

Exploring the Intersection of AI and IPR in the Context of the Emerging Phenomenon of Deepfakes

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The article endeavors to delve deep into the world of 'deepfakes'. Deepfakes are a product of technological advancements in artificial intelligence (AI) which have creators and consumers of their own. However, like any other technological invention, the phenomenon of deepfakes also presents itself as a double-edged sword. The disruptions produced by deepfakes have become ubiquitous, transcending geographical borders, and blurring boundaries between reality and fiction. The intersection between artificial intelligence and intellectual property rights is a crucial assessment point and merits meticulous examination, considering its contemporary relevance. The article is an attempt to review and analyze the disruptive nature of deepfakes, their manifestations and ramifications in the world of media and entertainment, the recipients of the infamous technology, and their corresponding rights, including personality rights and right of publicity, potential threats, and possible legal remedies within the framework of intellectual property law.

Keywords: AI, Deepfakes, Personality Rights, Right of Publicity, Celebrity Rights, Copyright

Modern technology and its products permeate deep into our everyday lives. Within the spectrum of modern technology, the gift of artificial intelligence has come to acquire a unique significance. The most important technologies that make up AI are machine learning, deep learning, and natural language processing.¹ Advancements in the fields of AI and machine learning have made things happen that were hitherto impossible. A human voice helping in navigation, a chatbot, or speech recognition by the computer—these instances are no longer figments of imagination. This is the backdrop within which one can locate the phenomenon of deepfakes.

The world of deepfakes is indeed quite deep in the sense that it uses a very nuanced and sophisticated technology; in that regard, it is very profound. It is also quite fake; in that it is far from truth or reality. Deepfakes are hyper-realistic videos digitally manipulated to depict people saying and doing things that they never actually said or did.² The origin of the term 'deepfakes' can be traced back to the year 2017, when a Reddit user named 'deepfakes' published several videos in which the faces of famous actresses were swapped onto porn.³

Although the phenomenon of deepfakes is relatively new, some scholars have attempted to

classify and analyze it in terms of four broad categories, i.e., deepfake pornography, political deepfakes, commercial deepfakes, and creative deepfakes.⁴ While the first two categories are more susceptible to being misused, thereby posing relatively greater risks and potential threats to the people targeted, the last two categories are relatively socially beneficial, causing less serious damage, if at all.⁴ Some of the unintended consequences that stem from the misuse of deepfakes range from humiliation, exploitation, and physical, mental, and financial abuse of individuals or corporations to deepening social divisions and polarization, as well as trust erosion in the institutions of society.

Deepfake videos have been trending online, garnering a lot of attention from people, besides also becoming a source of entertainment for people at the behest of the targeted populace — the victims of deepfakes. More often than not, the people who bear the brunt of this new technology are celebrities from different walks of life – politicians, film stars, sports personalities, etc. Celebrities, from Tom Hanks, Kristen Bell, and Scarlett Johansson to Anil Kapoor, Jackie Shroff, and Katrina Kaif, deepfakes have brought about a great deal of ordeal for those at the receiving end of the spectrum, from humiliation and harassment to anxiety and depression.⁵

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The Complex Interplay of Rights of Publicity and Personality Rights

The ubiquitous nature of deepfakes and the subsequent repercussions produced by the same have already been endured by Western countries, which are the forerunners of advanced and sophisticated technologies in AI. Suzzie Dunn, in one of her works,⁶ paints a comparative picture of various judicial and jurisprudential approaches adopted by the Courts in countries such as the United States, Canada, and Germany, while dealing with the menace of AI-generated works such as deepfakes. In all the aforementioned jurisdictions, Courts were observed to engage in a proportional balancing of protecting identity-based rights with the rights of the creator's freedom of expression and the public interest in the subject matter.⁶ Both legislative measures and judicial decisions reflect a careful balancing of the rights of the creators as well as the consumers.

In Canada and the United States, the frameworks of personality rights and publicity rights have often been invoked by the Courts, contingent upon the purpose with which the representation is made, whether it is simply to exploit the commercial success of that person's image or to promote a societal interest in freedom of expression, such as biographies or satirical skits. In the case of the latter, the producer's freedom of expression was more likely to prevail.⁶ In Québec and Germany, the economic aspect is overshadowed by concerns such as consent, public status, and dignity. The author proposes a proportional balancing of rights under a dignity-based model, encompassing elements of autonomy and consent as being invariably important features under such a model.⁶

Other scholars such as Russell Spivak, have analyzed the various legal dimensions of deepfakes in the light of various judgments passed by the judiciary in states like California in the United States.⁷ In one of the judgments, it was held that "the right of publicity is an economic right to use the value of one's own celebrity."⁸ Furthermore, the Court expressed its apprehension concerning the defendant acquiring for free some aspect of the plaintiff that would have market value and for which he would normally pay.⁹ Along similar lines, it was clarified that "all that a plaintiff must prove in a right of publicity action is that she has a pecuniary interest in her identity and that her identity has been commercially exploited by a defendant."¹⁰ In other words, the economic aspect was aptly underscored by the Court as it upheld that "the

right of publicity a holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame."¹¹

The Courts have particularly held that "the distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona'".¹² Interestingly, the doctrine of the right of publicity has dramatically expanded to include laypersons, and is no longer an exclusive right of a celebrity, in countries such as the United States. For instance, a California statute has even codified this right, upholding that "the statutory right of publicity exists for celebrity and non-celebrity plaintiffs alike."¹³ Further, the Courts have observed that in a society dominated by social networking sites such as YouTube, Facebook, Twitter, etc., the distinction between a 'celebrity' and a 'non-celebrity' seems to be an increasingly arbitrary one.¹⁴ Therefore, the deepfake need not necessarily pertain to a national celebrity to bring a suit premised on the right to publicity.¹⁵

A series of crucial judgments passed by the Delhi High Court marks an important juncture in the pathway toward judicial recognition of celebrity rights and personality rights, along with the right to publicity and the right to privacy. It becomes imperative to take note of such judgments, wherein the judiciary has offered its critical insights into and observations on contemporary issues, unraveling their nature and implications for the people most affected by the malicious use of technology and carving out space for better resolution of the novel problems created by the same.

The Delhi High Court in *ICC Development (International) Ltd. v Arvee Enterprises*,¹⁶ held that the right to publicity has evolved from the right of privacy, and any attempt to deprive the individual of his right of publicity would be in contravention to Articles 19 and 21 of the Constitution of India. The Court remarked that the right of publicity vests in an individual, and he alone is entitled to profit from it. In other words, any effort to reap profits from using the core elements of a personality, such as name, voice, signature, or any other unique aspect of the personality, will be deemed to be a strict violation of the aforementioned provisions of law.

In the case of *DM Entertainment Pvt. Ltd. v Baby Gift House and Ors.*,¹⁷ the Delhi High Court while observing that the right of publicity can be located within the individual's right and autonomy to permit or not permit the commercial exploitation of his likeness or some attributes of his personality, also cautioned against the over-emphasis on a famous person's publicity rights, as it would otherwise stifle exercise of the right to freedom of speech and expression in a democratic society. Various forms of expressions such as caricature, lampooning, or parody cannot be held to amount to commercial exploitation, per se. However, if the individual is of the view that any of those forms of expressions defames or disparages him, the remedy of damages for libel, or slander, as the case may be, would then, be available to him.

In *Titan Industries Ltd. V Ramkumar Jewellers*,¹⁸ the Delhi High Court shed light on the basic elements comprising the liability for infringement of the right of publicity, i.e., Validity and Identifiability. The former suggests that the plaintiff owns an enforceable right in the identity or persona of a human being, while the latter suggests that the celebrity must be identifiable from defendant's unauthorized use. The right to control the commercial use of human identity is the right to publicity, which recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or persona.

In *Anil Kapoor v Simply Life India & Ors.*,¹⁹ the Delhi High Court again dealt with the issue of protection of the personality rights of the plaintiff, including the right to publicity. It was alleged that several aspects of the plaintiff's persona were being misused by the defendants, including but not limited to using his name, voice, and photographs without authorization, and creating and using morphed images and videos of the plaintiff. The Court expressed its concerns about the role of technological tools such as AI in the context of celebrity/personality rights while observing that since technological tools are more freely accessible, it makes it easy for an unauthorized user to produce morphed images and videos of the celebrities targeted by him, which are often generated to garner attention, consequently painting them in a derogatory manner, leaving a slim chance of remedying the damage caused to their public persona and dignity, resulting in a gross violation of their rights.

In a plethora of judgments delivered by the Indian judiciary, it has been held that celebrity status by itself inherently grants the individual such rights. In the case of *Jaikishan Kakubhai Saraf v The Peppy Store and Ors.*,²⁰ a series of incidents were flagged that allegedly violated the personality rights and the right of publicity of the plaintiff. The plaintiff was aggrieved by distorted audios and videos floating online, in which apparently he was either singing or using profane language, thereby tarnishing his reputation. One of the defendants had been operating an AI Chatbot wherein it would impersonate the plaintiff, responding the way the plaintiff would, thereby violating the plaintiff's personality rights. The Delhi High Court observed that the alleged activities of some of the defendants did, *prima facie*, result in commercial benefits through the unauthorized exploitation of the plaintiff's personality as they had utilized the plaintiff's name, image, voice, and other unique characteristics without permission, resulting in the infringement of his personality and publicity rights.

The Copyright Conundrum

Issues pertaining to AI and IP were dealt with by the American Association of Publishers (AAP) when they shared their perspective after the World Intellectual Property Organization's (WIPO) conversation on the same.²¹ With regard to the aspect of copyright in deepfakes, the Association was of the view that "the question should perhaps be whether copyright should even be accorded to deep fake imagery, rather than to whom copyright in a deep fake should belong." Their central argument was that if the victim of a deepfake (a human subject) was represented in a manner that was completely contrary to their life, work, or status, then such a deepfake was rather unworthy of copyright protection.²¹

AAP further lays down instances wherein deep fake imagery may be considered for copyright protection such as when the human actor utilizes a commercially available AI algorithm to express his creativity because it is the human actor from whom the imagery originates, after the application of the AI program. In simple words, AAP suggests that "Copyright ownership could be accorded to the human actor employing the AI algorithm as a tool."²¹ However, this suggestion comes with a caveat that claims around copyright ownership should be critically dealt with, especially with respect to legal protection for creators of deepfakes that are devoid of creativity and have a malafide intention.

According to Section 2(d)(vi) of the Copyright Act, 1957, in relation to any literary, dramatic, musical, or artistic work that is computer-generated, “author” means the person who causes the work to be created.²² While this definition implies that there is human intervention in computer-generated works, it does not offer much clarity with respect to authorship in the context of AI-generated works, an area that is imbued with much ambiguity to date.²³

Potential Threats and Preventive Measures

The phenomenon of deepfakes encompasses a diverse range of potential threats and risks. Different scholars have attempted to delve deeper into the dystopic world of deepfakes, exposing their possible implications and imminent dangers. Franks and Waldman shed light on the aspect of “reputational injury” as one of the central wrongs of non-consensual deepfake porn videos, which causes intense distress, humiliation, and reputational injury.²⁴ Some scholars such as Diakopoulos & Johnson have expressed a similar concept in terms of “reputational harm”, which is undermining a person’s reputation and locating the same in the context of defamation.²⁵

The imminent dangers and potential risks posed by deepfakes call for a comprehensive strategy to combat the menace created by deepfakes. Westerlund, in her article, discusses at least four broad ways to combat deepfakes, which involve legislation and regulation; corporate policies and voluntary action geared towards prompt removal of user-flagged content; education and training aimed at digital literacy and appropriate online behavior; and anti-deepfake technology that includes deepfake detection, content authentication, and deep fake prevention.²⁶ Furthermore, empowering people about the nature of AI and its potential threats and pitfalls is the dire need of the hour for which different stakeholders such as government authorities, companies, educators, journalists, and media personalities can play a pivotal and proactive role in preventing fraudulent usage of such technologies for commercial, political, or anti-social purposes.²⁶

A multi-pronged approach to mitigating the burgeoning threats posed by deepfakes can also be conceived in terms of a five-step strategy.²⁷ Firstly, empowering users through interactive tutorials identifying deepfakes;²⁸ secondly, leveraging technologies such as blockchain to verify and trace the origin of online content;²⁸ thirdly, a collaboration between various stakeholders including

AI developers, consumer groups, civil society, organizations representing victims, executives from small, medium, and large businesses, as well as scientists and researchers;²⁹ fourthly, prioritizing ethics and fostering open dialogue and clear frameworks tailored towards a responsible AI development;²⁷ and lastly, nurturing research and development in deepfakes detection, prevention, and user education.²⁷

One of the key concerns that arise in the evolving era of technological innovations is that the technology used to create deepfakes is far outpacing the development of technology to detect it, wherein one of the biggest hurdles is identifying the wrongdoer and being able to take enforceable action against the wrongdoer.³⁰ Along similar lines, companies like Google and Facebook have shouldered the responsibility to develop reliable tools to detect deepfakes, with the hope that such detectors can also improve by leaps and bounds in the future.³¹

Legal Remedies

Presently, the current civil and criminal laws are not that well equipped to navigate through the novel and complex challenges posed by technologies such as deepfakes. It is pertinent to mention that, invariably, most governments all over the world are grappling with such inadequacies in legal frameworks. However, some legal remedies could be found in terms of defamation, or right to privacy, and even within the framework of intellectual property rights. Judicial intervention and evolving interpretations pertaining to the right to privacy, right of publicity, personality rights, and copyright protection are some of the ways through which preparedness, preventiveness, and responsiveness can be perceived in the Indian context.

There is an inherently intricate dynamic between technologies such as deepfakes as a product of AI and celebrity rights, which has been increasingly recognized by the Indian judiciary in various judgments in recent years. Since the Delhi High Court in particular has recognized publicity rights as individual rights, it now rests with the legislature to statutorily recognize the commercial and ownership aspects of publicity rights. In the context of technology and celebrity rights, recognition of property rights in one’s personae can go a long way in addressing the challenges posed by deepfakes. As the right to property is a creation of law, anything is property so long as the law confers the status of property on it.³¹ This is one of the many pragmatic steps that the legislature can take to safeguard

the rights of celebrities against the pitfalls of technological innovations.

In the Indian legislative landscape, the Standing Committee on Commerce in its recent report on the subject 'Review of the Intellectual Property Rights (IPR) Regime in India' suggested 'Sector-specific recommendations for regulation of Artificial Intelligence'. The Committee recommended creating a separate category of rights for Artificial Intelligence and related innovations, owing to their significant benefits and applications.³² Perhaps, more such AI-specific legal interventions can pave the way for a more conducive atmosphere for the growth of technology and related innovations.

Conclusion

From an ethical and moral standpoint, deepfakes present complex dilemmas, calling for a need to safeguard the moral rights of the person who has been wronged or has been the target of such a technology. Along these lines, three factors could be regarded as being central to the understanding of moral dilemmas presented by deepfakes and in determining whether they are morally problematic, i.e., the likelihood of objection by the victim of deepfakes, the likelihood of deception by way of deepfakes, and the intention behind creating a deepfake.³³ Deepfakes portray people in ways in which they would not want to be portrayed, through the use of morphed images and voices- rendering them inherently morally wrong.³³ This aspect of moral wrong emanates from the fact that a person's image and voice are closely tied to one's social and personal identity and so protection against any such digital manipulations should be considered a fundamental moral right of every person.³³

With the proliferation and pervasiveness of this unique technology, there is an impending danger of misuse, with ramifications at the individual level as well as the societal level. Given the paradoxical nature of technology, and the contradictions and conflicts that present themselves at the interface between artificial intelligence and intellectual property rights, there is a dire need for an appropriate response by all key stakeholders and to develop an efficient and exhaustive strategic framework geared towards combating the complex challenges posed by the ever-evolving landscape of advanced technologies such as deepfakes. Modern technological inventions have brought the pillars of economy, polity, and society to the edge of a precipice, accompanied by perplexing

situations intertwined with policy paralysis. Therefore, in order to successfully traverse the terrain of technology, only a tailor-made and time-bound response can act as the elixir to alleviate the distress caused by such disruptive technologies.

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