

Submitted by Sindhu A

Final year BA LLB(Hons.) student,

School of Law, Christ University, Bangalore, India.

Contact- sindhu.a@law.christuniversity.in

Interventions on the issue of Deepfakes in Copyright

Deepfakes refer to any media or digital representation that has been distorted using artificial intelligence and deep learning. It has various use cases in multiple fields including the entertainment sector, MedTech, education etcetera.¹ The company Cereproc uses it to create digital voices for children with disabilities or who have lost theirs to disease² and it was also used to resurrect Peter Cushing in *Rogue One: A Star Wars Story*.³ Despite having such vast potential to achieve greatness, deepfakes are also largely being deployed to harass women and celebrities, as was witnessed in 2017 when a Reddit user superimposed several actresses' faces onto performers in pornographic films.⁴ It is further used to disseminate political propaganda as was witnessed in India when a political candidate used deepfakes in his campaigning videos.⁵

The technology transgresses into various areas of law such as copyright infringement, data protection, privacy, defamation, freedom of speech and expression, content moderation and intermediary liability, even criminal law as it is a tool for digital fraud and is often weaponized against women for the purposes of revenge porn and harassment.

The existing United States position of law to tackle deepfakes:

In 2019, a deepfake of Kim Kardashian that was floating around was removed by YouTube on the grounds of copyright infringement.⁶ Although on the face of it, it does seem like this is a copyright issue, it is not under the existing United States copyright laws.

The Fair Use doctrine in the United States under 17 USC §107 is determined based on the following four factor test⁷:

(i) purpose and character of use,

¹ Jackie Snow, *Deepfakes for good: Why researchers are using AI to fake health data*, FASTCOMPANY (Sept. 24, 2018) <https://www.fastcompany.com/90240746/deepfakes-for-good-why-researchers-are-using-ai-for-synthetic-health-data>.

² Cereproc, *Synthesised Text-to-Speech gives voice for children who can't speak again!*, CEREPROC (Nov. 16, 2019) <https://www.cereproc.com/en/scottishchildvoices>.

³ Luke Kemp, *In the age of deepfakes, could virtual actors put humans out of business?*, THE GUARDIAN (July 8, 2019), <https://www.theguardian.com/film/2019/jul/03/in-the-age-of-deepfakes-could-virtual-actors-put-humans-out-of-business>.

⁴ Oscar Schwartz, *You thought fake news was bad? Deep fakes are where truth goes to die*, THE GUARDIAN (Nov. 12, 2018), <https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth>.

⁵ Regina Mihindukulasuriya, *Why the Manoj Tiwari deepfakes should have India deeply worried*, THE PRINT (Feb 28, 2020), <https://theprint.in/tech/why-the-manoj-tiwari-deepfakes-should-have-india-deeply-worried/372389/>.

⁶ Tiffany C LI, *Kim Kardashian v. Deepfakes*, SLATE (June 18, 2019), <https://slate.com/technology/2019/06/deepfake-kim-kardashian-copyright-law-fair-use.html>.

⁷ Digital Millennium Copyright Act, 17 U.S. Code § 107.

- (ii) nature of copyrighted work,
- (iii) amount and substantiality of the portion taken and
- (iv) the effect of use on potential markets.

Deepfakes can arguably satisfy the four factor test and receive protection under the concept of ‘transformative use. As propounded by the Supreme Court of the United States in the landmark judgement of *Campbell v. Acuff Rose*⁸, transformative use is when the copyrighted work has been modified to create content with new expression, meaning or message. This is often used as a defence by parodists, similarly any deepfake can be argued on the ground of being a parody and claim protection from copyright infringement under the concept of transformative use. Therefore, if deepfakes are taken down on the grounds of copyright infringement it may impede on one’s freedom of expression owing to the current position of copyright laws in the United States. The issue however, is with deepfakes created for malicious purposes obtaining protection under the concept of transformative use as well. This could be a dangerous consequence of the wide nature of the doctrine of fair use.

The existing Indian position of law to tackle deepfakes:

In the Indian context, Section 52 of the Indian Copyright Act, 1957 discusses the concept of ‘fair dealing’, although it doesn’t define it.⁹ The section contains an exhaustive list of works that are considered to be infringing, essentially distinguishing between bonafide and malafide users of protected works. It is in consonance with Article 13 of the Trade Related Aspects of Intellectual Property Rights (TRIPS) which states that *"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder"*.

The concept of fair dealing often comes down with heavy criticism for being rigid in contrast to the broad doctrine of fair use in the United States. Owing to its rigidity, the current position of Indian Copyright law can be used as an appropriate medium to tackle deepfakes. However, all deepfakes including the ones created with a legitimate purpose and for entertainment will infringe copyright under the Indian doctrine of fair dealing. This position needs to change to accommodate deepfakes created for bonafide purposes.

Copyright is closely knitted with Intermediary liability. More often than not, content such as deepfakes are able to reach a larger audience through social media and other intermediaries. Under Section 79 of the Information Technology Act, 2000 intermediaries may be ordered to take down unlawful content upon receiving actual knowledge or a court order.¹⁰ However in the case of *Myspace Inc. v Super Cassettes Industries Ltd*¹¹, the Court held that in circumstances of copyright infringement, the intermediaries are required to take down infringing content upon receiving a notification from private parties without necessarily

⁸ *Campbell v. Acuff Rose*, 510 U.S. 569, 92-1292, (1994).

⁹ Indian Copyright Act, 1957, No. 14 Acts of Parliament 1957 (India).

¹⁰ Information Technology Act, 2000, No. 21 Acts of Parliament 2000 (India).

¹¹ *Myspace Inc. v Super Cassettes Industries Ltd* (2005) 138 FTR 1 (Del) (India).

receiving a Court order. Further, under the draft of the Information Technology [Intermediary Guidelines (Amendment) Rules], 2018¹²- which is yet to take effect as it is under review- the intermediaries are mandated to proactively monitor and take down unlawful content by employing automated tools such as algorithms within 24 hours of the receipt of the order and/or notification. It could prove to be tedious for intermediaries to comply with the Draft rules, 2018 with respect to taking down deepfake content because the existing technology to detect deepfakes only functions on a dull accuracy rate of 65.18% accuracy¹³. Therefore moderating deepfake content online would pose a significant challenge to intermediaries in cases of copyright infringement.

Conclusion:

Deepfakes shouldn't merely be approached from a property rights perspective, because it involves an active presence of connected personal rights as well. In the United States and other countries with positions similar to that of the fair use doctrine, the claim of copyright infringement is unsuccessful to defeat malicious deepfakes. It is more appropriate for the victims of malicious deepfakes to use grounds of data protection, privacy, defamation and harassment to fight it as it is not a copyright issue in Countries with this position of law.

Deepfakes have a significant impact on copyright laws but it isn't well-equipped to deal with the multifaceted legal challenges posed by deepfakes alone.

¹² The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018, https://www.meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf.

¹³ James Vincent, *Facebook contest reveals deepfake detection is still an 'unsolved problem'*, THE VERGE (June 12, 2020) <https://www.theverge.com/21239064/facebook-deepfake-detection-challenge-unsolved-problem-ai>.