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FRACTURED REALITIES: THE DELETERIOUS IMPLICATIONS OF ARTIFICIAL INTELLIGENCE (AI) VOICE CLONING ON A PERSON'S NAME, HONOUR AND REPUTE

~Vedant Saxena¹

Abstract

Voice cloning technology has revolutionized the marketing and advertising sector by allowing AI bots to create falsified audio clips from a single clip. This technology has led to unethical practices, as a voice clone created with malicious intent can have disastrous consequences for the victim. This paper aims to explore legal pathways for victims of audio deepfakes, focusing on the right to publicity, intellectual property law, and defamation. The author divides the paper into three sections: examining the effectiveness of publicity rights, intellectual property law, and defamation law in deterring the growth of deepfake technology, particularly for celebrities, and the impact of copyright law on germination of audio deepfakes. The paper also explores the law of defamation in tortious and criminal spheres.

Keywords

Audio deepfake; Intellectual Property; Publicity right; Defamation; Judicial Activism.

¹ You may contact the author at the following email address: vedant11.saxena@gmail.com.

INTRODUCTION

The merits of Artificial Intelligence (AI) know no bounds. From providing invaluable assistance in academic and office assignments, breaking down the complexity of tasks without material costs and facilitating the requirements of persons with special needs, to multi-tasking and augmenting decision-making, the world of AI has witnessed a sea change over the past decade and has accomplished a plethora of meritorious activities. However, the marvels of AI have, of late, been frequently put to use by fraudsters to carry out scams and undesirable activities. A prime example in this regard is deepfake technology. A deepfake is a name given to synthetic media produced by AI, after being fed a catena of images and clips by the programmer, by superimposition of the likeness of the victim on an audio or video clip. A deepfake therefore falsely displays, to the unwary eye, the victim engaging in an act or giving a speech. On account of the vast advancement in the various aspects of AI, a deepfake may have a strikingly realistic touch. For instance, in 2022, a series of videos featuring acclaimed actress Margot Robbie went viral across social media. The videos featured the actress engaging in a plethora of activities, such as dancing while holding a bottle of wine and playing with her husband's items.² While the production of these videos seemed harmless and was, in all probability, made for fun, it was eerie to witness the number of people who were duped into believing that the entity starring in the videos was Margot.³

A BRIEF ON THE ILLICIT USES OF DEEPPFAKE TECHNOLOGY

While the use of deepfake technology may prima facie seem fun, it possesses the capability of marring an individual's reputation and leaving a deep scar on his psyche. One such popular use of deepfake technology is 'revenge pornography'. Such a term has been used to describe acts of stitching a woman's face upon the body of a porn star, thereby making it appear that the aggrieved was participating in any kind of sexual act, in utter contrast to actuality.⁴ In 2018, it was reported that a number of actresses, including Scarlett Johansson and Emma Stone, were subjected to deepfake pornography, falsely portraying them to engage in sexually explicit acts. Scarlett Johansson also went on to speak up against such pitiful use of technology and while commenting

² Daily Mail Online, available at: <https://www.dailymail.co.uk/tvshowbiz/article-10940661/Chillingly-realistic-deepfake-video-Margot-Robbie-goes-viral-TikTok.html> (last visited on March 27, 2024).

³ *Ibid.*

⁴ The Washington Post, available at: <https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/> (last visited on March 28, 2024).

upon the debilitating effects on victims of deepfakes, stated that the fighting to curb such technology was a lost cause.⁵

A CASE INVOLVING DEEPAKED VOICE THAT SHOOK THE INSURANCE INDUSTRY

The advancement of deepfake technology has also slithered into the insurance industry. As per a publication made in the Wall Street Journal, in April 2019, fraud involving deep faked audio was made, which involved the victim incurring a loss of almost \$ 243,000. The victim in this case wasn't a layman, but the Chief Executive Officer (CEO) of an energy firm based in the United Kingdom. The incident involved the CEO responding to deep faked audio, whom he believed to be the voice of the head of the firm's parent company, based in Germany. As per the instructions of the audio, the CEO transferred funds worth \$ 243,000 to a Hungarian supplier. Upon later being discovered that the audio was generated by a fraudster who used AI software to mimic the voice of the head of the German-based parent company, the CEO of the UK-based firm recalled the audio possessing a peculiar German accent and melody, on account of which he was not able to detect the fraud. This incident is a shocking reminder of the sheer excellence of AI software in producing believable, falsified clips and audios of individuals.

Further, this case comes as a reminder to modify the laws pertaining to the insurance industry, since in the present case, the insurance company of the victim, stated that he had never, until now, received a claim involving losses caused on account of AI software.

STATEMENT OF THE PROBLEM

It can therefore be concluded by the aforementioned discussion that a malicious or improper use of the innately fascinating voice cloning technology may have a detrimental impact on the victim. While celebrities are prone to being hunted down and may be affected more severely, an audio deepfake may have a long-lasting impact on a private individual also. Therefore, in light of this, strong legislation is required to counteract the growing threat of deepfake technology. While several states in the US have formulated legislation to counteract the growing threat of deepfakes, the pace with which such technology is witnessing advancements has rendered most of the laws

⁵ Deccan Chronicle, *available at*: <https://www.deccanchronicle.com/technology/in-other-news/020119/scarlett-johansson-says-fighting-deepfake-porn-is-fruitless-lost-caus.html> (last visited on March 28, 2024).

obsolete. In India, however, to date, no legislation has been drafted explicitly to suppress deepfakes. Through this paper, the author seeks to study the applicability of existing legislation on the aspect of audio deepfakes and its competence in making a dent in the rising threat.

RESEARCH QUESTION(S)

- Can the constitutional provisions, which regulate the law on the right to publicity in India, be effectively utilized to protect public figures and artists against audio deepfakes?
- Can a voice be considered a work falling within Section 14 of the Copyright Act, 1957 and thereby protectable under copyright law?
- Can a person employ the provisions of the Trademark Act, 1999 to get his name registered across all classes of goods and services and thereby prevent an unauthorized use of his name?
- Can an audio deepfake be interpreted as a ‘false’ or ‘defamatory statement’ to qualify as defamatory conduct under the law of defamation?

RESEARCH METHODOLOGY

The method of research employed for this paper is primarily analytical. The author has written this paper in a meticulous and effective manner by analysing doctrines, concepts, case laws and other such work. By carrying out an in-depth analysis of the aforementioned, the author has highlighted the lacunae in the existing legislation and has expressed his opinion on the ways in which such lacunae may be eliminated and the laws be interpreted in a better manner to suit the status quo. Further, the study was conducted with the assistance of several books authored by renowned authors on the topic, publications, and websites on the internet that provide information about phenomena occurring across the nation and the globe.

HYPOTHESIS

- Under Indian law, a celebrity can access the right to publicity, which has been interpreted by courts in light of constitutional values. However, such rights are subject to several limitations

- An action under copyright law does not seem plausible in the present day, in the wake of explicit rulings barring the copyrightability of a voice.
- Persons possessing a substantial degree of public recognition may invoke the provisions of trademark law and passing off to counteract audio deepfakes.
- An action for tortious defamation may be made available to a victim of voice cloning. An action for criminal defamation may also lie, in the event of courts making a liberal interpretation of Section 499 to include the publication of a deepfake audio within the necessity of a false or defamatory statement.

HIGHLIGHTING THE INDISPENSABILITY OF PROTECTING A CELEBRITY'S RIGHT TO HIS PERSONA

Celebrities public image has significant importance. It is an invaluable asset in the commercialization and promotion of products. Therefore, celebrities must be granted the exclusive legal right to profit out of their name and identity. This would ensure that celebrities are adequately awarded for their fame and create an invaluable economic incentive for the public. Further, identity protection would also help provide a celebrity with a powerful remedy against an unlawful appropriation of his identity. This is pertinent because its prominent for celebrities to be victims of deepfake technology rather common masses, because of the presence of a greater element of distinctiveness in a celebrity's voice. Further, an audio or video clip of a celebrity engaging in a controversial act is more likely to arouse the attention of the people rather than that of an individual. Availability of celebrity content across social media and the internet adds fuel to the fire since a catena of images and clips is what is required to produce an enticing deepfake.

In India, however, celebrity persona is still not recognized as intellectual property. Laws on publicity or merchandising rights of celebrities have merely been associated with constitutional values. The privileges granted to celebrities under trademark and copyright law are mostly associated solely with the protection of their on-screen work, and not their general persona. While there have been certain judgements wherein celebrities have been granted certain control over any potential unauthorized use of their name, this department is not without ambiguity. Through this section, the author tries to decode the loopholes in the current legislation and means to strengthen the rights of celebrities for their name and identity.

THE RIGHT TO PUBLICITY

Publicity rights accord a celebrity's personality the status of merchandise. The right to publicity grants a person an exclusive right over the commercial exploitation of his personality. Such rights have been debated by Indian courts. In the case of *Titan Industries Ltd. v. Ramkumar Jewellers*⁶, the Court, for the first time, defined the term 'celebrity' as a famous or a well-known person and is merely a person who "many" people talk about or know about'. In this case, the Court went on to state that the identity of a celebrity could be used for endorsing a product or service, only if he consents to the same regarding the place, time and nature of usage.

In the case of *ICC Development (International) Ltd v Arvee Enterprises*⁷, the Hon'ble Delhi High Court stated that a person can acquire publicity rights by his association with any sport, event, movie, etc. Such a person alone is entitled to profit from his public image, and any misappropriation of his persona would be violative of Articles of the Indian Constitution i.e.; 19 & 21⁸. Above mentioned case is relevant in the context of voice cloning since it is fairly easy for a person with access to a laptop or smartphone to create an audio deepfake of a celebrity endorsing a particular product or service. An act of putting a voice clone to unauthorized use can, therefore, be considered a misappropriation of a celebrity's personality and therefore, violative of the aforementioned articles. Moreover, in the recent case of *K.S. Puttaswamy (Retd.) v. Union of India*⁹, the Court held that a person is exclusively enjoys the entitlement of public image, and therefore, he exercises exclusive control over the commercial use of his identity.

However, owing to the present-day scenario, it is indispensable that the Indian courts adopt a dual approach with regard to publicity rights. Celebrity persona must not only be granted constitutional protection but must also be accorded the status of 'property'.¹⁰ Such status will enable the recognition of personal identity as intellectual property, and will thereby ensure a wider ambit of protection against misappropriation. At the dawn of the era of deepfakes, the chances of

⁶ *Titan Industries Ltd. v. Ramkumar Jewellers*, 2012 (50) PTC 486 (Del).

⁷ *ICC Development (International) Ltd v Arvee Enterprises*, 2003 VIIAD Delhi 405.

⁸ M.P.Jain, *Indian Constitutional Law* 98 (Kamal Law House, Calcutta, 5th edn., 1998).

⁹ *K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1.

¹⁰ Kanu Priya, "Intellectual Property and Hegelian Justification", *NUJS LAW REVIEW* (2008).

misappropriation of a person's identity, particularly a celebrity's, have increased many-fold and therefore, adequate legal protection is the need of the hour.

WENDT V. HOST INTERNATIONAL, INC.: AN EYE-OPENER IN THE CONTEXT OF RIGHT TO PUBLICITY

The case of *Wendt v. Host International, Inc.*¹¹ made a declaration of an important aspect with respect to the right to publicity. Herein, the appellants were actors in the television show 'Cheers', while the appellees were Paramount Pictures Corporation and Host International. Host International created robots and placed them in an airport bar paying semblance to the television show. According to the plaintiffs, the robots were based on the name and likeness of their characters in the television show. The Ninth Circuit opined that in order to determine whether the publicity rights of the plaintiffs had been violated by the defendants, it was pertinent to decode the similarities between the robotic figures and the appellants.¹² While the robotic figures bore striking similarities with the appellants' characters as portrayed in the television show, there were no similarities which they bore with the appellants in actuality.¹³ It is pertinent to note in this regard that the right to publicity can be invoked only in the event of a celebrity's real personality being misappropriated. A celebrity does not possess any right with respect to his reel character.¹⁴ This case is relevant when studied in the context of audio deepfakes, since if an artist's voice, no matter the distinctiveness, has been imbued into a fictional character, and the fictional character is misappropriated, it is only the holder of copyright in the work who may have a locus standi to prevent the antics of such fraudster; the artist may have no recourse for the same.

THE CASE OF EMMA WATSON: A CLASSIC PORTRAYAL OF THE HORRORS OF AN AUDIO DEEPPFAKE

Ever since her portrayal of the fictional Hermione Grainger in the Harry Potter franchise, Emma Watson has become a name to reckon with in the film industry. However, fame attracts fraudsters and unfortunately, Emma Watson has fallen prey to deepfake technology on a number of occasions. A deepfake comprises synthetic media that involves replacing a person's image or voice

¹¹ *Wendt v. Host International, Inc.*, 125 F.3d 806.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

with another's, thereby inducing the masses to believe events that never actually occurred in real life. Several public figures have ended up on the wrong side of deepfake technology. For instance, in 2018, acclaimed actress Scarlett Johansson spoke up on the potential horrors of such technology, in light of her face being stitched onto persons featured in pornographic content ¹⁵.

While there has been a rising discussion on the need for legislation regulating deep faked content, the rise of deep faked audio is equally alarming and requires deliberation. The rules surrounding deep faked audio are even more scarce across the globe, while the damage that such audio may have on the well-being of the victim is no less debilitating. In early 2023, there was an audio clip released on 4chan that featured the voice of Emma Watson reading across the pages of Adolf Hitler's book, 'Mein Kampf', which features the German dictator making public his political agenda. ¹⁶ To the normal ear, the voice featured in the audio clip displays a strong semblance to Emma Watson's and therefore, such a clip proved to be a marred blot on the actress's repute.

THE ELVIS ACT: A WELCOME FIRST LEGISLATION TO COUNTER VOICE CLONING

The recently concluded Ensuring Likeness Voice and Image Security Act in the state of Tennessee ¹⁷, popularly known as the 'ELVIS' Act, has widened the protectability of a celebrity's persona, covering not just the aspects of name, likeness or photograph, but also the aspect of voice. The Act has indeed been named after the legendary Elvis Presley, a household name in the music industry and often hailed as 'the king of rock 'n roll' and is one of its kind that ensures adequate protection for celebrities against unauthorized appropriation of several aspects of their persona, specifically in the context of digital technology. There are, however, certain exemptions expressly stated under the Act, which include accounts, sports broadcasts, public affairs and news. The First Amendment protects such rights and only to that extent does the Act exempt such acts. ¹⁸

¹⁵ Gizmodo, *available at*: <https://gizmodo.com/scarlett-johansson-on-deepfakes-the-internet-is-a-vast-1831399330> (last visited on March 31, 2024).

¹⁶ The Sunday Times, *available at*: <https://www.thetimes.co.uk/article/ai-4chan-emma-watson-mein-kampf-elevenlabs-9wghsmt9c> (last visited on April 1, 2024).

¹⁷ The Verge, *available at*: <https://www.theverge.com/2024/3/21/24108108/tennessees-elvis-act-becomes-law> (last visited on April 1, 2024).

¹⁸ *Ibid.*

The Act was passed, other than to protect celebrities against the horrors of deepfake technology, to ensure that the widespread availability of a celebrity's name, likeness or voice is not capitalized upon by fraudsters to gain illicit profits and thereby to further publicity rights.¹⁹ Moreover, the Act not only encompasses celebrities and artists but also private individuals who fall prey to deepfake technology.²⁰ Therefore, in conclusion, Tennessee is the first state across the globe to expressly pass legislation in order to curb the growing concern about deepfake technology.

It takes years of sweat and toil to become a household name. If other people were to profit from a celebrity's name, it would not only be unjust for the celebrity but would also be a marred blot upon creativity. Intellectual property has traditionally been associated with the right to protect intangible property, such as literary or artistic works, inventions, designs, cinematographic films, etc. Celebrity rights are a unique domain of rights, which, owing to the skyrocketing commercial values of celebrities, needs to be recognized.

While the Indian judiciary has time and again awarded damages and brought about multi-million-dollar settlements, it is the legislature that needs to statutorily recognize the commercial importance of celebrity rights, to fill up the lacunae in law. It is indispensable that celebrity rights are brought within the domain of property, to grant celebrities, the privileges of the intellectual property laws for their personalities.

AN IP-BASED APPROACH TO THE ASPECT OF VOICE CLONING: ANALYZING THE COPYRIGHTABILITY OF A VOICE

Copyright law protects the owner's literary or artistic creation against unauthorized exploitation. A person's identity, however, is not regarded as an asset under Section 14 of the Indian Copyright Act²¹. The jurisprudence surrounding the applicability of copyright law on a voice is still fairly nascent. It was, for the first time, held in the case of *Sim v Heinz & Co Ltd.*²², that a voice cannot be made subject to copyright protection. However, according to the author, it is pertinent to accord copyright protection to a voice in certain cases, in order to counteract the growing evils of voice

¹⁹ Cointelegraph, available at: <https://cointelegraph.com/news/how-music-industry-battling-ai-deepfakes> (last visited on April 2, 2024).

²⁰ *Ibid.*

²¹ Indian Copyright Act, 1957 (Act 14 of 1957).

²² *Sim v Heinz & Co Ltd.*, 1 WLR 313 1959.

cloning. Such cases may involve a fairly peculiar way of speaking, a voice imbued with a distinctive quality or a singing voice.

In the context of celebrity photographs, the lack of ownership in the concerned work is what impairs a celebrity's right against the exploitation of his personality. For instance, if actress Chloe Grace Moretz²³ were to be photographed at a private restaurant, she would not have legal recourse to the protection of her personality, for the ownership of photograph vests in the person taking the photograph. Such photographs lay down the groundwork for the creation of a deepfake and the victimized celebrity would be left remediless against an unauthorized appropriation of his identity.

By the 1994 amendment²⁴ to the Indian Copyright Act, performers have been granted certain rights for their performance in the concerned work. Section 38 of the Act²⁵ entitles a performer to the right to restrict any other person from making an audio or visual recording of his performance for commercial purposes. However, this right is both limited and restrictive. It is concerned with awarding certain privileges to a celebrity only in the event of his delivering a performance. A celebrity would not have any recourse to a private picture of his being captured and used for commercial purposes, under the Copyright Act.

A celebrity may be able to take recourse to moral rights, provided under Section 57 of the Act. Ordinarily, moral rights vest in the author, and he shall be exclusively privileged to safeguard his honour or reputation. However, from the cases of *Bala Krishnan v. R Kanagavel Kamaraj & Ors*²⁶ and *Phoolan Devi v. Shekar Kapoor & Ors.*²⁷, it could be inferred that the Court takes into account the implications of distortions on the lives of household names in particular. Therefore, while celebrities may be able to take recourse to Section 57, a private individual may not be that lucky.

²³ *Cosmopolitan*, available at: <https://www.cosmopolitan.com/entertainment/celebs/a60365/chloe-grace-moretz-high-line-coach-party-interview/> (last visited on April 2, 2024).

²⁴ The Copyright (Amendment) Act, 1994 (Act 38 of 1994).

²⁵ *Ibid.*

²⁶ *Bala Krishnan v. R Kanagavel Kamaraj & Ors.*, 1999 (3) CTC 247.

²⁷ *Phoolan Devi v. Shekar Kapoor & Ors.*, 57 (1995) DLT 154.

MIDLER V FORD MOTOR CO.: HIGHLIGHTING NON-FIXATION OF A VOICE WITHIN A TANGIBLE MEDIUM

The jurisprudence surrounding the copyrightability of an individual's voice can be traced back to the landmark case of *Midler v. Ford Motor Co.*²⁸ In this case, the defendant was involved in designing an advertisement that would feature a catena of the most popular songs of the past few years. In order to materialize this, the defendant sought to hire the original artists to feature in the advertisement. One of the artists, Bette Midler, however, turned down the defendant's offer. The defendant, in consequence, hired an impersonator in order to have Midler's song featured in the advertisement. It is pertinent to note that the holder of copyright in the song granted a license to the defendant to use Midler's song, in light of the fact that the rights of a performer are fairly limited with respect to his name and likeness.

In response, the plaintiff, Midler, filed a suit contending that since her voice was distinctive of her persona, she had the first right to the commercial exploitation of her voice. The District Court, pronouncing in favor of the defendant, held that a voice could not be considered protectable.²⁹ The Appellate Court, on the other hand, was of the opinion that in the context of celebrities, a person's voice is reflective of his name, likeness and repute and therefore, no other person may be allowed to use his voice without his express consent for the same.³⁰ It further held that despite a voice not being protectable under copyright law, the unauthorized impersonation of a celebrity's voice was impermissible and it was immaterial whether the holder of copyright in the work had granted a license to the defendant.³¹

Court accordingly stated that an individual's voice was not a protectable entity under copyright law, since one of the prerequisites for copyright protection is the 'fixation' of the concerned work in any tangible medium³². The Court was of the opinion that the voice of a person, irrespective of the fact whether he was a public figure, was one of the primary distinctive and identification features of his persona voice and was not capable of being appropriately 'fixed' as required under

²⁸ *Midler v. Ford Motor Co.*, 849 F.2d 460.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

the law and therefore, it could not be considered protectable.³³ The Court also went on to hold that the mere imitation of a performance fixed in a tangible form would not open up a case for copyright violation, despite the fact that the defendant may have intended to replicate the entirety of the performance.³⁴

THE LIMITATIONS OF THE JUDGEMENT IN MIDLER IN THE LIGHT OF THE GROWING INSTANCES OF VOICE CLONING

The status quo of AI exposes several limitations in the judgment in Midler. Firstly, not allowing a voice to be protectable under copyright law is detrimental to the victims of voice cloning.³⁵ Secondly, it is unlikely that the Court intended to strike out a difference between a deliberate imitation by an impersonator, or a cloned voice produced by AI, since both categories fall under the broad ambit of a ‘voice’, which was held unprotected under copyright law.³⁶ It is therefore immaterial in the legal context whether the reproduced voice has been created by a human or by AI software. In light of such limitations, a victim of voice cloning can't hold the perpetrator liable for copyright infringement. This can only be made possible in the event of the law being modified or interpreted to include voice within the scope of protected material, which is unlikely to happen anytime soon.³⁷

ASSESSING THE PROVISIONS UNDER THE TRADEMARKS ACT AND THEIR APPLICABILITY IN THE CONTEXT OF AUDIO DEEPFAKES

In India, while trademark law may not be able to provide adequate protection to private individuals against audio deepfakes, it does provide some protection to public figures. According to Section 2(1) of the Trade Marks Act, 1999³⁸, any sign, word (including personal names), design, numeral, goods packaging, and shape with a differentiating factor could be registered as a trademark. There have been several instances³⁹ of names, film titles and characters being registered under trademark

³³ *Midler v. Ford Motor Co.*, 849 F.2d 460.

³⁴ *Ibid.*

³⁵ *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 717–18 (9th Cir. 1970).

³⁶ *Midler v. Ford Motor Co.*, 849 F.2d 460.

³⁷ R. Anthony Reese, “Copyrightable Subject Matter in the ‘Next Great Copyright Act’” 29 *Berkeley Technology Law Journal* 1489–534 (2015).

³⁸ Trade Marks Act, 1999 (Act 47 of 1999).

³⁹ Nishant Kewalramani, “Character Merchandising” 17 *JOURNAL OF INTELLECTUAL PROPERTY RIGHTS* 454-462 (2012).

law. First debated in the case of *Star India Private Limited v. Leo Burnett (India) Private Limited*⁴⁰, the concept of ‘character merchandising’ is still relatively new in India, and jurisprudence is still emerging. It remains an unanswered question whether a celebrity’s public image could be registered under trademark law. In a recent case, *D.M. Entertainment v. Baby Gift House and Ors*⁴¹, veteran Indian composer Daler Mehndi filed a suit against a person to prevent him from using the domain name ‘dalmehndi.net’. The Delhi High Court went on to grant the injunction and thereby add prominent weight to the argument that there was significant fame and reputation attached to a celebrity’s name that thereby deserves protection.

THE SCOPE OF DEFENSIVE REGISTRATION IN INDIA

It is established law that a trademark can only be granted for a particular good or service that falls within the ambit of the NICE Classification. Therefore, as per statutory law, a trademark cannot be registered merely to protect a celebrity’s name. In recent times, however, there has been a growing trend where celebrities tend to get their names registered across several classes to have their reputation protected rather than use the mark on any goods or services. However, such practice too would seldom succeed under Indian trademark law, since a trademark could easily be opposed, cancelled or removed on the grounds of non-use. Moreover, as per the judgement rendered in the case of *Nandhini Deluxe v. Karnataka Cooperative Milk Producers*⁴², the applicant cannot be granted a monopoly over all the goods/services mentioned in a particular class; he can only exercise a monopoly over those for which he is using the mark.

PASSING OFF

In instances when a person passes off his goods or services as those of another, the latter could hold the former liable by this remedy. With regards to celebrity rights, the action of passing off could be taken up in instances when it is falsely indicated that a particular product is being endorsed by that celebrity. In *Titan Industries*, the plaintiff had roped in star couple Amitabh Bachchan and Jaya Bachchan for the advertisement of its brand, *Tanishq*. Subsequently, it was discovered that the defendants were unlawfully using the celebrities’ images to endorse their

⁴⁰ *Star India Private Limited v. Leo Burnett (India) Private Limited*, 2003 (2) BomCR 655.

⁴¹ *D.M. Entertainment v. Baby Gift House and Ors.*, CS(OS) 893/2002.

⁴² *Nandhini Deluxe v. Karnataka Cooperative Milk Producers*, AIR 2018 SC 3516.

products. While the Court held that the plaintiffs were the first owners of the copyright in the pictures in this case, on account of the endorsement agreements, it also accorded recognition to the right of a celebrity to control how, when and where his identity was being used.

In *Star India Private Ltd.*, the Bombay High Court held that for character merchandising, it is essential that the celebrity has gained a certain level of recognition that is independent of the product being endorsed. However, it did not set out the parameters of the recognition that the celebrity must possess, rendering the aforementioned observation ambiguous. This case also highlights the fact that the remedy of passing off, similar to the remedy provided by trademark law, can majorly be accessed by public figures and not private individuals or artists with a lesser degree of public recognition.

DEFAMATION: A WELCOME REMEDY FOR PUBLIC FIGURES AND PRIVATE INDIVIDUALS ALIKE

The tort of defamation involves the publication of a false statement about the victim, which causes a detrimental effect on the victim's reputation.⁴³ The tortious act of defamation, in contrast to Section 499 of the Indian Penal Code⁴⁴, which criminalizes libel, comprises both libel and slander, which are terms used to denote written and oral conduct, respectively. It is important to note that the term 'libel' has not been interpreted in a restrictive sense to include only printed material, but also encompasses content posted online.⁴⁵ Such interpretation is relevant in the context of deepfake technology since the lion's share of such content is posted on the Internet as images, audio or video files. Such posting would constitute an act of 'publication' and therefore, attract a suit for libel.

While victims of deep faked audio may find solace in a suit for libelous defamation, in the event of an audio or video clip featuring the victim in a bad light, the victim may also be able to sue for an act of slander.⁴⁶ However, interpreting the judicial definition of slander to cover deep faked content is difficult, since it is not the perpetrator but the victim himself who is spewing out the

⁴³ Legal Information Institute, available at: <https://www.law.cornell.edu/wex/tort> (last visited on April 3, 2024).

⁴⁴ Indian Penal Code, 1860 (Act 45 of 1860).

⁴⁵ Britannica, available at: <https://www.britannica.com/topic/tort> (last visited on April 3, 2024).

⁴⁶ Aaron Minc, "How to Report & Remove Defamation on YouTube" *MINC L.* (2022).

defamatory statements. This can be read in light of the fact that it is not the victim who is speaking out; it is the perpetrator who is using technology to speak through the victim's likeness.

CRIMINAL DEFAMATION

In order to attract the crime of defamation, the intent of the perpetrator to commit the act is of paramount importance. As per Section 499, if the wrongdoer publishes a false statement about the victim with the intent of lowering his reputation in the eyes of the third part, or with the knowledge that the publication of such statement shall most likely do so, he shall be deemed to have committed the crime of defamation.⁴⁷ It is also pertinent to note that truth is an absolute defense to criminal defamation, provided it is done to further public good.⁴⁸ Thus, if the statement is true and is made in the interests of the public, it is irrelevant whether the victim's reputation is lowered in the eyes of a third party.

It seems likely that a case for criminal defamation would be made out with respect to an act of voice cloning. The perpetrator, who is responsible for cloning the victim's voice, does possess, if not intention, the requisite knowledge that such an act is likely to lower the reputation of the victim in the eyes of a third party. It is impossible to believe that the perpetrator, the brainchild of the cloned voice who spent hours collecting the victim's images and clips and feeding it to the AI software, would be under the impression that the cloned voice was the victim's actual voice. The AI-assisted cloned voice, the perpetrator being well aware of its falsity, evidently does not display an actual scenario and is patently not the voice of the victim.

THE COMPLEXITY OF A DEEPPAKE IN LIGHT OF SECTION 499

However, the defense may argue that the nature of an act of voice cloning does not find a proper place within Section 499, since there is no actual defamatory statement being made. An act of voice cloning involves thousands of clips being manipulated by AI to create a fake audio clip of the victim. Therefore, the victim's reputation is not lowered by the direct act of the accused emitting a false statement about him but is lowered by the audio clip, which showcases him engaging in an act that he never committed. Still, it is very unlikely such an argument would carry

⁴⁷ Indian Penal Code, 1860 (Act 45 of 1860).

⁴⁸ *Ibid.*

weight in a court since the draftsmen intended to reduce acts of defamation by penalizing persons engaging in such acts.⁴⁹ While it is improbable that such technology could have been anticipated by the draftsmen at the time of framing the Act, it also cannot be concluded that the draftsmen intended on excluding acts of false portrayals of the victim via AI software, from the ambit of Section 499. For this reason, the Court shall likely consider the publication of a voice clone to be a manifestation of a false or defamatory statement. Further, a voice clone falsely featuring the victim expressing an opinion on a controversial topic may be just as detrimental to the name and honour of the victim, as would be a false statement made directly by the perpetrator. A voice clone may, in certain cases, actually be more debilitating to the victim's reputation, since it is more likely for a person to believe a statement being made by the victim himself, rather than one being made by a third party.

CONCLUSION

It is the kind of use that technology is put to, which determines whether AI is a boon or a bane. The production of a voice clone to destroy a person's reputation or use it as a medium to extract property is one of the most detrimental uses of technology, which needs to be curbed. Under Indian law, a celebrity can access the right to publicity, which has been interpreted by courts in light of constitutional values. However, as explained above, such rights are subject to several limitations and with the increasing ease with which a deepfake may be produced, it is pertinent that the laws are modified as per the status quo.

An action under copyright law does not seem plausible in the present day, in the wake of explicit rulings barring the copyrightability of a voice. While it was rightly held in *Midler* that a voice cannot be properly 'fixed' in a tangible medium, it is the need of the hour to accord copyright protection to a voice in at least certain circumstances, such as in the event of the voice possessing a distinctive touch or a singing voice. The provisions of trademark law and passing off may be utilized to counteract audio deepfakes in certain cases. However, the person entitled to take recourse under these provisions can only be one with a substantial degree of public recognition and a private individual may be left remediless via the IP laws.

⁴⁹ *Gertz v. Robert Welch*, 418 U.S. 323, 350 (1974).

An action for tortious defamation may be made available to a victim of voice cloning. As explained above, while an action for libel may be readily available, an action for slander would depend upon judicial intervention. An action for criminal defamation may also lie, in the event of courts making a liberal interpretation of Section 499 to include the publication of a deepfake audio within the necessity of a false or defamatory statement

