

## PROTECTION OF CAPTURES BY LAW AND ROLE OF AI NAVIGATING PHOTOGRAPH COPYRIGHT IN THE IPR LANDSCAPE

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**Harmanpreet Kaur\***

### ABSTRACT

*We live in a world where even 10-year-olds have access to social media apps having a variety of content and exactly what type? Google, Snapchat, Instagram, and other emerging apps have the content served in the form of “image”. Each image has someone behind the camera capturing it with skills, hard work, and motivation. Over time, photography has emerged as a profession, creating the exquisite art we see in visual representations. Perhaps, everything that has efforts behind it, needs appreciation. Every human innovation from pin to car patent is a necessitate as with ownership comes responsibility. As with any other artist, the original author must have the authority to prevent others from redistributing for profit. The perspective of art must reflect the ideas of the creator from using it for commercial purposes the sole right of ownership must be safeguarded. In this article, many of the prudential aspects of copyright, scope, the exclusive rights of photographers, infringements, fair use, licensing, and transferring copyright will be thoroughly discussed with the help of judgments by the apex and subordinate courts. Additionally, the role of Artificial intelligence in creating and editing images has created new issues and a gateway for implications of contemporary law. With imperative discussion of AI-generated photographs and how the law will pace with rapidly evolving technology, with the help of some legal paradigms and articulate examples of the application generating photographs. Questioning the ownership of AI-generated photographs. This article reflects contemporary perceptions regarding photograph copyright.*

**Keywords:** Copyright, Artificial Intelligence, Photograph, Exclusive Right, Infringement, Licensing, Patent.

### HISTORY OF COPYRIGHT

The advent of technology and evolution has unequivocally transformed human beings into intellectual creatures with an ever-expanding skill set, making us the sole beings with inventive minds, and utilizing our creations to nurture the world. Every creation of the globe, such as a

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\*BA LLB, ASIAN LAW COLLEGE, NOIDA.

pen, a book, and even a theory has its original author or a source of origin distinguishing it from the primitive techniques and tools with no ownership. The ownership comes with liability as well as recognition which is quite imperative in the contemporary context. Not only the immovable assets or finances are the treasure one possesses but the work one has attained skills in is also one's most precious asset.

Any work coming from an intellect was renowned as 'Intellectual property' which is born out of the creativity, and innovation of a being. As time grew it came to the notice of authorities that the need to preserve the right of an owner of any unique work has arisen and steadily growing as gradually new dimensions of works were discovered.

Globally the need for right over photograph commenced in the 6<sup>th</sup> century in Ireland where the case arose and the king stated a remarkable explanation to support the original author named St. Finnian.

*"To every cow belongs her calf, therefore to every book belongs its copy"*<sup>1</sup>

We need to remember that back then, books often featured images painted by authors of the accompanying texts. Thus, it is plausible to assume that the king recognized the copyright on these images as well, from St. Finnian. As time went centuries the copyright tales were a plethora, but one convention overturned the narrative of copyright globally which was the Berne Convention.

This Berne Convention became the initial step for recognition of right over photographs which was established in 1886 and serves as a foundation for the international protection of literary and artistic works. It grants photographers the same level of protection as other artists' works, resulting in photographers automatically being the owners of their images, obviating the need for registration. The convention requires that member states safeguard photographs for at least 25 years after creation. However, many nations have opted to lengthen this period, often extending it to the author's life, plus 50 or 70 additional years. Furthermore, the convention secures photographers' exclusive rights to reproduce, distribute, display, and create derivative works from their photographs.

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<sup>1</sup> <https://opensource.com/law/11/6/story-st-columba-modern-copyright-battle-sixth-century-ireland> by author Ruth Suehle on 9 June 2011

In India, the Bombay High Court prior to British rules on copyright marked the applicability of copyright laws of the United Kingdom<sup>2</sup>. 100 years prior to Indian independence the colonial regime enacted the first Indian copyright act<sup>3</sup>, which followed the footprints of the United Kingdom's laws.

In this regard, the country, post-independence, enacted an inclusive copyright act<sup>4</sup> in 1957 that transformed the protection status of photographs by declaring them artistic works of great repute. This ensured that photographers got exclusive rights over the reproduction, distribution, and display of work, hence their preservation and recognition in the artistic world.

The Copyright Act of 1957 provided vital protection where economic as well as moral rights were accommodated by setting up copyright societies, offices, and boards. The imperative change was the introduction of remedies for civil and criminal infringement. Section 63 of the Copyright Act 1957 recognizes the offences as criminal and remedies were injunction and monetary recovery as the photographer may have faced harassment, threats, and loss.

### **AMENDMENTS SHAPING PHOTOGRAPHY**

With advancements in technology, capturing, editing, and sharing photos has become more convenient than ever. However, these conveniences present challenges for photographers and their subjects. Many misconceptions exist about Intellectual Property (IP) Law, including matters such as the rights to the photos, the types of photos that can be legally taken, the restrictions on using these photographs, and who shall be the owner of the image captured by another person.<sup>5</sup> The foremost law could not resolve such issues diligently and by the time the requirement for amendments arose.

In 1983, the initial amendment made gradual updates such as the amendment clarifying the definition of a "photograph"<sup>6</sup> to include both the negative and positive images derived from it. This helped in broadening the scope of what constitutes a photograph under the law—strengthening the rights of photographers by explicitly recognizing their ownership and copyright over the photographs they create. This provided photographers with more robust legal protections against unauthorized use of their work. The amendment included provisions

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<sup>2</sup> McMillan v. Khan Bahadur Shamsul Ulama Zaka (1895- ILR Bom 557)

<sup>3</sup> Copyright Act of 1847

<sup>4</sup> Copyright Act 1957

<sup>5</sup> [https://nopr.niscpr.res.in/bitstream/123456789/14460/1/JIPR%2017\(4\)%20324-334.pdf](https://nopr.niscpr.res.in/bitstream/123456789/14460/1/JIPR%2017(4)%20324-334.pdf)

<sup>6</sup> [https://copyright.gov.in/Documents/Notification/Copyright\\_Amendment\\_1983.pdf](https://copyright.gov.in/Documents/Notification/Copyright_Amendment_1983.pdf)

for the licensing and assignment of copyright in photographs. This allowed photographers to transfer or license their rights to others while maintaining control over how their work is used.

Since then, significant amendments made greater change in years. From 1984 till 1999 amendments addressed the digitalisation which was adopted in India post-liberation of the trade barrier.

Posing international transferring of photographs as well as the role of the internet and the extension of copyright claims through watermarks and licensing. With the advancement of digital technologies, the implementation World Copyright Treaty and WIPO Performers and Phonograms Treaty in 2002<sup>7</sup> and 2010 addressed digital rights management, protecting photographers' works from unauthorized reproduction and distribution in digital formats. The amendments introduced provisions for easier enforcement of copyright infringement, providing photographers with legal remedies and protections against unauthorized use of their photographs. On September 25, 2018, the Government of India signed the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty.

The amendment made India compliant with Internet treaties<sup>8</sup>.

The scenario of copyright law was flipped upside down with the introduction of the Copyright (Amendment) Act, 2012<sup>9</sup> where one of the key changes was the recognition of moral rights of authors, including photographers. The amendment stipulated that even after the assignment of copyright, the author has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification, or other act about the work if such distortion, mutilation, modification, or other act would be prejudicial to his honour or reputation.

The concept of statutory licensing was introduced which allows broadcasting organizations to communicate to the public by way of a broadcast or performance, a literary or musical work and a sound recording or photograph, which has already been published, after giving prior notice and paying to the owner of rights in the work, royalties in the manner and at the rate

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<sup>7</sup><https://copyright.gov.in/#:~:text=These%20amendments%20had%20the%20effect,the%20Internet%20and%20digital%20era>.

<sup>8</sup> Ayyar R V V, The process and politics of a diplomatic conference on copyright, Journal of World Intellectual Property, 1 (1) (1998) 3-35

<sup>9</sup> [https://copyright.gov.in/Documents/Notification/Copyright\\_Amendment\\_2012.pdf](https://copyright.gov.in/Documents/Notification/Copyright_Amendment_2012.pdf)

fixed by the Copyright Board. Whereas it included provisions to facilitate access to copyrighted works for persons with disabilities. It allowed the reproduction, adaptation, and distribution of works in accessible formats for the benefit of disabled individuals without requiring permission from the copyright holder.

An essential part of the 2012 amendment was enhanced protection of digital photographs through digital rights management and technological protection measures. Incorporating measures like DRM systems which limit access to digital content to authorized users. For example, an e-book purchased from an online store may only be viewable on the purchaser's registered devices. Limitation for the number of uses and mediums such as any access to the platform by purchased email may be restricted to 2 or 3 devices, this enables the prevention of privacy and enhances originality.

Whereas TPMs are a component of DRM strategies but can also stand alone as methods of protection such as disabling the copy and paste functions or using software that detects and prevents screen capturing. restricting access to content, such as password protection or biometric scanning. In the case of photographs, embedding a digital watermark into the content can identify the source of the content and detect unauthorized copies.

These measures have paved the way for the prevention of false claims, piracy, assurance of revenue to the original photographer, and licensing agreements to be enforced, such as rental, subscription, or purchase models eventually benefitting fair use and protection of the efforts one takes for the photograph.

However, the use of DRM and TPM has also been controversial. Critics argue that they can be overly restrictive, limiting legitimate uses of content, such as fair use, and can create technical issues for consumers.

## **IMPLICATION OF LAW WITH EMERGING TECHNOLOGY**

Digitalization has caused numerous exchanges of images and the new term is “memes” on the internet to showcase the humorous context they often incorporate copyrighted material, such as images, characters, or quotes. The rise of social media platforms has led to a surge in user-generated content, some of which may involve copyrighted material. Platforms like YouTube and Facebook have implemented content ID systems to detect and manage such content, but challenges remain in balancing copyright enforcement with user rights.

Although the Indian legislature has always kept pace with innovation and protected the hard-earned appreciation that one truly deserves the amount of increment in usage of the Internet and exposure to different content served it becomes arduous for the laws to become stringent.

Artificial intelligence since the pandemic, has grown drastically and even teenagers have incorporated it in creating, generating, and even copying content without any effort. This is not alarming but the capacity of artificial intelligence to generate any imaginative image can pose a threat as well as a question arises that

### **WHO WILL BE THE OWNER OF THE PICTURE GENERATED BY AI AND CAN IT BE CLAIMED?**

At the end of June 2024, the application of Instagram applied the picture of AI-generated pictures named Imagine<sup>10</sup> and many apps such as 'Remini' Reminies the pictures with the help of artificial intelligence.

Traditional copyright law grants protection to works that involve human authorship and creativity. Since AI-generated pictures are created by algorithms and not by human authors, it raises questions about whether these pictures can be protected under current copyright laws.

There are two perspectives on this issue one as AI is human-made and considered merely a tool used by a human, the person who uses the AI to create the picture may be considered the author and owner of the copyright. This is similar to how the law treats other tools or instruments used in the creation of artwork. On the contrary, AI has been provided with the status of autonomy without significant human intervention, determining ownership becomes more challenging. Current laws do not typically recognize non-human entities as authors, leading to a legal gap for fully autonomous AI-generated works.

The Copyright Act does not provide clear answers to these questions. The Act does not contemplate non-human authorship and does not provide for the copyright of AI-generated works. This legal ambiguity could lead to disputes over the ownership and infringement of copyright of AI-generated photographs.

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<sup>10</sup> <https://embedsocial.com/blog/new-instagram-features/>



This is itself an arduous task to differentiate and determine which legislature needs to review as it can hamper the sense of originality making photography feel inferior to the one generated because originality seeks skills but technology overlaps both.

Moreover, AI can also infringe upon the copyright of existing photographs. AI can reproduce, distribute, and create derivative works from copyrighted photographs without the permission of the copyright owner. This could lead to widespread copyright infringement, which is difficult to detect and prevent.

## **UNDERSTANDING ACT WITH CASE LAWS**

As we discussed above the issue of artificial intelligence as law only recognises human innovation and photographs the question that arises

### **Can Only Human Has Copyright Claim?**

In the case of People for the Ethical Treatment of Animals <sup>11</sup>(PETA), who have argued that the copyright should be assigned to the macaque, a monkey who took his own selfie from the camera of the photographer. It was held in December 2014, and the United States Copyright Office<sup>12</sup> stated that work created by a non-human, such as a photograph taken by a monkey, is not copyrightable.<sup>13</sup> Ultimately out of the settlement the photographer gives 25% of the profit to Wildlife Century.

### **If A Photograph Is Clicked By Someone Else's Equipment, Who Is The Owner?**

In this case, copyright rights will be given to the one who clicked it as skills are prioritised over equipment even if they are hired or rented.

### **Can Anyone's Picture Be Used In Advertisement Without Permission?**

In the case of Burroughs Wellcome (India) Ltd v. Uni-Sole Pvt Ltd & Anr<sup>14</sup>, the plaintiff claimed that the defendant had used their photograph without permission in an advertisement. The court held that the defendant had infringed upon the plaintiff's copyright and granted an injunction against the defendant from using the photograph.

<sup>11</sup> [https://en.wikipedia.org/wiki/People\\_for\\_the\\_Ethical\\_Treatment\\_of\\_Animals](https://en.wikipedia.org/wiki/People_for_the_Ethical_Treatment_of_Animals)

<sup>12</sup> [https://en.wikipedia.org/wiki/United\\_States\\_Copyright\\_Office](https://en.wikipedia.org/wiki/United_States_Copyright_Office)

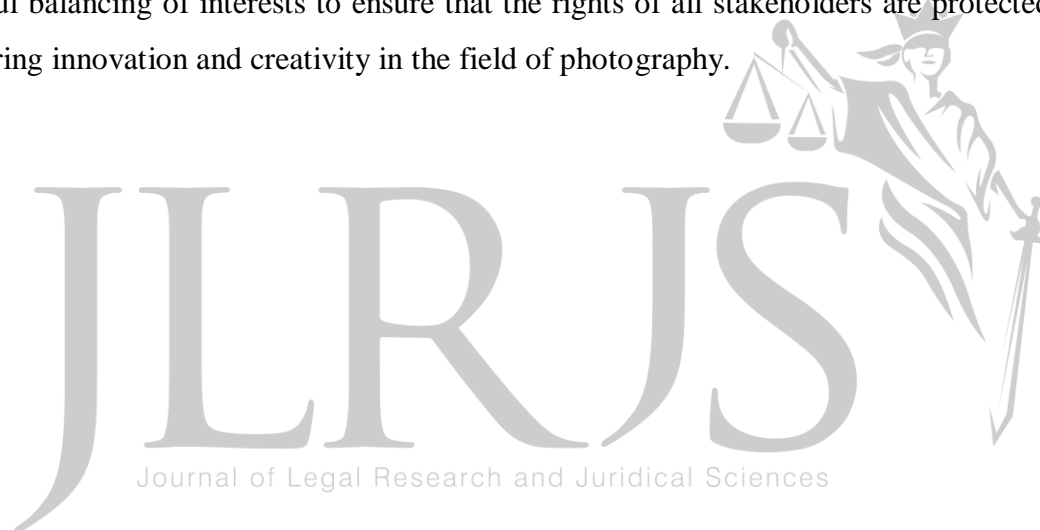
<sup>13</sup> [https://en.wikipedia.org/wiki/Monkey\\_selfie\\_copyright\\_dispute](https://en.wikipedia.org/wiki/Monkey_selfie_copyright_dispute)

<sup>14</sup> 1999 PTC (19) 741 - <https://indiankanoon.org/doc/1936801/>

Another case law demonstrating the facts Academy of General Education, Manipal v. B. Malini Mallya<sup>15</sup> case involved the unauthorized use of a photograph. The plaintiff claimed that the defendant had used a photograph of the founder of the plaintiff's institution without permission in a book. The court held that the plaintiff had the copyright over the photograph and the defendant had infringed upon it.

## CONCLUSION

The copyright of photograph law in India has evolved over the years to adapt to technological advancements. However, the rise of AI presents new challenges that the current legal framework is ill-equipped to handle. The law needs to be amended to address the issues of authorship and infringement in the context of AI-generated photographs. This would require a careful balancing of interests to ensure that the rights of all stakeholders are protected while fostering innovation and creativity in the field of photography.



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<sup>15</sup> 2009 (41) PTC 29 (Kar) - <https://indiankanoon.org/doc/1984096/>