellectual property laws in preserving fragrances is contingent upon the particular fragrance and the legal protection sought, Trade secrets can also be a potent means of securing intellectual property rights for fragrances, as exemplified by Chanel’s success with Chanel No. 5. Hence, it is incumbent upon companies to meticulously evaluate their options and judiciously select the most appropriate legal protection to guarantee the preservation of their fragrances’ intellectual property.

³⁷ *Supra* note 34.

³⁸ Reuters Staff, *CVS, Family Dollar sued over perfume knock-offs*, REUTERS, (12 June 2008), <https://www.reuters.com/article/fragrances-lawsuit/cvs-family-dollar-sued-over-perfume-knock-offs-idUKN1123911120080611>.

³⁹ *Id.*

V. INTELLECTUAL PROPERTY REGULATION OF FRAGRANCES

The regulatory landscape for fragrances includes both industry self-regulation and government regulation. In many countries, the fragrance industry is largely self-regulated through trade associations and voluntary industry standards. In the United States, for example, the International Fragrance Association (“**IFRA**”) sets voluntary standards for the safe use of fragrances in consumer products.⁴⁰ IFRA standards cover a range of issues, including the safe use of fragrance ingredients and labeling requirements.⁴¹

In addition to industry self-regulation, many countries have government regulations that govern the use of fragrances in consumer products. For example, the European Union (“**EU**”) has established a system of regulations known as the Registration, Evaluation, Authorization and Restriction of Chemicals (“**REACH**”) to manage the risks associated with chemical substances, including fragrances.⁴² The EU also has specific regulations governing the labeling of fragrances in consumer products.⁴³

In India, the regulation of fragrances is overseen by various government agencies, including the Central Drugs Standard Control Organization (“**CDSCO**”) and the Bureau of Indian Standards (“**BIS**”). The CDSCO is responsible for regulating the safety and efficacy of drugs and cosmetics, including fragrances. The BIS is responsible for setting standards for consumer products, including fragrances, to ensure their safety and quality.⁴⁴ India also has a voluntary self-regulatory organization called the Fragrances and Flavors Association of India (“**FAFAI**”). FAFAI sets industry standards for the safe use of fragrances and works with government agencies to ensure compliance with relevant regulations.⁴⁵ FAFAI's influence extends across the fragrance industry in India, comprising manufacturers, suppliers, and other stakeholders. It actively engages in establishing guidelines and best practices for the responsible use of fragrances, addressing safety concerns, and promoting ethical conduct within the industry. Through its collaborative efforts with governmental bodies, FAFAI helps shape and implement regulations that govern the fragrance sector. (Para space)

⁴⁰ INTERNATIONAL FRAGRANCE ASSOCIATION, GUIDANCE FOR THE USE OF IFRA STANDARDS, (May 4, 2020).

⁴¹ IFRA CODE OF PRACTICE, <https://ifrafragrance.org/about-ifra/ifra-code-of-practice>.

⁴² Sigma-Aldrich, REACH Regulation.

⁴³ EUROPEAN CHEMICALS AGENCY, UNDERSTANDING REACH, <https://echa.europa.eu/regulations/reach/understanding-reach>.

⁴⁴ MINISTRY OF MICRO, SMALL & MEDIUM ENTERPRISES (MSME), GOVERNMENT OF INDIA., FRAGRANCE & FLAVOUR INDUSTRY IN INDIA.

⁴⁵ *Id.*

The regulation of fragrances is an intricate matter that requires a delicate balance between the protection of intellectual property and the safety of consumers. The employment of intellectual property laws, such as patents and trademarks, is indeed a viable means of preserving the innovative and distinct aspects of fragrances. Nevertheless, these laws present certain constraints in terms of ensuring the safety and effectiveness of fragrances.

One potential avenue for regulating fragrances is through the implementation of labeling requirements. Many countries across the globe, including the United States and the European Union, mandate manufacturers to disclose the ingredients utilized in their fragrances on the product label.⁴⁶ This allows consumers to make informed decisions about the products they utilize and helps to identify potential allergens or irritants. In India, the Bureau of Indian Standards has established standards for the labeling of cosmetics, including fragrances, to ensure that consumers are apprised of the ingredients employed.

In addition to labeling requirements, governments may also impose restrictions on specific fragrance ingredients. For example, the European Union⁴⁷ has prohibited the use of certain allergenic fragrances in cosmetics, while the United States has set limits on the utilization of certain fragrance materials in personal care products.⁴⁸ These regulations are intended to safeguard the health and well-being of consumers, particularly those who may be susceptible to particular fragrances. Despite the potential of intellectual property laws and regulatory measures in regulating fragrances, additional measures are necessary to ensure the safety and effectiveness of these products. The implementation of these measures would not only enhance the protection of consumers but would also promote innovation and competition within the fragrance industry.

The complexities surrounding the regulation of fragrances are undeniable, particularly when it comes to the subjectivity and cultural significance of these unique products. However, there may be a potential solution that could address these challenges while also offering intellectual property protection for fragrances. This solution is centered around the creation of a universal fragrance

⁴⁶ Luminer, FAQs on Fragrance Labeling Requirements.

⁴⁷Helena Eixarch & David Andrew, *How EU Regulations Influence Fragrance in Cosmetics*, COSMETICS AND TOILETRIES, <https://www.cosmeticsandtoiletries.com/regulations/regional/article/21837141/how-eu-regulations-influence-fragrance-in-cosmetics>.

⁴⁸ U.S. FOOD AND DRUG ADMINISTRATION. PROHIBITED & RESTRICTED INGREDIENTS IN COSMETICS, <https://www.fda.gov/cosmetics/cosmetics-laws-regulations/prohibited-restricted-ingredients-cosmetics>.

database, accessible to regulators and consumers alike, that contains detailed information about fragrance ingredients and their properties, as well as potential risks associated with their use.

Creating a database has been used to solve problems in many fields, including healthcare, education, and finance. For example, in healthcare,⁴⁹ the creation of electronic health records [“EHRs”] has improved patient care, reduced medical errors, and provided researchers with valuable data for clinical studies. In finance,⁵⁰ the development of credit bureaus and financial databases has helped lenders and borrowers make informed decisions, and has reduced fraud and financial crime. However, the success of such a database would depend on a range of factors, including its design, accessibility, and the willingness of manufacturers to share information about their products.

To achieve this ambitious goal, the establishment of an international regulatory body for fragrances could be critical. This body would work to develop standards and regulations for fragrance ingredients and ensure compliance from manufacturers around the globe. Moreover, it could invest in research and development efforts to identify safer and more effective fragrance ingredients and provide incentives for manufacturers to participate in the database and comply with regulations. This would encourage greater transparency for consumers while promoting investment in the creation of safer, more effective fragrance ingredients.

The fragrance database could include a range of information about fragrance ingredients and their properties, including chemical composition, toxicity levels, and potential health effects. To address the issue of subjectivity it could also provide detailed information about the source of each ingredient, such as the plant or animal from which it is derived, and the extraction or manufacturing process used. Additionally, the database could feature notes on each fragrance, such as its scent profile, category, and intended use, as well as a similarity index based on evaluations from a panel of experts from an international regulatory body. The similarity index could be used to help consumers find fragrances that are similar to ones they already enjoy, while the notes could provide additional information to help consumers make informed purchasing decisions. The involvement of experts with deep knowledge of fragrance chemistry, olfactory aesthetics, and consumer preferences could help ensure the accuracy and reliability of the notes and similarity

⁴⁹ G Zurick, *Benefits of Electronic Health Records (EHRs)*, REGIS COLLEGE ONLINE (Sept. 23, 2021), <https://online.regiscollege.edu/online-masters-degrees/master-health-administration/benefits-of-electronic-health-records/>.

⁵⁰ INTERNATIONAL FINANCE CORPORATION (IFC), *THE EMERGENCE OF NEW DATA ECOSYSTEMS IN FINANCIAL SERVICES - RECENT DEVELOPMENTS IN SOUTH EAST ASIA* (2021).

index. Overall, such a database could be a valuable tool for promoting transparency and safety in the fragrance industry.

By facilitating the development of a universal fragrance database and international regulatory body, we may offer a more comprehensive and effective solution to the challenges of regulating fragrances. It would help to ensure that consumers are fully informed about the products they use while promoting the innovation and development of safer and more effective fragrance ingredients. Ultimately, this solution could provide greater intellectual property protection for fragrances, while also contributing to the safety and well-being of people around the world who enjoy these unique and culturally significant products.

VI. CONCLUSION

In summary, this paper has delved into the intricate challenges of regulating fragrances within the framework of intellectual property laws. It has illuminated the subjective nature of fragrances, emphasized their cultural significance, and underscored the limitations inherent in relying solely on conventional intellectual property mechanisms to ensure their safety and efficacy.

Throughout our exploration, we've examined the multifaceted regulatory landscape that governs fragrances, encompassing both industry-driven self-regulation and government-imposed standards. Additionally, we've scrutinized the role of intellectual property laws in regulating fragrances, including their application in labeling requirements and ingredient restrictions.

Furthermore, this paper has put forth a novel proposition to address the formidable challenges of fragrance regulation—a proposal involving the creation of a universal fragrance database and the establishment of an international regulatory body. This innovative approach seeks to harmonize and enhance the oversight of fragrances on a global scale, thereby striving for greater clarity, consistency, and efficacy in this vital domain.

The subjective nature and cultural significance of fragrances pose significant challenges to the effective regulation of their use and protection under intellectual property laws. However, the proposed solution of a universal fragrance database and international regulatory body could provide a more comprehensive and effective approach to regulation, while also facilitating greater transparency and innovation. A universal fragrance database and international regulatory body can help to address the subjective nature of fragrances by establishing clear standards and guidelines for the use of fragrance ingredients, promoting increased transparency and information availability,

and facilitating the development of safer and more effective fragrance ingredients that are culturally appropriate.

The future of intellectual property laws and fragrances will require continued collaboration between industry, regulators, and consumers to ensure that these complex and culturally significant products are both safe and accessible. While there are limitations to the effectiveness of intellectual property laws in regulating fragrances, there is also significant potential for innovation and development in this space.

The question that arises is *“To what extent can intellectual property laws effectively regulate the use and protection of fragrances, given their subjective nature and cultural significance?”*

The answer is that intellectual property laws can be effective in protecting the innovative and unique aspects of fragrances. While these laws can be used to protect the unique and innovative aspects of fragrances, they have limitations in ensuring their safety and efficacy. The subjective nature and cultural significance of fragrances further complicate the regulatory landscape, as different cultures and individuals may have varying preferences and perceptions of fragrances.

Labeling requirements and restrictions on certain fragrance ingredients are two approaches that can be used to regulate fragrances. However, they have limitations in ensuring the safety and efficacy of fragrances, particularly in the absence of clear and universal standards for fragrance ingredients. Additionally, the use of trade secret protection may limit the availability of information about fragrance ingredients, making it difficult for regulators and consumers to make informed decisions.

To overcome these challenges, a universal fragrance database and an international regulatory body for fragrances could be established. This would facilitate greater transparency and ensure that consumers are fully informed about the products they use. It could also promote research and development to identify safer and more effective fragrance ingredients.

In essence, while intellectual property laws can provide some level of regulation for fragrances, their effectiveness in ensuring safety and efficacy is limited. Although intellectual property laws can play a role in regulating the use and protection of fragrances, their effectiveness is limited by the subjective nature and cultural significance of fragrances. A comprehensive regulatory

framework, such as a universal fragrance database and an international regulatory body for fragrances, could provide a more effective solution to the challenges of regulating fragrances in a global market.

In closing, the urgency of this discourse on fragrance protection is underscored by its profound relevance in a rapidly evolving global landscape. As we have explored the regulatory landscapes in India, the United States, and the European Union, we have unearthed the complexities surrounding fragrance protection, particularly in the context of smell marks, it reveals not only divergent approaches but also potential for convergence. Fragrances, with their intricate ties to culture, creativity, and commerce, stand as a unique and sensory manifestation of intellectual property. Their protection is not merely a matter of legal intricacy but a matter of cultural preservation, economic innovation, and equitable access. In an era marked by the convergence of sensory experiences with technological advances, addressing the complexities of fragrance protection becomes paramount. As these aromatic works continue to bridge the tangible and the intangible, fostering a robust dialogue and framework for their safeguarding becomes not just an academic exercise, but a critical step towards recognizing and nurturing the rich tapestry of olfactory artistry in our global society.