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COPYRIGHT PROTECTION OF SHORT-VIDEOS AND RELATED CHALLENGES

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ABSTRACT

In this digital age, modern artists are hugely opting for growing digital platforms to publicise their creative work. Moreover, in the past few years, these platforms have introduced a shift towards shorter videos such as reels and YouTube shorts. Following this, artists are publishing their original work in short video format on these platforms. The article casts light on the need for the protection of intellectual property in this new emerging category of work. It specifically talks about the recent trend in the digital sphere of posting work in compact short-video format. The article is divided into two parts, the first part discusses under what category such work should be protected under present copyright law, and the second part deals with the criteria for the protection of such work. The author has examined present Copyright law and parliamentary reports to analyse the category of such work. Provisions related to cinematograph film and visual recording are discussed in depth. Moreover, to analyse the minimum criteria to claim protection for such work, the author has explored national and international cases, governmental policies and guidelines. The article focuses on the shortest duration of video that could be protected under copyright law. It also deals with the aspect of short videos using pre-copyrighted work. And emphasis on the recognition of short videos as a separate category of work and suggesting specific provisions for their proper acceptance in Indian copyright law.

KEYWORDS – Short videos, intellectual property, copyright, reels, original work.

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INTRODUCTION

In the continuously emerging digital age, it is evident traditional channels of content distribution are at backstage. It is visible that modern artists are opting for modern channels for publicizing their work. A few famous examples of the same are Instagram, Facebook, and YouTube. Along with these channels, the metaverse is full of various other platforms where artists are uploading their original literary, dramatic, musical and artistic work. This shift is forced by the shift of consumers on digital platforms. Centralized distribution, and the network effects generated by high user engagement on such platforms made artists publish their works on digital platforms.

A new addition to this shift has emerged in the past few years. It is visible on digital platforms that content consumers are more attracted to short video content. Now, following the demand and supply concept, the content creators are also forced to put forth their original work in the form of short videos. Be it an original literary or musical work, if the artist is not publishing it in a short video format, he will not get proper reach on the same. This trend is exemplified by platforms like YouTube Shorts and Instagram Reels, where short-form videos are prevalent.

The metaverse offers artists a unique platform to reach a global audience, it also requires a proactive approach to protect and preserve their intellectual property. While the artists are putting creativity within a compact format, the protection of such creativity under Indian Copyright law comes across a few alarming questions. Does the protection of law extend to such shorter videos, if yes, then how short videos are protected?

Through this article, the author has analyzed the current global trend in copyright law and primarily answered under what category such short video content could be protected. What should be the minimum criteria for claiming copyright protection under current law for such work?

1. UNDER WHAT CATEGORY SHOULD SHORT VIDEOS BE PROTECTED?

It is settled that the creative work has to be protected. Copyright law serves a crucial role in fostering creativity and innovation by providing creators with exclusive rights to their work. This legal framework offers economic incentives, allowing creators to monetize their creations and earn a living. It also protects intellectual property by preventing unauthorized use, copying, or distribution of creative works, ensuring that creators maintain control over their output.

The work in question here is short videos, popularly known as “reels” and “shorts”. These works

are available on various metaverse platforms and the same is being commercially exploited by the platforms for earning revenue by showing advertisements. On the other hand, the creators of this content are deprived of royalties they rightfully own. Even if some platforms are providing royalties/payouts, it is not based on the exploitation of work by platform, but rather on other factors like a certain threshold of consumer subscription² taking certain actions³ or under other bonus programs⁴ which is unrelated to the concept of copyrighted work and royalties.

In such a situation, it is important to understand how such short videos could be protected under Indian copyright law. Section 13 of the Indian Copyright Act, 1957⁵ outlines the work that could be protected under the Copyright Act.

Section 13(1) of the Indian Copyright Act, 1957

“13. Works in which copyright subsists. — (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say, —

- (a) original literary, dramatic, musical, and artistic works;*
- (b) cinematograph films; and*
- (c) sound recording”⁶*

As per this provision, the copyright can subsist in short videos under the head of “cinematograph film”.

1.1 ELAVTION BETWEEN SHORT-VIDEOS AND CINEMATOGRAPH FILM

But one must also analyze whether there is a difference between short video (videography) and cinematograph film. Videography is all about capturing special moments and live events. Videographers usually work on smaller projects like weddings, live events, concerts, or personal videos for social media platforms like YouTube, Facebook, and Instagram. On the other hand, cinematography also focuses on getting great footage but involves much more strategic planning and artistic direction. Cinematographers work with large crews and production teams to create music videos or high-end Bollywood films, adding a layer of artistic decision-making to the process.

²YouTube, *Monetisation policies*, 2024, available at <https://www.youtube.com/intl/ALL_in/howyoutubeworks/product-features/monetization/#subscriptions> (last visited on 15-07-2024)

³ Meta, *Instagram Creator Incentive Terms*, 2024, available at <Instagram Creator Incentive Terms | Instagram Help Center> (last visited on 15-07-2024)

⁴Meta, *Instagram Reels Play Bonus Program Rules*, 2023, available at <<https://help.instagram.com/183392733628561>> (last visited on 15-07-2024)

⁵ The Copyright Act, 1957 (Act 14 of 1957).

⁶ *Id.*, s. 13(1).

It raises the question whether these short video works, not even the short films, could fall under cinematograph film.

As per the plain reading of provision of Copyright Act, 1957:

*“cinematograph film” means any work of visual recording and includes a sound recording accompanying such visual recording and “cinematograph” shall be construed as **including any work produced by any process analogous to cinematography including video films.**”⁷*

It can be assumed that the work falls under this category and is protectable. The definition of “cinematograph film” includes visual recording as a part of it. Visual recording is defined under Copyright Act:

“visual recording means the recording in any medium, by any method including the storing of it by any electronic means, of moving images or of the representations thereof, from which they can be perceived, reproduced or communicated by any method.”⁸

Under this definition, visual recording means recording in any medium of moving images. It is a very broad sort of definition and can easily cover any recording of moving images. It can be said after looking into the definition that short videos can fall under this definition. But, as visual recordings are not per se protected under Copyright Act, they are protectable under the ambit of cinematograph film. It can be said that, cinematograph films are a subset of visual recording.

WHY VISUAL RECORDING WAS INTRODUCED IN THE COPYRIGHT ACT

Parliamentary Standing Committee on The Copyright (Amendment) Bill, 2010⁹, which was the instrument through which the inclusion of “visual recording” in the definition of cinematograph film was done, has clarified that the definition of the term "cinematograph film" is being revised to tackle the exploitation of works in digital medium. However, no other explanation was given by the committee in this respect.

⁷ *Supra* Note 4, s. 2(f).

⁸ *Supra* Note 4, s. 2(xxa).

⁹ Department-Related Parliamentary Standing Committee on Human Resource Development, “Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010” (November, 2010).

Therefore, it could be said that the ambit of “visual recording” can cover short-videos present in the digital sphere. It can be concluded that the ambit of the term “cinematograph films” under Indian Laws is not restricted and a broad interpretation is considered by law. Hence, it can be assumed that short videos are protected under Section-13 of the Copyright Act under the “cinematograph films” head.

2. WHAT IS THE CRITERIA FOR PROTECTION OF SUCH CONTENT?

After dealing with the question of protectability of short video, now, we must delve into the question of what should be the minimum duration and originality of such video to be protected under copyright law. The author has discussed a few cases and regulations by which it could be understood.

2.1 WHAT SHOULD BE THE DURATION OF SHORT VIDEOS TO BE PROTECTABLE?

1. Sara Nadzirah Binti Zulkifli v Khirulanuar Bin Mohamadiah

In a case of Malaysia named Sara Nadzirah Binti Zulkifli v Khirulanuar Bin Mohamadiah¹⁰:

In this case, the plaintiff, a 31-year-old self-proclaimed influencer, has close to 100,000 followers on Instagram as of April 1, 2022. The defendant, an Advocate and Solicitor of the High Court of Malaya, also sells durian through his business, Ezydurian Services. He claims to have over 318,000 followers on his Facebook account as of August 13, 2022.

The dispute arose when, on February 3, 2021, the plaintiff uploaded a **51-second video** of herself eating durian on Instagram, which garnered over 4,200 likes and 289 comments. Four days later, on February 7, 2021, the defendant uploaded the same video on his Ezydurian Facebook account without her permission or consent to promote his durian business.

The plaintiff demanded that the defendant remove the video, but he refused. This led her to file a lawsuit against him for copyright infringement.

In this case, the court ruled that the plaintiff's work was protectable as a cinematograph film under copyright law. The court ordered the defendant to remove the plaintiff's copyrighted 51-second video from his Facebook platform, Ezydurian Services. This decision demonstrates that even brief

¹⁰ Sara Nadzirah Binti Zulkifli v Khirulanuar Bin Mohamadiah, [2023] AMEJ 0254.

videos, such as the 51-second clip in this case, are eligible for copyright protection, reinforcing the rights of content creators in safeguarding their intellectual property. The court's order emphasizes the legal ramifications for the unauthorized use of copyrighted material and underscores the importance of obtaining permission before repurposing or sharing someone else's content, even in a marketing context.

2. England and Wales Cricket Board Ltd v Tixdaq Ltd of European Union

In another case of *England and Wales Cricket Board Ltd v Tixdaq Ltd of European Union*¹¹, where:

The claimants in this case are the governing body of cricket in England and Wales (first claimant) and a well-known UK pay-television operator (second claimant). They own copyrights in television broadcasts and films incorporated within those broadcasts of most cricket matches played by the England men's and women's cricket teams in England and Wales.

The defendants operate a website and various mobile applications. One of these applications allows employees, contractors, and users to upload clips of cricket matches lasting up to **eight seconds**. These clips can then be viewed by other users.

The claimants allege that the defendants have infringed their copyrights. In response, the defendants deny any infringement, citing fair dealing for the purposes of reporting current events as their primary defence, and relying secondarily on immunities for acting as a mere conduit and hosting. Additionally, the defendants counterclaimed for a declaration of non-infringement regarding the most recent versions of the app.

The claimants' copyright works include "broadcasts" and "films." According to the Copyright, Designs and Patents Act 1988 (CDPA)¹², "films" refer to the "first fixations of films," in line with the Information Society Directive¹³. The copyright in "films" and "broadcasts" is protected as signal rights under the CDPA, which does not require originality for copyright to subsist. Although the claimants could have argued that their use of camera angles, close-ups, slow motion, etc., created intellectual works akin to "dramatic works," they did not pursue that line of reasoning.

¹¹ *England and Wales Cricket Board Ltd v Tixdaq Ltd of European Union*, [2017] E.C.D.R. 2.

¹² The Copyright, Designs and Patents Act, 1988, s. 5B.

¹³ The Copyright and Information Society Directive, 2001.

The court in this case held that, an 8-second video clip can be protected under copyright law because it can constitute a substantial part of a broadcast or film, depending on its content and context.

The court's analysis relies on the Copyright, Designs and Patents Act 1988¹⁴, as well as the Information Society Directive¹⁵. The court acknowledges that while quantitative measurements are one factor in assessing whether a part is substantial, the qualitative significance of the part is also crucial. This includes considering the degree to which the part exploits the investment made by the broadcaster or producer.

In this case, the court observed that even an 8-second video could be protected if it contains substantial value. The video in question contained highlights such as wickets taken, appeals refused, and centuries scored. Such a video is a result of extensive video editing and requires investment and efforts from the broadcasters, thereby constituting a substantial part of the copyrighted work. The court held that an 8-second video can hold enough qualitative value to get copyright protection.

3. Punjab Influencer Empanelment Policy, 2023

The recent announcement of a policy by the State government of Punjab has also extended the protection of copyright to short videos. Punjab Influencer Empanelment Policy, 2023¹⁶, has emphasised the protection of online content creators. One of the critical aspects of this policy is that it extends royalty provisions to videos as short as 10 seconds.

As per the Policy, influencers on online platforms will get royalties for their copyrighted work. There are certain qualifications that an influencer has to meet like, an influencer must have been active on social media for at least six months, should not have any criminal cases or blacklisting history, and must maintain a minimum subscriber base. The Policy recognizes the protection of videos as short as 10-seconds. And the royalties are paid as a structure that is based on content-creators' follower counts from Category A (10 lakh+ subscribers) to Category E (10k+ to 50k subscribers).

The new policy's acceptance of *videos as short as 10 seconds* recognizes that creativity isn't

¹⁴ *Supra* Note 11, ss. 16,17,20.

¹⁵ *Supra* Note 12, arts. 2, 3(2).

¹⁶ Government of Punjab, "Punjab Influencer Empanelment Policy, 2023, Noti. No. PR No. 1/641929/2023" (Department of Information and Public Relations, 2023).

limited to longer formats, acknowledging the influence of concise, impactful content creators. The Punjab Influencer Empanelment Policy, 2023, by recognizing the value of short-form content and providing royalties to videos as short as 10 seconds, the policy validates the contributions of a broader range of creators and recognizes the shift in modes of publication witnessed since the inception of the digital age.

*4. Draft Guidelines for Examination of Cinematograph Film Works released by Ministry of Commerce & Industry*¹⁷

In a draft manual released by the Ministry of Commerce & Industry named "Guidelines for Examination of Cinematograph Film Works", it is discussed what is the ambit of cinematograph films for registration. The aim of this manual is to lay down comprehensive and definitive guidelines for the examination and registration of works falling under the category of Cinematograph Film, it also discusses the most commonly observed issues which arise in the course of examination of cinematograph film works.

The key aspect of these guidelines is that they do not impose any specific time limit for a work to be protectable, affirming that short videos are also eligible for copyright protection.

Point 11¹⁸ of the guidelines which discusses the question of how to determine/ascertain the correct category of work, expresses that for cinematograph film protection offers a broad definition that encompasses a wide range of visual recordings, including videos, short films, movies, animated movies, and documentaries. As per such an inclusive approach the guideline ensures that even shorter content, such as social media videos, is protected under copyright law.

Furthermore, the guidelines do not set a minimum duration for a work to be eligible for protection, this indicates that even brief visual recordings can have copyright protection under the current copyright regime. This omission of time-based criteria reflects an understanding of the present digital content landscape, where short videos are increasingly popular. As a result, content creators who produce shorter-form videos, such as Instagram Reels and YouTube Shorts, can claim protection under the Copyright Act. The protection granted to these shorter videos extends the same copyright rights to all content creators, regardless of the length of their work, which promotes creativity and safeguards the creativity of short video creators even in such compact

¹⁷ Ministry of Commerce & Industry, "Draft Guidelines for Examination of Cinematograph Film Works" (February, 2018).

¹⁸ *Id.*, p.no. 6-7.

formats.

Overall, the government's approach, as outlined in this draft guideline, reflects an understanding of the contemporary content creation landscape, where short videos are a significant part of the ecosystem. The lack of a specific time limit for a work to be protectable demonstrates the government's commitment to safeguarding the rights of all creators, recognizing the importance of even the shortest visual recordings.

2.2 WHETHER SHORT VIDEOS NEED TO BE ORIGINAL/CREATIVE WORK TO BE PROTECTABLE?

Justice Krishna Iyer in the *Indian Performing Right Society v Eastern India Motion Picture Association* (1977)¹⁹ gives a beautiful explanation of Cinematograph Films:

“A cinematograph film is a felicitous blend, a beautiful totality... Cinema is more than long strips of celluloid, more than miracles in photography, more than song, dance and dialogue and, indeed, more than dramatic story, exciting plot, gripping situations and marvelous acting. But it is that ensemble which is the finished product of orchestrated performance by each of the several participants, although the components may, sometimes, in themselves be elegant entities.”

There is no express stipulation in the Act that it should be original as in the case of literary, musical or artistic works. But copyright will not subsist in a cinematograph film if a substantial part of the film is an infringement of the copyright in any other work.²⁰ It, therefore, follows that in order to be entitled to copyright a cinematograph film should be original, that is, it should originate from the producer and not a copy of some other copyrighted work.

Jairam Ramesh and Others v/s State of Karnataka

In the case of *Jairam Ramesh and Others v/s State of Karnataka*²¹, where:

The case involves a dispute over alleged copyright infringement during the Bharat Jodo Yatra, a mass movement organized by the Indian National Congress (INC). The petitioners, who are high-ranking members of the INC, are accused of violating copyright by playing songs from the film "KGF Chapter-2" during the Yatra without permission from the copyright holder, MRT Music. And posted a reel of a Congress leader on its Instagram page with the background music owned

¹⁹ *Indian Performing Right Society Ltd vs Eastern India Motion Pictures*, AIR 1977 SC 1443.

²⁰ *Supra* Note 4, s. 13(3).

²¹ *Jairam Ramesh and Others v/s State of Karnataka*, 2023 SCC OnLine Kar 34.

by the complainant.

MRT Music, a partnership firm owning and broadcasting music, filed a complaint against the petitioners, leading to the registration of Crime No. 362 of 2022. The charges include offences under Section 63 of the Copyright Act, Section 66 of the Information Technology Act, and Sections 120B, 403, 465, and 34 of the Indian Penal Code (IPC).

The complaint alleges that the petitioners played the copyrighted songs during the Yatra without an agreement or permission from MRT Music, which holds the copyright as an assignee. The petitioners contend that they have not violated any copyright laws, arguing that the use of the songs was for non-profit and non-commercial purposes, and that MRT Music is not the copyright holder, but merely a licensee. The respondents, on the other hand, assert that MRT Music is an assignee with rights equivalent to a copyright holder, and the unauthorized use of the music by the petitioners constitutes a clear violation of the Copyright Act.

In the present case, the petitioners have meddled with the source code. Tampering with the source code without permission and freely playing the audio would undoubtedly amount to infringement of the copyright of the complainant.

For a work to be protectable under copyright law, it must be original and not infringe upon existing copyrighted material. In cases where short videos are uploaded by content creators, they must ensure that their content does not contain someone else's copyrighted work without proper authorization.

The *Jairam Ramesh and Others v. State of Karnataka* case demonstrates a scenario where alleged copyright infringement occurred during a political event, the Bharat Jodo Yatra. The petitioners, high-ranking members of the Indian National Congress (INC), were accused of playing songs from the film "KGF Chapter-2" without permission and posting a reel with the same background music on their Instagram page. The complainant, MRT Music, held the copyright to the music and filed a complaint, leading to legal action.

The petitioners' unauthorized use of copyrighted music and alleged meddling with the source code indicated clear copyright infringement, demonstrating that even short videos must not contain infringing material to be eligible for copyright protection. If a work incorporates existing copyrighted content without permission, it cannot receive copyright protection.

Eastern Book Company & Ors vs D.B. Modak & Anr.

When a work is a mixture of creativity and pre-copyrighted work of another author, in such a situation, the protection could be granted to it as per the Creativity Standard Doctrine outlined in *Eastern Book Company & Ors vs D.B. Modak & Anr*, where it was held that:

“Whenever a person produces something with his skill and labour, the other person cannot take the profit out of the skill. If someone wants to secure copyright for newly created work then it is necessary that the labour, skill and capital invested should be sufficient to impart to the work some quality or character which the original work does not possess, and which differentiates the original work from the newly created work. Otherwise, the protection could only be given to the extent of creativity expressed in the newly created work.”²²

Therefore, it could be understood that a work claiming to be protected has to be an original work. We witness a lot of short videos containing pre-copyrighted work of other authors, like, lip-sync videos. Such videos cannot be protected as they do not contain original work. For protection, the work must contain some amount of creativity.

2.3 WHETHER SHORT VIDEOS HAVE TO BE REGISTERED TO CLAIM PROTECTION?

In India, copyright protection is governed by the Copyright Act of 1957²³ and the Copyright Rules of 2013²⁴. The Act does not mandate the registration of copyright. The use of the word "may" in the Copyright Act of 1957²⁵, which relate to the Register of Copyright, indicates that registration of work is optional.

However, the registration is optional. But it must be seen that for registration of a cinematograph film, the cost is five thousand rupees. The draft guidelines for cinematograph film protection require a separate application and fee for each work, even if it's a short video. This means that every piece of content, including those as brief as 8 seconds, when registered individually has to a fee of INR 5,000 per work.²⁶

Given the high costs and time-consuming process of registering individual works, a more streamlined and separate mechanism should be introduced for short video registration. This will reduce the financial burden on content creators who produce multiple short videos on a regular

²²*Eastern Book Company & Ors vs D.B. Modak & Anr*, AIR 2008 SC 809.

²³ *Supra* Note 4.

²⁴ Copyright Rules, 2013 (G.S.R 172(E), dated 14th March, 2013).

²⁵ *Supra* Note 4, ss. 44,45.

²⁶ *Supra* Note 16, p.no. 3.

basis.

CONCLUSION

Addressing the current shift from traditional modes of publication to digital platforms, the mode of expressing creativity and creative work has largely changed. Young and new artists are opting for these digital platforms to express and publish their creative original works. Following the most recent trend, both creators and consumers are more likely to engage with short videos. And when creativity is being showcased in such short compact formats, which is in itself a very difficult task, it has to be protected under Copyright law. In the article above we have seen emerging global and national trends that have provided protection to videos as short as 8-seconds.

Indian copyright law is up to date to adopt such changes. The draft guideline Ministry of Commerce & Industry makes the approach of the government clearer that there is no specific minimum duration for cinematograph films to claim protection. And the precedents set by the Apex Court are also sufficient to deal with the problems associated with such digital content. Additionally, to properly place and recognize such short videos as an emerging category of creative and original work, there must be a separate registration process for short videos from that of cinematograph films.

Conclusively, it is important to address and recognize the efforts made by content creators in imparting their creativity in such short formats and to understand the gravity of new platforms of publication. It is required to bring changes in law to achieve the objectives it aimed to tackle, the creativity in original work has taken a new format, and it is the requirement of Copyright law to protect it.
