

## COPYRIGHTABILITY OF AIRSHOWS IN INDIA

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### *Abstract*

*The entertainment industry is ever-expansive and is open to accommodate newly developed forms of art under its ambit. However, the interplay between entertainment, intellectual expression and the law of copyright is one that needs consideration when we deviate from the traditional formats of art. It is undeniable that air shows are a source of entertainment and showcase talent and precision. Unlike traditional forms of art, the medium of fixation of air shows is not tangible or they are short-lived or momentary, due to which it is commonly categorized by many as impermanent art. Nevertheless, there can be a different perspective from which the copyrightability of air shows can be tested. It is squarely fitting to bring it under the ambit of dramatic works, owing to its choreography and arrangement as well as expression of the same may also be protected as an artistic work, given its pictorial element and intricate imagery. This brings us to the question of whether air shows can be brought under the ambit of copyright law; if yes, then what sort of work would it be granted protection under, and to what extent, if any, the fixation of air shows satisfy the Indian standard?*

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## INTRODUCTION

The concept of flight has been a subject of spectacle and technological development. Human efforts of soaring the skies have arguably been existing since 400 B.C. in China, upon the invention of the kite.<sup>1</sup> However, real progress in making humans capable of flight was only seen in 1485 after the Ornithopter was introduced through Leonardo da Vinci's illustrations.<sup>2</sup> Centuries later brothers, Joseph Michel and Jacques Etienne Montgolfier invented the first hot air balloon in 1783, followed by George Cayley's attempt at perfecting his glider model in the 19<sup>th</sup> Century, which though improved the aerodynamics, was still inadequate to fly a man.<sup>3</sup> In 1891, German engineer Otto Lilienthal perfected the glider model, making it capable of human flight over longer distances. Parallely, Samuel P. Langley built the first model of a plane, named the Aerodrome, which ran on steam power<sup>4</sup> and was followed by the famous Wright brothers who are not only regarded as the fathers of aviation but are regarded as the first true pilots. Brothers Wilbur and Orville Wright were the first who shifted the focus from brute power to functionality. As per Wilbur, *knowledge and skill* held a

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<sup>1</sup> Gavin, 'Chinese Kites- history and Culture' (*China Highlights*, 23 August 2021) <<https://www.chinahighlights.com/travelguide/culture/kites.htm#:~:text=When%20Were%20Kites%20Invented%3F,make%20and%20use%20them%20advanced>> accessed 17 December 2022.

<sup>2</sup> 'Joseph Michel and Jacques Etienne Montgolfier- Hot Air Balloon' (*Lemelson-MIT*) <<https://lemelson.mit.edu/resources/joseph-michel-and-jacques-etienne-montgolfier>> accessed 17 December 2022.

<sup>3</sup> Tom D. Crouch 'Sir George Cayley- British Inventor and Scientist' (*Britannica*, 4 December 2022) <<https://www.britannica.com/biography/Sir-George-Cayley>> accessed 17 December 2022.

<sup>4</sup> 'Langley Aerodrome' (*National Air and Space Museum*) <[https://airandspace.si.edu/collection-objects/langley-aerodrome-number-5/nasm\\_A19050001000](https://airandspace.si.edu/collection-objects/langley-aerodrome-number-5/nasm_A19050001000)> accessed 17 December 2022.

greater degree of importance compared to the actual machine and motors powering it. Not only did they go on to perfect their design but mastered the *art and skill* of piloting. In 1902, the shape was perfected and a 12-horsepower engine was installed to power it. The maiden flight of the “*Flyer*” was attempted on December 17, 1903, in Big Kill Devil Hill. Though unstable, it led to the conception of the “*Flyer III*”, which was piloted by Wilbur on October 5, 1905, flying for 39 minutes and travelling a distance of 24 miles.<sup>5</sup>

Soon after this milestone, the Grande Semaine d’Aviation de la Champagne, commonly known as the Rheims Aviation Meet was held in August 1909, which showcased the first air shows the world has witnessed. This was followed by a slew of American air shows in 1910 in Los Angeles, New York and Boston.<sup>6</sup> Over the years intricate formations were developed and with technological development, more and more elements were added to the air shows. Skywriting was one such element that added smoke effects to the exercise, which was introduced by the Black Cats in Farnborough in the year 1957.<sup>7</sup>

Although India had its first air show in its aviation capital, Bengaluru, on February 3, 1911,<sup>8</sup> the celebrated Aero India Show, yet again took

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<sup>5</sup> ‘1903 - The First Flight’ (*National Parks Service*, 14 April 2015) <<https://www.nps.gov/wrbr/learn/historyculture/firstflight.htm#:~:text=Orville%20takes%20off%20with%20Wilbur%20running%20beside%2C%20December%2017%2C%201903>> accessed 17 December 2022.

<sup>6</sup> David H. Onkst, ‘Air Shows- An International Phenomenon’ (*U.S. Centennial of Flight Commission*) <<https://www.centennialofflight.net/essay/Social/airshows/SH20.htm#:~:text=Early%20exhibition%20aviators%20staged%20the,aviation%2C%20and%20entertain%20the%20masses>> accessed 17 December 2022.

<sup>7</sup> Michal Graczyk, ‘Smoke Oil? The Essence Of Every Air Show’ (*Warter Racing*, 4 July 2015) <<https://warterracing.com/smoke-oil-the-essence-of-every-air-show/#:~:text=Have%20you%20ever%20wondered%20where,which%20uses%20special%20mineral%20oil>> accessed 17 December 2022.

<sup>8</sup> Chetan Kumar, ‘Bengaluru had its first date with air show a century ago’ (*Times of India*, 20 February 2017) <<https://timesofindia.indiatimes.com/city/bengaluru/bluru-had-its-first-date-with-air-show-a-century-ago/articleshow/57239626.cms>> accessed 17 December 2022.

place in Bengaluru in 1996. The popularity of the show has seen a steady rise over the following editions. As we are setting up for the 14<sup>th</sup> edition of the same in February 2023, we shall strive to answer certain questions that are attached to it.<sup>9</sup> Being an exercise, which not only requires extensive logistical preparation but also requires substantial practice and planning on the part of the pilots, a considerable amount of intellectual labour is put into the same. Discussions on the copyrightability of airshows have started to gain traction,<sup>10</sup> but the same is restricted to discussions in certain online forums and none have yet been addressed on a legislative platform. However, there has been little to no discussion concerning the copyrightability of airshows even in 2023 in India.

We shall test whether the preparational stage of planning would fall under the purview of dramatic works, owing to the thought that goes into choreographing the show alongside testing whether the expression of the same shall fall under artistic work or not. We shall also delve into the issue arising due to the mode of fixation being impermanent in nature. Further, a brief overview of the performers right arising out of the same shall also be discussed. We shall restrict ourselves to only the copyrightability aspects of air shows and shall not be touching on aspects pertaining to other forms of intellectual right protection. Finally, we shall be touching on the public policy paradigm which would arise in case air shows are found to be copyrightable under Indian Law.

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<sup>9</sup> Department of Defence Production Government of India, Ministry of Defence, 'Aero India 2023- The Runway to a Billion Opportunities' (*AeroIndia*) <<https://aeroindia.gov.in/>> accessed 17 December 2022.

<sup>10</sup> 'AirShow Performance Acts Copyright Questions' (*Airliners.net*, 5 May 2012) <<https://www.airliners.net/forum/viewtopic.php?t=919391>> accessed 31 July, 2023, Orias, 'Airshow Copyright Questions' (*UK Airshow Review*, 10 March, 2022) <<https://forums.airshows.co.uk/viewtopic.php?t=87448>> accessed 31 July, 2023.

## **COPYRIGHTABILITY**

To test the copyrightability of air shows, we shall be dividing this portion of the article into two distinct parts, which would test whether the same is copyrightable as a dramatic work and/or artistic work. Each part would critically examine the scope of the aforementioned subclassification, ascertain whether the same is a work of first instance or derivative work and analyse whether the mode of fixation of the same can and should be legally recognized in India.

### **A. Dramatic Work**

To address the discussion chronologically, we shall first look into the preparational stage of the show. A great deal of effort goes into the planning and preparing of an air show. The beauty lies in the precision and details of the planning, as you are essentially putting the life of a human on the line for entertainment and even the slightest error could prove fatal even to the most experienced and skilled pilot. Although there can be shows in which the pilot may impromptu perform the stunts, for this article, we shall be restricting ourselves to the performances which are planned and documented. This is because copyright protection as dramatic work would not be granted to acts that are dynamic and volatile, i.e., it is built up on the spot, owing to the fact that it lacks an underlying copyrightable work.<sup>11</sup> However, we shall be dealing with the aspect of impromptu work briefly, in the latter parts of the article, which shall consider the performer's rights.

On closer examination of the stunts which are performed in these air shows, it can be seen that the aerial performances are a combination of five basic types of aerobatic manoeuvres, which are combined to

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<sup>11</sup> Rukma George, 'Scriptwriters' Copyright Conundrum: An Analysis' 6(1) *ILI L. Rev.* 123 (2017).

form complex moves in choreographic sequences.<sup>12</sup> This gives our discussion a clear path to examine the nature of the work as well as ascertaining whether the work is of first instance or derivative.

The very premise of our argument lies in the fact that air shows are based on an underlying choreographic work, which strengthens our argument that the same shall be protected as a dramatic work.<sup>13</sup> However, before delving into the nuances of the question, a brief understanding of dramatic work and choreography is required. The Berne Convention for the Protection of Literary and Artistic Work (Berne Convention) grants protection to dramatic work but also goes on to cover choreography under its ambit.<sup>14</sup> The Stockholm Convention provides that for a work to enjoy copyright protection, the work needs to be fixed in writing or otherwise. This is a norm that is universally followed to date with certain exceptions. The Berne Convention allowed for nations to develop their laws and the same was further standardized by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Most often than not choreography is included with dramatic work, however, the United States of America (USA or US) does not define dramatic works under its copyright legislation. It only states that dramatic work would include the accompanying music.<sup>15</sup> The issue which would arise when copyright protection is sought for in air shows under the US Law is that the US Constitution mandates that only works which can be categorized under the definition of useful arts can

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<sup>12</sup> '10 Little-Known Facts About Air Shows' (*Hartzellprop*, 24 June 2019) <<https://hartzellprop.com/10-little-known-facts-about-air-shows/>> accessed 17 December 2022.

<sup>13</sup> The Copyright Act 1957 (India), s 2(h).

<sup>14</sup> Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, 828 U.N.T.S. 221, art. 2.

<sup>15</sup> Copyright Act 1976, 17 U.S.C. ss 101-810, s 102(a)(3).

enjoy copyright protection<sup>16</sup> and mere exhibition, spectacle and arrangement of scenic effects shall not qualify for dramatic work.<sup>17</sup> However, the case is not the same for choreographic work. The US law provides for the protection of choreographic work,<sup>18</sup> but the question which would arise is whether there needs to be any dramatic content in the same. The same was clarified when the scope of copyright in choreography was broadened from dramatic performance to include all forms of choreography.<sup>19</sup> Protection could also be afforded to choreographic work which was abstract, which means that there need not be any apparent story or theme, for example in abstract dance forms.<sup>20</sup> However, it is pertinent to note that the US law has excluded ordinary motor activities, social dances, commonplace movements and gestures, or athletic movements from the purview of copyright due to them lacking a sufficient amount of authorship.<sup>21</sup> The law in the United Kingdom (UK) is clear when it comes to dramatic work protection, which covers dance and mime under its ambit<sup>22</sup> and goes on to protect choreography, move notations and stage views.<sup>23</sup> Coming to the Indian context, the law as well as the courts have accommodated choreography under the ambit of copyright. However, when we consider the copyrightability of air shows, we need to satisfy a certain unwritten checklist.

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<sup>16</sup> U.S. Constitution, art 1, s 8.

<sup>17</sup> M.B. Nimmer, *Nimmer on Copyright: a Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (LexisNexis 1978), at 2.06 [A].

<sup>18</sup> Copyright Act 1976, 17 U.S.C. ss 101-810, 102 (a) (4).

<sup>19</sup> M.B. Nimmer, *Nimmer on Copyright: a Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (LexisNexis 1978), at 2.07 [B].

<sup>20</sup> *Ahn v. Midway Manufacturing Co.* 965 F. Supp. 1134 (1997).

<sup>21</sup> United States Copyright Office, 'Circular 52 Copyright Registration of Choreography and Pantomime' (US Copyright Office, September 2017) <<https://www.copyright.gov/circs/circ52.pdf>> accessed 17 December 2022.

<sup>22</sup> Copyright, Designs and Patents Act, 1988, s 3(1).

<sup>23</sup> *Massine v. de Basil* (1938) 82 Sol Jo 173 (EWHC).

### ***Originality in the Dramatic Element of an Air Show***

First, the show needs to satisfy the test of originality. As has been mentioned above, most air shows are a complex combination of the different basic sets of manoeuvres, which comprise horizontal and vertical movements, loops, spins, and stall turns also known as hammerheads. The question that arises is whether such choreography would be eligible for copyright protection. The answer lies in the realm of dance. Most dance choreographies are inspired by preceding work; however, this does not mean that it is precluded from the test of originality. As it has been observed by the Indian court that dances which originate from pre-existing dance forms are protectable under copyright. This happened most notably when the court allowed the literal representation of a dance form, *Yaksha Ranga* originating from *Yakshagana*, to be treated as a dramatic work.<sup>24</sup> However, it is not to say that certain choreographs of air shows can rightfully be works of the first instance given the rapid advancement in aviation technology and those cases the doctrine of the *sweat of the brow* shall be applicable.<sup>25</sup> However, since most of the choreographs are expected to be culminations of the movements which have been mentioned above, a higher degree of originality would be required to meet the standards of Indian Copyright law.

Relying on the US Court's decision it would be safe to say that in the case of derivative works, the standard of originality is generally based on two factors, first, the work has to be an original creation of the author and second, the work has to have some degree of creativity.<sup>26</sup> On the other hand, the Canadian Court held that there need to be certain changes made to the original work which is non-trivial, non-

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<sup>24</sup> Academy of General Edu., Manipal v. B. Malini Mallya 2009 (39) PTC 393.

<sup>25</sup> University of London Press v. University Tutorial Press [1916] 2 Ch. 60.

<sup>26</sup> Feist Publications Inc. v. Rural Telephone Services Co., Inc. 499 U.S. 340 (1991).

mechanical, and shall possess a certain degree of skill and judgment.<sup>27</sup> Although the Indian court was heavily inspired by the two aforementioned judgments, it took a slightly different approach in terms of derivative work, where it held that the work shall be the original and independent work of the author and shall have a minimum degree of creativity which is lower in standard compared to the US court's approach taken under the principle of a *modicum of creativity* but shall be higher than the UK court's approach taken viz-a-viz though the doctrine of the *sweat of the brow*.<sup>28</sup> However, the selection, arrangement, or combination shall not be such that it can only give rise to only a certain number of outcomes but shall be such that it would facilitate the creation of new work and also give room to the choreographers to be creative.

### ***Idea Expression Dichotomy in the Dramatic Element of an Airshow***

In continuation of the previous discussion, we need to tackle the second requirement for copyright, i.e., the conflict between idea and expression. It shall be noted that ideas are not copyrightable but only the expression is.<sup>29</sup> However, in this case, distinguishing between idea and expression becomes somewhat tricky, which would lead many to believe that there is a merger of the idea and expression. Nevertheless, this would not be an issue when it comes to the copyrightability of the final expression, i.e., the culmination of the stunts, is in question because it becomes significantly different and is capable of being expressed in several ways. It is pertinent to note that the case would be very different when it comes to the US. Although initially it was accepted by the Lower Courts of the US that yoga sequences were

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<sup>27</sup> CCH Canadian Ltd. v. Law Society of Upper Canada (2004) SCR 339.

<sup>28</sup> Eastern Book Company v. D.B. Modak (2008) 1 SCC 1.

<sup>29</sup> Baker v. Selden 101 U.S. 99 (1879).

copyrightable, the US Copyright Office subsequently clarified that yoga asanas and sequences are indeed copyrightable.<sup>30</sup> Nevertheless, this shall not pose any difficulty when it comes to the Indian context owing to its lower requirement of originality.

Even fireworks were deemed uncopyrightable under the law due to a lack of a medium of fixation (which we shall be dealing with next) and on the grounds of public health, which is beyond the purview of copyright.<sup>31</sup> However, it would be unfitting to state that fireworks are beyond the purview of IP protection as a patent for fireworks has been granted to Disney for fireworks having decreased environmental impact.<sup>32</sup>

### ***Fixation of the Dramatic Element of an Airshow***

Fixation plays a vital role in determining the copyrightability of a work. Fixation essentially means affixing a work onto something concrete which serves as the medium through which the work can be perceived, produced or communicated, having permanent or semi-permanent endurance.<sup>33</sup> The Berne Convention mandates a uniform international standard for copyright, however, it does not mandate that works need

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<sup>30</sup> Kate Brack 'The Fallout From a Downward-Facing Dog Fight' (*Brooklyn Based*, 19 April 2013) <<https://brooklynbased.com/2013/04/19/the-fallout-from-a-downward-facing-dog-fight/>> accessed 20 December, 2022, *Bikram's Yoga Coll. Of India, Ltd. P'ship v. Evolution Yoga, Ltd. Liab. Co.* 803 F.3d 1032 (9<sup>th</sup> Cir.).

<sup>31</sup> Eleonora Rosati 'Evolving Concepts of Work and Sustainability of Copyright: The Curious Case of Curated Fireworks Displays' (*IPKitten*, 18 September 2018) <<https://ipkitten.blogspot.com/2018/09/evolving-concepts-of-work-and.html>> accessed 20 December 2022.

<sup>32</sup> Gene Quinn 'Did You Know... Disney Patented Precision Fireworks Display' (*IPWatchdog*, 1 July 2010) <<https://ipwatchdog.com/2010/07/01/disney-fireworks-patent/id=11467/>> accessed 17 December 2022.

<sup>33</sup> M.B. Nimmer, *Nimmer on Copyright: a Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (LexisNexis 1978), at 1.08 [C] [2].

to be fixed and leaves it to the discretion of members to make standards for fixation as per their requirements.<sup>34</sup>

Thus, on one hand, the US has a statutory mandate for fixation in a tangible medium<sup>35</sup> and on the other hand, in France copyrightability is based solely based on creativity i.e., “*creation of mind*”,<sup>36</sup> irrespective of their “*genre, form of expression, merit or destination*.”<sup>37</sup> The copyrightability of a work depends heavily on the perceptibility of the same, for instance in the case of speech, it can be perceived by spoken words.<sup>38</sup>

While some may argue that the flexible and accommodative nature of the Berne Convention concerning fixation is opposed to its goal of creating a uniform body of copyright law, it can be countered with the reasoning that it has paved the way for varied works to be protected under modern copyright regime, which has seen tremendous expansion in creative media both in digital media and contemporary arts.<sup>39</sup>

Through the discussions in the previous sections, it has been established that airshows are indeed protectable as choreographic work which leads us to the following discussion relating to fixation which is mandatory in the case of choreographs. Fixation could be through verbal *description, notation, pictures, or diagrams in graphical form* as per US Law.<sup>40</sup> Further, in the UK, fixation is a pre-requisite for a work to

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<sup>34</sup> ‘Guide to the Berne Convention for the Protection of Literary and Artistic Works’ (WIPO, 1971) <[https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf)> accessed 17 July 2023, at 2.6.

<sup>35</sup> Copyright Act 1976, 17 U.S.C. ss 101-810, s 101.

<sup>36</sup> Code de la propriété intellectuelle, art. L111-1.

<sup>37</sup> Code de la propriété intellectuelle, art. L112-1.

<sup>38</sup> Antoine Latreille, ‘From Idea to Fixation: A View of Protected Works’, *Research Handbook on the Future of EU Copyright* (Estelle Derclaye ed. 2009) at 133, 141.

<sup>39</sup> Megan M. Carpenter, ‘If It’s Broke, Fix It: Fixing Fixation’ 39 Colum. J.L. & Arts 355 (2016).

<sup>40</sup> ‘Circular 51 Copyright Registration of Choreography and Pantomime’ (US Copyright Office, April 1961) <<https://www.copyright.gov/circs/circ52.pdf>> accessed 17 December 2022.

quality and enjoy copyright protection.<sup>41</sup> Similarly, when we delve into the Indian copyright regime, *choreography, scenic arrangement or acting other than that in a cinematographic film* needs to be fixed in a tangible medium, either in *writing, print or other form* to qualify for copyright protection.<sup>42</sup> If fixated as a cinematographic film, then the same shall not qualify for protection as a choreographic work.<sup>43</sup>

In India, to protect airshows under the head of dramatic work we would need to take the statutory mandate of fixation into consideration, keeping in mind that the main action or stunts in the air show are preceded by certain predetermined plans which are capable of being physically performed or is accompanied by action<sup>44</sup> fixed in either writing or otherwise.<sup>45</sup> However, ephemeral and contemporary works at times can be volatile and transitory. Since, artists are pushing the boundaries of creative expression beyond the four walls of traditional modes of fixation, restricting copyrightability to the tangible medium would make it unreasonably and unduly difficult for such artists to protect their creative expression.

## **B. Artistic Work**

Now, as we approach the second part of our discussion it is pertinent to note that airshows when viewed from an artistic angle would fall under the category of ephemeral arts and thus before delving any further into the discussion, we need to internalize this attribute and the non-permanent nature of airshows. Traditional art to a great extent is characterized by its permanent nature which is sustainable over time. However, the beginning of the 20<sup>th</sup> century marked a discourse in the discipline of Art. The discourse was characterized by art being

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<sup>41</sup> Mehdi Norowzian v Arks Ltd. (2000) E.C.D.R. 205.

<sup>42</sup> The Copyright Act 1957 (India), s 2(hh).

<sup>43</sup> Ibid.

<sup>44</sup> Institute for Inner Studies v. Charlotte Anderson CS(OS) 2252/2011; 2014 (57) PTC 228.

<sup>45</sup> Fortune Films International v. Dev Anand AIR 1979 Bom 17.

transience in time, non-permanent and conservable. This led to Ephemeral Art being brought into the mainstream and is considered a notable and accepted form of art. The essence of Ephemeral art is its fleeting nature and instantaneous consumption which also means that it is destined to destroy, deteriorate, or decompose over time. The only permanent element is change: repeated, evolving, fluctuating, or vanishing.<sup>46</sup> A great example of such ephemeral is *American Artist* Robert Smithson's 1970 ephemeral land art, Spiral Jetty.<sup>47</sup> Other notable examples could be the sand art by Sudarshan Pattnaik or the ice sculpture exhibition in Ladakh by Kangsing Snow and Ice Sculpture Association.<sup>48</sup>

Shedding light on air shows, it can very well be brought under the ambit of deteriorating or decaying ephemeral art which can be consumed by the audience only for a short duration of time. Air crafts performing stunts while expelling coloured gases, leaving behind impressions of colourful lines and shapes in the sky, for example, in the shape of a nation's flag is nothing uncommon to the spectators. The same can be witnessed in the Republic Day celebration on 26<sup>th</sup> January, where the tri-coloured Indian flag is a staple and does not fail to amuse the audience. While we all enjoy these stunts and admire their beauty a question that needs to be addressed is whether air shows, even though momentary, are copyrightable or not.

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<sup>46</sup> Ananyaa Banerjee & Nikita Sinha, 'Copyright Protection of Impermanent Art' (*Mondaq*, 6 September 2022) <<https://www.mondaq.com/india/copyright/1227748/copyright-protection-of-impermanent-art>> accessed 13 December 2022.

<sup>47</sup> Max Hodge, 'Top 5 Ephemeral Art Styles' (*Kazoart*, 25 April 2022) <<https://www.kazoart.com/blog/en/top-5-ephemeral-art-styles/>> accessed 13 December 2022.

<sup>48</sup> Rinchen Norbu Wangchuk, 'A Café, A Snow Leopard & More Inside Ladakh's Unique Ice Sculpture Exhibition' (*The Better India*, 15 February 2022) <<https://www.thebetterindia.com/276152/kangsing-snow-ice-sculpture-association-ladakh-workshop-pics/>> accessed 13 December 2022.

Berne Convention gives way for harmonious construction of all “literary and artistic works” which are capable of protection to be granted copyright protection. The artistic works enumerated in the Berne convention must in no way be given a limited or exclusive or exhaustive definition.<sup>49</sup> The use of the word "such as" is self-explanatory as the enumerated works are only examples as they are provided only as a matter of guidance for national legislators.<sup>50</sup>

The Indian copyright law grants protection to works that are *literary, dramatic, musical, artistic, cinematographic films or sound recordings*.<sup>51</sup> The definition of artistic work under the act is a comprehensive one that includes paintings, sculptures, graphics, cartoons, etchings, lithographs, photography, drawings, plan, maps, diagrams, sculptures, etc., however, it is not restricted to these *works* only.<sup>52</sup> In the absence of any definitional barrier and any requirement for artistic quality or aesthetics involved, air shows if they are the original work of the author can be considered artwork.

At the same time, when compared to the US Copyright Law, art also does not have a restricted meaning under the head of “Pictorial, graphic, and sculptural works”, therefore air shows can very well be under the realm of works of art,<sup>53</sup> but even though it can be categorized as works of art, extending copyright will depend on the standard of originality, fixation requirement which has been dealt in the following paragraphs.

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<sup>49</sup> Berne Convention for Protection of Literary and Artistic Work 1971, art 2.

<sup>50</sup> ‘Guide to the Berne Convention for the Protection of Literary and Artistic Works’ (WIPO, 1971) <[https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf)> accessed 17 July 2023.

<sup>51</sup> The Copyright Act 1957 (India), s 13.

<sup>52</sup> The Copyright Act 1957 (India), s 2(c).

<sup>53</sup> Copyright Act 1976, 17 U.S.C. ss 101-810, s 101.

### ***Idea Expression Dichotomy in the Artistic Element of an Airshow***

The next task is to decipher the idea and expression in an airshow. As copyright grants protection only to the expression and not ideas, expressions inextricably connected with the idea do not enjoy a separate existence and would not qualify for copyright protection,<sup>54</sup> which further necessitates the process of differentiation. It is no secret that aerodynamics has a role to play in performing impressive stunts by pilots. The super manoeuvrability, thrust vector control, and thrust-to-weight ratio all have a significant role to play while performing dog fights, stunts, and combat acts. Due to all these complex factors involved few stunts like Pugachev's Cobra, can hardly be used in actual combat and are mostly used in air shows.<sup>55</sup> Since airshows are mostly displays of a culmination of the basic categories of moves (discussed in the previous sections)<sup>56</sup> and are heavily dependent on the aerodynamics and capabilities of the jet, the role of the pilot is often diminished. This raises the question as to how much of the stunts are copyrightable. Keeping the above discussion in mind, offering copyright protection of stunts and manoeuvre techniques will ultimately lead to the idea being monopolized. Therefore, the only possible way of giving protection to airshows under the copyright regime is through a work of compilation and choreography (discussed in the previous section).<sup>57</sup>

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<sup>54</sup> Emergent Genetics India Pvt. Ltd v. Shailendra Shivam 2011 (47) PTC 494 (Del HC).

<sup>55</sup> 'Incredible Maneuvers Stunt Pilot in History' (*Wings Over Camarillo*, 17 May 2022) <<https://wingsovercamarillo.com/incredible-maneuvers-stunt-pilot-in-history/>> accessed 17 December 2022.

<sup>56</sup> '10 Little-Known Facts About Air Shows' (*Hartzellprop*, 24 June 2019) <<https://hartzellprop.com/10-little-known-facts-about-air-shows/>> accessed 17 December 2022.

<sup>57</sup> The Copyright Act 1957 (India), s 2(o).

### ***Originality in the Artistic Element of an Airshow***

As previously mentioned, copyright cannot exist in the stunts per se, the copyright will only exist in the original compilation of the stunts,<sup>58</sup> i.e., collection and assembly of the stunts in such a way that the copyright will only extend to the resulting work as a whole due to the original or creative mind used in the assembly, selection or coordination.<sup>59</sup> As the standard of originality in copyright is not as high as that of patents, a crude or humble amount of creativity will suffice the requirement of originality, i.e., having a minimum degree of creativity.<sup>60</sup>

In India, compilation and derivative works have different standards of originality. In the case of works of first instance, the standard is lower and it only requires the work to originate from the author. In cases of derivative work, the originality is dependent on the degree of skill, judgment and labour involved in making the derivation, in this case, the compilation. This requirement of skill and judgment should be non-trivial or non-mechanical with variation or inputs having a flavour of minimum creativity. The variation in compilation should be substantial and not the kind where only a few permutations are possible, leaving the author with the option to choose among the few predetermined variations.<sup>61</sup>

As the stunts are restricted due to the above-mentioned dynamics at play, arriving at a completely new work is difficult. Further, having such a demand will also frustrate the aim of copyright and would force the boundaries of copyright and enter a completely new domain similar to that of the laws of patents. As the common source of stunts is in

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<sup>58</sup> Copyright Act 1976, 17 U.S.C. ss 101-810, s 101.

<sup>59</sup> Feist (n 27).

<sup>60</sup> Ibid.

<sup>61</sup> Eastern Book Company (n 28).

the public domain it is common for authors to go back to the source for inspiration. In such cases, similarities are bound to occur, but while assessing the copyrightability, the work must be viewed as a whole and not in fragments.<sup>62</sup> In such a situation the safest way to conclude with regards to the originality of a work would be from a spectator or viewer's perspective. The work would satisfy the test if the similarities are only incidental and not manifest. Further, even when there are similarities involved, if there exist substantial dissimilarities that relay the fact that the work is not a slavish copy of an existing work, then the same shall satisfy the test of originality.<sup>63</sup>

### ***Fixation of Artistic Element of an Airshow***

Yet again, it is imperative to consider the fixation of airshows while we discuss its copyrightability as an artistic work. In the US, a work needs to surpass the basic requirements of creativity and originality to be eligible for copyright protection. It needs to be “*fixed* in a tangible medium, either in existence or one that is developed in the future which is stable enough to *last longer than a transitory duration*”.<sup>64</sup> This statutory mandate casts ephemeral arts outside the purview of copyrightability in the US due to a lack of a stable medium of fixation.<sup>65</sup> Furthermore, there are no judicial decisions on the transitoriness of the medium of fixation thus a harmonious construction is required in such cases. Firstly, a medium shall be such that it remains unchanged for a considerable amount of time, without needing to be completely static or permanent.<sup>66</sup> Secondly, there shall be a physical existence. Thirdly, it shall serve as a medium of communication to the public.

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<sup>62</sup> V Govindan v. E M Gopalakrishna Kone Lrind, AIR 1955 Madras 391.

<sup>63</sup> R.G Anand v. M/s. Delux Films & Ors 1978 AIR 1613.

<sup>64</sup> Copyright Act 1976, 17 U.S.C. ss 101-810, s 101, s 102.

<sup>65</sup> M.B. Nimmer, *Nimmer on Copyright: a Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (LexisNexis 1978), at 2.03[B], 2-32.

<sup>66</sup> Kelley v. Chicago Park District 635 F.3d 290 (7<sup>th</sup> Cir).

In the Indian context, there is no explicit mandate for fixation in the case of artistic work. Due to the absence of the same, we need to delve into the historical development of copyright law in India as well as consider the parliamentary debates to ascertain the legislative intent behind the law. Through the perusal of the Lok Sabha Debates, it is clear that the purpose of the Indian copyright law is to promote authorial and artistic work by creating congenial conditional and removing legal complications. Thus, for furthering this motive the legislations shall be construed in such a manner that it not only promotes creative liberty but also protects the products of intellectual and creative labour.<sup>67</sup> Further, on a close inspection of the provisions of the Copyright Act, it is clear that the Indian law provides certain leeway for the protection of both permanent and ephemeral arts.<sup>68</sup> On a conceptual reading of the provisions, it is revealed that artistic quality is not a determinant of copyrightability.<sup>69</sup> Nonetheless, fixation is a requirement which cannot be bypassed. Though fixation is an undeniable requirement, engravings made on clay, sand, ice or for that matter air cannot be a limiting factor for artistic works since fixation is allowed to be in *any medium or form*. This was the very argument put forth before the Hon'ble Delhi High Court, where fixation was argued to not be a precondition for the subsistence of copyright.<sup>70</sup> Thus, a work being transient neither takes away any qualitative value nor deters such work from being copyrighted. Further, the right of an artist also includes the right to commercial exploitation,<sup>71</sup> which means that he shall also enjoy control of the decision relating to the means through which he commodifies his work. In the case of ephemeral works this means of commodification might have strategic and domain-specific

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<sup>67</sup> Lok Sabha Debate, Copyright Bill, Vol. II, No.13, 27 May 1997 at 2179-2190.

<sup>68</sup> The Copyright Act 1957 (India), s 2 c(i).

<sup>69</sup> Ibid.

<sup>70</sup> Emergent Genetics India (n 54).

<sup>71</sup> The Copyright Act 1957 (India), s 14 c.

requirements, which gives them an edge in the market. In the case of airshows, there is no doubt that the medium of fixation is peculiar but this medium is what creates the worth of the work. It is a communication to the public through the artistic element which is based on the underlying dramatic work, which holds immense evidentiary value in terms of proving the originality and prior fixation.

Since the law of copyright is evolving with time, placing the barrier of a fixed set of mediums of fixation would hamper the creation of art and place shackles on the endeavours of artists who have been constantly pushing the boundaries of creative expression through innovative mediums of fixation.<sup>72</sup> In the absence of legislative or judicial mandates, the Indian copyright law is at the perfect juncture to include transient works like air shows under the purview of copyright by accepting the modern reality of contemporary arts which constantly utilises and incorporates dynamic elements.<sup>73</sup>

### **C. Interconnectedness of Dramatic Work and Artistic Work in Airshows**

The authors have tried to look at two possible ways under which the air show can be protected under artistic work. As aforementioned, we are only considering works which are planned and choreographed and not impromptu ones. Thus, we are assuming that there is some form of underlying work on which the stunts are to be performed which would give rise to the artistic work. Since the nuances of both dramatic and artistic work attached to air shows have been discussed, we shall now assess how the two can be interlinked in our current discourse.

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<sup>72</sup> Megan Carpenter & Steven Hetcher, 'Function over Form: Bringing the Fixation Requirement into the Modern Era' 82 *Fordham L. Rev.* 2221 (2014).

<sup>73</sup> Rebecca Tushnet, 'Performance Anxiety: Copyright Embodied and Disembodied' 60 *J. Copyright Society U.S.A.* 209-213 (2013).

An artistic work can be adapted into a dramatic work by way of performance in public <sup>74</sup> and can also be reproduced in a three-dimensional work from a two-dimensional work and vice-versa.<sup>75 76</sup> As choreography of the air show can be depicted in the form of artistic figures as well as literary work (instructions directing how to perform the stunts and their arrangement), before performing the actual stunt, there must be a fixation on the stunt in some tangible medium, i.e., the choreography, which qualifies for protection as a dramatic work. In such a situation the test will be whether by looking at the choreographic material in literary or artistic character, the resultant, art made with colourful gases can be arrived at. If yes, it will be copyrighted as a derivative work with a minimum degree of creativity and can be fixated in a tangible medium, in this case, the air/sky acts as the canvas for artistic expression. However, this only definitively connects the artistic work and the dramatic work, when there is an underlying dramatic work in place, but in the case of an impromptu act, the artistic work would not qualify to be a derivative work due to the absence of an underlying work. This is where we need to consider the medium of fixation of airshow, for the sake of clarity.

For ease of understanding, we are taking the example of the intricate patterns which are a common feature of all air shows. When we apply the US copyright law to the imagery of intricate patterns created by colourful gases expelled by the aircraft, copyright protection will mainly come down to two things.

Firstly, due to the higher standard of copyrightability, a minimum modicum of creativity which is accompanied by the constitutional mandate, these patterns being produced in an airshow might not

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<sup>74</sup> The Copyright Act 1957 (India), s 2(a)(ii).

<sup>75</sup> The Copyright Act 1957 (India), s 14(c)(B).

<sup>76</sup> The Copyright Act 1957 (India), s 14(c)(C).

suffice the standard of originality in the US. Nimmer opined that anything that is considered art by a substantial number, can be under the definition of ‘works of art’, irrespective of the group’s intellectual capabilities.<sup>77</sup> But simultaneously, the copyright clause in the constitution of the US talks about the promotion of science and useful arts. In such a situation, the copyrightability of air shows will face hurdles as whether such is for the promotion of useful arts or science is a subjective question that has no objective answer of yes or no.

Secondly, or perhaps more importantly for copyright, there must be a tangible medium of fixation for a period longer than the transitory duration of time. However, in the case of air shows such is missing. Keeping all these things in mind, copyright protection under the US Copyright Act, will be very difficult and posed with impediments.

### **POLICY QUESTIONS AND AIR SHOWS**

The Lockean philosophy behind copyright law states that a person (an author) can take what is common for all (from the public domain) in such a way that there is enough left for others to access and enjoy. As labour is the greatest contribution of the author, he has a right of employment of his labour and skill to the exclusion of others provided that such exclusionary right does not leave the society worse off.

Taking this philosophy into consideration, the Berne Convention as well as most countries approach copyright in a manner that keeps the interest of the author and public interest on the same pedestal if not more than the authors.<sup>78</sup> India has also been an adherent supporter of this balanced approach and has given the author exclusive right to

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<sup>77</sup> M.B. Nimmer, *Nimmer on Copyright: a Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (LexisNexis 1978), at 2.08 [B] [1].

<sup>78</sup> Sam Ricketson & Jane C. Ginsburg, *International Copyright And Neighbouring Rights: The Berne Convention and Beyond* (2nd edn. First Volume, OUP 2006).

enjoy the fruits of his labour and at the same time ample opportunities to facilitate access to society.<sup>79</sup>

Even though the legislation does not explicitly talk about this balance, numerous precedents of the court have touched upon the same.<sup>80</sup> Considering all the cases and the legislation it can be very well said that the legislative intent is to balance the exclusive rights of the author on one hand and access for society<sup>81</sup> on the other.

Applying this philosophy in air shows, the stunt itself cannot be copyrighted as it will create a monopoly on the idea. But, copyright protection in dramatic or artistic work on the whole show as a form of derivative work may still be possible. Moreover, allowing the free expression of ideas without monopolising the idea itself would act as a catalyst in enriching the knowledge pool and since our copyright law is governed by welfare legislation, the protection of the work will inspire others to create more and more work.

## **PERFORMER'S RIGHTS**

Delving into the rights of the performers is imperative for arriving at a comprehensive inference when it comes to understanding air shows from a copyright perspective. Although performer's rights have only been introduced in the Indian regime after the 1994 Amendment, it is pertinent to note that the performer's right is not the same as copyright and the distinction between the two has been pointed out by the Indian court.<sup>82</sup> The right can be conferred to any *actor, singer, musician, dancer, snake charmer, lecturer, acrobat, or any person* who makes a performance.<sup>83</sup> The only exception is that same was not acknowledged due to the

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<sup>79</sup> The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services (2016) 68 PTC 386.

<sup>80</sup> Eastern Book Company (n 28).

<sup>81</sup> The Copyright Act 1957 (India), s 52.

<sup>82</sup> Super Cassette Industries v. Bathla Cassette Industries Pvt. Ltd. 2003 (27) PTC (280).

<sup>83</sup> The Copyright Act 1957 (India), s 2(qq).

performance being casual and incidental.<sup>84</sup> The importance of the rights of the performers is often ignored, but this is essentially a way in which the Copyright Act protects the performers from third parties.

Now the question is whether the pilots shall be performers under the ambit of Indian law. The Delhi High Court provided some clarity to this question, where it was held that cricketers, umpires, and commentators all are considered performers under the Indian regime, so it would be safe to infer that stunt pilots would also qualify as performers under the Act. Now, for a certain act to be considered as a performance it has to be live in the first instance.<sup>85</sup> Air shows fairly satisfy this condition as well which means that they would enjoy the *right to broadcast the performance, produce and make a sound or visual recording and the right to communicate through different mediums which may not include broadcasting*. The pilot shall also be granted the moral rights which are attached to the performance and shall be identified as the performer and shall be protected from distortion, mutilation, and/or modification of his performance in a manner such that it might prejudice his reputation. However, he shall not object to the enjoyment of the same by a producer if he has consented to the use or incorporation of his performance in a film, nevertheless, he shall still be entitled to royalties if the performance is being commercially exploited.<sup>86</sup>

## CONCLUSION

The objective behind the law of copyright is to establish and maintain a creative space for authorial and artistic works. This view is also supported by India's IP Policy, which considers fostering creativity and innovation through the advancement of art and culture, as an

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<sup>84</sup> The Copyright Act 1957 (India), s 38(b).

<sup>85</sup> Neha Bhasin v. Anand Raj Anand 2006 (32) PTC 779.

<sup>86</sup> The Copyright Act 1957 (India), s 38A.

important aspect of the country's social, economic and technological development.<sup>87</sup> However, in light of the above vision, limiting copyrightability to tangible fixation creates an artificial hierarchy between permanent and ephemeral creative expressions which also leads to the complete disregard of the creative persona vis-à-vis the personality and moral rights of the author or artist. This defeats the social objective of copyright aimed at providing a common space for the development of arts, acting as fuel for knowledge creation and diffusion which in turn creates a platform for inspiring people.<sup>88</sup> If there is no shift in the paradigm then an entire segment of art would be kept beyond the scope of copyright law, which would be a massive blow to artists belonging to the domain of contemporary and ephemeral arts.<sup>89</sup>

The copyrightability of air shows has never been examined at length, but through this study, we can safely conclude that air shows are indeed copyrightable both as dramatic works and as artistic works. The dramatic work is protected as a choreography and arrangement that serves as the underlying work. Further, for artistic work, a liberal interpretation of the law would allow transient works to be protectable tangible expressions even if they are impermanent due to no specific requirement of transitory duration under Indian law. However, if the work is impromptu, only the artistic portion of the same can be considered for protection due to the absence of an underlying work and in such situations, the pilot shall enjoy his performer rights.

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<sup>87</sup> Ministry of Commerce and Industry Department for Promotion of Industry and Internal Trade, 'National Intellectual Property Rights Policy' (*Department for Promotion of Industry and Internal Trade*, 14 October 2020) <<https://dpiit.gov.in/sites/default/files/national-IPR-Policy2016-14October2020.pdf>> accessed 17 August 2023.

<sup>88</sup> Mira T. Sundara Rajan, 'Moral Rights in Developing Countries: The Example of India' 8(5) *JIPR* 357 & 449 (2003).

<sup>89</sup> Rebecca Tushnet (n 73).

However, through this discussion, we have encountered that the aspect of fixation is fairly vague in Indian law. Due to a dearth of precedents, the regime fails to address the question of whether the law restricts itself to only tangible mediums for a transitory duration of time or it also includes those forms of fixation which do not require such duration or tangibility. As the legislative intent, as well as the policy, supports a view of broadening the scope of copyrightable subject matter, the same should be contemplated and incorporated into the statute.