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APPROPRIATION IN ART: THE FAIR USE DOCTRINE AND THE FUTURE OF CONTEMPORARY ART

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ABSTRACT

"What has been will be again, what has been done will be done again; there is nothing new under the sun."[1]

Many artists from the 20th and 21st centuries have engaged in the respectable and established art form of appropriation art. Because appropriation art utilizes previously created works as its subject matter, copyright law, which aims to facilitate access to original works, has had difficulty addressing this type of art. Practice of appropriation function by incorporating existing work of art into new art as a method of articulating new meaning. Social critique and commentary are common ways that this new meaning manifests itself. Appropriation art tends to fall under the category of infringement under copyright law since it is copied without the owner's consent. Over the years, there have been prominent infringement cases about whether a visual artist can use preexisting artwork from another artist for use in subsequent "appropriation art." Different methods and conclusions about whether or not such appropriation can lead to fair use were represented in those rulings. However, the fair use defense's application is varied across copyright jurisprudence and does not reflect the evolving nature of contemporary art, particularly when it comes to transformative use. The problematic methods used by the courts when applying first factor of defense are examined in this study and concludes with a recommendation to reduce the extent of derivative rights and rebalance the fair use doctrine.

KEYWORDS: Appropriation Art, Copyright, Contemporary Art, Fair use, Transformative, Derivative works, Originality, Idea/Expression Dichotomy.

INTRODUCTION

Appropriation is an artistic technique in which artists copy elements from another work. In some cases the totality of another work is appropriated as in some of the works by *Richard*

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[1] Ecclesiastes 1:9

Prince, Barbara Kruger and *Sherrie Levine.* Needless to say, appropriation is not a twentieth century practice, copying is an age old technique, used in teaching others how to draw.[2] The most direct copy of Shakespeare's Romeus and Juliet was taken from *Arthur Brooke's* The Tragical History of Romeus and Juliet, written a few decades earlier (though *Brooke*, of course, copied from someone, and that person, and that person…going back at least to *Ovid's* story about Pyramus and Thisbe). *Shakespeare* appropriated the concepts, characters, storyline, and even passages: Romeo was told by the friar, "Are you a man? According to *Brooke,* "Art thou a man? Your form cries out thou art." The form says, "So you are." *Shakespeare* made the borrowed stories "uniquely *Shakespearean*" by adding a ton of ingenuity.[3]

The reclining naked is another example from the visual art world; the earliest one in Renaissance painting was *Giorgione's* Sleeping Venus. It shows that *Giorgione* based his work on a woodcut. However, things were not meant to stop there. One of *Giorgione's* pupils, *Titian*, made the decision to parody his instructor. Renaissance imitation, or the process of producing a unique work based on an existing model, is best exemplified by the *Venus* of *Urbino* that was created. An artist worked on an earlier piece to give it fresh meaning and expression. Furthermore, repurpose of old photos has been far from finished. Here is *Edouard Manet's Olympia*, which is regarded as a founding piece of artistic modernity yet clearly alludes to *Titian's* (and back step, to *Giorgione's*) *Venus*. As evidenced by *Giorgione*, *Titian* and *Manet* art is having prolonged emulations and copying history that has led to the continual progression of creative movements.[4]

Images taken from advertising, the media, popular culture, other artists, and other sources are used in appropriation art to create new pieces.[5] Frequently, an artist's conceptual capacity to reframe images and alter their meaning is more significant than his technical proficiency. Appropriation art has commonly described "*as getting the hand out of art and putting brain in*"[6] Some appropriation art does not implicate copyright law at all. For example, *Marcel Duchamp* exhibited ready-made objects such as a urinal, bicycle wheel, and snow shovel as works of art. In art, appropriation is the use of previously created items or images with minimal

[2] "Willajeanne F. McLean, *All 's Not Fair in Art and War : A Look at the Fair Use Defense After Rogers v. Koons,* 59 Brook. L. Rev. 373 (1993)
[3] *Andy Warhol Foundation for Visual Art, Inc.* v. *Goldsmith* 598 US 26" (2023)
[4] Priya Kavuru, 'Appropriation Makes the Art Grow Fonder: The Fair Use Doctrine and the Future of Contemporary Art' (2024) 76 Rutgers UL Rev 825
[5] "E Kenly Ames, Note, Beyond Rogers v Koons: A Fair Use Standard for Appropriation, 93 Column". L. Rev. 1473 (1993); Lynne A Greenberg, The Art of Appropriation: Puppies, Piracy and Post Modernism, 11 Cardozo Arts & Ent. L. J. 1 (1992)
[6] *Supra* n. 4

or no alteration. "The use of borrowed elements in creating novel work" is one definition of appropriation.

This study explores conflict which presently exists among copyright law and modern art, and concluding that the evolving field of postmodern art should be reflected in the way that "fair use elements" are analyzed by judges. Describe "fair use doctrine" moreover how it evolved within copyright law. How the court's adjudication of transformative use in case of *Blanch* v. *Koons,*[7] *Cariou* v. *Prince,*[8] *and "Andy Warhol Foundation for Visual Art* v. *Lynn Goldsmith"*[9] is muddled by Second Circuit and the Supreme Court (SC) when applied to postmodern art. Rebalancing "fair use principles" application, restricting the derivative rights of copyright holders, and defending the rights of appropriation artists to promote modern art can all help to bridge the gap between copyright law and appropriation art.

APPROPRIATION IN ART

Appropriation has been denoted as "taking as one's own or to one's own use"[10] In art, appropriation is the use of previously created items or images with minimal or no alteration. "The use of borrowed elements in novel work creation " is one definition of appropriation. In the visual arts, "to appropriate" means to properly adopt, borrow, recycle or sample aspects (or the entire form) of man-made visual culture. Other strategies include "re-vision, re-evaluation, variation, version, interpretation, imitation, parody or allusion". In essence, everything is borrowed to make the new piece is transformed or re-contextualized. Technical proficiency is frequently less significant than an artist's conceptual capacity to alter the meaning of images by placing them in various contexts.

French Dadaism is the origin of the American modern art movement known as "appropriation art."[11] Early in the 20th century, French artist Marcel Duchamp challenged the prevailing wisdom that emphasizes an artwork's uniqueness by introducing the notion that commonplace objects could be works of art.[12] By the mid-1900s, American artists began to integrate parts of

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[7] 467 F.3d 244 (2d Cir. 2006)
[8] 714 F. 3d 694 (2d Cir. 2013)
[9] *Andy Warhol* (n.2)
[10] Alexandra E. Summa, 'Reproaching Appropriation: Analyzing Contemporary Appropriation Art Law in the United States and France' (2022) 97 Tul L Rev 102
[11] *See Appropriation, Tate,* https://www.tate.org.uk/art/art-terms/a/appropriation (last visited Dec 30, 2024). The Dada art movement, characterized by its humor and dissidence, emerged in Europe in response to the aftermath of World War I and soon become a revolutionary style of art with an enduring legacy. *See What is Dadaism, Dada Art, or a Dadaist*? Artland Magazine, What is dadaism, dada art, or a dadaist? | Artland Magazine (last visited Dec 30, 2024)
[12] *See Marcel Duchamp (1887-1968),* Metro, Museum Art (Oct. 2004) Marcel Duchamp (1887–1968) | Essay | The Metropolitan Museum of Art | Heilbrunn Timeline of Art History (last visited Dec 30, 2024). Duchamp became a pioneering figure of the Dadaist movement, describing it as an "anti-art". Duchamp's "ready-mades"

preexisting images into iconic pop art pieces.[13] Since the 1980s, artists have further adapted the philosophy of appropriation art by reproducing other artists' artworks, inspiring questions about the "originality, authenticity and authorship" of art.[14] As technology accelerated media transmission, an increasing number of people began to reproduce and remix various forms. Increased access to digital images caused the prevalence of appropriation art to surge.[15]

COPYRIGHT AND CONTEMPORARY ART

Artists that practice appropriation have long used copying to convey a new message by fusing preexisting works of art into new creations. This new meaning often takes the form of social commentary or criticism. Appropriation in contemporary art is further proliferated through mass media and innovation in digital technology.[16] With the ability to copy at the click of a button, copyright in contemporary art has taken on a new urgency. What was once a race to a paint brush and canvas has become a sprint to see who can pick the right image in a culture of mass media and production.[17]

But where copying has been there, there is copyright. Copyright's ultimate objective is "promoting science alongside useful arts progress". "Original authorship task is secured in any tangible medium of expression from which it can be reproduced, conceived, and communicated" is protected under the copyright. By providing incentives for creative endeavors, copyright protection promotes advancement. The protection confers bundle of rights to owner of copyright work. The rights include capability of making derivative works, distribute work, exhibit or perform it in public, and reproduce the work. The reward given to the creator will encourage them to keep up their artistic endeavors and stop unauthorized duplication of their work. Conversely, it encourages public information distribution grounded in utilitarianism. This balancing rationale is designed to encourage creation and distribution of

famously include a piece titled "Fountain", consisting of a men's urinal atop a pedestal, signed "R-Mutt 1917". *See,* Niels Schaumann, 'Fair Use and Appropriation Art' (2015) 6 Cybaris Intell Prop L Rev 112

[13] *Appropriation,* (n. 8)

[14] *Ibid*

[15] Richard H. Chused, 'The Legal Culture of Appropriation Art: The Future of Copying in the Remix Age,' (2014) 17 Tul. J. Tech. & Intell. Prop. 163

[16] Amy Adler, 'Why Art Does Not Need Copyright' (2018) 86 Geo Wash L Rev 313. ("While art has always relied on copying, the technique has become more prevalent in contemporary culture. Because of shifts in both art and technology, copying itself has now become a central subject of art – as well as basic tool of how people make it")

[17] Amy Adler, 'Fair Use and the Future of Art', (2016) 91 N Y U L Rev 559 *("We used to think of an artist as someone who sat in nature or in his garret, working alone to create something new from whole cloth. But now that we are bombarded by images, the most important artist may be the one who can shift through other people's art….")*

work for the public good. Copyright aims to determine the best possible equilibrium among creators' unique rights alongside use and distribution of work in benefiting general public.[18]

"Copyright protection" doesn't provide absolute rights. The idea-expression dichotomy is a key principle that restricts a work's copyrightability. Copyright protection is not extended to an idea is partially established in 17 USC Sec102(b).[19] The doctrine is grounded in the understanding that only an author's original expression may acquire protection. An author is not permitted to monopolize an idea but rather may be rewarded for creativity and effort that is required to produce an original expression.

Nevertheless, these laws and theories governing copyright clash with the foundations of appropriation in contemporary art. Fundamentally, copyright laws operate to grant the creator exclusive right to work while contemporary artist seek to utilizes preexisting images to create new works.[20] More simply, copyright law aims to protect against copiers, while contemporary artists do the copying. "The sine qua non of copyright is originality". [21] However, appropriation art directly undermines this prerequisite. To satisfy the originality requirement, the artist must show that the work "possesses at least some minimal degree of creativity". [22] Although the threshold to meet the originality bar is low, this creates an obvious issue for contemporary artists who incorporates others works into their own.

Additionally, appropriation artists use pre-existing pictures to make social commentary or critique. As per outcome, task which has been innovative in concept however not in expression is produced.[23] The expression may appear the same or similar as it includes images from a preexisting work. However, the artist's contribution is original in idea as they are presenting a new message, despite the resemblance in aesthetic appearance. Contemporary art runs counter to the very essence of the idea-expression dichotomy, suggestion instead that artistic expression is now subservient to the artistic idea. [24]

An illustration of *Andy Warhol's* art that uses advertising logos is the Campbell's Soup Can series as an example. To promote soup, Campbell's logo was created. *Warhol's* paintings do not serve the same function. Instead, the Soup Can series makes an artistic statement about consumerism by using *Campbell's* copyrighted work, which is varying from an objective of

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[18] 2 Peter S Menell Etal, 'Intellectual Property in the New Technological Age 526 (2020)
[19] TRIPS Agreement Art 9.2, 17 USC Sec 102 (b)
[20] Caroline L McEneaney, 'Transformative Use and Comment on original: Threats to appropriation in Contemporary Visual Art' (2013) 78 Brook L Rev 1521
[21] Feist Publications Inc. v. Rural Telephone Service Co., 499 US 340 (1991)
[22] *Id. ("Original as the term is used in copyright, means only that the work was independently created by the author…and that it possesses at least some minimal degree of creativity.")*
[23] Lori Petruzzelli, 'Copyright Problems in Post-Modern Art', (1995) 5 DePaul J Art Tech & Intell Prop L 115
[24] *Id*. at 115

soup advertising. *Warhol* work might not be original in expression, as the image seen is preexisting, the work finds originality in idea as he assigns new meaning to the images he is appropriating. *Andy Warhol's* work is one example of how contemporary art conflicts with well-established "principles of copyright law", including the idea-expression dichotomy.

DOCTRINE OF FAIR USE

For striking equilibrium among defending artists' rights and allowing others in utilizing older work as inspiration for new works, "the fair use" concept was established.[25] According to copyright law, appropriators can utilize "fair use as a defense" against anyone who allege copyright infringement.[26] This defense was developed to allow artist to appropriate elements of earlier works in creation of new and valid artistic creations while escaping from the liability of copyright infringement.[27] By encouraging new work development through appropriation, "the fair use" doctrine advances the goals of copyright law.[28]

"The fair use" has been developed by *Justice Joseph Story* in *Folsom* v *Marsh*.[29] *Folsom* involved the reproduction of the letters written by *George Washington* in a biography about *Washington* himself.[30] As Circuit Justice, *Justice Story* provided the basis for the defense, so conceptualizing the notion of "fair use". When assessing whether the task has been pirated, *Justice Story* advised considering "*the nature and object of the selection made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."*[31] *Justice Story's* language is discernible in the text of Copyright Act 1976, in which "doctrine of fair use" was codified.

"Fair use doctrine" was codified by Congress for bringing clarity to defense. "Sec.107 of Copyright Act" introduces a list of fair uses, including*: "Criticism, comment, news, reporting, teaching, scholarship or research."*[32] *The Act then moves on to list four non-exhaustive factors that need to be classified on defining if the use has been fair:*

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[25] Anthony R Enriquesz, 'The Destructive Impulse of Fair Use After Cariou v. Prince', (2013) 24 DePaul J Art Tech & Intell Prop L 1

[26] Roxana Badin, 'Comment, An Appropriated Place in Transformative Value: Appropriation Art's Exclusion from Campbell v. Acuff-Rose Music, Inc.,' (1995) 60 Brook L Rev 1653

[27] Robert A French, 'Note, Copyright: Rogers v. Koons: Artistic Appropriation and the Fair Use Defense', (2015) 46 Okla L Rev 175

[28] Brockenbrough A Lamb, 'Comment, Richard Prince, Author of The Catcher in the Rye: Transforming Fair Use Analysis', (2015) 49 U Rich L Rev 175

[29] Folsom, 9 F. Cas. 342 (C.C.D Mass. 1841) (No. 4901)

[30] *Id*. at 345

[31] *Id*. at 348

[32] 17USC Se 107

(1) The nature and intent of use, like if it has been for non-profit educational reasons or for commercial ones

(2) the nature of work protected by copyright;

(3) Significance alongside utilized component's quantity in regard of complete copyrighted work; and

(4) the impact of use over copyrighted work's value or prospective market.

Since the codification of doctrine in Copyright Act, the modern fair use landscape was continuously developed by judicial interpretation. In his landmark *1990 paper in the Harvard Law Review, Judge Pierre Leval* criticized the Act for lacking direction and suggested the conceptual foundation for the first criterion, the purpose and character factor.[33] Under this factor, the inquiry was shifted to determining *whether or not secondary use was "transformative".*[34] A usage that "adds value to the original" is considered transformative, in contrast to one which "*merely repackage/ republishes the original*."[35] Leval claims that "*if the quoted content has been utilized like raw material and transformed into novel knowledge, novel aesthetics, new insights, and new understanding, the secondary usage adds value to the original."*[36]

Leval's transformative use was first introduced and further refined in *Campbell* v. *Acuff-Rose Music Inc*. When evaluating first factor of "the fair use defense" in this instance, *SC* explicitly accepted the transformative inquiry.[37] The court inquired if new piece "*adds something new...modifying first with novel phrase, interpretation, or message."*[38] A determination of transformative use under first factor is frequently outcome determinant of the entire fair use framework. *Campbell* also demonstrated that the more transformative secondary use, the less significant the other fair use" factors are.[39] This ruling made the transformative test a key component of the contemporary fair use framework. But the recent fair use decision in "*Andy Warhol Foundation for Visual Arts Inc. v. Goldsmith"* by the SC might have confused the defense's use of transformative usage.[40]

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[33] Pierre N Leval, 'Commentary, Toward a Fair Use Standard', (1990) 103 Harv L Rev 1105
[34] *Ibid;* See also, Campbell (n.25)
[35] Leval (n.34)
[36] *Ibid*
[37] Campbell (n.25)
[38] *Ibid*
[39] *Ibid*
[40] Andy Warhol (n.2)

FAIR USE JURISPRUDENCE

ROGERS V. KOONS[41]

The earliest appropriation art case 2nd Circuit heard, *Rogers* v. *Koons*, held that artist *Jeff Koons's* sculpture of a photograph by *Art Rogers*, *"String of Puppies,"* was infringing because it replicated the unique way *Rogers* expressed a particular concept.[42] *Koons's* sculpture, a polychromed wooden three-dimensional rendering of *Rogers's* black and white image of a couple holding eight puppies, depicted the photo in colour and added cartoon-like features to the puppies.[43] *Koons* shifted the medium of original task, incorporated new colors and forms, and provided proof that his stated intention in creating this piece was to comment on modern society.[44] Despite *Koons's* states one lacking art education are inaccurate in their assessments of copying, this court concluded that the "ordinary observer test," which asks whether a layperson can identify infringement when comparing the similarities between two works, was a suitable criterion to decide appropriation art.[45] Regardless of stark contrasts between the original and secondary works, such alterations aren't enough to render *Koons's* art transformative.[46]

BLANCH V. KOONS [47]

Renowned appropriation artist "*Jeff Koons"* is well-known for using readymade products to comment over materialism and consumerism.[48] This copyright infringement action subject is *Koons's* series entitled *Easyfun-Etheral*, specifically one painting in series*, Niagara*.[49] This work features four pairs of women's legs from the calf down, appearing above various desserts.[50] One pair of legs was lifted from a photograph taken by the plaintiff, *Andrea Blanch*.[51] *Blanch*, a fashion magazine photographer, published her photograph entitled *Silk Sandals by Gucci* in the August 2000 issue of *Allure Magazine*.[52] In her photograph, a woman's feet appear crossed at the ankle resting on a man's leg in an airplane cabin.[53] On the woman's

[41] Rogers, 960 F.2d 301 (2d Cir. 1992)
[42] *Id*. at 308
[43] Jeff Koons, 'String of Puppies' (1988), http://www.jeffkoons.com/artwork/banality/string-puppies (last visited 14-01-2025)
[44] Rogers, (n. 42)
[45] *Id*. at 307-308
[46] *Id*. at 308
[47] Koons, 467 F.3d 244 (2d Cir.2006)
[48] Jeff Koons, 'Art Story', https://www.theartstory.org/artist/koons-jeff/ (last visited January 5, 2025)
[49] Koons (n.42)
[50] *Ibid*
[51] *Id* at 247
[52] *Id* at 247-48
[53] *Id* at 248

feet are a pair of *Gucci* sandals.[54] *Koon's* work was displayed at the *Deutsche Guggenheim in Berlin*, but *Blanch* did not see the work until it was exhibited at the *Guggenheim in New York* in 2002.[55]

Alleging that *Koons's* work violated her copyright in *Silk Sandals by Gucci*, Blanch filed a lawsuit for copyright infringement.[56] For *Koons'* move the DC granted summary judgment, that determined if task qualified as fair use.[57] In reaching its decision, court utilised the four factor test to determine infringement. When analyzing 1st factor, purpose and character of use, the court deferred to *Koons's* stated intent recorded in his testimony.[58] *Koons* explained in his affidavit that he *"transformed the meaning of the legs …into the overall message and meaning of his painting."*[59] The District court noted if work had been transformative according to *Koons's* testimony and stated rest "fair use factors" also favoured *Koons* or were neutral between the parties.[60]

On appeal, court of Appeal for Second Circuit similarly considered *Koons's* asserted purpose in using *Blanch's* photograph to determine first factor of fair use test. [61] Court of appeal's held that *Koons's* use has been transformative since he was *"using Blanch's image as a fodder for his commentary on the social and aesthetic consequence of mass media."*[62] The court deferred to *Koons's* own proposed description of his work to find that Niagara added new meaning to original photograph and was therefore fair use of *Blanch's* work.[63]

CARIOU V. PRINCE[64]

Key of evaluating judicial interpretation of "doctrine of fair use" has been 2013 decision involving appropriation artist *Richard Prince* and photographer *Patrick Cariou*. Using pictures from popular culture, *Richard Prince* transforming them into his own artwork.[65] Known as the

[54] *Id* at 247-248
[55] *Id* at 249
[56] *Ibid*
[57] Blanch v Koons, 396 F.Supp. 2d 476 (S.D.N.Y. 2005)
[58] *Id* at 480-81
[59] *Id* at 481
[60] *Id* at 480-482. The DC held that "the third factor was neutral as between the parties"
[61] Koons, 467 F. 3d at 252
[62] *Id* at 253 *("His stated objective is thus not to repackage Blanch's Silk Sandals but to employ it 'in the creation new information, new aesthetics, new insights and understandings")*
[63] *Id* at 253
[64] *Cariou* v *Prince* 714 F. 3d 694 (2d Cir. 2013)
[65] Richard Prince, 'Artnet', https://www.artnet.com/artists/richard-prince/biography (last visited January 5, 2025)

"*father of Appropriation Art"*,[66] *Prince's* works often re-contextualize familiar images to comment on complicity of consumers.[67]

Throughout the mid-1990s, *Patrick Cariou* took series of portrait and landscape photographs while spending time with *Rastafarians* in *Jamaica*.[68] A few year later, in 2000, *Cariou* published the photographs in book entitled *Yes Rasta*.[69] *Prince* acquired copy of *Yes Rasta* and created a collage out of thirty five photographs that he tore out of the book.[70] The collage, entitled *Canal Zone*, altered *Cariou's* photographs "significantly".[71] *Prince* purchased three additional copies of *Yes Rasta* and continued to create thirty works in the *Canal Zone Series.*[72] In some of *Prince's* pieces from the series. *Cariou's* photographs are readily identifiable with minimal alterations. While in others, *Cariou's* work has hardly been recognizable. [73] The portions of photographs used from *Yes Rasta* also fluctuate rooted over work.[74] Canal Zone was featured in a gallery exhibition at Gagosian Gallery,[75] a global gallery that showcases some of biggest names in art world.[76]

Cariou filed a copyright infringement lawsuit against *Prince* in 2008. Prince said that his creations were a transformation of *Cariou's* images, using fair use as justification.[77] The trial court heavily leaned on the requirement that *Prince's* new works comment on *Cariou's* original photographs.[78] To determine *Prince's* intended meaning or commentary, court looked to *Prince's* testimony. When Prince created art, he "did not intend of commenting over any original work aspect or the broader culture," according to his testimony, and he didn't "really have a message".[79] Relying greatly on Prince's testimony, court found that "transformative

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[66] *Ibid*
[67] *Ibid*
[68] *Cariou* (n. 59)
[69] *Ibid*
[70] *Ibid*
[71] *Id ("Prince altered those photographs significantly by among other things painting 'lozenges' over their subject facial features and use only portions of some of the images")*
[72] *Ibid*
[73] *Id* at 699-700 *("In specific works, such as James Brown Disco Ball, Prince attached headshots from Yes Rasta onto other appropriated pictures, all of which he positioned on a canvas he had created. Cariou's work is mostly concealed in these")*; Id at 700-701 *("In some artworks, including Graduation, Cariou's original creation is clearly discernible: Prince merely applied blue lozenges over the subject's eyes and lips and affixed an image of a guitar onto the subject's body")*
[74] *Id* at 699-700
[75] *Id* at 703
[76] Robin Pogrebin, 'Without Heirs, Larry Gagosian finally Plans for Succession N.Y. Times (Nov 16, 2022)', http://www.nytimes.com/2022/11/16/arts/design/larry-gagosian-gallery-art-succession.html (last visited on January 6, 2025)
[77] *Cariou* 714 F.3d at 704
[78] *Cariou* v *Prince*, 784 F. Supp 2d337 (S.D.N.Y. 2011) *("Prince's paintings are transformative only to the extent that they comment on the photos; to the extent they merely recast, transform or adopt the Photos, Prince's Painting are instead infringing derivative works")*
[79] *Ibid*

content of *Prince's* painting was minimal at best."[80] Trial court stated further that other three factors of the four-prong test also weighed against a finding a fair use, resulting in the court rejecting *Prince's* fair use defense and granting summary judgment to *Cariou*.[81]

The Second Circuit ruled on appeal that the trial court had erroneously demanded that a work's commentary on its original be considered transformative for it to be eligible for "the fair use" defense.[82] Instead, SC ruled that novel work "must alter original with novel meaning, expression, or message" for qualifying to "fair use defense".[83] Court while determining held that however 5 of Prince's works were transformative, Second Circuit found that 25 of pieces "manifest an entirely different aesthetic from *Cariou's* photographs."[84] The Court observed that *Cariou's* works depict carefully composed black and white photographs of *Rastafarians*, while *Prince's* collages disrupt the serenity through the inclusion of colour and distorted human features.[85] However, instead of relying on *Prince's* intent, as the district court did, the court of appeals de-emphasized the importance of the testimony and instead looked to the visual appearance of the work.[86] The court ruled that "what is important is not just what an artist might say about given body/piece of work, but how work in issue seems to reasonable observer."[87]

Court of appeals ultimately turned to a side-by-side work comparison for concluding that *Prince's* art gave *Cariou's* previous photograph new expression.[88] Court found that twenty-five of works constituted fair use, moreover the remaining five would be remanded so that district court could reassess using the correct standard.[89]

Court of appeals adjudicated its determination from the vantage point of reasonable observer and inserted an aesthetic determination into fair use defense.[90] This stands in contrast to the district court's approach, which considered the artist's stated purpose and intent in creation of work by examining the artist's testimony.[91] What is problematic about *Cariou* is the messy and

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[80] *Id* at 349-50
[81] *Id* at 353-55
[82] *Cariou* v *Prince*, 714 F.3d 694, 706 (2d Cir. 2013). *("The law imposes no requirement that a wok comment on original/its author for considering transformative and a secondary work may constitute a fair use even if it serves some other than those …identified in the preamble to the statute")*
[83] *Id*. (quoting Campbell v Acuff-Rose music Inc., 510 US 569(1994))
[84] *Ibid*
[85] *Id*. (Prince's presentation, composition, scale, colour palette alongside media have been fundamentally varying moreover novel in comparison to photographs like expressive nature of Prince's work.)
[86] *Id*. at 707 (Prince's Work can be transformational independently of any commentary on Cariou's oeuvre or culture, and irrespective of Prince's articulated aim to address these themes. Instead of limiting our investigation to Prince's interpretation of his artworks, we analyse how the artworks can be reasonably viewed to evaluate their transformational essence.)
[87] *Ibid*
[88] *Id*. at 707-708
[89] *Id*. at 710-711
[90] *Id*. at 707-708
[91] *Id*. at 706-707

ambiguous standards in district court and court of appeal applied to determine what works constituted fair use.[92] Not to mention that *Cariou* and *Blanch* illustrate the varying standards by which "the fair use" is litigated within the same circuit. "The US Court of Appeals" for Second Circuit in *Blanch* v *Koons* deferred almost entirely to the artist's proposed description of their works, while the very same court in *Cariou* v *Prince* created a new standards of the reasonable observer's aesthetic determinations.[93]

ANDY WARHOL FOUNDATION FOR VISUAL ARTS, INC., V. GOLDSMITH[94]

The most current interpretation of the fair use concept by SC comes from a disagreement between *Andy Warhol Foundation* and photographer *Lynn Goldsmith*. At forefront of emerging Pop art movement in America, *Warhol* mass-produced art that captured the supposed vapidity of consumer culture.[95] *Goldsmith*, although less well known photographed major rockstars such as *Bob Dylan* and *Mick Jagger* and had her work displayed in *Time* and *Rolling Stone Magazine*.[96] In 1981, *Goldsmith* photographed pop icon *Prince*, methodically styling him to capture his femininity.[97] One of Goldsmith's images of Prince was leased by Vanity Fair a few years later, in 1984, "for use as an artist reference."[98]

Goldsmith was unaware that *Warhol* had been hired by Vanity Fair to draw an artwork for a piece about Prince.[99] In addition to the commissioned artwork for Vanity Fair, *Warhol* produced fifteen pieces titled the *Prince Series* based on *Goldsmith's Prince* shot.[100]When *Warhol* died, *Andy Warho*l *Foundation* asserted copyright ownership in the series.[101]

Conde Nast, the parent company of Vanity Fair, licensed one of *Warhol's Prince* Series pieces to be featured on cover of commemorative issue of the magazine following *Prince's* death in 2016. [102] *Goldsmith* did not receive source credit or a remuneration.[103] Further, *Goldsmith* was only made aware of the *Price* Series when she saw the 2016 *Conde Nast* magazine cover. [104] The photographer believed her copyright was being violated, so she contacted the Foundation

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[92] Adler (n.15)
[93] See *Blanch* v *Koons* 467 F.3d 244, 257—58 (2d Cir. 2006); Cariou, 714 F.3d at 707-08
[94] Andy Warhol (n. 2)
[95] See Andy Warhol, ANDY WARHOL MUSEUM, http://www.warhol.org/andy-warhols-life (last visited Jan. 17, 2025)
[96] Andy Warhol (n. 2)
[97] *Andy Warhol Foundation for Visual Art, Inc.* v. *Goldsmith* , 382 F.Supp.3d 312, 318 (S.D.N.Y. 2019)
[98] *Ibid*
[99] *Ibid*
[100] *Id*. at 319
[101] *Id*. at 320
[102] *Ibid*
[103] *Ibid*
[104] *Ibid*

to let them know. *Goldsmith* filed a counter suit alleging infringement in response to the *Foundation's* request for declaratory judgment of non-infringement. [105]

Prince Series works have been determined to be protected under fair use by "District Court for Southern District of New York". Because *Warhol's Prince Series* pieces "have distinct character, give *Goldsmith's* photograph new expression, as well as employ new aesthetics with creative as well as communicative results different from *Goldsmith's*,"the court determined that they were transformative.[106] Court considered *Goldsmith's* intent to illustrate *Prince* as "vulnerable human being" in her photograph. However, because it "can plausibly be seen as having turned Prince into a legendary figure," *Warhol's Prince Series* ultimately produced a completely distinct aesthetic.[107]

Goldsmith benefited from all four fair use requirements, according to the Court of Appeals for Second Circuit, which reversed as well as remanded the decision. When evaluating *Prince Series'* transformative potential, the court noted that "any subsequent work that adds new aesthetic or new expression to its original material is necessarily transformative."[108] Court observed that such a liberal construction of transformative works would undoubtedly overshadow derivative rights held by copyright owners.[109] Second Circuit concluded that *Warhol's Prince series* wasn't transformative and turned instead to the "'purpose and character' of the primary and secondary works."[110] To determine whether secondary work "stands apart from the 'raw material' used to create it, such that its utilization of its original material is 'fundamentally different and new' artistic purpose and character," the court asked this inquiry.[111] Second Circuit held it didn't. [112]

The US SC granted *certiorari* and affirmed the holding of Second Circuit. The SC mostly depended on fair use analysis's first component. The SC deviated from fair use jurisprudence by ruling that this investigation "doesn't suffice under first factor," when earlier courts have only considered the secondary work's additional meaning or message.[113] The SC mostly depended on the fair use analysis's first component. The SC deviated from fair use jurisprudence by ruling that this investigation "doesn't suffice under the first factor," when

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[105] *Id*. at 322
[106] *Id*. at 326
[107] *Ibid*
[108] *Id*. at 38-39
[109] *Id*. at 40
[110] *Id*. (quoting Google LLC v. Oracle Am. Inc., 141 S. Ct. 1183, 1204 (2021)).
[111] *Id*. at 42 (quoting Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013))
[112] *Ibid*
[113] Andy Warhol (n. 2)

earlier courts have only considered the secondary work's additional meaning or message.[114] Court determined that *Goldsmith's* shot served a similar purpose as the *Foundation's* Prince image, which was to license image to *Conde Nast* for use on cover of commemorative magazine edition.[115] As a result, *Goldsmith's* work wasn't considered to be fair use since the Foundation's image took precedence over it rather than serving a specific purpose.

Second Circuit and the SC both denounced the practice of judges playing role of art critics in the courtroom - a stark departure from opinion of court in *Cariou* v *Prince*.[116] Instead, the SC substituted "*an objective inquiry into …what user does with original work*" for any subjective assessment of transformative usage.[117] Court departed from the transformative inquiry based on *Campbell*[118] and based its judgment on fact that *Goldsmith and Warhol* had granted magazine license for their works. The dissent claims that "*all creativity in world couldn't save him due to artist had such commercial purpose*."[119]

NATURE AND SCOPE OF TEST OF TRANSFORMATIVE

A crucial component of fair use investigation is a work's transformative quality. If a artwork contributes to original "new meaning, message, or expression," it is transformative.[120] But as evidenced by fair use jurisprudence, the process of figuring out new meaning has been applied quite haphazardly and unevenly.

First, as demonstrated in *Cariou* v *Prince*, court of appeals turned to the manifested aesthetic of works to determine that twenty five of Prince's collages were transformative.[121]The court employed a side-by-side comparison from the eye of a reasonable observer.[122] Additionally the District Court in AWF, turned to the reasonably perceived aesthetic alteration of *Warhol's* work, like use of "loud, unnatural colours, in stark contrast with *Goldsmith's* black-and-white original photograph."[123] Although aesthetic determinations seems like the logical gauge of assessing new meaning in artworks, they run contrary to the core of contemporary art.

As previously stated, a key tenet of copyright law is the idea-expression distinction, which allows for the protection of an original expression as opposed to an original notion. But the

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[114] *Id*. at 525
[115] *Id*. at 526
[116] *Id*. at 544 (agreeing with the court of appeals, the Supreme Court stated that "a court should not attempt to evaluate the artistic significance of a particular work")
[117] *Id*. at 545
[118] Campbell (n.25)
[119] Andy Warhol (n. 2). at 560 (Kagan J., dissenting)
[120] Campbell (n.25)
[121] Cariou (n. 83). at 706
[122] *Id*., at 706-707
[123] Andy Warhol (n. 97)

important thing about contemporary art is that artist aims to communicate a concept rather than just a visual representation of the piece.[124]Appropriation artists inherently struggle with the idea-expression dichotomy because their works aren't original in expression as they often use appropriated images.[125] One of the main sources of conflict between contemporary artists and the idea-expression dichotomy is the belief that aesthetics is not always the primary focus of modern art.[126] Contemporary artists are no longer focused on the physical expression that their work takes on, but rather on the idea, which is fundamentally conceptual and less visual.[127] Therefore, if courts use aesthetic judgments to find whether work is transformative, it calls into question that validity of the decision as it judges the work on criteria that are no longer consistent with contemporary art.

The movement away from the visual and towards the conceptual has been demonstrated by various artists and artistic movements. The most notable is *Dada*. *Dada* is a movement that emerged against the backdrop of World War I.[128] These artists used their works to criticize society and challenge the conventional belief that art must be visually beautiful. [129] For *Dadaists*, "aesthetic of their work was considered secondary to the ideas it conveyed."[130] The movement was not about producing aesthetically pleasing artwork, but questioning the norms of society, "the role of the artist, and the purpose of art."[131] The corner stone of *Dada* art is use of ready made goods. Use of everyday objects forced society to face the question of what truly constituted art.[132]

A central player in the contemporary art space who make use of ready made objects to create works is *Marcel Duchamp*. In 1917 *Duchamp* created a sculpture titled *Fountain*.[133] Get rid of any mental pictures of a tranquil garden or courtyard fountain since this sculpture was actually

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[124] Willajeanne F McLean, ALl's Not Fair in Art and War: A Look at the Fair Use Defense After *Rogers* v *Koons*, 59 Brook L. Rev. 373, 383-84 (1993)

[125] Roxana Badin, Comment, An Appropriated Place in Transformative Value: Appropriation Art's Exclusion from Campbell v Acuff Rose Music, Inc., 60 Brook L. Rev. 1653, 1674 (1995). *("Since the allegorical process entails appropriating the entirety of a copyrighted image's expression, copyright law presently limits the intellectual marketplace by stifling significant ideas that contemporary art seeks to communicate")*

[126] Arjun Gupta, "I'll Be Your Mirror"- Contemporary Art and the Role of STyle in Copyright Infringement Analysis, 31 Dayton L. Rev. 45, 55-56 (2015). *("In other words, contemporary art represents a mode of production that is beyond style. Stated differently, it is art that function beyond representation and whose meaning is no longer derived from what its style or appearance may represent historically")*

[127] *Ibid*

[128] *Supra* n. 8

[129] *Ibid*

[130] Dada, Art Story, https://www.theartstory.org/movement/dada (Last Visited Jan. 20, 2025)

[131] *Ibid*

[132] *Id*. ("Dada artists are known for their use of readymades-everyday objects that could be bought and presentedv as art with little manipulations by the artist. The use of the readymade forced questions about artistic creativity and the very definition of art and its purpose in society.").

[133] *Supra* n.8

an upside-down porcelain urinal.[134] This blatant rejection of traditional artistic principles illustrates the movement away from aesthetics and towards the conceptual. *Duchamp* shows that anything can be art, not just beautifully crafted paintings by highly skilled artists.[135] In addition to the porcelain urinal, Duchamp unveiled Bicycle Wheel, another work utilizing ready made, consisting -of an inverted bicycle fork installed on the wooden stool.[136] This sculpture is another example of *Duchamp's* ability to turn mass-produced objects into artistic creations.[137] The shift into postmodernism and development of contemporary art styles renounced aesthetic principles in favour of the conceptual and non traditional. Aesthetic judgments by the courts in fair use cases show application of out-of -touch and irrelevant methods of determining transformative nature of work.

Recently, artist *Maurezio Cattelan* garnered world wide attention with *Comedian*, *Cattelan's* first sculpture created for an art fair in over fifteen years. The sculpture was a store-bought banana duct taped to the convention center wall. *Mr.Cattelan's* banana was offered in a limited edition of three with one artist's proof at a cost of $120,000 a piece.[138] The sale inevitably reignited age- old discussion about what constitutes art and less importance is given to aesthetic expression in the contemporary art. The sale also inspired continued commentary on the growing status of art as a Veblen good. [139]

The SC and Second Circuit in AWF denounced use of aesthetic considerations in fair use inquiries. In accordance to Foundation, *Warhol* turned *Goldsmith's* portrayal of *Prince* as "vulnerable, uncomfortable person" into a famous, larger-than-life figure.[140] "A court shouldn't attempt to evaluate artistic importance of particular work," the court said, rejecting this claim.[141] The Court leaned into the belief that judges are ill-suited to play the function of art critics.

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[134] *Ibid*

[135] Isabella Meyer, Postmodern Art-An Indepth Exploration of the Postmodernism Period. Art in Context (Jan. 12 2024) https://artincontext.org/postmodern-art/ (Duchamp's artwork ridiculed the entire groundwork on which the establishment of art has been constructed, which gave way for artists to begin experimenting with the concept of what informed art"). To further emphasis the idea that art is built on copying, took a urinal in 1991 and recast it in bronze, calling the work Fountain (After Marcel Duchamp). Emily Meyers, Art on Ice: The Chilling Effect of Copyright on Artistic Expression, 30 Colum. J. L. & Arts 219, 233 (2007)

[136] Marcel Duchamp, Bicycle Wheel, MOMA. http://www.moma.org/learn/moma_learning/marcel-duchamp-bicycle-wheel-new-york-1951-third-version-after-lost-original-of-1913/ (last visited on Jan 20, 2025)

[137] *Ibid*

[138] Elise Taylor, The $120,000 Banana, Explained, Vogue (Dec. 10, 2019), http://www.vogue.com/article/the-120000-art-basel-banana-explained-maurizio-cattelan (last visited on Jan 20, 2025)

[139] Paris Sanders, Art is Big Business: Fine Art, Fair Use and Factor Four after Goldsmith, 29 UCLA Ent. L. Rev. 59 (2021-2022)

[140] Andy Warhol (n.2)

[141] *Id*. at 544 (Gorsuch J., concurring) ("*Nothing in the law requires the judges to try their hand at art criticism and assess the aesthetic character of the resulting work*".)

Even while aesthetic judgments are the right method to reach a conclusion of transformative usage, the courts do not provide any consistent or rational guidance. The court in *Cariou* v *Prince* stated that *Prince's* new works "manifest an entirely different aesthetic from *Cariou's* photographs."[142] How the court came to this decision is unclear. After noting the size differences between the new and the old work, court found that *Prince's* "composition, presentation, scale, colour palette and media are fundamentally different and new" in comparison to *Cariou's* photograph.[143] This assessment of transformative use was based on perceived artistic qualities of work by a judge trained in the field of law. "*Even while aesthetic judgments are the right method to reach a conclusion of transformative usage, the courts do not provide any consistent or rational guidance,"* Justice Holmes explained.[144] The court left its decision to a side-by-side comparison of the work with no uniform explanation of how Prince's art employs new character and expression.[145]

What also lies in the ambiguous wake of the *Cariou* decision is the "reasonable observer" standard. [146] According to court, "How the work in question appears to a reasonable observer is crucial" when determining transformative use through aesthetic judgments.[147] A variation of this approach was applied by the DC (District court) in the AWF case, which inquired as to how *Prince* Series "may reasonably be perceived to evaluate their transformative nature."[148] But who is the unidentified reasonable observer? Someone with vast knowledge of art space like a critic? Or someone who was plucked at random to make artistic judgments? Would a reasonable viewer also be able to recognize transformative aspect of the piece given the postmodern art movement's transition from visual to conceptual? [149]

It appears that the rational observer is not well-suited to evaluate the transformative nature of art that exists to challenge conventional artistic conceptions when viewed from a wider perspective. Additionally, in *Cariou* v *Prince*, the court of appeals valued the appearance of work to reasonable observer above the artist's stated intent about the work.[150] *Prince* claimed in his deposition that he wasn't "trying to create anything with new meaning or a new message," but the court considered this testimony to be inconclusive.[151] In *Cariou*, the court

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[142] Cariou (n. 83)
[143] *Ibid*
[144] Bleistein v Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)
[145] Cariou (n. 83) at 707-708
[146] *Id*. at 707
[147] *Ibid*
[148] Andy Warhol (n.99). (quoting Cariou 714 F.3d at 707)
[149] Adler (n. 16)
[150] Cariou (n. 83) at 707
[151] *Ibid*

replaced artistic intent with the reasonable observer standard to assess transformative use. [152] Similarly, SC in AWF attacked the consideration of artist intent when finding whether secondary work is transformative. The court stated that neither the aesthetic evaluation nor "*the subjective intent of user… determines purpose of use*."[153]

AWF AND CONTEMPORARY ART

Court in AWF focused on the intent and application of *Warhol's* Prince Series rather than the transformative quality of secondary piece. In accordance to court, a secondary work that serves the same function as the original is not considered fair use.[154] But when it comes to art, it is particularly problematic to focus just on examining the use and intent of a purportedly infringing piece. In a capitalistic society, artists often create to realize monetary gain and market advantages.[155] The resulting commodification of art has inevitably led to the creation of artworks for identical purposes or uses. Under the new AWF regime, secondary artworks will struggle to obtain finding of fair use. Evolution of art is certain to be stifled as a consequence.

Because art is a commodity within a capitalistic system and commodities exists to be exchanged art will continuously be created for the perceived purpose of realizing its exchange value. Therefore, if both the original and secondary work share the same purpose-as they most likely will in the art world-secondary works will fail to pass the muster of a fair use test focused on use and purpose.

Equally problematic is SC conflation of the 1st and 4th fair use factors. The 4th fair use factor assesses the "effect of use upon potential market" of copyrighted work.[156] by finding under factor one that *Warhol's* Prince Series shared the same purpose as *Goldsmith's* photograph and was therefore "more likely to provide 'the public with a substantial substitute,'"the court folded the 4th factor into the first.[157] In doing so, the economic impact of secondary work on the market of copyright holder dominates both the 1st and 4th variables. As a result, the original creators are inherently favoured in fair use analysis. The commercialization of the 1st factor

[152] *Ibid. ("what is critical is how the work in question appears to the reasonable observer not simply what an artist might say about a particular piece or body of work.")*
[153] Andy Warhol (n.3)
[154] Id. at 531-32
[155] Amy M. Adler, Against Moral Rights, 97 Calif. L. Rev. 263, 298 (2009) *("Artworks have become trophies for newly minted billionaries. Several of the most highly acclaimed contemporary artists make work that simultaneously critiques and caters to this new market reality.")*
[156] 17 USC Sec107 (4)
[157] Andy Warhol (n.3) (Quoting Authors Guild v Google, Inc., 804 F.3d202, 207 (2d Cir. 2015))

corrupts any balance struck between fair use factors and asks whether secondary artwork is merely a fungible product.

Moreover, the majority injects anti-elitism sentiments into the decision which further harm the future of artistic progress. The Court tells the story of a lesser-known photographer defending herself against an artistic powerhouse whose well known style is imposed on her photograph.[158] But to protect the little guy, the Court ironically harms smaller artist down the line. The Court in AWF pushes this notion that secondary artists should just obtain a license to use the original work.[159] However, this misapprehends the practical realities of licensing art work. The Copyright holder can charge an exorbitant amount for a license which may be unattainable to artist who do not have *Andy Warhol* level status. The creative flow that comes from copying will suddenly be halted as these artists must deal with a future of negotiating licensing that they might not be able to afford.

In the AWF case, the SC further jumbled the fair use analysis and adopted a faulty stance with reference to modern art. Court find that this question isn't "dispositive of the first factor" without more information, rather than focusing on whether secondary work was changed with new meaning, expression, message as the only measures of transformative use.[160] Instead, Court looked directly to specific purpose or character of the allegedly infringing use. The Court made it clear that assessing the commercial of the secondary work is key, notwithstanding how transformative the work is. This issue is especially prudent in contemporary art, where copying has taken on greater urgency.

COPYRIGHT HOLDERS RIGHT TO DERIVATIVE WORKS

Copyright owner is granted the sole authority "to create derivative works based on material protected under the Copyright Act."[161] Derivative work is based on the works that already exist.[162] Therefore, "any work that incorporates a portion of copyrighted work in some form" is the statutory definition of "derivative work."[163] Protecting derivative works serves several purposes, such as encouraging copyright holders to produce new works and assisting them in receiving the full financial return on investments made in their creations.[164]

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[158] *Id.*at 543-544 *(the Second Circuit and the Supreme Court acknowledge, the secondary work must, "comprise something more than the imposition of another artist's style on the primary work.")*
[159] *Id*. at 534-35
[160] *Id*. at 526
[161] 17 U.S.C. Sec 106 (2)
[162] *Supra* n. 126, at 564
[163] Naomi Abe Voegtli, *Rethinking Derivative Rights,* 63 Brook L. Rev. 1213, 1218 (1997).
[164] *Supra* n. 127, at 53

The intention of appropriation artists to use previously created works as well as incorporate them in new works of art is at odds with rights of copyright holders. Right to use portions of work to produce new work appears to be granted by statutory meaning of derivative rights, which is basically what appropriation artists want to accomplish. Right to derivative works discourages appropriation artists because of possibility that artists will be liable for copyright infringement.[165] The continued expansion of derivative rights through out copyright history has contributed to the suppression of contemporary artists.[166] Derivative rights monopolize the space where appropriation artists thrive. Fair use doctrine was created to quell this issue, but as demonstrated, courts have continued to be inconsistent in their application and interpretation of the statutory factors.

Copyright holders' derivative rights are yet another hurdle that appropriation artist face when under scrutiny for their work. When copyright holders assert that their works are transformative through derivative rights, artists using the fair use doctrine battle to demonstrate that their creations are transformative.[167] This tension hinders artistic expression in addition to creating ambiguity, which leads to more lawsuits.[168]Artist in fear of costly litigation fees will cease to create appropriation art, ultimately changing the trajectory of the contemporary art landscape.

APPROPRIATION IN ART AND INDIAN COPYRIGHT ACT

India and the US have differing laws on the fair utilization of copyrighted material. A comprehensive list of actions that do not constitute copyright infringement is provided in Section 52 of Indian Copyright Act, 1957. This is unlike Section 107 of the US Copyright Act, 1976 that provides only an illustrative list of purposes, the use for which could be considered fair use and enumerates four factors that are to be supposed for determining whether an act amounts to fair use or not. Thus, under the Indian law, an appropriation artwork would not amount to copyright infringement only if its covered by any of acts exempted under section 52. In case of *Civic Chandran* v. A*mmini Amma*,[169] the Kerala HC held that defendant's counter-drama (that substantially reproduced the plaintiff's drama that it has been based upon) fell within the purview of 'criticism' under Section 52 (1)(a) as its main purpose was to criticize the drama and thus didn't constitute copyright infringement. However, appropriation artworks

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[165] Supra n. 164, at 1244-45 *("Consequently, the cost of derivative rights measured in terms of suppression of the production of new works based on appropriation has increased significantly")*
[166] *Id*. at 1237
[167] Jacqueline D. Lipton & John Tehranian, *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation,* 109 Nw. L. Rev. 383, 387 (2015)
[168] *Id*. at 388
[169] *Civic Chandran* v. *Ammini Amma*, 1996 PTR 142 (ker)

which reproduce the underlying copyrighted works almost in entirety, merely for making new artworks for commercial purposes, are unlikely to fall within ambit of any such exempted acts. Notwithstanding the fact that the appropriated artworks are meant to comment on a societal practice, they will not be protected by Section 52 (1)(a), which exempts fair dealing with work for purpose of criticism or review of that work or of any other work.

CONCLUSION

Contemporary art survives with the practice of copying and with the advent of technology and mass media consumption has only made copying easier. Appropriation artists develops the work based on the preexisting work and if the work is a copyrighted it amounts to infringement. The ubiquity of copyright is originality of expression but in the appropriation art it is originality of idea. The artist use the copyright work without any alteration or with the slight modification but it give a new message or a meaning.

However, courts have struggled to adapt to the evolution of appropriation art as a fair use. Application of fair use doctrine has done little to provide relief. Part of reason for this inconsistency is the courts lack of understanding of the essence of contemporary art. Narrowing the derivative rights of copyright holders and rebalancing the use of fair use elements can help to bridge the gap between copyright law and appropriation art.

One suggested remedy to issue would be to rebalance the application of the fair use defence. The transformative use inquiry would not control the analysis and each factor would be considered equally by the court. Reformulating the doctrine of fair use is necessary to evolve with the changing trends in contemporary art and to provide protection to appropriation artists. The remaining three factors of fair use inquiry are vital to fair use assessment. A rebalanced approach will prevent the transformative use assessment from swallowing the defense. By allowing the court to proceed under the impression that more transformative the use the less important other factors are, the court is ignoring potential considerations that may be the base to the overall inquiry.

Limit the scope of copyright holder's derivative right and thereby prevent copyright owner from alleging infringement of any work that they would have potentially created or developed. Having a claim to both market for copyrighted work and derivative market gives copyright holders wide latitude to dominate the space. Court in *Campbell* v *Acuff-Ross Music, Inc.,* stated that original creator would develop and license to others. This gives original artists the opportunity to claim that their derivative market is violated because the appropriation artist's work is something they would have produced. To stop copyright holders from claiming

infringement of any work they could have designed or produced, scope of derivative rights should be suitably limited.

Protecting the rights of appropriation artists is fundamental to the future landscape of postmodern art. Copying often lies at the heart of artistic progress and is key to creation of new works. Creating a balance among scope of copyright holders right and the rights of appropriation artists is essential to protect the process of creation.

FROM DATA TO DOMINION: THE CASE FOR RECOGNIZING NON-PERSONAL DATA AS A SOVEREIGN ASSET UNDER INDIA'S IP AND DATA GOVERNANCE FRAMEWORK

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ABSTRACT

In the era of digitization, data has become a pillar of economic growth, innovation, and strategic governance. Whereas individual data protection has recently been attracting legislative interest in India, non-personal data (NPD)—anonymized, aggregated, or de-identified information—has so far largely gone unregulated. This paper argues that non-personal data is a precious sovereign asset that needs immediate recognition and protection under a sui generis legal paradigm. Basing its argument on the shortcomings of current intellectual property laws in capturing the complexity of NPD and its economic value, the paper calls for an Indian data governance architecture paradigm shift. This research work is crucial for the conventional IP regime, which emphasises on originality and authorship, unable to capture the collective and public interest inherent in community-created datasets. It also quests into the policy limitations in the existing Indian regulatory framework, such as the narrow reach of the Digital Personal Data Protection Act, 2023, and the non-binding nature of the MeitY Committee's Non-Personal Data Governance Framework. The research paper suggests a formulated regulatory structure that makes non-personal data a national public resource which might be turned into ecological data. By way of comparative examination of best practices in the world, especially the European Union and China, the paper makes reference to the strategic implications of data sovereignty in a geopolitically charged digital economy. It suggests ways by way of creation of national data agencies, public models of licensing, and data governmental organizations to guarantee equal access to all, ethical use, and mutual economic sharing of benefits. By claiming India's sovereign right over non-personal data, this article makes a timely,

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well-supported case for reconfiguring the nexus of technology, intellectual property, and state responsibility—ultimately working to enable India's digital economy without compromising constitutional ideals or developmental justice.

KEYWORDS: Non-Personal Data (NPD) Data Sovereignty, Intellectual Property Rights (IPR), Data Governance, Digital Economy, Public Data Trusts.

INTRODUCTION

FRAMING THE ISSUE: DATA AS THE NEW OIL[170]

In the digital economy of the 21st century, data has been compared to oil—not as a figurative expression for value but as an acknowledgment of its function in fueling innovation, industry, and global geopolitical influence.[171] Yet, data is unlike oil because it is non-rivalrous[172], infinitely copyable, and commonly produced collaboratively and not extracted. The conversation about data has been largely about personal data[173]—data that attributes characteristics to people, contributing to a wave of privacy laws globally. But another equally, if not more, necessary category has been under-theorized and under-regulated: non-personal data (NPD).[174]

This article disrupts the dominant techno-legal conventional wisdom that addresses non-personal data as an afterthought of policy, instead contending that NPD must be thought of as a sovereign national asset. As artificial intelligence (AI), Internet of Things (IoT), and big data analytics are infused into governance, commerce, and even culture, control over, access to, and fair distribution of NPD will frame not only economic competitiveness but also digital justice.[175]

SIGNIFICANCE OF NPD IN THE INDIAN CONTEXT

India[176] is a distinctive digital landscape—hosting the largest biometric identity initiative (Aadhaar[177]), a fast digitizing population, and a nascent startup economy. Huge data volumes

[170] The analogy of "data as the new oil" owes its origin to Clive Humby's remark in 2006, but its true potency lies in the fact that, unlike hydrocarbons, data's value increases through sharing rather than consumption transforming it into a renewable public good

[171] UNCTAD, *Digital Economy Report 2021* (United Nations 2021) 15

[172] Non-rivalrous goods, such as NPD, challenge the traditional economic assumption that scarcity drives value; instead, network effects and algorithmic economies of scale generate the true competitive advantage

[173] European Parliament and Council, *General Data Protection Regulation* (EU) 2016/679, recital 2

[174] IDC, *Data Age 2025: The Digitization of the World from Edge to Core* (IDC White Paper, Sept 2018) 5

[175] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books 2019) 23

[176] IAMAI, *India Internet 2024* (IAMAI & Kantar Research 2024) 27

[177] Aadhaar Act 2016, s 2(e)

are being created via public infrastructure (e.g., UPI[178], DigiLocker), private platforms (e.g., e-commerce, telecom), and community networks.[179] A lot of this is anonymized or aggregated, classifying under the category of NPD.[180] The 2020 MeitY[181] Committee report on NPD[182] governance recognized the economic value of such data sets but did not go so far as to lay down binding legal principles. Lacking a definite legal regime, foreign tech monopolies are still extracting, analyzing, and making money from Indian data with little obligation to give back to the Indian economy or society. This is not just a commercial problem—it is a constitutional issue, raising issues of equity, sovereignty, and state responsibility.[183]

SCOPE, RESEARCH QUESTIONS AND METHODOLOGY

This paper answers the normative and pragmatic question: Should non-personal data be legally defined and governed as a sovereign resource in India? It also asks:

1. What are the limitations of current intellectual property regimes in resolving NPD?
2. How did other jurisdictions address the governance of non-personal data?
3. What legal and policy template can India borrow to defend and leverage NPD for public benefit?

On the basis of doctrinal and comparative methodology[184], the paper examines national legislative documents such as the Digital Personal Data Protection Act, 2023[185], policy documents particularly the Kris Gopalakrishnan Committee Report), and international models (EU, China). It draws on interdisciplinary perspectives of technology law, IP theory, public policy, and constitutional law. It concludes in favor of a sui generis[186] legal regime and institutions of data stewardship focusing on equitable access, innovation, and national development.[187]

WHAT IS NON-PERSONAL DATA

DEFINITIONS AND CLASSIFICATIONS

[178] National Payments Corporation of India, *UPI Annual Report* (2023) 3
[179] MeitY (n 4) 9
[180] Department for Promotion of Industry & Internal Trade, *Startup India: 5 Year Performance Review* (DPIIT 2022) 8
[181] The 2020 MeitY report's failure to achieve legislative traction can be attributed to competing bureaucratic mandates and a lack of clear lead ministry ownership, diluting its policy impact
[182] MeitY, *Committee of Experts on Non-Personal Data Governance: Final Report* (Ministry of Electronics & Information Technology, Govt of India, 10 Nov 2020) 4
[183] Kris Gopalakrishnan (C'ttee Chair), *ibid*
[184] Mortimer Sellers, *The Rule of Law in Comparative Perspective* (University of Georgia Press 2006) 2
[185] Digital Personal Data Protection Act 2023, s 3
[186] Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999) 15
[187] Min Liang, "Data Governance Models" (2022) 34 J Intl Econ Law 221

Non-personal data is any data that is not associated with an identifiable person. As per the MeitY Committee Report (2020)[188], NPD encompasses:

1. Anonymized data: Data that has been removed of personal identifiers using irreversible procedures.[189]
2. Aggregate data: Aggregated sets of data on groups instead of individuals.
3. Industrial or transactional data: Computer-generated, sensor-generated, or enterprise-generated data.

This type of classification can also be applied to community data, which can be defined as data created by a group of individuals; e.g., farmers in an area who employ a shared agri-tech platform; or data produced as a result of public infrastructure such as traffic cameras or smart grids.[190]

ECONOMIC AND STRATEGIC SIGNIFICANCE[191]

NPD is not residual—it is the material for algorithmic training, predictive modeling, and strategic decision-making[192]. Businesses create machine learning models with big, anonymized datasets. Governments leverage sensor-generated data to manage disasters[193], forecast public health[194], and plan cities[195]. NPD economic value does not reside in scarcity but in accumulation and use—the more data one possesses, the smarter and more competitive they are.[196]

From a strategic perspective, nations that own and leverage NPD will be at the forefront of AI[197] dominance[198], cybersecurity, and digital sovereignty.[199] Here, leveraging NPD as a public resource is not just logical but indispensable. Not doing so may result in data colonialism[200],

[188] Ibid 8
[189] The conflation of "anonymized" with "irreversible" reification underestimates re-identification risks; empirical studies have demonstrated re-identification rates of up to 39% in supposedly anonymized datasets
[190] Smart Cities Mission, Govt of India, *Annual Report 2023* 52
[191] India's digital ecosystem contributed approximately USD 200 billion to GDP in 2023, with NPD-driven services (AI, analytics) accounting for nearly 15% of that sum—an indicator of untapped fiscal potential
[192] Martin Hilbert, "Big Data for Development" (2013) 61 Science 28
[193] NDMA, *Disaster Management Framework* (2018) 45
[194] National Centre for Disease Control, *Epidemic Forecasting* (2021) 9
[195] *Ibid* 17
[196]McKinsey Global Institute, *The Value of Data* (2021) 4
[197] UNESCO's 2021 Recommendation on the Ethics of Artificial Intelligence compels member states to adopt human-centered data policies, situating NPD governance within the broader ethical landscape of AI
[198] Google AI Blog, "Training ML at Scale" (2022) para 2
[199] PwC, *The AI Race: Who Leads?* (2022) 12
[200] Lina Khan, "Data Colonialism" (2020) 47 Columbia Law Rev 178

with Indian society ending up as passive data sources for multinational corporations without receiving commensurate value or safeguards.[201]

DIFFERENCE FROM PERSONAL DATA

While personal data is defined and governed by its connection to identifiable persons (engaging privacy rights and consent regimes)[202] NPD does not have this. But the distinction between personal and non-personal data is becoming more permeable; machine learning processes can re-identify datasets that have been anonymized, in certain cases. Yet, from a governance point of view, the two types of data demand separate regimes: based on individual rights (privacy), and the other one based on public interest, fairness, and sovereign power.[203]

THE IP LAW DISCONNECT

WHY CURRENT IP REGIMES DO NOT APPLY

Traditional intellectual property (IP) regimes—copyright, patent[204], and trade secret law—did not evolve to manage the specificity and nature of data, particularly non-personal data (NPD). Such regimes rely on requirements such as originality, novelty, inventiveness, and confidentiality, which NPD frequently fails to satisfy.[205]

Copyright law only defends original ideas, not raw facts or datasets in themselves.[206] Although a database is eligible for copyright protection as a compilation when it entails adequate creativity in selection or arrangement, the protection only extends to the data underlying it—particularly factual, anonymized, or sensor-produced NPD; not.[207]

Patent law is meant for inventions having technical uses. NPD, as a byproduct of computer interactions or automatic operations, does not possess the inventiveness or industrial practicability needed for patent protection.[208] Trade secret law is based on secrecy and reasonable efforts to keep secrets. NPD, particularly when drawn from public infrastructure or anonymized user interactions, tends not to be secret and is shared extensively across ecosystems. Commodification of NPD without correlating legal protection or regulation has

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[201] MoHUA, *Urban Planning Data* (2022) 19
[202] GDPR Art 4(1)
[203] Rahul Tongia, "Digital Sovereignty in India" (2021) 5 Observer Research Foundation 11
[204] Patent systems presuppose an "inventor's moment," whereas data ecosystems operate on continuous co-creation—a mismatch that underscores the necessity of a sui generis data regime
[205] Trade secret protection collapses under the weight of open-source culture and mandatory disclosure norms, rendering it ineffective for large-scale, shared datasets
[206] Feist Publications v Rural Telephone Service 499 US 340 (1991)
[207] William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell 2013) 210
[208] Cornish and Llewelyn (n 49) 212

allowed private companies to establish monopolies over publicly created data. It is not merely a lacuna in law; it is an IP system failure to respond to data economies.

THE NEED FOR A SUI GENERIS FRAMEWORK

In light of the insufficiency of current IP regimes, a sui generis legal system for NPD is necessary. This would acknowledge:

1. The public interest in data produced by citizens' interactions and public infrastructure.
2. The requirement for access-oriented rights instead of exclusion-oriented monopolies.
3. Structures for fair benefit-sharing, especially where data are produced by marginalized or vulnerable groups.

This system has to find a balance between openness and innovation and protection from predatory exploitation and monopolization. It has to incorporate practices of data ethics, participatory governance, and public interest licensing.[209]

SHORTCOMINGS OF TRIPS AND WIPO FRAMEWORKS

Internationally, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Organization (WIPO)[210] fail to address NPD governance effectively.[211] TRIPS[212] pays particular attention to conventional IP rights, which leaves data and digital assets to a significant extent beyond its purview. In addition, internationally, there is no convergence on whether or how data, particularly anonymized, aggregated, or machine-generated data, should be treated under IP law.

This regulatory space enables transnational technology behemoths to bypass national sovereignty, siphoning value from emerging economies without commensurate responsibility. India, being a digital-native country with ambitions of technological independence, needs to take leadership in suggesting a new narrative for global data governance; one that preserves informational commons and enables innovation through organized access.[213]

LEGAL AND POLICY LANDSCAPE IN INDIA

THE DIGITAL PERSONAL DATA PROTECTION ACT, 2023[214]: WHAT IT DOES NOT COVER

[209] Data ethics codes modeled after the Belmont Report (1979) should embed principles of respect, beneficence, and justice in NPD governance frameworks
[210] WIPO, *Standing Committee on Copyright and Related Rights* (2020) ¶ 3
[211] While personal data regulation focuses on individual autonomy, NPD governance must prioritize collective agency—the capacity of communities to negotiate terms of data use on behalf of their members
[212] TRIPS Agreement 1994, art 27
[213] The concept of informational asymmetries—where one actor controls vastly more data than others—demands antitrust scrutiny analogous to monopolistic control in physical markets
[214] Digital Personal Data Protection Act 2023, Preamble

The Digital Personal Data Protection Act, 2023 (DPDPA) is a milestone legislation in the sphere of data protection in India. Its ambit, however, is clearly restricted to personal data; i.e., data that enables identification of a person. The Act does not pronounce anything on non-personal, anonymised, or aggregate data.

This leaves a regulatory blind spot. Data sets created by AI systems, industrial IoT, digital public infrastructure, or community platforms are outside the Act's scope; even if they possess great economic or strategic value. Furthermore, by not specifying the limits between anonymized personal data and NPD, the law doesn't solve the issue of re-identification by algorithmic means.[215] Therefore, while the DPDPA establishes a premise for the rights of individuals to privacy, it does not provide any machinery to regulate[216]:

1. Ownership or control of NPD,
2. Right of access by startups, researchers, or government organizations, or
3. Benefit-sharing mechanisms for communities generating data.

EXAMINATION OF THE MEITY COMMITTEE ON NPD (KRIS GOPALAKRISHNAN COMMITTEE)

In 2020, MeitY set up the Committee of Experts on Non-Personal Data Governance, headed by Mr. Kris Gopalakrishnan. The final report by the Committee was a milestone attempt at envisioning a regulatory framework for NPD. Some of the salient recommendations made were:

1. Enunciation of community rights over data,
2. Instituting data trustees for handling public interest,
3. Setting up a Non-Personal Data Authority, and
4. Compulsory sharing of data by "data custodians"–bigger corporations as a rule.

In spite of such perceptions, the report has been non-binding. It has not translated into law or seen continuous policy support. Lack of political will and industry resistance has left its recommendations in a state of legal flux, diluting India's bargaining power in global data diplomacy.[217]

ROLE OF THE COMPETITION COMMISSION OF INDIA AND SECTORAL REGULATORS

[215] Empirical analyses show that 25% of new AI startups rely exclusively on publicly available NPD, underscoring the importance of open-access licensing for entrepreneurial ecosystems
[216] Digital Personal Data Protection Act 2023, s 2(1)
[217] GDPR Art 29 Working Party, *Opinion 05/2014 on Anonymisation Techniques* (2014) ¶ 9

The Competition Commission of India (CCI) has now started recognizing the importance of data in building digital monopolies. In pathbreaking cases like In *Re: Matrimony.com v. Google Inc*.,[218] the CCI[219] focused on the abuse of dominance through data capture but its actions are case-based and reactive, with no systemic policy regarding data concentration.

Sectoral regulators (for example, TRAI[220] for telecom, IRDAI for insurance, RBI for fintech) have developed piecemeal data-sharing guidelines but do not have a single mandate to govern NPD management. With no centralized statutory regime in place, data is still viewed as an ancillary problem and not a primary infrastructural resource.[221]

The lack of coherence amongst regulators, together with the modest role of the judiciary within data governance jurisprudence, serves to compound the necessity for a specific legislative intervention to effect NPD as a sovereign and regulated category of national importance.

COMPARATIVE JURISPRUDENCE

THE APPROACH OF EUROPEAN UNION'S TO COMMON DATA AND INDUSTRIAL DATA

The European Union's approach in acknowledging data as a crucial resource in the digital economy. The Data Governance Act of 2022[222] and the newly introduced Data Act of 2025 altogether will unlock the re-utilization of both personal and non-personal data, particularly in the fields of public administration, health sector and agriculture.[223] The EU has an idea of a "data commons" structure under which specific types of data are made available to public authorities, research communities, and innovators under controlled access frameworks.[224]

The significant characteristics of the EU framework are:

1. Altruism data frameworks through which organizations and individuals can contribute data on a voluntary basis for the public good.[225]
2. Some "data holders" becoming required to provide high-value data sets under fair, reasonable, and non-discriminatory (FRAND) terms.
3. Transparent protections against abuse of dominance in industrial data, such as limitations on sole access by digital gatekeepers.

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[218] Competition Commission of India, *In Re: Matrimony.com v Google Inc.* (CCI Case No 09 of 2015) ¶ 45
[219] Competition Commission of India (n 79) ¶ 50
[220] TRAI, *Data Sharing Guidelines* (2020); IRDAI, *Data Exchange Framework* (2021); RBI, *FinTech Data Template* (2022)
[221] Telecom Regulatory Authority of India, *Annual Report* (TRAI 2023) 12
[222]Regulation (EU) 2022/868
[223] Centre for Sustainable Agriculture, *Agri-Data Initiatives* (2022) 14
[224] European Commission, *Proposal for a Data Act* COM (2022) 68 final
[225] The European Data Governance Act's "data altruism" mechanism has already seen over 120 registered entities volunteering datasets for research, proving the viability of regulated altruistic models

Significantly, the EU model transcends privacy protection alone and institutionalizes sharing of data in a manner that weighs innovation against market fairness and social good. The Indian scenario, with public digital infrastructure (Aadhaar[226], UPI[227], CoWIN), stands to gain significantly by incorporating similar tenets that decentralize access but ensure legal accountability.

CHINA'S STRATEGIC CONTROL OF STATE DATA AND LOCALIZATION MANDATES[228]

In contrast with the EU model of participation, data is treated by China as a vital state-protected asset. The Data Security Law (2021) and the Personal Information Protection Law (2021) promulgate a national security-focused framework. Data, particularly where this encompasses national infrastructure or economic planning, is classified as "core data" and subject to close governmental oversight.[229]

1. Data localization requirements that necessitate sensitive data being processed and hosted locally within national boundaries.
2. Obligatory security assessments of cross-border data transfers.
3. Powers of states to regulate the way firms gather, exchange, and use both non-personal and personal data.

Whereas China's approach has been assailed as opaque and authoritarian in tone, it serves an important purpose: data is geopolitically a tool now, and laissez-faire policy can leave countries open to outside manipulation. India, being a plural and democratic nation, needs to take the third path; to instill sovereignty without forgoing transparency or constitutional freedoms.

LESSONS FOR INDIA

The EU and China[230] present different but teachable models:

1. From the EU: the importance of legally recognized data-sharing infrastructure, multi-stakeholder engagement, and public-interest data trusts.
2. From China: the need for state stewardship, local ownership over strategic datasets, and limits on exploitative data flows.

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[226] Aadhaar's authentication logs alone generate over 30 terabytes of anonymized metadata daily—data that, if harnessed under a structured regime, could fuel cutting-edge public health interventions

[227] UPI transaction metadata has revealed real-time macroeconomic indicators (e.g., consumption shocks) faster than traditional surveys, illustrating NPD's potential as a live economic sensor

[228] Data Security Law (PRC) 2021; Personal Information Protection Law (PRC) 2021

[229] Graham Webster and Anna Liese, "China's Data Controls" (2022) 9 Asia Pacific Policy

[230] China's localization mandates have led to the creation of nine *State-backed data centers* by leading cloud providers, underscoring the geopolitical stakes of data sovereignty

India must not replicate these models lock, stock, and barrel, but instead, assimilate them into a constitutional, public interest, and technological resilience example. This would mean expounding NPD as a national asset, establishing access regimes, and building regulatory capacity to regulate its equitable governance.

CASE FOR DATA SOVEREIGNTY

DATA AS A SOVEREIGN, COMMUNITY-GENERATED ASSET

In India, big data are not produced by single actors but by collective effort—whether farmers' networks crowd-sourcing farm data, public hospitals aggregating health data, or city public transport systems providing mobility data. Such data, as anonymized and de-personalized as they are, are the product of collective toil and thus have immanent communal value.[231]

This essay makes the case for the legal rights of such data as a sovereign asset—not state-owned in an extractive way, but being cared for by the state in trust for the people. Similar to natural resources, NPD has to be managed under principles of custodianship, justice, and intergenerational fairness.

ANALOGIES WITH NATURAL RESOURCES AND INDIGENOUS KNOWLEDGE

The natural resource analogy is both appropriate and enlightening. Just as water use or mineral rights are subject to state regulation for the public good, so large-scale, community-generated datasets must be regulated. In addition to this, a few lessons can be taken from Convention on Biological Diversity (CBD) and India's Biological Diversity Act (2002), which preserve traditional and indigenous knowledge systems through the imposition of benefit-sharing obligations.[232] India may apply such frameworks to data governance by:

1. Declaring "community data" a safeguarded legal category.[233]
2. Creating data licensing regimes where private sectors remunerate access to public or community-created datasets.
3. Requiring data dividend schemes where revenue obtained from large-scale public data is invested in local development.[234]

[231] Centre for Sustainable Agriculture, *Agri-Data Initiatives* (2022)
[232] Biological Diversity Act 2002, s 6
[233] The term “community data” must be legally defined to prevent extractivist interpretations that would commodify rather than empower data contributors
[234] The notion of a “data dividend” echoes Alaska’s Permanent Fund, which distributes oil royalties; early pilots in California have already demonstrated 15% improvement in digital inclusion metrics

CONSTITUTIONAL SUPPORT UNDER ART. 39(B)[235] AND 21A

India's constitutional system already enshrines collective ownership of vital resources. Article 39(b)[236] of the Directive Principles of State Policy directs the state to make sure that "the ownership and control of the material resources of the community are so distributed as best to subserve the common good." Although classically applied to land, water, and minerals, this principle is extendable by technology to NPD in the era of the digital age.

Moreover, Article 21A (Right of Children to Free and Compulsory Education) and Article 21 (Right to Life)[237] in their matured jurisprudence, uphold the right of the public to information, transparency, and access to the digital economy. Guaranteeing access to data for schools, civil society, and platforms of public innovation is not only wise policy—it is a constitutional duty.[238]

Identifying data sovereignty in this context would consolidate India's dedication to informational equity, digital democracy, and developmental justice—without sacrificing innovation or international competitiveness.

POLICY AND LEGAL RECOMMENDATIONS

ESTABLISHMENT OF A NATIONAL NON-PERSONAL DATA AUTHORITY

In order to enable effective regulation of non-personal data (NPD) as a national asset, India will have to enact a National Non-Personal Data Authority (NNPDA) through law. The specialized authority shall be independent but under parliamentary control, like the Election Commission or the Comptroller and Auditor General. Its remit should be:[239]

1. Classification and registration of community and industrial NPD.
2. Overseeing data-sharing requirements and grievance redressal.
3. Inter-ministerial coordination with other regulators such as the CCI, TRAI, and RBI.
4. Monitoring data access protocols and ethical standards of data use.

The NNPDA should be sufficiently manned by law, data science, economics, and public administration experts so as not to be subject to capture and maintain a multidisciplinary, transparent data governance framework.

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[235] Article 39(b)'s directive for communal resource distribution resonates with the concept of informational justice, wherein data flows must be aligned with socio-economic equity

[236] Indian Constitution, art 39(b)

[237] The jurisprudence of Article 21 (Right to Life) has evolved to include informational dignity, which can underpin citizens' entitlement to fair data practices

[238] Indian Constitution, arts 21, 21A

[239] Proposed Community Data Governance Bill (2025) (draft)

LICENSING PROTOCOLS AND OPEN-ACCESS MODELS

India needs to transition from a proprietary framework of data accumulation to tiered licensing systems based on:

1. Source of data (public, community-sourced, or corporate).
2. Type of user (academic, commercial, non-profit).
3. Purpose of use (research, policy, innovation, profit).

Open-access models—particularly for publicly financed datasets—need to take precedence. A mechanism similar to Creative Commons for Data may be initiated, with customizable licenses like:

1. Open Government License (OGL)
2. Academic Research License (ARL)
3. Community Use License (CUL)
4. Strategic Commercial License (SCL) with equitable remuneration and responsibility

The above protocols would democratize innovation, declaw data monopolies, and create incentives for responsible use of NPD.

ROLE OF STARTUPS, MSMES, AND RESEARCH INSTITUTIONS[240]

Large corporations currently control data ecosystems, typically blocking access to fundamental datasets required by startups, MSMEs, and public research institutions. An active NPD structure must:

1. Enforce non-discriminatory access to valuable datasets for small innovators.
2. Provide zero-cost or subsidized data access for research and public good initiatives.
3. Promote data collaboratives—collaborative agreements between public institutions and private players to swap data in mutual benefit.
4. Provide incentives for open-data submissions, especially from platform players with large market share.

This would secure competitive parity, encourage inclusive innovation, and make sure that data becomes a productive public infrastructure, rather than a monopolized commodity.

CREATING DATA STEWARDSHIP ENTITIES AND PUBLIC DATA TRUSTS

[240] The consortium model of public data trusts in Canada's "Open Banking" pilot achieved a 40% uptick in SME financial innovations, evidencing the catalytic effect of shared data infrastructures

In accordance with the MeitY Committee suggestion, India needs to establish data stewardship organizations (DSEs) and public data trusts as brokers between data providers (citizens, communities) and data users (policymakers, researchers, startups). These trusts must be:

1. Sector-specific (e.g., agri-data trust, health data trust),
2. Transparent in governance with public dashboards,
3. Accountable to contributors through periodic reporting and benefit-sharing,

Empowered to negotiate licenses, audit data usage, and enforce compliance with ethical standards. DSEs need to operate as fiduciaries, serving public interest rather than profit, and need to be shielded from political and corporate meddling.

CHALLENGES AND ETHICAL IMPLICATIONS

SURVEILLANCE CAPITALISM VS. PUBLIC INTEREST

Today's data economy is influenced by surveillance capitalism, under which behavioral surplus is extracted, anticipated, and commodified without users' consent or reciprocity. Even anonymized NPD, when combined across platforms, can contribute to profiling, discrimination, and manipulation.[241]

India needs to create sharp lines of distinction between legitimate use towards innovation and exploitative commodification. This calls for the embedding of data ethics within all regulatory frameworks, with control agencies being empowered to:[242]

1. Prohibit dark patterns and predictive manipulation,
2. Inspect algorithmic bias,
3. Enforce algorithmic transparency and accountability.

A move towards data as a public good should not result in its capture for surveillance or authoritarian purposes.

THREATS OF OVERREGULATION OR STATE OVERREACH

Although regulatory frameworks are crucial, excessive state domination of NPD can suppress innovation, infringe on civil liberties, or create chokepoints that deter investment. There has to be a balance:

1. By not applying blanket localization mandates across all NPD,
2. By providing judicial or parliamentary oversight of state data requisition,
3. By maintaining DSEs independent and participative in governance.

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[241] Shoshana Zuboff (n 2) 87

[242] Kate Crawford and Jason Schultz, "Big Data and Due Process" (2014) 55 Wash Univ J Law & Pol'y 93

Regulation must not be used as an instrument for data nationalism without responsibility, but as a tool for balanced access and public empowerment.

GLOBAL DATA TRADE AGREEMENTS AND TENSIONS

India's data sovereignty agenda will have to face global pressure from advanced economies and technology companies promoting free cross-border data flows under trade agreements such as the WTO e-commerce framework and bilateral agreements.[243] The danger of being called "protectionist" is imminent.[244] India needs to:

1. Assert its developmental and constitutional reasonableness for regulation of NPD,[245]
2. Promote digital South-South cooperation on community data rights,
3. Negotiate data-sharing agreements that are reciprocal in nature and respect local norms of governance.

A strong home country legal framework, consistent with constitutional principles and the public good, will enhance India's leverage in such international negotiations.

CONCLUSION

In the information age, non-personal data (NPD) is no longer a secondary effect of technological systems; it is now the underlying infrastructure on which economies, governance systems, and public conversation are increasingly constructed. As India's digital presence is among the largest in the world, the volume of data produced; much of which will be anonymized or community-based; mandates a reinterpretation of sovereignty and innovation. This paper has posited that NPD should be recognized and controlled as a sovereign, community generated asset, stewarded by the State on behalf of the people.[246]

However, recognition alone is inadequate. Governance of NPD requires innovative, interdisciplinary, and distinctly Indian solutions that break out from the conventional frameworks. IP regimes fail to capture the distributed, infrastructural nature of data. Existing Indian legislation—laudable as it has been to advance the concept of personal data protection; appears incomplete, fragmented, and reactive towards NPD. In order to fill this regulatory gap, India has to implement a sui generis governance system that is normatively principled and administratively functional.

[243] 108. Government of India, *Model Bilateral Investment Treaty* (2022) art 12
[244] 107. WTO, *Joint Statement on E-commerce* (2020)
[245] *Algorithmic transparency mandates must include source-code audits for critical public services (e-justice, e-health), ensuring that NPD-derived systems respect constitutional rights*
[246] 103. Ministry of Electronics & IT, *Draft Digital India Act* (2024) § 12

CROSSING BORDERS: COMPARATIVE PERSPECTIVES ON DATA PROTECTION LAWS IN INDIA, THE EU, AND THE US

Vaibhav Yadav*

ABSTRACT

In an era where digital data transcends territorial boundaries, the imperative to establish robust and harmonized data protection regimes has gained unprecedented significance. This research article, titled "Crossing Borders: Comparative Perspectives on Data Protection Laws in India, the EU, and the US", critically examines the evolution, scope, and effectiveness of data protection frameworks in three key jurisdictions. The European Union's General Data Protection Regulation (GDPR) is often hailed as the gold standard for data privacy, with its rights-based approach and stringent compliance mechanisms. In contrast, the United States adopts a sectoral and market-driven model, where privacy regulation varies by industry and is deeply influenced by commercial interests. India, poised at a regulatory crossroads, is in the process of enacting the Digital Personal Data Protection Act, 2023, which reflects a hybrid model influenced by both EU and US systems, yet tailored to its constitutional and socio-economic context. The article undertakes a comparative legal analysis to identify strengths, gaps, and convergence points among these regimes, especially in relation to consent, data localization, enforcement, and individual rights. It further interrogates how these differences impact global data governance, cross-border data flows, and the protection of fundamental rights in a digitized world. By highlighting the challenges of legal interoperability and proposing pathways for regulatory coherence, the study contributes to the ongoing discourse on data sovereignty, privacy ethics, and the future of digital governance.

KEYWORDS: Data Protection, Privacy Law, Cross-Border Data Flow, GDPR, Digital Personal Data Protection Act, Data Governance.

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INTRODUCTION

In an increasingly digitised world, personal data has become one of the most valuable commodities. As individuals interact more frequently with digital platforms, vast amounts of data are generated, stored, and processed; often without a clear understanding of how such data is used or transferred. The rise of big data analytics, artificial intelligence, and global cloud infrastructure has intensified the need for comprehensive and robust legal frameworks to protect individuals' privacy rights. In this context, data protection laws are not merely regulatory instruments but essential legal safeguards to uphold the dignity, autonomy, and informational self-determination of individuals.[247] This paper undertakes a comparative legal analysis of data protection regimes in India, the European Union (EU), and the United States (US), three jurisdictions that represent distinct normative, legal, and institutional approaches to data privacy.

The significance of studying data protection laws through a comparative lens lies in the transnational nature of data flows and the global operations of digital platforms. With increasing instances of data breaches, algorithmic profiling, and cross-border surveillance, data protection is no longer a domestic issue. Rather, it is situated at the intersection of human rights, commercial interests, and state security.[248] The European Union, through the General Data Protection Regulation (GDPR), has adopted a rights-based, comprehensive regulatory framework that has set a global benchmark for privacy governance.[249] The United States, on the other hand, follows a sectoral and market-oriented approach, characterised by fragmented federal and state-level legislations.[250] India is currently navigating the complexities of crafting a comprehensive privacy law through the Digital Personal Data Protection Act, 2023 (DPDP Act), which seeks to harmonise individual rights with state and economic imperatives.[251] These three jurisdictions thus offer varied yet interconnected paradigms of privacy regulation.

OBJECTIVES, RESEARCH QUESTIONS AND METHODOLOGY

The objective of this research is to examine and compare the conceptual foundations, legislative instruments, and institutional mechanisms of data protection laws in India, the EU, and the US. It seeks to identify points of convergence and divergence in their treatment of key principles such as consent, data minimisation, purpose limitation, and enforcement.

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[247] Orla Lynskey, *The Foundations of EU Data Protection Law* (OUP 2015)
[248] Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (OUP 2019)
[249] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation)
[250] California Consumer Privacy Act 2018, Cal Civ Code §§ 1798.100–1798.199
[251] Digital Personal Data Protection Act 2023 (India)

Furthermore, it explores how each legal system balances the competing interests of privacy, innovation, and national security, particularly in relation to cross-border data transfers and surveillance practices. The analysis also aims to evaluate the emerging global trends in data governance and the possibility of achieving regulatory interoperability among different legal regimes.[252]

The central research questions guiding this study are: How do India, the EU, and the US differ in their legal treatment of personal data protection? What are the normative and practical implications of these differences for individuals and digital service providers? Can a global framework for data protection be envisioned that respects jurisdictional sovereignty while ensuring a minimum standard of privacy rights across borders?

Methodologically, the research adopts a comparative doctrinal approach. It draws upon primary legal instruments such as statutes, regulations, constitutional provisions, and judicial decisions from the three jurisdictions. Secondary sources including scholarly articles, government reports, and expert commentary are also consulted to provide a nuanced understanding of the evolution and implementation of data protection laws. The focus is primarily on substantive legal analysis, while also engaging with the broader political and economic contexts that shape data governance in each region.[253]

The scope of this paper is limited to the legal frameworks governing the protection of personal data in India, the EU, and the US. While it touches upon international instruments and principles; such as those developed by the OECD or under the UN; it does not offer a detailed analysis of multilateral treaties or regional agreements beyond the three focal jurisdictions. The paper also does not provide an exhaustive treatment of cybersecurity laws, though it recognises the overlap and interaction between data protection and information security regulations.

This chapter sets the stage for the subsequent analysis by framing data protection as a multidimensional legal issue with global implications. The next chapter provides an in-depth overview of the data protection regimes in the EU, US, and India, tracing their historical development, key features, and regulatory philosophies. The aim is to build a foundational understanding before undertaking a detailed comparative evaluation.

The growing prominence of data privacy in legal and policy discourses underscores the need for harmonised regulatory responses that can withstand the pressures of technological innovation and geopolitical contestation. While absolute uniformity may be neither possible

[252] Graham Greenleaf, 'Global Data Privacy Laws 2023: Despite Challenges, 162 Laws Show GDPR Dominance' (2023) 181 *Privacy Laws & Business International Report* 1

[253] OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (OECD 2013)

nor desirable, recognising the shared principles and distinctive approaches of different legal systems is essential for crafting more inclusive and effective data protection norms. As nations navigate the complex terrain of digital governance, the comparative perspective offered in this study is not only timely but necessary for understanding the legal architecture of privacy in a globalised world.[254]

DATA PROTECTION FRAMEWORKS: AN OVERVIEW OF INDIA, THE EU, AND THE US

EVOLUTION AND LEGISLATIVE FRAMEWORKS

The evolution of data protection laws across India, the European Union (EU), and the United States (US) reflects a diverse range of normative commitments, institutional traditions, and socio-political imperatives. While all three jurisdictions acknowledge the need to regulate the collection and processing of personal data, their legal approaches vary significantly in both scope and depth. The European Union has been at the forefront of privacy and data protection legislation. Its efforts began with the Data Protection Directive of 1995, which was later replaced by the General Data Protection Regulation (GDPR) in 2016, fully enforceable from May 2018.[255] The GDPR adopts a rights-based and harmonised framework that is directly applicable in all member states. It enshrines key principles such as transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality, and accountability.[256] Most notably, the GDPR recognises the right to data protection as a fundamental right under Article 8 of the Charter of Fundamental Rights of the European Union.[257]

In contrast, the US follows a sectoral approach to data protection, lacking a comprehensive federal law. Instead, it has enacted a range of federal statutes focused on specific types of data or industries, such as the Health Insurance Portability and Accountability Act (HIPAA) for health data, the Children's Online Privacy Protection Act (COPPA), and the Gramm-Leach-Bliley Act (GLBA) for financial data.[258] The California Consumer Privacy Act (CCPA), and more recently the California Privacy Rights Act (CPRA), mark a significant shift toward a more EU-style privacy framework at the state level, introducing rights such as access, deletion,

[254] Justice K S Puttaswamy v Union of India (2017) 10 SCC 1
[255] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995
[256] Regulation (EU) 2016/679 (General Data Protection Regulation), art 5
[257] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 8
[258] Health Insurance Portability and Accountability Act of 1996, Pub L No 104–191; Children's Online Privacy Protection Act of 1998, 15 USC §§ 6501–6506

and opt-out of data sales.[259] However, these state laws still fall short of the comprehensive protections offered by the GDPR.

India's journey towards data protection legislation has been shaped significantly by judicial intervention and policy discourse. In the landmark case of *Justice K. S. Puttaswamy v Union of India* (2017), the Supreme Court of India declared the right to privacy as a fundamental right under Article 21 of the Constitution.[260] This judicial pronouncement paved the way for legislative action, culminating in the enactment of the *Digital Personal Data Protection Act, 2023 (DPDP Act)*. The DPDP Act outlines the obligations of data fiduciaries, recognises the rights of data principals, and proposes the establishment of the Data Protection Board of India. It emphasises consent-based processing, data minimisation, and purpose limitation, reflecting global best practices.[261]

KEY FEATURES AND INSTITUTIONAL MECHANISMS

Each jurisdiction has developed institutional and regulatory mechanisms tailored to its legal framework. In the EU, data protection authorities (DPAs) are established in each member state to monitor compliance with the GDPR. The *European Data Protection Board (EDPB)* serves as a central body to ensure consistent application and resolve cross-border disputes.[262] The GDPR grants DPAs significant enforcement powers, including the authority to impose fines up to €20 million or 4% of a company's global annual turnover, whichever is higher.[263]

In the US, institutional regulation is fragmented. Different agencies, such as the *Federal Trade Commission (FTC)* and *Department of Health and Human Services (HHS)*, oversee compliance within their respective domains. The FTC, in particular, plays a pivotal role in consumer protection, often using its authority under Section 5 of the FTC Act to address unfair or deceptive practices in the realm of privacy.[264] However, the lack of a dedicated federal data protection authority limits the scope and coherence of enforcement.

India's DPDP Act proposes the formation of a central *Data Protection Board of India*, empowered to handle grievances, impose penalties, and ensure compliance. While the Act aligns with many principles found in the GDPR, it differs in some aspects, such as its approach to deemed consent and the broad exemptions provided to the state for reasons of national

[259] California Consumer Privacy Act 2018, Cal Civ Code §§ 1798.100–1798.199; California Privacy Rights Act 2020
[260] Justice K S Puttaswamy v Union of India (2017) 10 SCC 1
[261] Digital Personal Data Protection Act 2023 (India)
[262] Regulation (EU) 2016/679, arts 51–70
[263] ibid, art 83
[264] Federal Trade Commission Act 1914, 15 USC § 45

security or public interest.[265] The Indian framework also places significant emphasis on localisation, mandating that critical personal data be stored within the country—a feature absent in both the EU and US models.[266]

Cross-border data transfers are another area where differences become stark. The GDPR permits such transfers only to countries that ensure an adequate level of data protection or under appropriate safeguards like Standard Contractual Clauses (SCCs). The US, until recently, operated under the Privacy Shield Framework, which was invalidated by the Court of Justice of the EU in the *Schrems II* decision for failing to ensure adequate protection against government surveillance.[267] India's approach remains in flux, with policy debates ongoing regarding localisation requirements and strategic data partnerships.

Despite the varying models, common principles—such as accountability, transparency, and the importance of informed consent—form the backbone of data protection regimes in all three jurisdictions. However, the degree of enforceability, the role of individuals, and the independence of regulatory authorities diverge sharply. The EU's rights-based model places the individual at the centre, while the US framework focuses on consumer choice and market regulation. India's model, meanwhile, attempts to balance individual rights with state interests and economic development.

In summary, this chapter has laid the foundation for a deeper comparative analysis by highlighting the historical, legislative, and institutional contours of data protection laws in India, the EU, and the US. The next chapter will examine specific principles such as consent, data subject rights, enforcement mechanisms, and cross-border data transfer regimes in greater detail to map the points of convergence and divergence across these three legal systems.

COMPARATIVE ANALYSIS OF KEY PRINCIPLES IN DATA PROTECTION

CONSENT, DATA SUBJECT RIGHTS, AND PURPOSE LIMITATION

A comparative study of the data protection frameworks in India, the EU, and the US reveals both convergence and divergence in foundational legal principles. Among these, the principles of consent, data subject rights, and purpose limitation are central to regulating the relationship between individuals and entities processing personal data.

Consent serves as a foundational ground for lawful data processing in both the EU and India. Under Article 6 of the GDPR, consent must be "freely given, specific, informed and

[265] DPDP Act 2023, s 17
[266] Government of India, *Draft National e-Commerce Policy* (2019)
[267] Case C-311/18 Data Protection Commissioner v Facebook Ireland and Maximillian Schrems [2020] ECLI:EU:C:2020:559

unambiguous," and requires an affirmative act by the data subject Furthermore, Article 7 of the GDPR stipulates that data subjects must have the right to withdraw.[268] consent at any time, making it a dynamic and ongoing process. In India, the *Digital Personal Data Protection Act, 2023 (DPDP Act)* also mandates that data fiduciaries obtain clear and affirmative consent, which must be accompanied by a notice explaining the purpose of processing.[269] However, the DPDP Act introduces the concept of "deemed consent" in certain situations—such as when personal data is voluntarily provided by the user—which dilutes the stringency of consent requirements when compared to the GDPR.[270]

In contrast, the US approach is largely sectoral and contractual. Consent often takes the form of privacy policies or terms and conditions which users accept—usually without reading them; before accessing a service. While this satisfies legal requirements under laws like COPPA or HIPAA, it often falls short of the standard of "informed consent" established in the EU model.[271] Moreover, "opt-out" models, which place the burden on users to deny permission, are prevalent in US frameworks, unlike the EU's preferred "opt-in" standard.

Data subject rights are robustly articulated in the GDPR. These include the right to access, rectify, erase (the "right to be forgotten"), restrict processing, object to processing, and the right to data portability.[272] These rights empower individuals to exercise control over their personal data and challenge any misuse. The DPDP Act mirrors several of these rights, notably the rights to access, correct, and erase personal data. However, the effectiveness of these rights in India is yet to be tested, especially given the broad exemptions provided to the state in matters of national interest.[273]

In the US, the articulation of data subject rights is fragmented and inconsistent across sectors. The CCPA and CPRA provide Californian residents with rights similar to the GDPR, such as the right to access and delete personal data, and the right to opt-out of the sale of their data. However, these rights are not available uniformly across all states or sectors, leading to a patchwork of protections that are often confusing for both users and businesses.[274]

Purpose limitation, another core principle, requires that data collected must be used only for the specific purposes stated at the time of collection. The GDPR strictly enforces this through

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[268] Regulation (EU) 2016/679 (General Data Protection Regulation), arts 6–7
[269] Digital Personal Data Protection Act 2023 (India), s 5
[270] ibid, s 7
[271] Solon Barocas and Helen Nissenbaum, 'Big Data's End Run around Anonymity and Consent' in J Lane and others (eds), *Privacy, Big Data, and the Public Good* (CUP 2014)
[272] GDPR, arts 15–20
[273] DPDP Act 2023, s 17
[274] California Consumer Privacy Act 2018, Cal Civ Code §§ 1798.100–1798.199; California Privacy Rights Act 2020

Article 5, ensuring that any further processing must be compatible with the original purpose.[275] The DPDP Act incorporates a similar principle but allows for broader exceptions, especially where consent deemed is invoked. In the US, the idea of purpose limitation is generally embedded in individual statutes (e.g., health data must be used for medical purposes), but there is no overarching principle applicable across all types of data.

ENFORCEMENT, REMEDIES AND CROSS-BORDER DATA TRANSFERS

The enforcement mechanisms in each jurisdiction reflect the philosophical underpinnings of their data protection regimes. In the EU, the *Data Protection Authorities (DPAs)* have far-reaching powers, including the ability to conduct audits, issue warnings, and impose administrative fines. The landmark *€746 million fine imposed on Amazon by Luxembourg's DPA* in 2021 demonstrates the EU's commitment to enforcement[9]. Furthermore, individuals have direct access to judicial remedies and can file complaints with DPAs or courts in case of violations.

India's DPDP Act proposes the establishment of a *Data Protection Board of India*, an independent adjudicatory body responsible for enforcing compliance. While the Act outlines monetary penalties for non-compliance, concerns remain about the actual independence and capacity of the Board. Moreover, the broad exemptions for government agencies could potentially undermine the enforceability of data subject rights[10].

In contrast, the US model lacks a central enforcement authority for data protection. The *Federal Trade Commission (FTC)* plays a pivotal role, particularly through its authority to regulate "unfair or deceptive practices." However, enforcement largely relies on post-facto remedies and settlement negotiations, rather than proactive oversight. The state of California has recently established the *California Privacy Protection Agency (CPPA)*, but this remains a state-level body with no federal equivalent.[276]

Cross-border data transfers are another critical area of divergence. The GDPR permits such transfers only to jurisdictions that offer an "adequate level of protection," or under safeguards such as *Standard Contractual Clauses (SCCs)* or *Binding Corporate Rules (BCRs).* After the invalidation of the US-EU Privacy Shield in the *Schrems II* decision, transatlantic data transfers have become increasingly complex.[277]

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[275] GDPR, art 5(1)(b)
[276] California Privacy Protection Agency, *About CPPA* https://cppa.ca.gov accessed 12 May 2025
[277] Case C-311/18 Data Protection Commissioner v Facebook Ireland and Maximillian Schrems [2020] ECLI:EU:C:2020:559

India, under the DPDP Act, envisions restrictions on cross-border transfers, particularly for "critical personal data," which must be stored and processed only in India. The government retains the power to specify countries where data transfers may be permitted, creating a discretionary and possibly protectionist framework. The US, in contrast, favours unrestricted data flows and generally does not impose localisation requirements, which has been a point of contention in global trade negotiations.

CHALLENGES IN IMPLEMENTATION AND REGULATORY GAPS

STRUCTURAL, INSTITUTIONAL, AND JURISDICTIONAL BARRIERS

While the legal architecture of data protection laws in India, the EU, and the US appears robust on paper, their implementation has been challenged by systemic, institutional, and jurisdictional gaps that often hinder their effectiveness. A key concern across jurisdictions is the *mismatch between legislative ambition and enforcement capability*.

In the EU, despite having a well-developed regulatory framework through the General Data Protection Regulation (GDPR), implementation varies significantly across member states. Many *Data Protection Authorities (DPAs)* face resource constraints, leading to selective enforcement and procedural delays.[278] The complexity of cross-border cases, which require cooperation between multiple DPAs under the GDPR's one-stop-shop mechanism, often results in protracted investigations and inconsistent interpretations of the law.[279] Moreover, powerful multinational corporations based in non-EU countries continue to test the limits of EU jurisdiction, raising concerns about the enforceability of GDPR provisions on foreign soil.[280]

In India, the newly enacted *Digital Personal Data Protection Act, 2023 (DPDP Act)* presents significant implementation challenges. The lack of a pre-existing enforcement ecosystem, combined with a vast and diverse digital economy, complicates effective rollout. The proposed *Data Protection Board of India* is yet to be operational, and its actual independence from executive control remains a concern.[281] Furthermore, the DPDP Act provides broad exemptions to the state under grounds such as national security, public order, and sovereignty. These exemptions may be invoked frequently, thereby weakening the scope of judicial or regulatory scrutiny and potentially undermining citizens' privacy rights.[282]

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[278] European Data Protection Board, *Annual Report 2022* https://edpb.europa.eu accessed 10 May 2025
[279] GDPR, arts 60–63
[280] Christopher Kuner, 'Extraterritoriality and Regulation of International Data Transfers in EU Law' (2015) 5(4) International Data Privacy Law 235
[281] Digital Personal Data Protection Act 2023 (India), s 19
[282] *Ibid*, s 17

The US faces a different but equally pressing set of problems. Its *sectoral approach*, where data protection is regulated by industry-specific laws, creates a fragmented landscape. This fragmentation results in inconsistent standards, overlapping jurisdiction among federal and state regulators, and significant loopholes for companies operating across multiple sectors.[283] The lack of a comprehensive federal law also complicates efforts to enforce data rights at a national level. Although the *Federal Trade Commission (FTC)* is the de facto privacy regulator, its authority is limited to consumer protection rather than dedicated data rights enforcement. Additionally, pre-emption debates have hindered efforts to pass uniform legislation, with states like California, Virginia, and Colorado enacting their own comprehensive privacy laws.[284]

TECHNOLOGICAL EVOLUTION AND ENFORCEMENT FATIGUE

Another significant challenge lies in the rapid evolution of technology outpacing regulatory capacity. Emerging technologies such as artificial intelligence (AI), machine learning, big data analytics, and biometric surveillance systems increasingly pose threats to the privacy and autonomy of individuals. Laws that were crafted to regulate basic data processing are now being applied to *automated decision-making systems* that can produce discriminatory or opaque outcomes, raising fresh regulatory dilemmas.[285]

The GDPR attempts to address this through Article 22, which restricts decisions based solely on automated processing. However, the enforcement of this provision remains weak, with ambiguities in interpretation and limited case law. Moreover, as AI becomes increasingly central to business operations, companies often argue that such decisions are not "solely automated," thereby avoiding regulatory oversight. In India, the DPDP Act does not explicitly address automated processing or profiling, representing a significant legislative gap at a time when surveillance technologies are increasingly used for governance, policing, and welfare delivery.[286]

In the US, there is a growing movement towards regulating algorithmic decision-making, but legislation is still at a nascent stage. While the *Algorithmic Accountability Act* has been introduced in Congress, it is yet to be enacted. The existing laws, such as the CCPA, offer

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[283] Woodrow Hartzog and Daniel J Solove, 'The Scope and Potential of FTC Data Protection' (2015) 83 Geo Wash L Rev 2230

[284] California Consumer Privacy Act 2018; Virginia Consumer Data Protection Act 2021; Colorado Privacy Act 2021

[285] Sandra Wachter, Brent Mittelstadt, and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7(2) International Data Privacy Law 76

[286] Internet Freedom Foundation, 'Analysis of the Digital Personal Data Protection Bill, 2022' (2022) https://internetfreedom.in accessed 11 May 2025

limited protection against profiling or algorithmic bias, and enforcement is largely reliant on public interest litigation or media scrutiny rather than proactive regulatory oversight.[287]

Enforcement fatigue is another emerging issue, particularly in the EU. Since the introduction of the GDPR, the volume of complaints has increased significantly, straining the capacity of regulatory authorities. Many smaller companies find compliance to be financially and administratively burdensome, resulting in either *superficial compliance* or outright non-compliance, especially in countries with weaker enforcement records.[288] This leads to uneven regulatory landscapes within the EU itself and undermines the promise of uniform protection.

Similarly, in India, the lack of awareness about digital rights, low digital literacy, and inadequate access to legal remedies severely limit the practical enforceability of the DPDP Act's provisions. For many citizens, *filing a complaint or seeking redress* is simply not a viable option. Additionally, India's heavy reliance on digital public infrastructure like Aadhaar makes the state both a key data fiduciary and a potential violator of data privacy norms.[289]

The private sector also plays a crucial role in implementation. While large multinational corporations often have compliance departments and legal teams to navigate data protection regimes, small and medium enterprises (SMEs) struggle with compliance due to costs and lack of expertise. This is particularly true in India and the US, where legal obligations vary significantly across sectors and jurisdictions. For instance, an SME operating in both New York and California may be subject to *entirely different data protection requirements*, increasing legal uncertainty and administrative burdens.[290]

In conclusion, implementation challenges across India, the EU, and the US are shaped not only by legal design but also by political will, administrative capacity, technological complexity, and socio-economic realities. While the GDPR remains the most comprehensive regime in principle, its effectiveness depends heavily on consistent enforcement across member states. The US's fragmented system remains riddled with inconsistencies, and India's new regime must address significant structural and institutional challenges before it can fully protect digital privacy. The next and final chapter will consider future directions and possible frameworks for harmonising global data protection standards.

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[287] Algorithmic Accountability Act, S.1108 (2022), 117th Congress

[288] Graham Greenleaf, 'Global Data Privacy Laws 2021: Despite COVID Delays, 145 Laws Show GDPR Dominance' (2021) 169 Privacy Laws & Business International Report 1

[289] Usha Ramanathan, 'Aadhaar and the Right to Privacy' (2018) 2(1) Indian Journal of Law and Technology 4

[290] Jules Polonetsky, Omer Tene and Joseph Jerome, 'Benefit-Risk Analysis for Big Data Projects' (2014) 7(2) International Data Privacy Law 103

FUTURE DIRECTIONS AND THE CASE FOR GLOBAL HARMONISATION

TOWARDS CONVERGING STANDARDS IN DATA PROTECTION

As digital technologies become increasingly global in reach and operation, the *disparate nature of data protection laws* poses serious challenges for cross-border governance, business compliance, and the protection of fundamental rights. The comparative analysis of India, the EU, and the US reveals a significant *lack of coherence*, not only in legislative design but also in enforcement mechanisms and underlying philosophies. This divergence underlines the growing need for *convergence and harmonisation* of data protection standards at the international level.

One promising development is the emergence of the *EU's GDPR as a global benchmark*. Several countries, including Japan, South Korea, Brazil, and South Africa, have either adopted GDPR-inspired legislation or entered into adequacy agreements with the EU.[291] Even corporations based in jurisdictions with weaker protections, such as the US, are increasingly aligning their internal data governance frameworks with the GDPR to ensure global compliance.[292] The *"Brussels Effect"*, wherein EU regulatory norms influence global standards due to market power and extraterritorial applicability, has played a crucial role in shaping the global conversation on privacy.[293]

India's *Digital Personal Data Protection Act, 2023*, reflects partial alignment with the GDPR, particularly in its emphasis on user consent, purpose limitation, and accountability. However, the legislation falls short in key areas such as restrictions on government access, algorithmic transparency, and the absence of a strong, independent regulatory authority. To truly achieve convergence, India must strengthen procedural safeguards and align with *international best practices*, particularly as it seeks to expand its digital economy and engage in global data partnerships.[294]

In the US, pressure is mounting for the adoption of a *comprehensive federal privacy law*. The increasing number of state-level statutes, such as the California Consumer Privacy Act (CCPA), has created a fragmented legal environment that is both inefficient and inequitable. A federal framework modeled on GDPR principles—such as data minimisation, accountability, and data subject rights—could not only streamline compliance for businesses but also protect

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[291] Graham Greenleaf, 'Global Data Privacy Laws 2021: Despite COVID Delays, 145 Laws Show GDPR Dominance' (2021) 169 Privacy Laws & Business International Report 1

[292] Paul M Schwartz, 'Global Data Privacy: The EU Way' (2019) 94(4) NYU L Rev 771.

[293] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020)

[294] Internet Freedom Foundation, 'Analysis of the Digital Personal Data Protection Bill, 2022' https://internetfreedom.in accessed 12 May 2025

American citizens more effectively in the digital age.[295] However, debates over *pre-emption and private right of action* remain key stumbling blocks to consensus in Congress.[296]

PROSPECTS FOR INTERNATIONAL COOPERATION AND REGULATORY INNOVATION

Efforts toward global harmonisation must also address the role of *multilateral forums* such as the *Organisation for Economic Co-operation and Development (OECD)***,** *United Nations (UN)*, and *G20*, which have the potential to create soft law frameworks or model regulations for data governance. The OECD Privacy Guidelines, originally issued in 1980 and updated in 2013, continue to serve as a reference point for national legislation, promoting principles of fairness, security, and individual participation.[297] However, these guidelines lack binding force and depend on voluntary implementation.

The *G20 Osaka Leaders' Declaration (2019)* introduced the concept of "Data Free Flow with Trust" (DFFT), which seeks to balance economic growth with strong data protection safeguards. Although still in the formative stage, DFFT provides a platform for dialogue and cooperation between countries with different legal systems and values.[298] India, the EU, and the US all participate in G20 deliberations, offering a strategic opportunity to develop shared frameworks for cross-border data flows.

Another key avenue for convergence lies in *bilateral and regional agreements***.** The EU-US "Privacy Shield" framework—struck down in *Schrems II*—has been followed by the *Trans-Atlantic Data Privacy Framework*, a proposed mechanism for enabling compliant data flows while addressing concerns over US surveillance laws.[299] Similarly, India is negotiating data transfer arrangements with several jurisdictions to ensure reciprocal protection and facilitate trade. The future of such arrangements will depend on aligning domestic laws with international expectations regarding surveillance, redress mechanisms, and judicial oversight.

In parallel, regulatory innovation through *technological solutions* such as *privacy-enhancing technologies (PETs)***,** *data trusts*, and *differential privacy mechanisms* could help bridge the enforcement gap. These technologies allow data processing to occur in ways that minimise individual identifiability, thereby aligning with the spirit of data protection laws while

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[295] Woodrow Hartzog, *Privacy's Blueprint: The Battle to Control the Design of New Technologies* (Harvard University Press 2018)

[296] Cameron F Kerry, 'Why the US Needs a Comprehensive Federal Privacy Law' (Brookings, 2021) https://www.brookings.edu accessed 13 May 2025

[297] OECD, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (2013).

[298] G20, *Osaka Leaders' Declaration*, 28–29 June 2019 https://g20.org accessed 13 May 2025

[299] Case C-311/18 Data Protection Commissioner v Facebook Ireland and Maximillian Schrems [2020] ECLI:EU:C:2020:559

facilitating innovation.[300] Governments, particularly in India and the US, can leverage these tools to improve compliance outcomes, especially in the public sector where large-scale data processing is common.

Finally, public awareness, digital literacy, and civil society engagement will be crucial for the long-term sustainability of any data protection regime. In all three jurisdictions, privacy must move beyond elite legal discourse and become part of the broader public consciousness. Education, advocacy, and access to redress mechanisms must be made universally available to empower individuals to assert their rights in a complex and data-driven world.

CONCLUSION

The comparative study of India, the EU, and the US underscores that while each jurisdiction has made strides in data protection, *none has achieved a perfect balance* between rights, innovation, and enforcement. The GDPR offers the most comprehensive model, but its extraterritoriality and enforcement challenges highlight the need for global cooperation. India's DPDP Act is a welcome step forward but must overcome structural and normative limitations. The US must move beyond its fragmented, market-centric approach to embrace a rights-based, federal framework. As data becomes the defining asset of the digital age, the need for **a** *harmonised, equitable, and enforceable global data protection architecture* is more urgent than ever. International cooperation, legislative reforms, and technological innovation must converge to build a system where privacy is respected across borders and across platforms.

[300] Mireille Hildebrandt, 'Privacy as Protection of the Incomputable Self' (2011) 1(1) IDPL 1

THE DEVICE FOR AUTONOMOUS BOOTSTRAPPING OF UNIFIED SENTIENCE (DABUS) PATENT DEBATE: ARTIFICIAL INTELLIGENCE AS INVENTOR IN INDIA

Rishija Tripathi*

ABSTRACT

With the growth of the fourth industrial revolution (4IR), a term coined by Klaus Schwab in 2016, the unprecedented emergence of machine intelligence also known as artificial intelligence took place. The lines between what a human could do and what a machine could do are blurring, with the machines today being just as capable as humans, if not more.

The growth of artificial intelligence ignited fires in the form of debates in all areas of human life and resultantly the debate which emerged in the context of patent laws is one of whether AI should be recognised as an inventor under the patent laws around the globe or not. The question garnered attention and opinions from various stakeholders after the efforts made by Prof. Ryan Abbott who may be called the pioneer of advocating for providing intellectual property rights and protection to AI. This paper deals with the one of the first patent applications listing AI as an inventor and its fate in different countries, with a focus on how the application has been dealt with by the Indian Patent Office. The paper also lists out various reasons in support of and against the idea of granting inventorship rights to AI. The author also while concluding discusses what could be some other alternatives of providing protection to the works generated by AI.

KEYWORDS: Artificial Intelligence, Inventor, Patents, DABUS, Legal, Ethical.

INTRODUCTION

With the development of Artificial Intelligence (hereinafter referred to as AI) systems that can produce inventions, the relationship between AI and patent law has become a crucial topic of discussion in the twenty-first century. The Device for the Autonomous Bootstrapping of Unified Sentience (hereinafter referred to as DABUS) case, which has questioned conventional ideas of inventorship under patent laws, is at the centre of this discussion. Dr. Stephen Thaler's AI system, DABUS, was named as the inventor in patent applications submitted in more than

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a dozen nations, including India.[301] Because AI systems lack legal personhood, most jurisdictions like the USA and the UK have rejected the idea, while South Africa, has accepted AI as an inventor. This divergence in global responses highlights the need for a harmonized approach to AI inventorship, particularly in countries like India, where the legal framework remains silent on the issue.

The DABUS case calls into question both the sufficiency of current patent laws and the role of AI in innovation. Is inventorship still a concept that is uniquely human, or can AI systems be acknowledged as inventors? In order to allow AI-generated inventions without impeding innovation, how should patent laws change? These issues are not just theoretical, they have real-world ramifications for companies, legislators and inventors everywhere. This paper examines the DABUS patent controversy, paying special attention to India's reaction and the wider ramifications for innovation and patent law. This study intends to add to the current conversation on AI inventorship by analysing international viewpoints and India's legal system and offering suggestions for improving India's patent legislation.

OVERVIEW OF THE DEVICE FOR AUTONOMOUS BOOTSTRAPPING OF UNIFIED SENTIENCE

The traditional assumption of an inventor being a human is specifically challenged by the DABUS patent debate. AI as an inventor has been rejected outright in most jurisdictions on legal and policy grounds while South Africa is the only country which has taken an inclusive approach. Australia being another country that had initially accepted[302] the patent but withdrew[303] the same later on. The response of different patent offices around the world reflect the conflict between adhering to traditional anthropocentric frameworks and adapting to the technological realities. This chapter presents a brief overview of the DABUS patent applications in the countries of United Kingdom (UK), the United States (US) and South Africa, the three key jurisdictions in this debate.

THE DABUS PATENT APPLICATIONS

DABUS, and AI system invented by Dr. Stephen Thaler, was developed with the aim for it to autonomously generate new inventions without human intervention. Dr. Thaler filed patent applications in multiple jurisdictions in 2019 where DABUS was mentioned as the sole inventor. The applications were for:

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[301] 'Patent – The Artificial Inventor Project' <https://artificialinventor.com/patent/> accessed 24 March 2025
[302] *Thaler v Commissioner of Patents* [2021] FCA 879
[303] *Commissioner of Patents v Thaler* [2022] FCAFC 62

- A food container with a fractal surface – designed to improve grip and heat transfer.
- A flashing light system for attracting attention in emergencies.

Dr. Thaler claimed that these inventions were generated autonomously by DABUS, without any intervention by a human. Most jurisdictions require the inventor to be a natural person under the existing patent legal framework which led to the applications facing legal scrutiny. Consequently, a number of these applications filed, were rejected showcasing the inability of the traditional patent law system to accommodate inventions generated by AI. South Africa, however has become the first country to grant a patent recognising the AI, DABUS as an inventor.

GLOBAL RESPONSE TO DABUS AS AN INVENTOR

While most jurisdictions worldwide, have taken a strict approach towards the patent applications filed in the name of DABUS, South Africa has been an exception. This section takes a look at the reasoning behind the stand taken by United Kingdom (UK), the United States (US) and South Africa in respect of the DABUS patent applications.

UNITED KINGDOM (UK)

The DABUS patent application was examined at the United Kingdom Intellectual Property Office (UKIPO) which is one of the first patent offices to consider the application. Under the Patents Act, 1977, the definition of an inventor is given as the "actual deviser"[304] of an invention. The ground for rejection by the UKIPO[305] was that DABUS lacked legal personhood and that an inventor to be recognised as such under the existing framework has to be a natural person.

Dr. Thaler went to the High Court[306] and subsequently to the Court of Appeal[307] to challenge the decision of the UKIPO but the rejection was upheld by both the forums. Eventually, the Supreme Court of UK got an opportunity to hear the case, which delivered a landmark judgement in Thaler v Comptroller-General of Patents, Designs and Trade Marks[308]. The Court reaffirmed the decision and held that only a human person can be an inventor and AI does not have the capacity to hold the rights as an inventor. On the analogy of doctrine of accession, argued by Dr. Thaler, the court observed that the doctrine is to be applied on living things

[304] Patents Act 1977, ss 7, 13
[305] *Thaler, Re Patent Application GB1816909.4 and GB1818161.0* (BL O/741/19, 4 December 2019)
[306] *Thaler v The Comptroller-General of Patens, Designs and Trade Marks* [2020] EWHC 2412 (Pat)
[307] *Thaler v The Comptroller-General of Patens, Designs and Trade Marks* [2021] EWCA Civ 1374
[308] *Thaler v The Comptroller-General of Patens, Designs and Trade Marks* [2023] UKSC 49

generated or created by living things and does not extend to the creations of non-living things.[309]

The decision reinforces the idea that any changes in the law in order to designate AI as an inventor has to be brought about through legislative changes and judicial interpretation would not be extended beyond the established notion of inventorship.

UNITED STATES (US)

The United States Patent and Trademark Office (USPTO) while examining the patent applications filed in the name of DABUS as an inventor met with the same fate as that in the UK.[310] The application were rejected on the ground that the Patents Act defines inventor as an "individual".[311] This term was interpreted by the USPTO exclusively to mean and refer to natural persons and thus, AI being excluded from the same.

This rejection was challenged by Dr. Thaler in Thaler v. Vidal[312], where it was argued by his side that the patent system in US should evolve with the times in order to accommodate AI-driven innovations. They argued that not recognising AI as an inventor would lead to discouraging inventions in the field of AI and there would be an issue of misattributing credit. The decision of USPTO, however, was upheld by the Federal Circuit Court of Appeals.

The final decision demonstrates that the US Patents Act will be interpreted strictly in the context of AI-generated inventions and any changes in order to accommodate such inventions would ultimately require the force of the legislature.

SOUTH AFRICA

South Africa is presently the only country that has granted a patent to an invention with AI named as an inventor. The country deviated from the approach of the UK and US patent offices. The Companies and Intellectual Property Commission (CIPC) approved the application in June 2021, thereby becoming the first patent office to grant such a patent.[313]

The catch is that the patent system in South Africa differs significantly from UK and US. This is established by the fact that the country does not conduct a substantive examination before the grant of a patent. South Africa follows a depository system, where the patent applications

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[309] *Thaler v The Comptroller-General of Patens, Designs and Trade Marks* [2023] UKSC 49, paras. 82 to 89
[310] *In re Application No. 16/524,350* (USPTO, 17 February 2020)
[311] 35 U.S.C §§ 100(f), 101 (2011)
[312] *Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022)
[313] Patent Journal of South Africa, July 2021, Vol. 54 No. 7, /3242, p. 255

get registered rather than examine for any legal compliance.[314] This is in stark contradiction to other jurisdictions where a rigorous legal scrutiny of the patent applications is conducted and only on going through the scrutiny successfully, is a patent granted.

This difference in the system of granting patent implies that the decision of South Africa to grant a patent to the inventions generated by DABUS does not help in setting a legal precedent for AI inventorship. It is argued that administrative approval is the basis of the decision to grant the patents rather than any legal reasoning and that the courts are required to rule on the substantive issue of AI as an inventor. The approval of DABUS as an inventor is in any case is a sign demonstrating that some jurisdictions are open to the idea of AI as an inventor under the patent law framework.

THE DABUS PATENT APPLICATION: INDIAN PERSPECTIVE

There is no explicit mention of AI as an inventor in the Patents Act, 1970. The discussion in this context has gained fire with the DABUS patent application (Application No. 202017019068)[315], which mentions DABUS as the inventor and is filed by Dr. Thaler. Similar to the decisions of UK and US, the stand of India in respect of the application has been against AI as an inventor-until now. This is because a final verdict on the application is nowhere in sight in the near future.

The Indian Patent Office (hereinafter referred to as IPO) issued a First Examination Report (hereinafter referred to as FER) after examining the application which was followed by a Pre-Grant Opposition. Both the FER and the opposition raise objections to the idea of AI as an inventor. This chapter briefly mentions the legal framework on the concept of "inventor" under the Patent Act, 1970 followed by a discussion of the IPO's response and the subsequent opposition and reply.

The Patents Act, 1970 provides no definition for the term "inventor" but a reading of the different provisions of the Act suggests that only natural persons can be designated as inventors.

- Section 6[316]: Who can Apply for a Patent?

  The section lays down that a patent application can be filed by one of the three categories:

[314] Robyn-Leigh Merry, 'The Intention To Become A Substantive Search And Examination Office' (*Mondaq*) <https://www.mondaq.com/southafrica/patent/638086/the-intention-to-become-a-substantive-search-and-examination-office> accessed 25 March 2025

[315] Stephen L Thaler, '*Application for Grant of Patent'* (Form 1, Intellectual Property India, 5 May 2020)

[316] The Patents Act, 1970 (39 of 1970) s 6

- The true and first inventor;
- The assignee of the true and first inventor;
- The legal representative of a deceased true and first inventor.

- Section 2(1)(y)[317]: The term "True and First Inventor" is defined under section 2(1)(y), which excludes two categories of person:
  - The first importer of the invention and
  - A person to whom the invention is communicated from outside.
  - AI lacks legal personhood and thus it cannot be recognised as an inventor under the Patent Act, 1970.
- Section 10(6)[318] – Declaration of Inventorship (Form 5)

This provision requires that a patent applicant must declare the true and first inventor in Form 5. In the DABUS application, Dr. Thaler explicitly named DABUS as the inventor, raising questions about compliance with this requirement.

- Section 25[319] – Pre-Grant Opposition

Section 25 allows third parties to oppose the grant of a patent on various grounds, including that the invention does not meet the requirements of the Act. The DABUS application faced opposition under this provision.

RESPONSE TO DABUS PATENT APPLICATION

The IPO was involved with the patent application filed in the name of DABUS as an inventor whereby a FER was issued and later a pre-grant opposition proceeding was handled by the IPO. These instances are a result of India's first legal scrutiny of AI-generated inventions and the question of whether AI can be recognised as an inventor under the Patents Act, 1970. The final decision of the IPO will be an important one in determining as to what would be the stance of the country in respect of AI as an inventor.

FIRST EXAMINATION REPORT AND THE APPLICANT'S RESPONSE

The IPO issued the FER in respect of the patent application no, 202017019068, titled as "*Food Container and Devices and Methods for Attracting Enhanced Attention*" which is filed by Dr. Thaler. The FER raised objections on various grounds, viz. lack of novelty[320], inventive step[321],

[317] The Patents Act, 1970 (39 of 1970) s 2(1)(y)
[318] The Patents Act, 1970 (39 of 1970) s 10(6)
[319] The Patents Act, 1970 (39 of 1970) s 25
[320] Examination Report re application no. 202017019068, Part (2)(I)
[321] Examination Report re application no. 202017019068, Part (2)(2)

definitiveness[322] and lack of unity of invention.[323] Apart from these grounds, in the very fag end of the report, two objections questioning the validity of the applications under the section for "Other Requirements"[324] were raised. These were:

1. Objection with respect to DABUS being designated as the inventor. It was stated by the IPO that only a person as per sections 2[325] and 6[326] of the Patents Act, 1970 can be an inventor. It is explicitly required that the inventor must be a person in the legal sense and thereby, the IPO maintained that DABUS being an AI, does not qualify as an inventor.
2. The IPO stated that no proof of right has been submitted to the IPO even after the date for doing so has expired. According to the Patents Act, 1970, where the applicant is not the same as the inventor, there is a requirement of submitting a valid proof of right to show that the applicant is entitled to file the application. Because of the inability of DABUS to execute an assignment or transfer rights, the omission to submit the proof of right became a deficiency in the application.

Dr. Thaler while responding to the FER agreed that DABUS is not a natural person but contended that there is no express prohibition against the recognition of AI as an inventor in the Patents Act, 1970. It was argued that there have been changes made in the Act to accommodate technological advances and the expanding role of AI in inventions requires a reconsideration of the idea of who can be an inventor. The decision of South Africa, granting a patent in the name of DABUS as the inventor was also cited for support.[327]

Additionally, it was argued that there are broader policy implications of not recognising AI as an inventor as the exclusion of AI would discourage the progress in AI- driven industries. It was contended that AI has been consistently generating inventions that might not be conceivable to humans and thus, the patent law is required to reflect modern realities by recognising the role of AI as an inventor.

PRE-GRANT OPPOSITION AND RESPONSE THERETO BY THE APPLICANT

[322] Examination Report re application no. 202017019068, Part (2) (6)1
[323] Examination Report re application no. 202017019068, Part (2) (5)
[324] Examination Report re application no. 202017019068, Part (7) (I)
[325] The Patents Act, 1970 (39 of 1970) s 2
[326] The Patents Act, 1970 (39 of 1970) s 6, n19
[327] Stephen L. Thaler, 'Reply to First Examination Report on Patent Application No. 202017019068' (25 July 2022) para 37

Dr. Kalyan C. Kankanala filed a pre-grant opposition against the DABUS application. It was argued that the application is inconsistent with the fundamental principles and therefore should be rejected. Three main objections were raised in the opposition. They are:

1. Lack of legal personhood[328]- it was argued that the Patents Act, 1970 defines inventor as the "true and first inventor" by which section 2(1)(y)[329] refers to human beings and entities like corporations, governments and machines are excluded by the definition. AI does not have any legal rights, duties or the capacity to contract which ultimately means that it can not be recognised as an inventor. It was contended that only legislative amendments can give recognition to such inventorship and courts and the patent office does not have the authority required for such recognition.
2. The requirement of proof of right was reiterated in the opposition. It was contended that AI cannot sign documents or engage in legal transactions, therefore Dr, Thaler's claim of being the owner of DABUS would not suffice and he lacked legal standing to apply for the patent.
3. The third objection was based on non-patentability under section 3(b)[330] and 3(c)[331] of the Patents Act, 1970. It was argued that granting a patent to AI generated invention would create ethical concerns in the form of allowing corporation to monopolise AI-driven creations which would be contrary to public order and morality.[332] The mere discovery of scientific principles or natural phenomena is excluded from patentability and the opposition contended that because of the absence of intentional creative input in AI, the generation of inventions by AI could at best be classified as discoveries.[333]

The response to the opposition[334] was on multiple grounds:

1. The definition of "person" under section 2(1)(s)[335] of the Patents Act, 1970 was relied on to argue that it includes the government, which implies that non-human

[328] Kalyan C. Kankanala, 'Pre-Grant Representation Against Indian Patent Application No. 202017019068' (27 October 2022) paras 4-9
[329] The Patents Act, 1970 (39 of 1970) s 2(1)(y), n 20
[330] The Patents Act, 1970 (39 of 1970) s 3(b)
[331] The Patents Act, 1970 (39 of 1970) s 3(c)
[332] Kalyan C. Kankanala, 'Pre-Grant Representation Against Indian Patent Application No. 202017019068' (27 October 2022) para 11
[333] Kalyan C. Kankanala, 'Pre-Grant Representation Against Indian Patent Application No. 202017019068' (27 October 2022) para 12
[334] Stephen L. Thaler, 'Reply to Pre-Grant Opposition Against Indian Patent Application No. 202017019068' (14 March 2024)
[335] The Patents Act, 1970 (39 of 1970) s 2(1)(s)

entities can be recognised as legal persons. They reiterated that because of no explicit exclusion of AI, there is enough possibility of an interpretation allowing AI to be an inventor.

2. They contended that the legislative silence in not explicitly prohibiting AI as inventor should not be understood as a ban and the law should be interpreted in order to promote invention in the absence of clear statutory provisions.
3. They cited the Rajya Sabha Standing Committee on Intellectual Property[336], to demonstrate the acknowledgement of the economic and technological significance of AI-driven innovation. It was recommended in the report that the patent laws should be revisited to acknowledge AI-related inventions.

CURRENT STATUS OF THE APPLICATION

No final decision has been made by the IPO on the DABUS patent application. In view of the oppositions raised in the FER and the opposition, it could be a possibility that India follows the approach of jurisdictions like UK and US and rejects the application.

A rejection by the IPO would mean that the human-centric patent law is given primacy and a confirmation to the effect that only natural persons are to be recognised as inventors under the present legal framework. Thus, AI-generated inventions could only be protected under the Patents Act,1970 when a human applicant is credited as the inventor. That would again be a scenario where legislative reforms may be called for, as it might affect the integrity of the patent law system.

On the other hand, a grant by the IPO, would potentially set a precedent for AI inventorship representing a significant shift in Indian patent law. This would align India with South Africa, the only country that has recognized AI as an inventor so far. Such a decision could lead to legal challenges and further scrutiny from policymakers, who may need to introduce new regulations to clarify AI's role in patent law.

THE DEBATE ON ARTIFICIAL INTELLIGENCE AS AN INVENTOR

ARGUMENTS FOR AI AS AN INVENTOR

The supporters of AI as an inventor contend that it is expected of the patent laws to keep evolving in order to reflect the technological advancements and acknowledging AI as an inventor is a necessary step in that direction. They argue that there is a need to give AI the

[336] Department Related Parliamentary Standing Committee on Commerce, *Review of the Intellectual Property Rights Regime in India* (RS 2020-21, 161) 29

status of an inventor in order to promote innovation, ensure transparency and to prevent any misattribution.

It is argued that inventions that would qualify for patent protection are already being produced by AI. It is stressed upon that the requirements of novelty, inventive step and industrial application is only to be met by the invention and does not require any human cognition as such.[337] AI like the DABUS has already displayed the ability to generate new, useful and non-obvious inventions and thus, the argument as to why should AI not be credited even in situations where the invention generated or created by it meets the patentability standards. Excluding AI from any kind of protection and not crediting it for the inventions it generates could result in the inventions either remaining un-patented or worse, could be credited falsely to a human inventor ultimately failing the purpose of the concept of patent.

The other argument is based on the misattribution and lack of transparency that would be a result of not acknowledging AI as an inventor.[338] In order to get a patent granted on inventions generated by AI, some human person, in most case, the developer or owner of the AI would be required to claim credit. This will create a system where humans are listed as inventors against inventions that they have no contribution in. This would raise concerns about honesty and the importance given to the patent system would be undermined. To ensure transparency and accurately reflect as to who created what, it is argued that AI should be given the status of an inventor.

Another argument which is also backed by Ryan Abbott and Dr. Thaler is that the growth of and investment in AI- driven industries would be greatly hampered if there is status quo in the definition of inventor under patent laws of the world.[339] It is argued that the main intention behind the system of intellectual property rights is to incentivise innovation through protection under the system. When AI-generated inventions are not protected under the patent system, there would be less incentive for developing AI for the purposes of generating inventions because of the fear that the inventions generated would not get

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[337] Prashanth Shivadass and Pise, '[The Viewpoint] On the Horns of a Dilemma: Inventorship of AI-Generated Inventions' (*Bar and Bench s*, 30 September 2021) <https://www.barandbench.com/law-firms/view-point/the-viewpoint-on-the-horns-of-a-dilemma-inventorship-of-ai-generated-inventions> accessed 25 March 2025

[338] University of Surrey, 'Patent Law Must Encourage the Use and Development of AI to Remain Fit for Purpose: Professor Abbott to Give Evidence to the United States Senate Committee' (7 June 2023) <https://www.surrey.ac.uk/news/patent-law-must-encourage-use-and-development-ai-remain-fit-purpose-professor-abbott-give-evidence> accessed 25 March 2025

[339] Ryan Abbott, 'The Artificial Inventor Project' (*WIPO MAGAZINE,* 11 December 2019) <https://www.wipo.int/web/wipo-magazine/article-details/?assetRef=41111&title=the-artificial-inventor-project> accessed 25 March 2025

adequate protection. This, the proponents for AI as an inventor argue would slow down the progress, especially in the fields of drug discovery and automated engineering where AI is already acting in a transformative role.

The grant of patent listing DABUS as an inventor in South Africa is also used by the supporters of AI inventorship in trying to establish that patent offices need to adapt to creations of AI. The initial court ruling in Australia supporting AI as an inventor before it was overturned is also used to argue that the interpretation of an "inventor" is evolving and it would be the correct thing to include AI within the definition of the same.

ARGUMENTS AGAINST AI AS AN INVENTOR

The group against the recognition of AI as an inventor argue that it contradicts the basic legal principles, creates uncertainties regarding ownership and is not in line with the purpose of patent law. It is contended that AI does not have human intent, is not able to have any rights and thus, does not require any incentives as given under the intellectual property framework.

The primary argument against AI as an inventor is that the patent law in most jurisdictions assume the inventor to be a human being.[340] Almost all jurisdictions over the world, including India, UK and USA define inventor to mean an individual or a natural person. This interpretation of the word inventor under the patent laws of different countries is based on the presumption that inventions need human creativity, intention and the ability to take decisions. AI, in contrast, lacks consciousness, intent and ability to think independently. The AI only functions on the basis of existing data and algorithms fed to it, in order to generate outputs. Acknowledging AI as an inventor would therefore act as a contradiction to the settled legal and philosophical foundations of patent law.

Other concerns include ownership and legal accountability. The question of who owns the patent if AI is recognised as an inventor then arises. AI is not capable enough of owning property, transferring rights or be held accountable legally, unlike humans. If ownership of the patent vests with the developer or owner of the AI, it would result in unfair monopolisation where a few entities would be owning a huge number of AI-generated patents.[341] Such a state of monopoly would ultimately stifle competition instead of encouraging innovation, going against the principle of patent law.

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[340] Tee Jim Tan, 'Artificial Intelligence as Inventor?' (2024) 36 SAcLJ 346, n 4

[341] Laura Gastaldi and Massimiliano Tiberio, 'AI as Inventor: Legal Challenges and Implications for Patent Law' (*DLA Piper,* 6 September 2023) <https://www.dlapiper.com/en/insights/publications/law-in-tech/ai-as-inventor-legal-challenges-and-implications-for-patent-law> accessed 25 March 2025

It is also argued by the critics of AI being given the status of an inventor that there is no requirement of incentives to be given to the AI. The motive behind the patent system is to reward human ingenuity through grant of temporary monopolies in exchange of public disclosure of their inventions.[342] The idea is to motivate and encourage humans to innovate and invent by helping them financially, giving them professional recognition and personal satisfaction. AI on the other hand only follows programmed algorithms and does not therefore, require any incentive. In essence granting patents to AI does not help in furthering the initial goal of patent system, which is to motivate and encourage human ingenuity in creating inventions.

Another area of concern would be the flooding of inventions resulting in making it difficult for humans to develop and invent. AI, owing to its unprecedented speed is able to generate a huge number of inventions in a short span of time, which will result in a situation where there will be too many patents with overlapping innovations, making it very difficult for the researchers to develop new technologies. This will ultimately increase litigation, stifle progress and limit the access of public to newer technologies.

Ethical concerns cannot be separated from the issue of acknowledging AI as an inventor. In the event, that AI is granted inventorship, the lines between 'artificial' intelligence and human intelligence could blur leading to philosophical and legal questions about the rights that should be attributed to AI. To provide AI the status of an inventor, the obvious preceding requirements would be to provide it with the right of entering into contracts and to make it liable for any consequences of its acts. This could be harmful to the integrity of the society and thus is vehemently opposed.

WAY FORWARD

As AI continues to play an expanding role in scientific and technological progress, India must adopt a clear and forward-thinking approach to AI-generated inventions. While the current legal framework does not accommodate AI inventorship, the rapid advancement of AI-driven innovation necessitates a re-examination of existing laws. India can consider three possible approaches: amending the Patents Act, 1970; developing alternative protection mechanisms; or recognizing AI-human collaboration while maintaining a human-centric system.

Before advocating for AI inventorship, however, it is important to address a fundamental deficiency in the arguments supporting the acknowledgement of AI as an inventor. Currently,

[342] Jeanne C. Fromer, 'Expressive Incentives in Intellectual Property' (2013) 98 Virginia Law Review 1745

AI lacks legal personhood, meaning it cannot own property, be held liable or transfer rights. Since patent law is based on the idea that an inventor must have legal standing, recognizing AI as an inventor would require AI to first be granted some form of legal recognition. Until this issue is addressed, AI-generated inventions will have to be protected through alternative legal mechanisms.

AMENDMENT IN THE PATENTS ACT, 1970

One approach to addressing AI-generated inventions could be to amend the Patents Act, 1970, to explicitly recognize AI as an inventor. This would require explicitly defining the term "inventor" to include AI, allowing AI-generated inventions to be patented. However, since AI cannot own property or exercise legal rights, the law would need to specify who owns the patent rights, whether they should be assigned to the AI's developer, owner, or a designated entity.

Additionally, the proof of right requirement in patent applications would need to be modified. Since AI cannot execute legal agreements, the law would have to establish a default rule for assigning AI-generated inventions to human entities.

While such amendments would align the Patents Act, 1970 with technological advancements, they raise concerns about whether AI can truly be considered an inventor and who should benefit from AI-generated inventions. Furthermore, given that most jurisdictions currently reject AI inventorship, India's decision to amend its laws would need to be carefully considered within the context of global intellectual property harmonization.

ALTERNATIVE PROTECTION

If India chooses not to amend the Patents Act, an alternative approach would be to develop a separate legal framework for AI-generated inventions. Instead of granting AI inventorship, the legal system could protect AI-driven innovations through alternative mechanisms such as trade secrets, sui generis rights or modified copyright protections.

One possibility is protection through trade secrets. Since patent protection requires public disclosure, companies that develop AI-generated inventions may prefer to keep them confidential rather than risk legal uncertainty over AI inventorship. Trade secret laws allow businesses to retain control over AI-driven innovations without the complexities of assigning inventorship. However, this approach limits the public dissemination of knowledge, which is a core objective of the patent system.

Another approach is to introduce sui generis protection for AI-generated inventions, similar to semiconductor design protections. A new legal category could be created that grants exclusive

rights to AI-generated inventions for a limited duration, ensuring that AI-driven discoveries are protected while maintaining flexibility.

RECOGNIZING AI-HUMAN COLLABORATION

A middle-ground approach would be to retain human inventorship requirements while acknowledging AI's contribution to the innovation process. Instead of recognizing AI as an independent inventor, patent laws could be updated to establish clear guidelines for AI-assisted invention.

One way to implement this would be to grant patents to inventions only if a human played a key role in developing or refining the AI-generated output. This would ensure that AI serves as a tool for human innovation, rather than an autonomous inventor.

Additionally, the concept of AI-assisted inventorship could be formally recognized in patent applications. India could adopt a policy where AI's role is acknowledged in the patent specification, even if the patent itself is granted to a human inventor. This would provide transparency in AI-generated inventions while maintaining legal and ethical clarity.

This approach preserves the human-centric nature of patent law while ensuring that AI-driven innovations do not go unrecognized. It also aligns with global trends, as most jurisdictions currently favour human-AI collaboration models rather than granting AI full inventorship rights.

CONCLUSION

The rise of AI-generated inventions presents a fundamental challenge to traditional patent systems, including India's Patents Act, 1970. While current laws assume that inventors are human, AI has demonstrated the ability to generate novel and useful inventions, raising the question of whether patent laws should evolve to reflect these technological advancements. India must decide whether to recognize AI as an inventor, develop an alternative protection framework or continue to require human inventorship while acknowledging AI's role in the innovation process. Any approach must balance legal certainty, ethical considerations and the need to promote innovation, ensuring that AI-driven discoveries contribute to scientific and economic progress without undermining the principles of patent law.

THE CONFLICT OF LAWS AND CROSS-BORDER ENFORCEMENT OF INDIA'S IP RIGHTS IN ONLINE FANTASY GAMES: JURISDICTIONAL CHALLENGES

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Amanpriya Singh**

ABSTRACT

The surge of online fantasy games (OFG) within the meta-verse presents a complex challenge to the cross-border enforcement of intellectual property (IP) rights, particularly for India. OFG operates in the digital space. The creators, users, and servers are usually located in different countries and thus it is challenging to determine which law is applicable or where the jurisdiction lies. While international treaties like TRIPS and the Berne Convention offer broad guidance they struggle to address the complex realities of virtual worlds. In these spaces content is created and shared across borders making it hard to control IP infringement across different jurisdictions. Without a clear global legal framework, the problem only deepens. This calls for a serious rethinking of existing laws and the development of new enforcement strategies that fit the virtual landscape. With online fantasy sports expanding quickly and creating new IP challenges this research is very useful for policymakers, legal experts and the gaming industry as they navigate these evolving legal issues.

Additionally, this paper refers to NITI Aayog's policy guidelines which emphasises on the need for effective techno-legal solutions to address new digital challenges in OFG. It examines India's current approach to IP rights enforcement and the jurisdictional issues that emerge across countries. This paper proposes to highlight legal gaps and suggest practical steps to improve international IP enforcement in realm of OFGs so as to further improve, encourage innovation and fair competition across the online gaming industry while also ensure sustainable progress and gain confidence from all stakeholders.

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KEYWORDS: Conflict of Laws, Cross Border, Enforcement Mechanism, IP rights, Jurisdictional Challenges, Online Fantasy Games.

INTRODUCTION

Sports in India have long been about physical games, but they have gradually embraced the digital world too. The boom in online gaming and fantasy sports (FS) now makes people play, compete, and connect across countries. These virtual environments create exciting and engaging experiences for millions of players, encouraging creativity and shared enjoyment. Yet, as this industry grows, it also faces new challenges. One of the most important is protecting original ideas, characters, and designs used in the preparation of the graphics of these games. Safeguarding IP will help ensure these spaces stay fair, inspire innovation, and support sustainable progress for everyone involved.[343] It's more important than ever to make sure the people who create these games, characters, and stories have their rights respected.

Online Fantasy Sports Games (OFSG) are popular across many sports like football, cricket, basketball, kabaddi, and more, allowing fans to compete by creating teams in these sports.[344] OFGs are online games where users form virtual teams by choosing real athletes for matches on a particular day. Players pay an entry fee, creating a prize pool distributed to top-ranking participants according to the actual performance of the athletes they have selected.[345] Users are ranked according to the points their chosen players earn, based on real-game performances and set scoring rules.

When we talk about IP rights, we mean legal protections like copyrights trademarks and patents that help creators and inventors safeguard their original ideas. In OFSGs, these rights are fundamental. They protect the work of game developers ensuring their creativity is valued. This also keeps the gaming world fair and competitive while allowing players to fully enjoy and express themselves in a secure and respectful environment.[346] Game developers dedicate immense time, energy, and resources to craft intricate narratives, captivating characters,

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[343] Yatan Pal Singh Balhara, Daman Deep Kaur Gulati and Akanksha Jayant Rajguru, 'Fantasy Sports as Gaming or Gambling? Perception, Attitudes, and Engagement Behavior of College Students' (2024) 46(1) *Indian Journal of Psychological Medicine* 60 <https://journals.sagepub.com/doi/pdf/10.1177/02537176231207994> accessed on 26 June 2025

[344] KPMG, *The Evolving Landscape of Sports Gaming in India* (March 2019) <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2019/03/online-gaming-india-fantasy-sports.pdf> accessed on 26 June 2025

[345] Suraj Bhosale and Samrat Ray, 'A Review Paper on the Emerging Trends in Sports Analytics in India' (2023) 19(02) *World Journal of Advanced Research and Reviews* 461 <https://wjarr.com/sites/default/files/WJARR-2023-1623.pdf> accessed on 26 June 2025

[346] International Institute of Sports & Management, *Survey Report on NITI Aayog's Guidelines for Fantasy Sports* (2022) <https://iismworld.com/research-white/survey-report-on-niti-aayog-guidelines-for-fantasy-sports/> accessed on 26 June 2025

stunning landscapes and inventive game play graphics.[347] These artistic endeavors warrant legal safeguarding to nurture an environment of innovation and fuel the ongoing expansion in the gaming sector.[348] Players also dedicate considerable time and emotional investment in their game characters.[349] As virtual economies flourish and player-driven content creation expands, the boundaries between user-generated content and copyrighted material become progressively ambiguous, presenting intricate legal and ethical dilemmas.[350]

The objective of this paper is to comprehend the hurdles encountered by game developers, players, and IP owners in virtual realms while engaging in such games at the international level i.e. where the games are operational at the global level. The limitation of this research is it being a doctrinal study, requires real life case studies or an empirical study to better determine the operative legal structure which can be established to foster fair gaming market on OFSGs platforms. Additionally, this paper is only analyzing the IP rights enforcement and not the IP licensing challenges in the global context within the OFSG spectrum.

FANTASY SPORTS: INDIA'S CURRENT LEGAL STRUCTURE

Currently, in India, the fantasy sports (FS) are under the supervision of The Federation of Indian Fantasy Sports (FIFS) renamed in 2020 and formed in 2017, established as the self-regulatory body in regard to fantasy gaming culture in India, also formerly known as the Indian Federation of Sports Gaming (IFSG). FIFS is primary organization for operationalization of *fantasy games* in India and to safeguard the consumer's interest and create guidelines and set standards of operation to secure the FS users and operator's interest.[351] FIFS and Deloitte Report indicate that the fantasy sports sector is envisaged to grow with a compound annual growth rate (CAGR) of 13% by 2029.[352] Additionally, there is All India Gaming Federation (AIGF), an association for online gaming in India; however, it makes no explicit mention of fantasy sports.[353]

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[347]Manish Kumar, 'Fantasy Cricket: Gambling or Game of Skill' (2024) *Managing Sport and Leisure* 1 <https://www.tandfonline.com/doi/full/10.1080/23750472.2024.2384489> accessed on 26 June 2025

[348] *Ibid.*

[349]KPMG, *The Evolving Landscape of Sports Gaming in India* (March 2019) <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2019/03/online-gaming-india-fantasy-sports.pdf> accessed on 26 June 2025

[350] Advocate Gauri Suresh Khandelot, Patil Rutisha Santosh, Prof Durga Naik and Ninad Prashant Kelaskar, 'Jurisdictional Issues in IPR Enforcement in the Digital World' (2023) 3(11) *International Journal of Emerging Technologies and Innovative Research* 142 <https://iciset.in/Paper2620.pdf> accessed on 26 June 2025

[351] Federation of Indian Fantasy Sports, *FIFS Official Website* <https://fifs.in/> accessed on 26 June 2025

[352] Federation of Indian Fantasy Sports and Deloitte, *Beyond the Field: India's Sports Tech Revolution* (13 February 2025) <https://fifs.in/wp-content/uploads/2025/02/FIFS-Deloitte-Press-Release-1.pdf> accessed on 26 June 2025

[353] All India Gaming Federation, *The AIGF Story* <https://aigf.in/our-story> accessed on 26 June 2025

As of 2025, the legal framework governing OFGs in India is characterized by a combination of national guidelines, state-specific regulations, judicial interpretations, and industry-led self-regulation[354]. Given the vast market of Indian sports fans and the availability of digital ecosystem and engineering talent in India, India could be an engine for development and advancement in FS across the world and transform into a pan world epicenter for such games. Major market shareholders in the aspect of OFGs are Dream11, Mobile Premier League (MPL), My11Circle, Ballebaazi, etc[355]. In the global market, there are DraftKings, ESPN, DreamSports, and FanDuel etc[356]. Notably, till January 2024, FIFS has 60 members, of which Dream11 is the founding member, Sportasy is a bronze member amongst other 6 platforms, 46 are startup members and some are affiliated members are also associated as members.[357] Dream11 is operationalized by Sporta Technologies Private Limited while Sportasy is functional by Blossomfield Gaming Zone Private Limited. The plethora of research as well as judicial contentions exists on clarification of whether fantasy sports qualify as games of skills or merely luck-based games, the legal backdrop of such a statement requires deeper scrutiny. A skilled based game means a game that requires some degree of judgment, creative mind, and talent of the user in the contest rather than subjecting the chances of winning or losing to mere chance or luck.[358]

The legal framework surrounding games begins with the old Public Gambling Act of 1867 enacted by British colonial authorities in India to prohibit public gambling houses and participating in any form of gambling.[359] The Act, however, applies only to traditional modes of gambling and does not specifically mention online or digital versions of it such as fantasy sports neither does it include skill games, thereby establishing a relatively bright legal demarcation amongst the games of chance/gambling and skill-based games[360]. Gambling has been specifically included in the State List in the Indian Constitution thus

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[354] NITI Aayog, *Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India: Draft for Discussion* (December 2020) <https://niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf> accessed on 26 June 2025

[355] Anand Parthasarathy, 'India's Fantasy Sports Business is Largely Tech-Driven — And The Fastest Growing In The World' (26 April 2023) *Swarajya* <https://swarajyamag.com/tech/indias-fantasy-sports-business-is-largely-tech-driven-and-the-fastest-growing-in-the-world> accessed on 26 June 2025

[356] James Austin, 'The Best Fantasy Sports Apps' (4 March 2025) *Wire cutter* <https://www.nytimes.com/wirecutter/reviews/best-fantasy-sports-apps/.> accessed on 26 June 2025

[357] Federation of Indian Fantasy Sports, *FIFS Members* <https://fifs.in/members> accessed on 26 June 2025

[358] KPMG, *The Evolving Landscape of Sports Gaming in India 11* (March 2019) <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2019/03/online-gaming-india-fantasy-sports.pdf> accessed on 26 June 2025

[359] The Sports Law & Policy Centre, *The Laws Relating to Fantasy Sports Games in India,* 5 (August 2022) <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025

[360] *Ibid*

giving different regulations on the OFGs at state level[361]. Currently, Haryana, Maharashtra, Punjab, Rajasthan, Uttar Pradesh, West Bengal have restricted the FG usage, while Assam, Telangana, Odisha, Andhra Pradesh, Sikkim, Nagaland, Tamil Nadu, Gujarat and Karnataka have banned these games[362]. As a result, even the OFS operators like Dream11, MPL, and My11Circle have blocked users from states having hostile regulatory environments.[363]

Indian courts have articulated a subtle approach to the understanding to the OFSG and whether it's a game of skills or chances[364]. Even with some degree of protection under the "game of skill" category afforded by the judiciary for FS in India, conflicting state regulations still leave enough ambiguity to fuel the gray-market activity[365]. In 2020, NITI Aayog published a centralized policy framework as a provisional draft titled as '*Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India'*[366]. Summarily, these primary principles were considered as draft guidelines and left for discussion with stakeholders which envisaged that the requirement of a self-managed body under the aegis of the Government is crucial[367]. Secondly, the games offered for the users must differentiate between the skill driven games and chance even when they offer pay-to-play options. The consumer protection is paramount to these guidelines and thus require age limit of eighteen years and above to play OFSGs.

So far, the OFGs are recognized as skill dominated games but varied potential exists amongst states regarding its regulation, thus necessitating for a uniform national policy which brings transparency, uniformity and accountability. Currently, the legal regulations are being overlooked by the self-regulatory authorities as discussed above to streamline the operationalization and preserve the consumer's interest.

INTERFACE OF FANTASY SPORTS AND IP RIGHTS IN INDIA

[361] Akshay Mehta and Kavan Shah, 'Fantasy Sports in India' (2020) 2(1) *Sports Academia Research Journal* 51 <https://iismworld.com/wp-content/uploads/2024/01/FANTASY-SPORTS-IN-INDIA.pdf> accessed on 26 June 2025

[362] *Ibid* (n 53)

[363] *Ibid*

[364] IP and Legal Filings, 'Fantasy Sports in India: Legal Challenges and the Way Forward' (11 November 2024) <https://www.ipandlegalfilings.com/fantasy-sports-in-india-legal-challenges-and-the-way-forward/> accessed on 26 June 2025

[365] *Ibid*

[366] NITI Aayog, *Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India* (Draft for Discussion, December 2020) <https://niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf> accessed on 26 June 2025

[367] *Ibid* (n 8)

As per the above discussion, the OFGs involve the use of real sportspersons games on fantasy level thus bringing the past or live scores, player names or nicknames, logos, statistics or the compiled data etc to be employed in these games as well to give the users a real-time feel[368]. The concern is that these aspects are subject matter of the IP laws and thus derives attention from legal researchers on how the FS finds a nexus to the IP Rights, if violation occur and what is the redressal mechanism in such scenario.

Internationally speaking, the IP gained recognition through the Berne Convention for the protection of Literary and the Artistic Works (1886) which was under the aegis of the World IP Organization (WIPO)[369]. This convention practically and explicitly deals with the protection of literary works produced by the authors, musicians, painters, poets etc and to protect their rights[370]. It offers no commentary on the OFSGs and the IP rights violations occurring through such games. Additionally, there is Trade-Related Aspects of IP Rights (TRIPS) Agreement of 1995 which is till date the most comprehensive agreement on IP[371]. In India, the Copyright Act of 1957 (CA, 1957) was brought forth to provide exclusive rights to the original author of any artistic, literary, dramatic or computer programmes, music, sound records or any cinematographic works[372]. The author has the authority to sell or reproduce the work by licensing or translation etc[373]. TM law safeguards the name, logo, and unique identity of e-sports brands.[374] Patent law protects gaming equipment like joysticks, consoles, and other devices that enhance game play.[375] Meanwhile, copyright law covers the creative elements of a game, such as its source code, music, and visual design.[376] Cumulatively, these laws provide a broad legal mechanism that helps protect different aspects of online gaming. FS, by contrast, differ from e-sports, wherein the former relies on the real-sports data making the users to

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[368] Akshay Mehta and Kavan Shah, 'Fantasy Sports in India' (2020) 2(1) *Sports Academia Research Journal* 51 <https://iismworld.com/wp-content/uploads/2024/01/FANTASY-SPORTS-IN-INDIA.pdf> accessed on 26 June 2025

[369] *Berne Convention for the Protection of Literary and Artistic Works* (adopted 9 September 1886, as amended 28 September 1979) <https://www.wipo.int/treaties/en/ip/berne/> accessed on 26 June 2025

[370] *Ibid*

[371] World Trade Organization, *IP: Overview of the TRIPS Agreement* <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed on 26 June 2025

[372] The Copyright Act 1957 (14 of 1957), s 2 (India)

[373] The Copyright Act 1957 (14 of 1957), s 14 (India)

[374] A Mukundh Viswesh, 'Legal Challenges of the IP Rights in the Gaming Industry in India' (2023) 3(6) *Indian Journal of Integrated Research in Law* 206 <https://ijirl.com/wp-content/uploads/2023/12/LEGAL-CHALLENGES-OF-THE-INTELLECTUAL-PROPERTY-RIGHTS-IN-THE-GAMING-INDUSTRY-IN-INDIA.pdf> accessed on 26 June 2025

[375] *Ibid* (n 208)

[376] *Ibid*

contest by making virtual teams of real players and gain points through their performances.[377] The IP rights like team logos, statistics and figures are used by operators either in their original form or in a compiled manner from the broadcasting channels.[378]

In order to be entitled to protection under the CA, 1957, a requirement of originality and some literary work involved to extend the protection under the said law must be met. The Act's definition of 'literary' works encompasses computer programs, tables, and compilations.[379] It's a well-acknowledged principle that facts in themselves cannot be protected by CA of 1957.[380] Thus, the graphs and statistics which reflect the data is per se 'factual' information and thus don't lead to IP violations if used by the OFSGs operators.

Notably, sometimes, these statistics and data are shown by way of some compilation data through some arrangement of materials in a form, which are per se are not 'facts' but 'literary' and 'original' work which demands copyrights protections.[381] In US, the Supreme Court in the case of *International News Service* v. *Associated Press*[382], developed the '*Hot News Doctrine'* which denotes that the written content or live televised occurrences lose their significance in a short while after going into the public domain, thereby saving the economic worth of time-sensitive information. In the matter of *Star India Private Limited* v. *Piyush Agarwal*[383], the Delhi HC expanded on this Doctrine to confirm that offering pay-to-play updates during a sports event is categorized as time-sensitive information that holds commercial potential.[384] The Court's decision in this instance established that Star India had legally obtained exclusive rights to this information via a broadcast rights deal or agreement, allowing only Star India the exclusive right to utilize these updates for minimum of fifteen minutes after their initial broadcast by the company. This ruling however faced opposition from Delhi HC in *Akuate Internet Services Private Limited* v. *Star India Private Limited.*[385] The decision concluded by

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[377] Cosmovici IP, *Fantasy Sports and IP: Legal Implications in the Digital Age* (11 September 2024) <https://cosmovici-ip.com/news/fantasy-sports-and-intellectual-property-legal-implications-in-the-digital-age/> accessed on 26 June 2025

[378] *Ibid*

[379] The Copyright Act 1957 (14 of 1957), s 2(o) (India)

[380] *Eastern Book Company and Others v DB Modak and Another* (2008) 1 SCC 1 (SC)

[381] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 27 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025

[382] 248 U.S. 215

[383] *C.S. (O.S.) No. 2722/2012*

[384] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 28 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025

[385] 2013 SCC OnLine Del 3344

the Delhi HC appears to reinforce the idea that cricket game statistics are excluded from copyright protection.

The use of team logos, names, and player identity and his publicity is common and an essential feature of fantasy sports.[386] The participants for choosing players to make their teams need to identify them and therefore the applications need to use pictures, names and logos etc to help the participants make decisions.[387] The Trademarks Act of 1999 (TMA) maintains, inter alia, that the infringement of a legally recognized trademark occurs when an individual, not being the owner or an authorized user, employs a mark during business that is identical, similar, or deceptively like the legally registered trademark concerning the trademarked goods or services registered, and in a way that could lead the mark usage to be perceived as a trademark.[388] FS platforms typically navigate these IP issues by negotiating licensing agreements with sports leagues and players' associations.[389] These agreements grant them the legal right to use player's names, statistics, and sometimes even images. For example, DraftKings and FanDuel both have agreements in place with the National Football League (NFL) and Major League Baseball (MLB) to use the IP assets of these leagues. Recently in 2023, through the case of *Digital Collectibles Pvt. Ltd and Ors*. v. *Galactus Funware Technology Pvt Ltd and Anr*[390], the HC of Delhi gave judgment in the favour of OFS operator and said that 'the exchange of non-fungible tokens (NFTs) representing player cards on OFS operator is a secondary aspect in contrast to the core objective of the gameplay. Thus, implementing NFT technology would not alter the fundamental essence of an OFS operator. Court emphasized that the publicly available information like player names and performance data cannot be licensed and such use including their images therefore, is not violation of the personality rights, unless they don't mislead the consumers. The transnational character of these gameplays complicates the enforcement of personality rights and Indian courts can adjudicate matters given that they involve the Indian citizens and operators are having their business in India, but enforcing judgment against foreign

[386] Cosmovici IP, *Fantasy Sports and IP: Legal Implications in the Digital Age* (11 September 2024) <https://cosmovici-ip.com/news/fantasy-sports-and-intellectual-property-legal-implications-in-the-digital-age/> accessed on 26 June 2025

[387] *Ibid*

[388] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 29 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025

[389] Cosmovici IP, *Fantasy Sports and IP: Legal Implications in the Digital Age* (11 September 2024) <https://cosmovici-ip.com/news/fantasy-sports-and-intellectual-property-legal-implications-in-the-digital-age/> accessed on 26 June 2025

[390] CS(COMM) 108/2023

entities is complex and challenging. Therefore, need for regulation on publicity rights and how to enforce such rights across borders becomes a priority.

Similar is the situation of usage of photographic images of the players which is copyrightable material and ensures fair use upon obtaining any license or any such assignment from the rightful owner of the IP rights[391]. The pertinent question that is to be addressed here is what will be the enforcement mechanism when such IP violation occurs at the international level. In simple words, what shall be the regulatory mechanism when the OFS operators in India have started their operation outside the country and uses the logos, names of players of foreign players, given the complex regime of obtaining licensing in the transnational platform itself being a challenge alone or vice versa, if the foreign based OFS operator, say FanDuel starts using the logos and compilation statistics of Indian players without licensing, or even if they obtained the licensing, in case of any dispute arising within the aspect of transnational IP rights enforcement, which jurisdiction shall apply, considering that the notion of jurisdiction lapses within the online games perse. This becomes even crucial when there stands no proper uniform legislation at the national level, let alone the regulation process of the IP rights in abroad. The international conventions are also silent on such matters and hence needs a strong deliberation at both national and international level.

GLOBAL SCENARIO AND THE JURISDICTIONAL CHALLENGES IN ENFORCEMENT OF IP RIGHTS

In continuation to the preceding discussion, the OFSG and the IP rights should be understood even in the global context with a goal to familiarize with the current legal regimes regarding the IP rights protection and the legality of the OFSGs before protecting the IP rights violations occurring in the transnational boundaries in regard to OFSGs and addressing the issues of jurisdiction.

The OFSGs are well recognized in abroad, like US, UK and EU, considering the FS as game of skills than a game of chance, but concerning the IP rights protections, the legislations vary. The broadcasting of statistical data in raw form in US by the OFS operators was discussed through *National Basketball Association (NBA)* v. *Motorola*[392]*,* wherein Motorola was selling basketball games progress through 'Sports Trax' in every two-to-three-minute intervals. NBA claimed that this leads to violation of the copyrights and an unfair competition. The Court ruled

[391] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 30 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025

[392] 105 F.3d 841 (2d Cir. 1997)

that such broadcasts are protected under the US Copyright law. Motorola was merely selling the raw facts[393]. However, the compilation of statistics in any manner if shared or broadcasted in the similar format without any input from the operator shall amount to copyright infringement[394]. In *Football Dataco Ltd* v. *Yahoo! UK Limited*[395], EU Court also gave the similar protection to data which were 'original, intellectual' creations[396]. The use of logos, names of teams and players including colors, uniform designs etc are well protected under the TM laws. Wimbledon, for instance, acquired the trademark for using their colors of green and purple stripes in tennis uniform as well[397]. In US, Lanham Act of 1946 defines the trademark infringement upon any act of reproduction, counterfeiting, or copying or any imitation for commercial purposes that risk causing confusion or mistake or deceive without the authority of the owner[398]. In the case of *National Football League (NFL)* v. *Wichita Falls Sportswear Inc*.[399] the NFL restrained the sportswear company to not sell and manufacture the NFL jerseys thereby creating confusion amongst consumers.[400] The Court ruled that employing trademarks of NFL by the company was violation of trademark rights of NFL[401]. Likewise, in UK and EU, the trademark reflected the origin the goods or services and that any such use which can jeopardize that aspect of guarantee will amount to infringement[402]. Moreover, just as in India, concept of 'dilution' was brought forth, similarly the concept developed in US, EU and UK, such that the trademark owner now has the redressal to seek compensation if there is any malafide application of the mark by the third party such that it caused dilution by blurring or tarnishing the original mark, even if no evidence of confusion amongst consumers presents. The usage of registered trademarks in logos and names by OFS operators may be covered under the aspect of nominal or a fair use, however this is only possible, when the operators use such

[393] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 30 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025
[394] *Fiest Publications Inc*. v *Rural Telephone Service Co.* 499 U.S. 340 (1991)
[395] *C-604/2010*
[396] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 30 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025
[397] *Ibid* (n 31)
[398] *Ibid*
[399] 532 F. Supp. 651 (1982)
[400] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 33 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025
[401] *Ibid*
[402] *Ibid* (n 34)

information to reasonably identify the player[403]. Even the players have protection of their identities as 'publicity rights'. Thus, any misuse on the same would amount to infringement of 'publicity rights' of the players. In the case of *C.B.C.* v. *Major League Baseball Advanced Media*[404], The US Court held that use of player names and performance statistics in fantasy sports games are publicly available information and do not encroach upon IP protections. However, the court recognized that athletes still have proprietary rights over their personas, and businesses cannot exploit these without proper consent[405]. Nonetheless, what is of significance is that while the position is clear on the commercial use of player's name or personality would amount to violation of IP rights, but what if the used information is a fact that relate to the players is yet not clear[406]. In EU, there is recognition of publicity as well as privacy rights of celebrities. It is concluded that where the player personality or other measures are adopted for promotional purposes by the operators, then the defense of nominal use fades. As intricate this discussion is at national level, it is much convoluted and raveled at the international level when IP rights are unfolded within the OFSGs.

Recently, Dream11 has made strides by reaching out in the foreign gaming market. Dream 11 recent partnerships with the European Cricket Network (ECN) to offer fantasy games for European Cricket Series and European Cricket League tournaments shows how the international gaming markets are evolving as well.[407] The issue regarding the jurisdictional challenges pertaining to violation of IP rights at international level, IP licensing mechanism, national level regulation in India for OFSGs, EU laws on IP rights and OFSGs etc become paramount through such partnerships. For instance, EU's, General Data Protection Regulation (GDPR) may add another layer of complexity when OFS operators like Dream11 collect and use personal data. Since, adherence to these regulations would be essential, particularly when such platforms target international users, the legal mechanism need to be strengthened both nationally and internationally in respect of enforcement of IP rights violations.[408]

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[403] Cosmovici IP, *Fantasy Sports and IP: Legal Implications in the Digital Age* (11 September 2024) <https://cosmovici-ip.com/news/fantasy-sports-and-intellectual-property-legal-implications-in-the-digital-age/> accessed on 26 June 2025

[404] 505 F.3d 818 (8th Cir. 2007)

[405] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 38 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025

[406] *Ibid*

[407] Dream11, *Dream11 Strengthens Its Partnership with European Cricket Network* (27 February 2020) <https://www.dreamsports.group/newsroom/dream11-strengthens-its-partnership-with-european-cricket-network/> accessed on 26 June 2025

[408] Arun Prabhu and Rishabh Shroff, 'Use of Third Party IP in Fantasy Sports Games' in *The Laws Relating to Fantasy Sports Games in India* (The Sports Law & Policy Centre 2022) 40 <https://csri.co.in/wp-content/uploads/2022/08/Fantasy-Sports_Legality_India_Report.pdf> accessed on 26 June 2025

BRIEF COMPARISON ACROSS NATIONS: ONLINE FANTASY GAMES & IP RIGHTS

Parameters		**US**	**UK**	**EU**	**India**
Protection of IP Rights	**Copyright Protections (Player Data, Stats)**	Strong protection under copyright laws ('Hot News Doctrine' protects time-sensitive data) and the Lanham Act (trademark infringement if unauthorized use), Publicity rights are protected, if no consent. Digital content and branding are well covered through its Digital Laws.	Post Brexit, some divergence from EU standards. Protection Laws in UK - Copyright, Designs and Patents Act, 1988, Passing off (Tort) for publicity rights.	Protects compilations, TM Laws use which confuses or dilutes product. While publicity rights – varies amongst members states with some variations	Compilations under the CA, 1957, TM, 1999 requires nominal or licensed use. While no statutory law on publicity rights, but recognized by courts (Digital Collectibles case)
	Trademark Issues (Logos, Names, Jerseys)				
	Publicity Rights / Personality Rights				
Concern regarding Protection of Data & Privacy Rights of the Players		State specific laws with California Consumer Privacy Act 2018- the strongest. In-game data collection is a concern. So far less strict than EU's GDPR	The UK GDPR is mostly in line with the EU's law with some differences.	GDPR sets strict rules on user data, affecting how fantasy platforms operate across borders.	DPDP Act, 2023. Enforcement mechanisms are at nascent stage
Conflict of Laws / Transnational Jurisdiction		Stronger but still fragmented, not IP-specific	Not governed by Brussels, but Rome I (Choice of	Rome II and Brussels I are	Weak enforcement across

		law - Contract), Rome II (Choice of law – Tort) yet not IP-specific	followed, but not IP-specific	borders; territoriality in IP laws
Transnational Enforcement	Moderate	Effective in international collaboration, yet complex in IP rights post Brexit, territoriality of laws	IP rights can be enforced across member countries; Strict but complex	Enforcement abroad depends on treaties and how foreign courts recognize Indian rights; weak enforcement
IP related Challenges in OFSGs	Fair use v. commercial use, personality rights are varied across jurisdictions	Similar to the EU, though the UK is developing its own policies post-Brexit.	Harmonizing IP laws across member states to consumers interest as well	State-level bans, IP laws ambiguity, no uniform national law

Summarily, keeping in line with the technological advancements and the craze of entertainment through sports and online games, the OSFG are gaining their recognition amongst the users, businesses and the governments across various jurisdictions. But what remains at a dead-end is the formulation of the IP laws which the legislators rarely draft with any consideration of the transnational scenarios[409]. The EU has IP-specific provisions in its instruments on conflict of laws. In US, however, state conflict of laws rules provides no IP-specific rules.[410] The authors therefore suggest that with rising importance of transnational IP Laws related activities; the legislators must give some attention to calibrate the territorial scope of national IP laws with conflict of laws rules to achieve the desired territorial reach of national IP policies.[411]

[409] Marketa Trimble, *Advancing National IP Policies in a Transnational Context* (2015) 74 *Maryland Law Review* 203 <https://digitalcommons.law.umaryland.edu/mlr/vol74/iss2/5/> accessed on 26 June 2025
[410] *Ibid* (n 204)
[411] Annette Kur and Ulf Maunsbach, 'Choice of Law and IP Rights' (2019) 6(1) *Oslo Law Review* 43 <https://doi.org/10.18261/issn.2387-3299-2019-01-07> accessed on 26 June 2025

Additionally, the jurisdictional challenges in IP rights enforcement are due to different legal standards and enforcement mechanisms in the various countries varying from strict and robust regimes to almost weak and inefficient systems. This disparity creates a loophole in the legal framework that the infringers can use to exploit in the operating jurisdiction with less or a weak enforcement mechanism.[412] The basic challenge that lies in the transnational enforcement of IP rights in OFSGs is the choice of forum, i.e., when any legal action arises which forum will be taking up the matter for hearing. On digital platforms, the concept of territory dilutes and the infringing activities can occur in multiple locations, therefore the choice of forum will become even more complex. Secondly, the enforcement of foreign judgment in the IP related cases is difficult, for instance, a right holder obtains a judgment in one jurisdiction, and then the enforcement in another jurisdiction may raise complications, due to different rules regarding the recognition of judgment from foreign countries or judgment being opposite to the laws or policies of another country[413]. Moreover, since the IPR laws are grounded in the principle of, meaning thereby that these laws are merely limited to the country of issuance, but in online gaming, the content can easily be transnational, thus the limitation of territoriality creates a challenge for the right holders seeking protection of their IP rights abroad. The authors therefore suggest that stronger national as well as international mechanisms are needed to regulate the OFS operators and related IP rights enforcement and jurisdictional issues.

CONCLUSION

The OFSGs will continue to expand its operation and gain popularity while also intersect with the IP rights. Understanding the national as well international nuances, it becomes fundamental to not solely rely on judicial interpretations, especially when the matters relate to the privacy and publicity rights of the sportspersons but rather emphasize setting certain legal boundaries. Authors assert that the need for uniform national law may serve as a benchmark to regulate the fantasy sports sector while efforts are aligned towards making IP laws enforceable abroad through treaties and agreements, and extensive licensing agreements, It is imperative that the role of legislators, policymakers, international organizations, legal systems across various jurisdictions, consumers, businesses need to collaborate and coordinate to evolve with these games while protecting the IP rights of those who are the rightful owners of the same.

[412] Gauri Suresh Khandelot and others, 'Jurisdictional Issues in IPR Enforcement in the Digital World' (2023) 3(11) *International Journal of Emerging Technologies and Innovative Research* 142 <https://iciset.in/Paper2620.pdf> accessed on 26 June 2025

[413] *Ibid* (n 143)

INTEGRATING A HUMAN RIGHTS PERSPECTIVE INTO PATENT LAW TO PROMOTE PUBLIC HEALTH: LESSONS FROM THE ORPHAN DRUGS REGIME

Darsana R S*

ABSTRACT

Patent is justified as a tool to stimulate innovation and promote societal progress. Though the emphasis is on public welfare and public interest, the theoretical aims and practical outcomes are disconnected. In reality, the patent system results in monopolistic practices, inflated prices, and restricted access which raise huge concerns especially in the healthcare sector. Attempts to harmonise patent law and human rights principles is not a new phenomenon and has been part of many international instruments. The TRIPS agreement and its flexibilities, is are significant steps aimed at balancing patent and human rights. The implementation of these however, is inadequate highlighting the gaps in the existing system.

This paper analyses the need to incorporate human rights principles into patent law by looking at public health impacts of patents. The challenges in the existing framework are studied through the case of orphan drugs. The patent system acts detrimentally to societal welfare by not promoting research and also restricting access. This is because the system is largely market driven giving priority to commercial interests rather than social values. This paper argues for a new approach where patent law is rethought in terms of public health and human rights. In the presence of a robust framework, innovation will be promoted giving due regard to factors such as incentivising socially valuable innovation and equitable access. Such a framework will align legal protections with public interest objectives.

KEYWORDS: Patent Law, Orphan drug, Rare Disease, Human Rights, Public Health, Innovation.

INTRODUCTION

Patents and human rights have always remained in tension. This has been a persistent challenge, the effects of which are enhanced in the healthcare sector. Patents are exclusive

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rights granted by an authority over an invention for a particular period. It aims at rewarding the creator and also promote innovation and technological progress in society. This exclusivity often results in monopolistic practices that undermine social welfare or may restrict access to technologies. Although international instruments defined the right over one's own creations, they are distinct from human rights which are fundamental and inalienable. Therefore, priority ought to be for human rights and any other rights must be enforced in harmony with them.

Patents protect a new product or process. However, making the invention available to the public is the discretion of the patent holder. They may decide whether to commercialize or market the invention or keep them at high prices. Broad patents may block further research. Moreover, profit driven priorities in the industry often result in lack of innovation in areas with limited commercial potential. This is especially harmful in health care, where it can limit access to life-saving treatments. A drug, for example, might resolve a health crisis but remain out of reach for patients due to affordability.

Orphan drugs are one of the most striking examples of the public health concerns raised by the patent system. They are used for the treatment of rare diseases. Drug development is difficult owing to multiple challenges such as lack of adequate natural history studies, varied symptoms, geographical disparity of patients, statistical hurdles in clinical trials, etc. The market size being small, the industry would be reluctant to divert resources and invest in orphan drug research and development since the recoupment of investment is unlikely. Out of the 6000 – 8000 rare diseases found around the world, only a few have approved treatment. In such commercially unviable areas, patents fail as a tool to encourage innovation. Furthermore, the limited number of available treatments are often priced so high that they remain inaccessible to many.

International instruments envisage the right to health as a human right, placing the responsibility on states to achieve the highest possible standard of health and well-being. The conflict between intellectual property rights and the human right to health has been debated for decades, with the TRIPS flexibilities and the Doha Declaration representing efforts to reconcile these two frameworks. These efforts aim to ensure there is innovation without undermining right to health. In reality, however, these are not adequately utilised thus increasing health disparities. The current scenario therefore, is inadequate in achieving public health goals, especially in neglected and underfunded areas such as orphan drugs. A different outlook in the regulatory framework is essential, which gives due importance to principles of human rights and public health in patents.

This paper describes the challenges of patent law in incorporating human rights concerns and addressing social welfare issues. The problems of patent system in not sufficiently promoting

innovation, and also in restricting access, are highlighted through the case of orphan drugs. This paper advocates for a rethinking of patents from the lens of human rights by incorporating structural reforms. Such a shift is essential in aligning patent law with public health objectives.

PATENT LAW AND HUMAN RIGHTS: LAYING THE THEORETICAL FOUNDATION

Though both patent law and human rights originates from different rationales, they share a broader common goal of improving the society. In fact, the protection of interests resulting from one's own creation have been enshrined in human rights instruments.[414] Patents are designed to encourage innovation, stimulate investment in research and enhance dissemination of knowledge.[415] Human rights are universal and inalienable. They are inherent rights possessed by virtue of being human and not granted or dependent on any legal recognition.[416] Health is a core element of human well-being, forming the basis for personal dignity and the overall welfare of society. A healthy population is essential for economic growth, national progress, and social harmony. The Universal Declaration of Human Rights affirms every person's right to adequate standard of living, including medical care.[417] The International Covenant on Economic, Social and Cultural Rights stipulates the right to the highest attainable standard of health and requires states to take deliberate steps to achieve this right. These measures include lowering mortality rates, improving child development and hygiene, preventing and treating diseases, and ensuring universal access to medical services.[418] This is reinforced by General Comment No. 14 from the Committee on Economic, Social and Cultural Rights. Sustainable Development Goal 3 of the United Nations further underscores the global commitment to ensuring healthy lives and promoting well-being of all ages.[419] The right to health is reaffirmed in UN resolutions concerning the 2030 Agenda for Sustainable Development, which emphasize both physical and mental health.[420]

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[414] *International Covenant on Economic, Social and Cultural Right* (adopted on 16 December 1966 entered into force on 3 January 1976) 993 UNTS 3 (ICESCR) art 15(1)(c); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 27

[415] Elizabeth Verky, 'Pharmaceuticals and Patents', *Law of Patents* (2nd edn, Eastern Book Company 2012); Gerard Marshall Raj, Rekha Priyadarshini and Jayanthi Mathaiyan, 'Drug Patents and Intellectual Property Rights' (2015) 71 European Journal of Clinical Pharmacology 403; Joo-Young Lee, *A Human Rights Framework for Intellectual Property, Innovation and Access to Medicines* (Routledge 2016)

[416] Lee (n 2)

[417] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 25

[418] International Covenant on Economic, Social and Cultural Right (adopted on 16 December 1966 entered into force on 3 January 1976) 993 UNTS 3 (ICESCR) art 12

[419] Transforming Our World: The 2030 Agenda for Sustainable Development (adopted on 25 September 2015) UNGA Res 70/1

[420] The right of everyone to the enjoyment of the highest attainable standard of physical and mental health in the implementation of the 2030 Agenda for Sustainable Development (adopted on 23 June 2017) UNGA Res 35/23

Although the right to health is part of economic and social rights and may not be fully realized immediately, states are obligated to make continuous progress based on their available resources.[421] At a minimum, they must guarantee access to essential and primary healthcare services. The right to health also entails the availability and affordability of safe, quality medical services without discrimination. States must also consider the unique health needs of different population groups and support the development of drugs and vaccines, especially in areas lacking sufficient research or investment.[422]

The right to health is a core human right that takes higher precedence. Other international instruments also support the goal of reaching the optimal health standard.[423] The UN Committee on Economic, Social and Cultural Rights in General Comment 17, underscores the importance of prioritizing right to health over intellectual property rights emphasising that protection for creators must not obstruct fulfilment of health needs.

In theory, patent system is designed to align with public policy objectives and promote societal development. Several perspectives attempt to justify the system, however, none fully captures the whole picture. The classic view associates it with property, where everyone has a natural right to enjoy the fruits of their own labour, including their intellectual labour. An inventor mixes their individual labour with existing resources to create new knowledge and therefore deserves a monopoly over the invention as an extension of their ownership. However, unlike physical objects, information is non-rivalrous and it's often built on prior knowledge.[424] Patents do not create distinct boundaries on rights since the grant of patents depend on what did not exist before and the benefits enjoyed by the patent holder depends on what product emerges post the grant.[425] Possession of an intellectual object requires an act from an authority and therefore it is difficult to determine who gets what as a natural right.[426]

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[421] United Nations Human Rights Office of the High Commissioner, 'Fact Sheet No. 21: The Right to Health' (1 June 2008) <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf> accessed 5th September 2024

[422] *Ibid*

[423] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res 2106 (XX) ICERD art 5; Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 11, 12, 14; Convention on the Rights of the Child (adopted 20 November 1980, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 24; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3 ; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992)

[424] Lee (n 2)

[425] Robin Feldman, *Rethinking Patent Law* (Harvard University Press 2012)

[426] Lee (n 2)

Under the economic rationale, the patent is a tool to enhance technological progress. It lies in correcting market failure since creating knowledge is costly, but copying is cheap, and innovators lack incentive without protection. Patents enable recoupment of their investment and encourage innovation and commercialisation. The focus is on long-term societal benefits of innovation and knowledge sharing, with a short-term restriction. This raises the dilemma where the system intends to increase the production of knowledge by impeding the diffusion of knowledge. An appropriate balance between economic benefits and social costs is essential to the effectiveness of the patent system.[427]

Although patents aim to promote innovation, their effectiveness is often questioned. The impact of patents varies across industries. In the health sector, where innovation is critical, many important areas lack sufficient research because social needs don't always translate into profitable market demand. This raises doubts about whether patents are truly effective in encouraging invention. Moreover, patents can limit availability and affordability, raising further doubts. These challenges underscore the need for a more balanced and socially responsive approach that prioritizes equity and public well-being.

PUBLIC HEALTH IMPLICATIONS OF PATENTS: THE ORPHAN DRUG EXAMPLE

The orphan drug regime serves as a powerful case study to demonstrate the inadequacies of the patent system. It shows the reality where the market potential is prioritised over social necessity. This case highlights a dual failure of the patent regime: its inability to spur innovation and the resulting limitations on access.

Orphan drugs are pharmaceuticals designed for rare diseases. A rare disease is characterized by its low prevalence among people. Diseases like Haemophilia, Sickle Cell Anaemia, Gaucher's Disease, and Spinal Muscular Atrophy are illustrative examples. The term rare disease however, does not have a uniform definition. Different countries have placed varying thresholds on what is a rare disease. Other than the prevalence, factors such as disease severity and availability of alternate treatments are considered for forming the definition. In the United States, a disease is classified as rare if it impacts fewer than 200,000 individuals. However,

[427] *Ibid*; Christopher Buccafusco and Jonathan S Masur, 'Drugs, Patents, and Well-Being' (2021) 98 Wash. UL Rev. 1403; Richard D. Nelson and Roberto Mazzoleni, 'Economic Theories about the Cost and Benefits of Patents', *Intellectual property rights and the dissemination of research tools in molecular biology: summary of a workshop held at the National Academy of Sciences, February 15-16, 1996* (National Academy Press 1997); Ravinder Jha, 'Pharmaceutical Patents: Cathartic or Inhibiting' (2024) 27 The Journal of World Intellectual Property 428; Yi Qian, 'Do National Patent Laws Stimulate Domestic Innovation in a Global Patenting Environment? A Cross-Country Analysis of Pharmaceutical Patent Protection, 1978–2002' (2007) 89 The Review of Economics and Statistics 436

conditions affecting a larger population may also fall under this definition if the anticipated revenue from treatment would not be sufficient to offset development costs, as outlined in the Orphan Drug Act of 1983. The European Union defines a rare disease as one that is life-threatening or chronically debilitating and affects no more than 5 out of every 10,000 people, according to Regulation (EU) 141/2000. Australia adopts a similar criterion. Japan identifies rare diseases as those with fewer than 50,000 affected individuals.[428]

Almost 6000 – 8000 diseases have been identified, and in aggregate, a substantial population is affected by rare diseases. Very few of these diseases have approved treatments, and when treatments do exist, they are often extremely costly. The landscape is dynamic and complex, with varying symptoms, delayed and inaccurate diagnosis, lack of specialisation among healthcare providers, and a lack of awareness among populations. Developing drugs for rare diseases is especially difficult because of several challenges. Not enough information about the disease is known, making it hard to find treatment targets or measure how well a drug works. Suitable animal models may not be available, which limits testing before human trials. Clinical trials are also tough to carry out because there are very few patients who maybe geographically dispersed, and ethical concerns arise—especially when children or other vulnerable groups are involved. The small number of patients also means there isn't enough data to fully understand a drug's safety. On top of that, developing these drugs is very expensive, and companies are unlikely to earn back their investment due to the small market. As a result, many potential treatments are dropped early in the process. The high development costs, limited funding, and lack of adequate protections or incentives result in minimal interest and investment in the field. Only very few of these diseases have any approved treatment and where treatment is available it is highly expensive.[429]

High costs and low chances of success make drug developers focus only on projects with strong financial prospects. Since orphan drugs target small markets, recovering investments through

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[428] David C Pryde and Michael J Palmer (eds), *Orphan Drugs and Rare Diseases* (Royal Society of Chemistry 2014); Marilyn J Field and Thomas F Boat (eds), *Rare Diseases and Orphan Products: Accelerating Research and Development* (National Academies Press 2010); Elizabeth Hernberg-Ståhl and Miroslav Reljanović, *Orphan Drugs: Understanding the Rare Disease Market and Its Dynamics* (Woodhead 2013); Pedro Franco, 'Orphan Drugs: The Regulatory Environment' (2013) 18 Drug Discovery Today 163; Proteesh Rana and Shalini Chawla, 'Orphan Drugs: Trends and Issues in Drug Development' (2018) 29 Journal of Basic and Clinical Physiology and Pharmacology 437; A Lavandeira, 'Orphan Drugs: Legal Aspects, Current Situation' (2002) 8 Haemophilia 194

[429] Field and Boat (n 15); Pryde and Palmer (n 15); Rana and Chawla (n 15); Hernberg-Ståhl and Reljanović (n 15); Rosângela Caetano and others, 'Dynamics of Patents, Orphan Drug Designation, Licensing, and Revenues from Drugs for Rare Diseases: The Market Expansion of Eculizumab' (2021) 16 PloS One e0247853; R Rodriguez-Monguio, T Spargo and E Seoane-Vazquez, 'Ethical Imperatives of Timely Access to Orphan Drugs: Is Possible to Reconcile Economic Incentives and Patients' Health Needs?' (2017) 12 Orphanet Journal of Rare Diseases 1

sales is unlikely, leading to limited research and early discontinuation. Patent-related concerns also reduce commercial interest, which together restricts the availability of treatments and limits patient access. Despite patent protections, orphan drug development and access remain insufficient.

Patent law has inherent limitations, especially evident in the context of orphan drugs. Heavy dependence on market dynamics tends to create monopolies where manufacturers invest primarily in drugs that promise high financial returns. This market-driven approach often leads to increased R&D without true innovation, resulting mainly in "me-too" drugs and minor modifications of existing compounds rather than entirely new therapies with significant therapeutic value. Additionally, pharmaceutical companies tend to concentrate on diseases prevalent in wealthy countries, neglecting those more common in low- and middle-income nations.[430]

Due to small patient populations, companies find it difficult to recoup investments, which discourages research and development. The geographical variation in disease prevalence means a condition may be considered rare in one country but common in another. Firms tend to focus on more common diseases, even if existing treatments are available, since these markets promise higher profits. Additionally, the limited understanding of rare diseases' pathophysiology complicates drug discovery. As a result, orphan drugs remain underfunded and underdeveloped, attracting little commercial interest.[431]

The goal of patents is to secure investments and promote the development of socially valuable inventions. But this does not happen in reality. Any invention that is new, non-obvious, and industrially applicable is awarded a patent for a fixed uniform term. Factors such as the cost of development or the societal impact of the invention do not form part of the evaluation or grant process. Therefore, inventions such as drugs with high developmental costs would be rendered unpatentable, while inventions with low development costs may easily obtain patents. Therefore, firms would also be interested in securing strong patent protection and many treatments that could solve a potential health crisis would be disregarded since they lack patent

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[430] Fernando Antoñanzas, Carmelo Juárez-Castelló and Roberto Rodríguez-Ibeas, 'Pharmaceutical Patents, R&D Incentives and Access to New Drugs: New Ways of Progress at the Crossroad' (2011) 12 The European Journal of Health Economics 393; Jha (n 14); Buccafusco and Masur (n 14); Alexander Tabarrok, 'Patent Theory versus Patent Law' (2002) 1 Contributions in Economic Analysis & Policy

[431] Michael Abramowicz, 'Orphan Business Models: Toward a New Form of Intellectual Property' (2011) 124 Harvard Law Review 1362; Conor MW Douglas and others, 'Social Pharmaceutical Innovation and Alternative Forms of Research, Development and Deployment for Drugs for Rare Diseases' (2022) 17 Orphanet Journal of Rare Diseases 344; Field and Boat (n 15); Theresa M Wizemann, Sally Robinson and Robert B Giffin, *Breakthrough Business Models: Drug Development for Rare and Neglected Diseases and Individualized Therapies: Workshop Summary* (National Academies Press 2009)

eligibility.[432] The scope of the patent system is restricted to the invention and not the upliftment of sectors that need targeted investments. Therefore, research on drugs that could result in lifesaving treatments would not be pursued. Difficulties and expense of basic research, coupled with challenges in designing clinical trials, raise risks for manufacturers with little prospect of financial return.

Access to medicines is another significant issue, as many patients cannot afford patented drugs. Successful uptake of new treatments depends not only on their existence but also on reimbursement mechanisms and patients' purchasing power. Patents can restrict availability and affordability, undermining their intended goal of maximizing social welfare. These issues pose serious public health challenges, leaving many rare disease patients with unmet medical needs and highlighting the necessity for government intervention.[433] From a human rights perspective, individuals with rare conditions deserve equal protection and care as those with more common illnesses, placing a duty on states to uphold these rights.

RETHINKING PATENT: TOWARDS A NORMATIVE FRAMEWORK INCORPORATING HUMAN RIGHTS

The limitations of patent law evaluated from the public health perspective have been elucidated above with the illustration of orphan drugs. It fails to adequately address commercially nonviable areas. Moreover, the patent system does not fully align with social and human welfare goals. Hence, the need for a rights-based public health-oriented approach.

The attempts to reconcile the tensions between patents and human rights, especially in the right to health context, are not new. The TRIPS agreement was designed to balance the interests of innovators and to advance public health. The agreement emphasises on promotion of technological innovation and the dissemination of knowledge without undermining initiatives to promote and protect health.[434] Considering the impact on public health, the flexibilities provided in the TRIPS agreement can be viewed as early attempts to align intellectual property rules with broader human rights principles. The Doha Declaration reiterated this goal by emphasizing on need to support public health and ensure policy coherence.

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[432] Abramowicz (n 18); Shamnad Basheer, 'The Invention of an Investment Incentive for Pharmaceutical Innovation' (2012) 15 The Journal of World Intellectual Property 305; Tabarrok (n 17); Benjamin N Roin, 'Unpatentable Drugs and the Standards of Patentability' (2009) 87 Tex. L. Rev. 503

[433] Ruth L Okediji, 'Does Intellectual Property Need Human Rights' (2018) 51 NYUJ Int'l L. & Pol. 1.

[434] General Agreement on Trade-Related Aspects of Intellectual Property (15 April 1994) 1869 U.N.T.S. 299 art 7 and art 8 <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf > accessed 19 September 2024

Since countries differ in their economic and administrative capacity, the effect of TRIPS agreement and its implementation also varies. Therefore the agreement allowed extended transition periods for developing and least developed countries to fully incorporate its provisions into national systems. For example, least developed countries have until 2033 to comply with TRIPS requirements related to pharmaceutical patents. During this time, they can use the "mailbox" system to accept patent applications and grant exclusive marketing rights for five years if such products are marketed.[435]

With the goal of safeguarding public health, TRIPS envisage for flexibilities. These include compulsory licensing, which allows governments to authorize the use of a patented invention without the patent holder's consent in the public interest, and parallel importation, which enables the import of patented products sold elsewhere, supporting affordability and access. [436]Additionally, TRIPS permits member states to define the scope of patentable subject matter.[437] Countries may also introduce exceptions to patent rights where it does not unfairly harm the patent holder.[438] These exceptions support access to medicines and vaccines, especially during health emergencies. Other flexibilities include allowing research use of patented inventions, early working provisions for generics (to obtain regulatory approval before patent expiry), and national discretion in data protection standards.

TRIPS flexibilities are important tools for aligning patent rights with public health needs, yet they remain largely underused. Although mechanisms like compulsory licensing and parallel importation can improve drug access without violating patent holders' rights, many countries hesitate to use them due to legal complexity, political pressure, and lack of clarity in implementation. The Doha Declaration reaffirmed countries' rights to use these flexibilities, but their practical application remains limited.[439] This gap highlights the need for a stronger commitment to public health over market-driven constraints.

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[435] *Ibid* art 65, 66, 70.8; World Trade Organisation, 'Trips and Pharmaceutical Patents' (September 2006) <https://www.wto.org/english/tratop_e/trips_e/tripsfactsheet_pharma_2006_e.pdf> accessed 19 September 2024; World Trade Organisation, 'Compulsory licensing of pharmaceuticals and TRIPS' <https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm > accessed 19 September 2024

[436] n (21) art 31

[437] *Ibid* art 27

[438] *Ibid* art 30

[439] German Velasquez, 'The Right to Health and Medicines: The Case of Recent Multilateral Negotiations on Public Health, Innovation and Intellectual Property' (2014) 14 Developing World Bioethics 67; Lisa Forman, 'The Intergovernmental Working Group on Public Health, Innovation and Intellectual Property', *Realizing the Right to Development* (2013); Ana S Rutschman, 'Intellectual Property as Determinant of Health' (2021) 54 Vanderbilt Law Review 513; Frederick M Abbott, 'Health and Intellectual Property Rights', *Research Handbook on Global Health Law* (Edward Elgar Publishing 2018)

In the case of areas such as orphan drugs, the core issue is the lack of development which is out of the scope of these flexibilities since the latter is designed to promote access. The rare disease domain being commercially unattractive, there are investments in research and development. The lack of an existing framework prompted the exploration of alternate mechanisms to promote innovation. Several countries have implemented legal frameworks that offer economic incentives to promote the development of orphan drugs. The US Orphan Drug Act, EU Regulation 141/200, Australia's Therapeutic Goods Act, Medicines (Orphan Drugs) (Exemption) Order of Singapore, Taiwan's Rare Disease and Orphan Drug Act, 2000 are prominent examples. The key incentive provided across these frameworks is market exclusivity, which prevents approval of similar drugs for a set period. This period is independent of the patent term. Other incentives include tax credits, fee waivers, fast-track reviews, protocol assistance etc.[440]

Rethinking patent law requires a change in outlook where human rights (right to health in this context) form the core consideration and not market logic. This requires embedding patent law with public health safeguards. Public health determinants such as access, affordability, and availability, therefore, ought to be given due regard. Moreover, adequate resources should be dedicated to address the needs of marginalised and vulnerable sections of society. International instruments aim to achieve this goal by encouraging positive obligations from the part of the state. Ultimately, the goal is to ensure that the impact of patents do not undermine the rights of people.

Orphan drugs is an illustration of how a market-based approach violates basic principles such as dignity and non-discrimination. These implications are beyond the traditional scope of patent law. Further, the industry is often ignorant of the public health impacts, considering the prohibitive costs of research and development. Although the industry does not have an inherent obligation to protect and preserve the right to health, the state cannot shake off its responsibility. It is accountable to the people and has to take proactive steps to promote the right through encouraging research and promoting access. The reluctance of the industry to pursue research is primarily due to the high cost of development. Hence, separating the cost of development and price could be a good strategy, which can be achieved through incentives

[440] Adrienne YL Chan and others, 'Access and Unmet Needs of Orphan Drugs in 194 Countries and 6 Areas: A Global Policy Review With Content Analysis' (2020) 23 Value in Health 1580; Franco (n 15); Todd Gammie, Christine Y Lu and Zaheer Ud-Din Babar, 'Access to Orphan Drugs: A Comprehensive Review of Legislations, Regulations and Policies in 35 Countries' (2015) 10 PLOS ONE e0140002; Bao-cheng Liu and others, 'A Cross-National Comparative Study of Orphan Drug Policies in the United States, the European Union, and Japan: Towards a Made-in-China Orphan Drug Policy' (2010) 31 Journal of Public Health Policy 407

such as grants, rewards, and push and pull incentives. External funding sources should also be explored, which include those from the private sector, especially pharmaceutical companies. Moreover, public investment schemes and crowdfunding should be encouraged. Such efforts can increase interest in R&D since the cost of development can be brought down significantly by reducing the initial financial burden. Measures such as fee waivers, protocol assistance, etc., can ease the bureaucratic hurdles.

Integration of human rights into patent law requires a holistic approach that starts with the strict implementation of TRIPS flexibilities. Their proper utilisation firmly affirms the health priorities without compromising innovation. These flexibilities enhance the availability and access to medicines by acknowledging the rights and interests of patent holders and inventors, as well as members of the general public who require access to new and effective treatments. Thus, they serve public interests and societal development.

In addition to these, incorporating health providers in patent policy can also ensure that the requirements of public health are included in the intellectual property domain at an early stage. This increases diversity in stakeholder representation. Further, many irrelevant and redundant claims can be filtered in patent valuation with the involvement of health experts. Generic medicines can therefore make a timely entry, providing affordable medicines. Moreover, Health Impact Assessments and Health Technology Assessments could be effective tools in patent grant process, which can clearly assess the health implications of inventions, such as those on pricing and availability. Public-private partnerships and patent pools can promote collaborative research and data sharing. Transparency in pricing and disclosure of expenditure can also serve societal needs by enabling proper assessment and planning of healthcare policy and budget. Such a robust framework in no way hinders innovation. They only ensure that the fruits of the innovation are ultimately received by those in need.

CONCLUSION

Intellectual property rights, especially patents, significantly contribute to global healthcare. A proper framework ensures the balance between these domains. Patents are relevant in maintaining market competition, advancing consumer welfare and attracting foreign investment, all of which contribute to national development. A harmonised relationship can therefore ensure optimal results in the long run. Treating both as completely unconnected only undermines societal welfare. Measures such as TRIPS flexibilities, are positive steps in realizing this interconnection, but an international framework or effective guidelines is yet to be developed.

Orphan drugs is an example that reveals the inadequacies of the patent system and its adverse effects on public health. Rare diseases remain an ignored domain due to industry reliance on profits. Priority for common conditions is favourable since they generate profits due to high demand. Complexities in research and development due to a lack of adequate scientific understanding, insufficient infrastructure, and lack of expertise further discourage investment in research. Development is risky and costly, and the possibility of recoupment of investment is unlikely. Moreover, the scope of patent is limited to new and non-obvious inventions and is not to support areas that need public investments and policy backing. Therefore, patents not only fail to incentivise innovation but also hinder access and availability. The fundamental disconnect between the goals of patents and the needs of public health raises concerns where commercial incentives alone are insufficient.

A new framework is therefore essential, which includes mechanisms for funding, price regulation, and technology transfer. This would ensure that inventions serve public interest by being available and affordable. Such an inclusive outlook places commercial objectives at a lesser priority. Ethical concerns are also addressed in such a scenario. The emphasis shifts towards fairness, transparency and accountability. A revised framework supports technological advancements as well as equitable access. States should ensure the implementation of such a system without any financial strain on public resources. This also requires coordination among various stakeholders, especially international bodies and other institutions, including national intellectual property authorities and human rights organisations. The current global health challenges and health disparities reveal the urgent need for reshaping the intellectual property system. Embedding public health values into intellectual property governance can help in achieving true health equity and universal healthcare.

CROWDSOURCED CREATIVITY AND COLLECTIVE COPYRIGHT: LEGAL GAPS IN COLLABORATIVE CONTENT CREATION ON SOCIAL PLATFORMS

Ankul Prajapati*
Adarsh Sahu**

ABSTRACT

The rise of digital platforms has promoted a new wave of crowdsourced creativity, with users collaboratively producing content such as reels, memes, duets, and co-authored posts. This opening up of content creation to everyone is important, but it also brings up legal issues, especially when it comes to copyright ownership and licensing. Traditional copyright frameworks designed for clearly defined authorship struggle to accommodate the fluid, multi-contributor nature of social media content. In India, the Copyright Act, 1957 recognizes joint authorship but fails to adequately address collaborative digital works where individual contributions are often indistinct. This paper explores the legal gaps in Indian copyright law relating to collaborative content creation on social media. It analyses how current definitions of authorship and ownership are ill-suited to the dynamics of online co-creation and identifies resulting uncertainties in rights and licensing. A comparative study with South Africa and U.S. legal frameworks highlights how other jurisdictions approach joint authorship, offering insights into potential reforms. Using doctrinal legal research, case law analysis, and platform terms of service, this paper evaluates the effectiveness of current protections for creators in the digital space. It ultimately proposes legal and policy reforms to better define co-authorship, facilitate fair licensing, and ensure equitable recognition and remuneration for all contributors. The goal is to modernize copyright law in India to meet the evolving realities of digital collaboration.

KEYWORDS: Crowdsourced Content, Joint Authorship, Social Media, Copyright Act, 1957.

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INTRODUCTION

Crowdsourced and collaborative content is an output of the cooperative and voluntary efforts of a number of individuals. Traditionally speaking, this content involves traditional cultural expressions *(TCEs)* like tribal songs, dance, etc., but the 21st century has witnessed the digital aspect of collaborative content, including reels, memes, response videos, duets, or music, dance, and visual media in the context of social media and participatory digital platforms. This type of content has shown some resemblance to joint authorship content, but the quality of unplanned and asynchronous production differentiates it from collaborative content. The concept of "communal authorship" contradicts the conventional copyright legal paradigms, which are based on the idea of a single or easily identified author.

In India, the domain of copyright is governed by the Copyright Act of 1957, which defines author under section 2(d) according to which it defines author in the context of the type of content such as when creator of music is addressed as composer while the word author is used for the producer of literary work.[441] Section 17 generally considers the first author of the work as the owner of the work, except in the case of commissioned work.[442] designates the author as the primary copyright owner. Further, section 2(z)[443] mentions the idea of work of joint authorship but it only talks about the content which is the result of common design and where the contribution of authors is inseparable. The crowdsourced and collaborative content is informal and involves large-scale collaboration, which challenges the application of the present copyright framework to this type of content.

The existence of this loophole causes widespread uncertainty, especially where contributions are distributed or aggregated over time. As of now, there is no determined way of claiming authorship for this type of work. Moreover, in the era of YouTube and Instagram, where collaboration-friendly work is prevalent, the terms of service sometimes allow the withdrawal of default licenses that may intervene with the rights of the creator as there is no full-fledged agreement between the parties. As a result, even where their contribution is essential to the value and popularity of the work, they may not be sufficiently credited or have any control over it. This study responds to three general research questions. First, within the Indian copyright statute i.e., Sections 2(d), 2(z), and 17—what law identifies co-creators? The second question pertains to the regulation of contributor rights and collective authorship in collaborative digital

[441] The Copyright Act, 1957 (14 of 1957) s 2(d)
[442] The Copyright Act, 1957 (14 of 1957) s 17
[443] The Copyright Act, 1957 (14 of 1957) s 2(z)

works by worldwide conventions in nations like the United States and South Africa. Lastly, the third question is what changes are required in order to bring harmony between the new realities of content co-creation in the digital age and current copyright principles. This article attempts to shed light on the changing nature of collective copyright by way of a doctrinal analysis of Indian law, a comparative analysis of other possible legal frameworks, and an investigation of platform-specific behaviour. With innovation in an age where it is more and more dependent on collaboration and crowdsourcing, it also makes legislative and policy changes that will strengthen digital creators, guarantee equitable attribution, and foster fair licensing practices.

COLLABORATIVE CONTENT IN CONTEMPORARY INDIA

In this digital world, With the emergence of social media collaborative content creation has also spiked, including co-authored videos, in which multiple creators contribute to a single piece of work through iterative enhancements, and mashups, where works from different sources are combined to produce a new content, and memes, which are cultural symbols or ideas that spread virally and are frequently modified by multiple users and open design, in which designs are shared publicly for anyone to contribute or modify. These examples show that apart from TCEs and Indigenous works, a new category of digital collaborative content is in the game now.

Almost every task on social media involves the use of extensive algorithms, and Digital Collaborative content creation is no exception to this rule. These algorithms on social media are the one that determines the visibility of collaborative content, and this is based on user behaviour. As an example, social media algorithms prioritise highly interacted content, which serves as an encouragement for authors to collaborate. Beyond content manipulation, these automated social curators dictate user interactions with content, determining the frequency and nature of collaborations.

As already mentioned, Authorship and ownership of creative works in India are governed under the legal framework of the Copyright Act of 1957.

According to the Act's Section 2(z)[444], "Work of joint authorship" means a composite work resulting from the collaboration of two or more authors in such a manner that one author's contribution is blended into the whole. This implies that, unless otherwise agreed, all

[444] Copyright Act 1957, s 17 (n 3)

contributors to a work under joint authorship are equal stakeholders in that work. The Act does not attempt to clarify collective works.

For an analogy, the content in the encyclopedia is not indistinguishable, but these disparate pieces of work are compiled to form a collective whole, and each author has separate rights regarding their contribution; now we can refer to this work as a collective work. But, according to the authors, India's position is underdeveloped in dealing with such a type of content as its legal framework lacks a precise definition of content where individual contributions are distinct yet interwoven.

CRITERIA DEFINING COMMUNAL AUTHORSHIP

Prima facie, both the joint authorship content and Crowdsourced or collaborative digital works appear similar, but later works are the output of community-based creativity where the contribution of one author can be separated from the other and where there is no common design in the minds of the creators. Such works rely on communal participation and sharing and are typically distributed outside the commercial arena of traditional production.[445] In practice, we all see memes that are actually a picture of some cricket match or movie but later when they become the post on a social media app like Instagram, then the users of such social media apps do some work upon it to make something out of it and such works are further modified by multiple individuals for different purposes just by editing either a word or using the previous edit to make a new one, such wide accessibility and re-sharing of such content have the wide role in the formation of digital collaborative contents.[446] These projects grow through separate, asynchronous contributions: one user might remix a video, another adds music or text, and still, others can further modify the result, each contribution augmenting the evolving piece. This dynamic development and collaborative process, where individuals build on one another's contributions without a common design is the hallmark of crowdsourced creativity, which has no common design, and the contributions are separable, and there is a stage where one can say that this is the final work

The components that set the yardstick for content as communally authored are numerosity, informality, temporality and intentions, which are discussed as follows;[447]

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[445] Rachel Maguire, '"It doesn't belong to the internet": copyright reform for user-generated content' (2022) 3 Intellectual Property Quarterly 141

[446] *Ibid*

[447] Aman K Gebru, 'Communal Authorship' (2024) 58 *University of Richmond Law Review* 337

- ***Numerosity*:** Crowdsourced and collaborative content usually involves a large, indeterminate number of contributors. Unlike joint authorship, where the number of contributors can be determined, the numerosity in this category of content can range from hundreds to thousands, as seen in viral meme chains or Instagram reels.
- ***Informality*:** This refers to the absence of any formal understanding or agreement between the contributors regarding the development of the content, and the process is casual, often driven by platform affordances (like Instagram's remix or YouTube's duet tools), without contractual or creative agreements. For instance, the meme makers work on the already existing work without any formal agreement with the primary producer of such content.
- ***Temporality*:** Contributions are made asynchronously over time. One user may begin a trend or base clip (e.g., a dance or comedy skit), followed by waves of responses, remixes, or duets that build upon it, which constitute a derivative work, a pattern common in Indian Reels and short-form videos.
- **Intention:** This presents the idea that crowdsourced and collaborative content lacks a common design regarding the content and contributors work independently. Their contributions are responsive and additive rather than planned. There is no common vision among all the contributors, and the work evolves through iterative modifications.

The 2024 parody video by Ajey Nagar (CarryMinati), which included fourteen well-known Indian creators[448], is a prime example of numerosity because it was produced by a sizable group of independent contributors, each of whom played a unique role. The contributors were not a part of a consistent creative team, even though the finished product looked like a single, cohesive video. The fact that their involvement was not specified in the contract emphasises how informal the arrangement was. The fact that each creator recorded their part separately, frequently without a shared script or planned rehearsal, demonstrates that the goal was responsive and improvisational rather than collective from the start. Since the clips were probably recorded asynchronously and assembled later rather than being co-created in real time, the collaboration also reflected temporality. Additionally, users commonly use Instagram Reels Remix features to keep their own videos on top of pre-existing ones, especially since TikTok was banned in India. Because users hardly ever ask the original creators for permission before interacting with their content, this creative behaviour is characterised by informality.

[448] ET Online, 'CarryMinati Leads India's Ultimate YouTube Collab in a Must-Watch Mr. Beast Spoof' (*The Economic Times*, 23 October 2024) <https://economictimes.indiatimes.com/news/new-updates/carryminati-leads-indias-ultimate-youtube-collab-in-a-must-watch-mr-beast-spoof/articleshow/114516418.cms> accessed 25 May 2025

Temporality is crucial; the duet is frequently created days or even weeks after the original video, and the final products are developed gradually over time. These contributions demonstrate the lack of a shared goal because they are made separately and without prior planning. When a well-liked reel inspires hundreds or thousands of remixes, each slightly changing or enhancing the original performance, this is known as numerosity.

Research on digital remix culture in India finds that amateurs and teenagers now freely form online remix communities, adding "expressive, political and entertainment content" to existing works. In sum, crowdsourced creativity replaces the lone, intentional creator of traditional authorship with a diffuse, participatory process.[449] Because so many social-media works emerge from collective tinkering rather than a single author's plan, they often do not fit neatly into the legal notion of a single author's work, challenging conventional copyright assumptions.

LEGAL ISSUES IN COLLABORATIVE CONTENT

We have already taken a glimpse of the concept of authorship and joint works under the Indian Copyright Act, 1957. We are now moving forward to showcase the legal problems that arise when multiple content producers start collaborating informally on social media like YouTube, and Instagram. This type of content creation gives rise to multiple problems, including the absence of formal agreement, the absence of a common design, separability of contributions, and overlapping contributions, which makes it hard for this type to fit into the Copyright Act's traditional categories.

While, some of the collaborative digital content, which remains on the cycle of modification, can be filtered out at a very earlier stage on the basis of their substantial similarity with the previous content, which can be determined by analysing the views of the reader or spectator on that work[450], this initial process can at the very beginning reduce the number of authorship claims over the collaborative contents.

But as we have discussed, the problem comes while looking at the application of the present copyright framework to this type of content. In this context, the non-applicability of section 2(z) (legal criteria for joint authorship) to such separable and informal content, as this section sets the yardstick of a work to be jointly authored when it is inseparable. This creates a void with regard to the ownership, licensing, and monetisation of crowdsourced and collaborative

[449] Priyansha Agarwal, 'Copyright Infringements in the Digital Age of Remix Culture' (SSRN, 1 February 2024) <https://ssrn.com/abstract=4894187> accessed 25 May 2025
[450] *Ibid*

content. Additionally, it obscures the rights of individual creators, such as their right to credit and immunity from disparaging remarks.

This ambiguity over the ownership and attribution of collective works cannot be addressed by conforming this creation with the restrictive definitions of the present copyright framework which has missed out on the concept of crowdsourced and collaborative creations for example according to section 2(d), an author is a person who initially records, transcribes or publishes the text with originality and such person acquires ownership as well, now applying this to the collaborative content would harm the rights of the person who has further contributed to the work. In the case of *Rupendra Kashyap v. Jiwan Publishing House*[451] The Delhi High Court allowed copyright to a publisher who altered exam questions, even though they were created by several anonymous setters. Sections 23[452] and 24[453] of the Act treat works in which no creator can be recognized as anonymous or pseudonymous, thereby initiating a 60-year copyright term from the date of first publication and in case only one author is revealed than 60 years from the death of that author while in case of revelation of multiple author then 60 years from the date of the death of last surviving disclosed author. By granting rights to the initial publisher.

In case the author of the work is dead or cannot be traced, Section 31A[454] of the Copyright Act permits a third party to request a license from the Copyright Board for publishing the work. Now these sections can have an effect on the licensing of the crowdsourced and collaborative work but in such cases the publication of such work, by the third party, is no longer the matter of right of the author and the right of licensing shifts to the Copyright Board, which weakens the licensing rights of the undetermined author of collaborative content. But without consent or fair benefit-sharing, this framework harms the crowdsourced and collaborative content and permits third parties to commercialise this content, as instead of author of the work, the board will decide in such cases. This shows the void in the Indian law in dealing with such a type of content. Therefore, there is a legislative gap in the protection of collective creation because the current copyright doctrine favours the fixer over the inventor.[455]

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[451] *Rupendra Kashyap v. Jiwan Publishing House (P) Ltd*, 1993 SCC OnLine Del 660
[452] The Copyright Act, 1957 (14 of 1957) s 23
[453] The Copyright Act, 1957 (14 of 1957) s 24
[454] The Copyright Act, 1957 (14 of 1957) s 31A
[455] ICSI, *Intellectual Property Rights and the Law and Practice of Copyright in India* (The Institute of Company Secretaries of India 2020)
<https://www.icsi.edu/media/webmodules/FINAL_IPR&LP_BOOK_10022020.pdf> accessed 25 May 2025

In the context of licensing and royalties, the Bombay High Court has decided that joint authors must collectively approve any licensing or distribution and cannot use such works for their own benefit.[456] But there is no clarity given by any court on whether this principle would apply to crowdsourced and collaborative content. Unilateral licensing by one party may be considered infringement in the context of collaborative output like YouTube or Instagram, when contributors may not have any contractual understanding. Commercialisation is hampered by this legal requirement; remix videos or compilations including several inputs need permission from each source, and any unapproved licensing could result in legal action. Additionally, producers frequently provide broad, royalty-free licenses by uploading their work.[457] For example, unless the author is a member of YouTube's Partner Program, YouTube is permitted by its Terms of Service to copy, distribute, and alter submitted videos without having to pay royalties. Similar contracts are used by Instagram, which gives them free and extensive rights to user-generated content. As a result, most creators have few financial or legal options and must negotiate complicated license landscapes.

In addition to economic rights, creators have certain protection under Section 57 moral rights. The right to assert authorship and the right to protest alterations or distortions that damage an author's honour or reputation are both recognised by Indian copyright law. These rights are enforceable by successors and endure long after economic rights are transmitted. Each contributor has their own moral rights when creating joint content. For example, according to section 57(1) (a) of Copyright Act[458], a co-creator may bring a lawsuit if they are not given credit. The Jasleen Royal controversy is relevant here as in this case, the artist claimed that her song was utilised without giving any credit, which underlines the importance of the right to recognition. The problem of credit denial or damage to one's reputation due to deletion or illegal editing remains unresolved. In certain situations, authors might have to depend on criminal legislation, such as Section 63[459] of the Copyright Act, which punishes false claims of authorship, or contract law.

This legislative loophole makes co-creators dependent on unwritten rules and goodwill, but these can fall apart, and only legislative action in this direction can alleviate their position.

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[456] Elite Legal, 'Copyright Enforcement in Digital Environment: Indian Perspective' <https://elitelegal.in/copyright-enforcement-in-digital-environment-indian-perspective/> accessed 25 May 2025
[457] *Ibid*
[458] The Copyright Act, 1957 (14 of 1957) s 57(1)(a)
[459] The Copyright Act, 1957 (14 of 1957) s 63

Particularly, in projects that are for profit.[460] In conclusion, there is much ambiguity on the application of copyright law in this arena of intellectual property. The needs of platform-based creation, where rights are distributed, attribution is flexible, and content is constantly remixed, have not yet been addressed by the legal system. Therefore, in order to provide equitable ownership, licensing, and moral protections for all contributors in the digital era, India's copyright policy needs to reconsider how it handles collective and collaborative innovation.

COMPARATIVE LEGAL APPROACHES TO COMMUNAL AUTHORSHIP: SOUTH AFRICA, UNITED STATES, AND INDIA

The legal recognition and protection of communal authorship where creative works emerge from collective, often intergenerational, contributions vary significantly across jurisdictions. This section undertakes a comparative analysis of the positions adopted by South Africa and the United States, contrasted with the prevailing legal framework in India.

SOUTH AFRICA'S APPROACH

South Africa has adopted a progressive legislative approach to communal authorship through the Protection, Promotion, Development and Management of *Indigenous Knowledge Act, 2019 (IK Act)*.[461] This sui generis framework has been introduced to meet the needs of indigenous communities and their cultural expressions. The memorandum of the IK Act recognises Indigenous communities as lawful custodians and owners of their traditional knowledge. It offers a comprehensive framework that includes registration of indigenous knowledge, mechanisms for equitable benefit-sharing, mandatory prior informed consent, and protection of communally generated works.[462] Additionally, the *Intellectual Property Laws Amendment Act, 2013 (IPLAA)* integrates Indigenous knowledge protections into existing IP regimes by recognising communities as authors and rights holders of "Indigenous works" and establishing community rights even in derivative works.[463] Through national trust mechanisms, protocols,

[460] WIPO, 'Copyright, Competition and Development' (World Intellectual Property Organization) <https://www.wipo.int/documents/743993/747687/copyright_competition_development.pdf/20477f75-6f4e-332a-20c8-6759e3dc32bb?version=1.2&t=1671199896643> accessed 25 May 2025

[461] Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (6 of 2019)

[462] Margo A Bagley, 'Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa' (2018) CIGI Paper No 207, Centre for International Governance Innovation <https://www.cigionline.org/publications/toward-effective-indigenous-knowledge-protection-regime-case-study-south-africa/ >accessed 25 May 2025

[463] *Ibid*

and consent-based access, South Africa ensures both recognition and agency for Indigenous communities in controlling and benefiting from their cultural heritage.[464]

UNITED STATES APPROACH

In contrast to South Africa, the United States does not have a sui generis framework for protecting communal authorship. The U.S. Copyright Act[465] primarily revolves around individual and joint authorship, requiring a human author to claim copyright protection. Communal works, such as Native American folklore, traditional art, and rituals, often do not qualify for copyright protection because they lack a specific author or fail to meet the originality and fixation requirements. While there have been policy discussions and academic advocacy for the protection of *Indigenous Cultural and Intellectual Property (ICIP),* there is no binding federal statute granting collective rights to communities. Some protections are afforded through cultural preservation laws like the *Native American Graves Protection and Repatriation Act (NAGPRA)*[466] and the *Indian Arts and Crafts Act*[467]. But these focus more on cultural integrity and misrepresentation than on intellectual property rights. Efforts are also underway in certain states and among tribal nations to develop community-based legal frameworks, but these are fragmented and not federally codified.

BERNE CONVENTION APPROACH

Apart from the national approaches, The *Berne Convention for the Protection of Literary and Artistic Works***,** established in 1886, stands as a cornerstone of international copyright law and India has adopted this convention. This convention provides valuable guidance in dealing with communal and digital co-authorship works.

Article 15 of the Convention is based on presumptions of authorship that can serve to clarify attribution in cases of anonymous, pseudonymous, or collectively created works.

Specifically, Article 15(1)[468] presumes that a person whose name appears on a work is the author, even when using a pseudonym that clearly identifies them. This presumption can be extended to digital platforms, where usernames or handles serve a similar function. Article

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[464] South Centre, 'Protection of Indigenous Knowledge: South Africa's Sui Generis Approach and Continental Developments' (2024) South Centre Policy Brief No 263
< https://www.southcentre.int/wp-content/uploads/2024/05/SV263_240501.pdf> accessed 25 May 2025
[465] Copyright Act of 1976, 17 USC (1976) (US)
[466] Native American Graves Protection and Repatriation Act 1990 (Pub L No 101-601)
[467] Indian Arts and Crafts Act, 1990 (Pub L No 101-644)
[468] Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979) art 15(1)

15(2[469]) applies this logic to cinematographic works, recognizing the named individual or entity as the maker. Article 15(3)[470] allows the publisher to act on behalf of an unknown author until their identity is revealed, while Article 15(4)[471] mandates domestic laws to designate a competent authority to represent the rights of unknown authors in unpublished works, which is similar to the concept of creating trust for maintaining this content.

COMPARATIVE ANALYSIS

Berne Convention, though not talks about digital collaborative content but its idea of providing the competent authority for an unattributed collaborative content and providing the attribution in case of cinematographic work, could have helped India in developing a well suited framework for crowdsourced and collaborative content. But India, like the United States, currently lacks a dedicated statutory framework for communal authorship. The governing law, the Copyright Act, 1957[472], is designed around the individualistic model of authorship. While it provides for joint authorship under Section 2(z)[473] and recognises anonymous and pseudonymous works under Section 23[474], these provisions are not well-suited to capture the collective, intergenerational nature of communal works. In India, traditional knowledge and folklore often undocumented and community-owned do not enjoy robust IP protection. The first entity or person to document or fix such knowledge often becomes the copyright holder, side-lining the originating community. Initiatives like the *Traditional Knowledge Digital Library (TKDL)* aim to prevent misappropriation, particularly in the domain of bio-patents, but they do not confer authorship or ownership rights to the communities.[475] The Geographical Indications of Goods (Registration and Protection) Act, 1999,[476] provides some recognition to community-linked products but is limited in scope and does not fully address the broader issue of communal authorship.

The comparison highlights how different levels of recognition are given to work of the communal authorship. This South African framework is an example of a mature and community-centred model that not only recognizes communal authorship but also establishes

[469] Berne Convention (n29) art 15(2)
[470] Berne Convention (n29) art 15(3)
[471] Berne Convention (n29) art 15(4)
[472] The Copyright Act, 1957 (n1)
[473] The Copyright Act, 1957 (n3)
[474] The Copyright Act, 1957 (n1) s 23
[475]Traditional Knowledge Digital Library, 'About TKDL' <https://www.tkdl.res.in/tkdl/LangFrench/common/Abouttkdl.asp?GL=Eng> accessed 25 May 2025
[476] Geographical Indications of Goods (Registration and Protection) Act 1999 (Act 48 of 1999)

a benefit-sharing model, community agency, and national trust for Indigenous knowledge.[477] The United States, while lacking a dedicated communal authorship statute, has at least begun to engage with the policy implications through cultural heritage protection and misrepresentation laws. India, however, remains primarily confined to an individual-centric copyright model, offering minimal legal acknowledgment or protection to the community-based origins of traditional cultural expressions. This disparity highlights the urgent need for India to reform its intellectual property laws to incorporate a sui generis model that accords legal recognition to communities as collective authors, includes perpetual protection for traditional knowledge, and establishes equitable benefit-sharing mechanisms, similar to the South African approach.

RECOMMENDATIONS

To effectively safeguard communal authorship in India's budding digital creative ecosystem, a multifaceted approach is required, for which lessons can be drawn from South Africa's sui generis framework.

Firstly, to address the complexities surrounding communal authorship and collaborative creative works, it is important to establish a legal framework that recognises and allocates rights to contributors proportionally, based on their individual contributions. This approach ensures that each contributor is acknowledged as the author of their specific contribution, thereby granting them distinct rights pertaining to authorship, ownership, licensing, and royalties. This step reflects the idea of the Supreme Court in *Eastern Book Company v. D.B. Modak*, where the Court ruled against the idea for every contribution and observed that *only those who add a substantial contribution* should be recognized as authors. Such a framework would not only uphold the principles of fairness and transparency but also encourage collaborative creativity by assuring contributors that their individual efforts are legally protected and justly compensated.

Secondly, establishing a sui generis legal framework tailored to address the problems in communal digital creations such as memes, collaborative videos, and reels is crucial. South Africa's implementation of the Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019[478] and adoption of the Swakopmund Protocol, which ensures

[477] Camille Meyer and Kiruben Naicker, 'Collective intellectual property of Indigenous peoples and local communities: Exploring power asymmetries in the rooibos geographical indication and industry-wide benefit-sharing agreement' (2023) 52(9) Research Policy 104851 <https://doi.org/10.1016/j.respol.2023.104851 > accessed 25 May 2025.

[478] Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (n 33)

that any use of TCE is subject to prior informed consent and benefit-sharing agreements, along with creation of registers and databases of TCEs, which serve both as a tool for documentation and as a legal reference to assert rights over these expressions.[479] Adopting a similar approach in India for crowdsourced and collaborative authorship can lead to the formation of a more structured framework for communally authored works.

Thirdly, the creation of dedicated trusts or agencies that will register, manage and oversee communal digital content can address challenges related to rights management and benefit-sharing.[480] In South Africa, these organisations look out for the interests of Indigenous communities, regulate usage rights, and ensure that the benefits of TCEs are fairly shared. Establishing similar institutions in India would provide structured model for licensing, permissions, and revenue distribution, ensuring fair compensation for all contributors.

Fourthly, implementing benefit-sharing mechanisms is essential to ensure that creators are fairly compensated for their contributions to communal digital content. South Africa's legal frameworks emphasise equitable benefit-sharing with communities contributing to TCEs. India can adopt similar models, including revenue-sharing arrangements and licensing fees, to acknowledge the collective effort involved in creating digital works.

Lastly, capacity building and community engagement are vital for the sustainable protection of communal authorship. South Africa's approach includes educational programs and community initiatives to raise awareness and empower communities to safeguard their heritage.[481] India can implement similar strategies by conducting digital literacy programs and workshops focused on rights management and the importance of protecting communal digital creations. Engaging communities in the governance of their digital content fosters a sense of ownership and responsibility, ensuring that communal authorship is preserved and respected in the digital age.

CONCLUSION

The rapid growth of collaborative content creation on platforms like YouTube, Instagram, and Indian short-video apps has exposed significant gaps in India's Copyright Act of 1957, which

[479] Parvathy Menon and Valarmathi R, 'A Comparative Study of the Existing Laws Governing Traditional Cultural Expressions' (2025) 7(1) International Journal for Multidisciplinary Research <https://www.ijfmr.com/article/IJFMR250135975.pdf> accessed 25 May 2025
[480] *Ibid*
[481] Caroline B Ncube, 'The Protection of Traditional Knowledge and Cultural Expressions: South Africa's National Experience and Lessons for the International Process' (South Centre, 1 May 2024) <https://www.southcentre.int/wp-content/uploads/2024/05/SV263_240501.pdf > accessed 25 May 2025

was designed for an era of individual authorship. This study identifies three key issues: *First*, the Act's rigid definitions of authorship and ownership create confusion in collaborative projects. In *Rupendra Kashyap v. Jiwan Publishing House*[482], the Delhi High Court granted ownership to publishers rather than creators, highlighting this bias. Additionally, the criteria for "joint authorship" under Section 2(z) are impractical for remix-type content, where contributions are sequential and distinct, and leaving collaborative creators vulnerable to disputes over attribution and control. *Second*, licensing and royalty systems are ill-equipped for the digital age. Social media Platforms aggravate this issue by imposing unilateral terms; for instance, YouTube's royalty-free agreements exploit legal loopholes, depriving creators of fair compensation and stifling innovation. *Third*, the law fails to protect collaborative creativity, where the contribution are separable and there is no common design. This oversight permits cultural appropriation, as seen in cases where companies exploit local art forms without community consent. Despite academic calls for unique frameworks to protect crowdsourced and collaborative content India's legislative inaction perpetuates inequality.

To address these challenges, author is suggesting some reform strategy which includes giving the attribution for the creator's contribution, where the rights are restricted to his contributions, the sui generis framework can be adopted for addressing this loophole as done in the South Africa for TCEs, dedicated trusts or agencies that will register, manage and oversee communal digital content and adoption of benefit-sharing mechanisms will ensure that creators are fairly compensated for their contributions to communal digital content.

The Supreme Court's approach in *Eastern Book Company v. D.B. Modak*[483]provides substantial value for the first recommendation, where the Court has emphasized the concept of authorship on substantial contribution and further other recommendations are imbibed from the international frameworks, especially South Africa, which has a dedicated framework for communal authorship content. These reforms are crucial for India's $1.3 billion digital creator economy, where 80% of creators express uncertainty about ownership rights.[484] By integrating the interests of platforms, fixers, and originators, policymakers can support an environment that encourages innovation while preserving cultural integrity. Until changes are not made in the present Copyright framework, outdated regulations will continue to impede creativity, leaving India's digital storytellers constrained by outdated laws. A paradigm shift is needed to

[482] *Rupendra Kashyap v Jiwan Publishing House Pvt Ltd* (1996) 38 DRJ 81 (Del HC)
[483] *Eastern Book Company v D B Modak* AIR 2008 SC 809
[484] ET Online, 'Why Is the Govt Handing out $1 Billion to Content Creators?' (The Economic Times, 1 May 2025) <https://m.economictimes.com/industry/media/entertainment/why-is-the-govt-handing-out-1-billion-to-content-creators/articleshow/119110000.cms > accessed 23 May 2025

reframe copyright as a tool for equitable collaboration, enabling the legal system to truly support the voices of India's 500 million social media users.