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Right Not to Be Mimicked

by

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INTRODUCTION

'Mimicry', as defined by the *Oxford Dictionary* is "the action or skill of imitating someone or something, especially in order to entertain or ridicule." According to the same, 'Parody' is, "an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect." Since the two, are similar in their nature and purpose, for the purpose of this research paper, they will be used interchangeably.

Mimicry has both, popularity and cultural importance of long standing. It is a form of poking fun at tempting targets for the entertainment of audiences.¹ To some, watching oneself would be delicious; to others it would be devastating.² Oscar Wilde has said that "Parody is the tribute mediocrity pays to genius." Yet Aldous Huxley said that "Parodies are the most penetrating form of criticism." We live in a world where absolute self-esteem and absolute control over public reaction to one's work is totally unrealistic. In this context, Huxley's opinion holds more consistency with the present world.

Although many have simply dismissed it as a joke, or have it in good spirit, some have sought legal remedies too. This paper looks through the possible legal remedies for the 'Right to Not Be Mimicked.'

Parodies can be through any form of media, visual arts, cinematography, or in literature. But in the present paper, the mimicry of people, will be taken as the subject of discussion.

DEFAMATION

Defamation in law, is attacking another's reputation by a false publication. It is not only a tortious law but also a crime under Section 499 and Section 500 of the Indian Penal Code. The elements of defamation are:

- I False information
- II that is published



III and causes injury

IV to the reputation of the concerned person.

One of the most high profile cases in this matter is *Balasaheb Keshav Thackeray v. State of Maharashtra*.³ In the said case, it was alleged that the petitioner made a mimicry of Sonia Gandhi's style of speaking and said derogatory things in the process. The petition was accepted by the Bombay High Court.

This is the remedy that is usually adopted in a case of mimicry. In India, Sunny Deol had sent a notice to an FM channel over a mimicry show. The legendary actor, Manoj Kumar had also filed a defamation suit against Shah Rukh Khan and Farah Khan over his portrayal in their movie 'Om Shanti Om'.

But both the cases were futile, as far as development of law in this area is concerned as they were withdrawn in time.

PARODY AND MIMICRY VIS-À-VIS FAIR USE

Copyright, like every other intellectual property right, is granted to give exclusive rights to the creator or the maker and give an incentive for more creativity.⁴ But, in favour of the society in general, it has many exceptions granted by the Copyright Act as well.

The concept of fair dealing was brought as one of the defences of copyright infringement, recognized by the Berne Convention⁵ and the TRIPS Agreement.⁶ The rationale is that sometimes, infringement of copyright may cause more good than bad.⁷ In the famous case of *Hubbard v. Vosper*,⁸ Lord Denning said it was impossible to define 'fair dealing'. It is a question of fact, a question of degree of infringement and the use of the same.⁹ Fair dealing does not even require permission of the copyright owner.¹⁰ It is a limitation to the monopolistic right of the owner of the copyright.¹¹

Although the term 'fair dealing' has not been categorically defined under the Indian Copyright Act of 1957, Section 52, makes it very clear that fair use



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has to fall within the purposes of private use, research, criticism and review.¹² In *Blackwood case*¹³ the court gave two points to determine what is 'fair' in the term 'fair dealing':

I There is no intention to compete and to obtain profit from such competition.

II The intention of the infringer must not be unfair, improper or oblique.

It has further also been held that the basic purpose of Section 52 of the Copyright Act is to protect the freedom of expression under Article 19(1) of the Constitution of India so that purposes like research, private study, criticism or review or reporting of current events can be protected.¹⁴

Thus, in the present case, talking about mimicry and parody for the purpose of commercial exploitation, fair use cannot be used as a defence unless it involves labour and creativity.¹⁵

Going by the tradition, wherein, mimicry and parody are a form of review and criticism, it also falls under the ambit of fair use.¹⁶ Parodies and Mimicries are often looked at as a comical or satirical form of social observations.¹⁷ It has been held that when deciding whether it is a valid parody, the infringement should only be to the extent that is necessary to remind the viewers or the listeners of the original work.¹⁸

The basic objective of law is to protect a reviewer who wants to put forth opinions or views or comments on a particular copyrighted work.¹⁹ Even if the copying of a work is substantial it would not be infringement if it is for the purpose of criticism or review.²⁰

But the purpose of the infringement must be criticism and review and not just profit making.²¹ It has been held that it is not fair to let a trade rival or a competitor take a copyrighted work and use it for his/her own benefit.²²



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In *Metro-Goldwyn-Mayer Inc. v. Showcase Atlanta Coop Productions Inc.*,²³ the defendants produced a musical play based on the book and the play, 'Gone with the Wind' and contended it was a parody but the Court stated that this musical could harm the potential market for the actual play and was not a parody but a musical adaptation.²⁴

PERFORMERS' RIGHT

Performers were internationally recognized for the first time with the adoption of the Rome Convention of 1961.²⁵ It called for the protection against unauthorized broadcast of any performance.²⁶ But, unfortunately, the Indian Law failed to recognize this right for the longest time.²⁷ The 1995 Amendment of the Copyright Act finally included this right, by way of Section 38.

Performers need to be rewarded for their creativity and efforts. Section 2(qq) of the Copyright Act, 1957, defines performer as including "an actor, singer, musician, dancer, acrobat, juggler, snake charmer, a person delivering a lecture or any other person who makes a performance."²⁸

Section 2(q) says that performance in relation to this said performer's right means any visual or acoustic presentation made by one of the performers.²⁹

Section 38(3), importantly lays down what constitutes as infringement of Performers' Rights. Section 38(3)(b) is what concerns the issue of mimicry in relation to the same. It entails reproducing a sound recording or visual recording of the performance, which sound recording or visual recording was—

I made without the performer's consent; or

II made for purposes different from those for which the performer gave his consent; or

III made for purposes different from those referred to in section 39 from a sound recording or visual recording which was made in accordance with section 39;³⁰



Before this right was introduced in the statute, in a landmark case, *Fortune Films International v. Dev Anand*³¹, the Supreme Court stated that an actor has no rights over his performance in a film. This position was not only changed by the Amendment of 1995 but also established by way of case laws.

In *Super Cassette Industries Ltd. v. Bathla Cassette Industries (P) Ltd.*³², it was held that re-recording of a song without the authorization of the original performer constitutes as an infringement.

In relation to the present debate of mimicry, this case law stands strong. There has been a recent rise in the trend wherein Social Media Influencers mimic performances of actors and singers and record themselves. Although this is not commercially exploited prima facie, it gradually gives them a fan base or a social media following that eventually opens up a lot of opportunities for commercial exploitation.

There has been not much development in the area of performers' rights, but it is clear that the former art and present trend of recreating performances, for appreciation or critique violates the performers' right.

PERSONALITY RIGHTS & PUBLICITY RIGHTS

"The celebrity is a person who is known for his well-knownness...

He is neither good nor bad, great nor petty. He is the human pseudo-event."

*—Daniel Boorstin*³³

In this contemporary era of media, film, YouTube, movies, reality shows etc., it has become a very difficult task to define and identify who celebrities are as this status has been often given to many in our society. The definition of celebrity given by Boorstin, classifies a person to be a celebrity for his unquestionable feature about being well-known. The amount of intangible value these celebrities hold is utilized in almost every field, be it for economic purposes by businesses to comic and gossip purposes by the entertainment industry. Their alliance with many of the products, brands and causes enable the advertisers to benefit out of the personal and professional status they carry.

In order to protect these personalities from exploitation of their intangible value, a unique and distinctive right is accorded to them known as Personality rights. Kant and Hegel were among the very first to recognise this personhood



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approach. They viewed private property as an embodiment of the personality.³⁴ These theories support the argument of private property rights in one's persona as they foster self-expression and human progress in the society.³⁵ Hence, one's personality incorporates an individual's emotional, dignitary, human and moral values.³⁶

In today's world, merely the name, image or voice of a celebrity can affect the reputation of the product being endorsed. In India, as there is no specific legislation recognising this right, they are generally invoked through the newly added fundamental right of privacy.³⁷ These rights mainly provide protection from unauthorised use of one's name, image, voice or persona without authorisation or permission. This personality right is a two-fold right, one that of privacy and the other being of publicity. Right to publicity is the right that protects one's image and likeness from being economically and commercially used without authorisation and right to privacy gives the 'right to be left alone' and not become a topic of discussion or a piece of entertainment for the public.

One of the very first cases which discussed and gave an opinion on mimicry and imitation of another's looks, style, performance, manner and voice was *Bloom & Hamlin v. Nixon*,³⁸ which was decided in the year 1903. Although the primary issues raised in this case were that of a copyright infringement, the court did give out its opinion about imitation and mimicry for style, name and persona. In this case, the plaintiff was the copyright holder of the song 'Sammy' used in the stage production of 'The Wizard of Oz.' The defendants were the producers of a musical comedy 'The Runways', which show cased a performance by Fay Templeton in which the performer mimicked artists. Lotta Faust, who sang the song 'Sammy' was imitated. This imitation was preceded by a disclaimer that it was an imitation of the plaintiff's star singer Lotta Faust singing the song 'Sammy'. Denying the claim of copyright infringement, the court stated that:

"what is being presented are the peculiar actions, gestures, and tones of Miss Faust; which were not copyrightable... It is the personality of Lotta Faust imitated that is the subject of Miss Templeton's act, modified, of course, by her own individuality, and it seems to me that the chorus of the song is a mere vehicle for carrying the imitation along. No doubt, the good faith of such mimicry is an essential element... Fay Templeton does not sing it, she merely imitates the singer;



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*and the interest in her own performance is due, not to the song, but to the degree of excellence of the imitation. This is a distinct and different variety of the historic art from the singing of songs, dramatic or otherwise, and I do not think that the example now before the court has in any way interfered with the legal rights of the complainants."*³⁹

This case, mainly concluded that as long as the imitation of another's persona, style, performance, gestures, tones etc., is being done in good faith and there is a significant amount of modification and exhibit of the imitator's own skill and excellence of the talent involved, the mimicry does not amount to copyright theft or copyright infringement. This case also recognised the fact that mimicry in its own form is a different, separate and distinct talent which is used for the purpose of entertainment when it is performed in good faith.

The judgment given in the above case was upheld and followed in *Savage v. Hoffmann*⁴⁰ and *Murray v. Rose*⁴¹. In *Savage*, a suit was brought to bring an injunction against the defendants from staging imitated and mimicked shows of the plaintiff's performers in the copyrighted musical known as 'The Merry Widow'. The court giving the reasons given in *Bloom* case held for the defendants that "obviously the complainant has no literary property in the manner which Barbanell and Bria dance or posture. They, if any one, have the right to complain."⁴² The Court further held that the manner and method of every dancer, actor or performer is individual, distinct and utterly unlike the railroad scene,⁴³ which was held the subject of literary property in *Daly v. Palmer*⁴⁴. In the *Murray* case, the court clearly ruling for the defendants held that:

*"... it is a matter of common knowledge that skilled performers have become famous and successful financially as 'imitators'. Veteran theatre-goers will recall Elsie Janis and Cissie Loftus. When they gave due credit to the persons imitated, the latter were pleased with the compliment involved. There is no claim that the imitation is other than fair. It is not charged that it aims to ridicule or to provoke anything but admiration for the skill of the plaintiff and her imitators. The public is not in any measure deceived."*⁴⁵

The courts through these judgments manifested the argument that mimicry or imitation of another performance or action is not actionable per se. The

voice, posture, actions, performances, motions and voice of actors or performers and mere stage businesses may be imitated or mimicked as they have no literary quality attached to them and are not copyrightable.⁴⁶ This proposition was valid until the imitated performances were not involved in commercial or economic exploitation of the talents of another. This proposition was very well summarised by Judge Yankwich in *Supreme Records v. Decca Records*⁴⁷:

*"There is a line of cases which holds that what we may call generically by the French word representation, which means to perform, act, impersonate, characterize and is broader than the corresponding English word, is not copyrightable or subject to any right recognized under the law of unfair competition. So the choice of a distinct locale for a play or story is not the subject of appropriation. Nor are mechanical devices used in production, gestures or motions of actors, or the movement of a dance or a spectacle."*⁴⁸

In *Sim v. HJ Heinz Co Ltd.*,⁴⁹ plaintiff being a well-known British actor with a

recognisable voice, brought a suit against the defendants who allegedly imitated and mimicked his voice without authorisation in advertisements for commercial benefits. The Court in this case held that: *"it would seem to me to be a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without consent"*⁵⁰. In the recent judgment of *Irvine v. Talksport Ltd.*,⁵¹ the United Kingdom High Court held that a celebrity could have an interest in his reputation and he could safeguard the same from unauthorised and unlicensed use.

In yet another case of *Midler v. Ford Motor Co.*⁵² the defendants wanting to use a song by Bette Midler in one of their commercials for Ford car approached her to licence the same. But, when their request was turned down by the plaintiff, the defendants contacted Ula Hedwig requesting her to record the same song with the instructions *"to sound as much as possible like the Bette Midler record"*. When this commercial was aired, the plaintiff sued the defendants claiming that her style of singing and persona was imitated by the defendant singer. The court holding in favour of the plaintiff held that by instructing the singer to sound as much as possible like the plaintiff, the defendants clearly had an intention to make commercial or economic benefit from the song by associating it with the identifiable voice of Midler. Therefore, the court held that right to publicity in combination with personality rights,



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accord entertainers, artists and celebrities to have an exclusive control over the economic exploitation of their names, image, personality, voice and likeness.⁵³

Even though India has no legislative or statutory law on the concerned law, there are occasions when well-known actors and celebrities have taken help of the concept of personality rights in order to protect and safeguard their distinctive and identifiable personalities from unauthorised commercial or economic benefits. One of such instances is when Rajinikanth, the legendary South Indian actor had issued a legal notice prohibiting anyone from imitating or mimicking his on screen personality and character in the movie 'Baba' before it released in the year 2003.⁵⁴ He felt a need to take this step in order to safeguard his style and persona from commercial exploitation without his consent.⁵⁵ Following this situation, the judgment of *ICC Development (International) Ltd. v. Arvee Enterprises*,⁵⁶ clearly stated that the right of publicity does not extend to events and is only restricted to persons. The court stated that:

"...The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organiser (non-human entity) of the event would be violative of Articles 19 and 21 of the Constitution of India. No persona can be monopolised. The right of Publicity vests in an individual and he alone is entitled to profit from it. For example, if any entity, was to use Kapil Dev or Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorisation, they would have a valid and enforceable cause of action..."

In India, amongst millions of people, it might be hard to find a person who can equate a particularly deep and authoritative baritone voice of one of the most celebrated actors in the Indian film industry, Mr. Amitabh Bachchan. The most difficult venture

would be to identify if his dialogues enjoy the enormous popularity because of his voice or because of the dialogues itself.


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Having an extensive and wide popularity and economic value, his voice has been mimicked multiple times over the past years in the entertainment industry for selling products or to establish an event. Recently, the actor decided to seek protection for his unique baritone voice after getting knowledge that his voice was being mimicked in order to promote a brand of "gutka" (a powdery, granular, light brownish to white substance. It contains tobacco, betel nuts and other additive and harmful products) without his permission. To quote his words:

*"not only is this unethical and wrong, it paints me in bad light as well...For someone who does not smoke or propagate smoking or any kind of intoxicant, by keeping away from endorsing such products, it is most disgusting to find someone conflagrating the law of the land and the law of ethics."*⁵⁷

In a much more recent case of *Shivaji Rao Gaikwad v. Varsha Productions*,⁵⁸ the plaintiff, Rajinikanth filed a suit against the producers of the movie with the name 'Main Hoon Rajinikanth' for imitating his name, image, personality and style of delivering dialogues. The three main contentions made by the plaintiff were that, firstly, being a cultural figure in the world and a leading actor in the Indian film industry, unauthorised use of his name and personality would affect his reputation and publicity rights; secondly, the plaintiff was not willing to commission any movie which is based on his personal life as he is against such gross commercialisation of his name and reputation; and thirdly, the producers not only used his name and image without his permission but also contained obscene and immoral scenes which violated his personality rights and also amounted to infringement of his privacy rights. Further, the actor also added saying that mere unauthorised use of his name and image would create a confusion in the society which would be commercially beneficial to the producers of the movie because of the goodwill attached to his name. The Court recognising the personality rights, passed an injunction order against the defendants from releasing the movie.

Before the development of visual and recording technology, a performer had an opportunity to own personality rights only in his artistic performance on stage which could include right to voice, likeness, privacy and publicity. But post the sound and visual recording process which has enabled high level of editing and animation, originals have been exploited in the commercial market, which is unauthorized and illegal. Further, due to efficient animation and editing applications, it is now a simple job to fabricate convincing persons, look-alikes, similar voices etc. A real problem arises when these technologies

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are used to manipulate footage, images, voices etc. which becomes a persistent source of uncertainty, doubt and a major cause for defamation.

With the development in the field of intellectual property laws, mimicry in the form of spoof videos is also becoming more and more popular. In recent times we have come across a lot of situations in which imitators have got into trouble for mimicking

and imitating a particular personality or profession. For instance, Sugandha Mishra found herself in trouble when she sang songs of Lata Mangeshkar and tried to imitate her voice but was labelled as an insult to the legend. The Kapil Sharma Show also landed in controversy when the nurse community protested about the fact that Rochelle Maria Rao plays a gorgeous, clumsy and sensuous nurse in the show with whom everybody falls in love. Yet another occasion when mimicry targeted the dignity and reputation of a celebrity was when during the 'Jhalak Dikhlai Jaa' grand finale, Kavita Kaushik was targeted by the 'Comedy Nights Bachao' team in their roast. Even though there are judicial precedents on the imitation of persona, name and image for commercial use, there are neither any judicial nor legislative solutions to the issue of whether mimicry done in order to ridicule or make fun of another is legal or not.


SUGGESTIONS AND CONCLUSION

Even though being mimicked is one of the biggest fears of celebrities, mimicry or parody has not been able to make space for itself in any statute in India. There is an immense need for the art of mimicry to be bound by a statute. It has been so neglected that it has not even been defined anywhere, not even in any case laws.

Further, there is a need to outline the boundaries of exemption that mimicry and parody can take under the pretext of fair use. More often than not, it is a form of commercial entertainment and far from fair criticism or review. There is no action against the stand-up comedians or the mimics who not only make fun of people's talents and art brutally but also dwell into their personal lives and their mannerisms. It is something that should be out of bounds for everyone, even ones who do it in the name of good fun. A balance has to be sought between the rights of the artists and the freedom of speech and expression of the mimics.

The authors hereby have reached the conclusion that mimicry, which was once meant to be an art of making people laugh, has crossed its boundaries. It has now become a method of offending. Further, it takes away the statutory right of performers' rights, privacy rights and publicity rights of the celebrities.

Moreover, mimicry being such an old art and tradition, people often do not resort to legal remedies for the same. And, if they do, the common public and the comedians target them as being too sensitive to take a joke. Defamation

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is the last resort they look up to, even though there are more major remedies available.

In this era, wherein, social image is something that can make or break a career, especially, that of an artist, this has become a highly sensational and sensitive issue. With the rise in the comedy circuit and the social media influencers, this is more important than ever before.

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⁴ *Millar v. Taylor*, (1769) 4 Burr 2303 : 98 ER 201.

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- ⁶ The TRIPS Agreement 1995, art 13.
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- ¹⁵ *Campbell v. Acuff-Rose Music Inc.*, 1994 SCC OnLine US SC 22 : 127 L Ed 2d 500 : 510 US 569 (1994).
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- ²⁷ *Ibid.*
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