

Copyrightability of Characters

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The paper is based on the intellectual property law protection that could be granted to graphic and fictional characters that are part of our daily lives. Special focus is made on the copyrightability aspect of intellectual property protection. The judgments of various courts have been dealt with in detail to determine the attitude of the courts with regard to this kind of protection. This has been essential because there are no express provisions in the law, which could grant copyright protection to characters. The courts have not been hesitant to grant copyright protection to graphic characters, but when it comes to fictional characters, the courts used various tests developed over the ages, to determine whether a character is well delineated or not. If the character is found to be extremely well-developed, unique and has a personality different from other characters, only then is a copyright protection granted to such a fictional character.

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Characters like Mickey Mouse, Donald Duck and James Bond among others have become part of our daily lives. From comic strips to soft toys and video games to movies, all these characters provide ample avenues for earning money to the owners of such characters. For example, in its zeal to protect Mickey Mouse, Disney has gone so far as to object to painting of the ubiquitous creature on the walls of a Hallandale, Florida day care center.¹ Characters such as those mentioned above, are the creations of

artists. It is they who use their imagination to clothe the idea of a character with certain specific and unique attributes (by which we recognize a character) and thereby give the idea an expression. The creator uses his intellect and labour to form the character and hence he would be the first person to exploit it by giving it protection thus preventing misappropriation by third parties. Like the creators of the characters, licensees and advertisers also have a common interest in the property

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and would want to prevent it from being used by a third party without authority and thereby lose out on economic benefits. Such reasons bring the question of 'intellectual property rights' protection of characters. Copyrightability of the same becomes important. Thus it is imperative to analyse, at what point of time does a character become entitled to legal protection. Another doubt that arises is with regard to the copyright over characters that have already entered the public domain, but is subsequently cast in a new copyrighted work. It is pertinent to note that there are other forms of legal protection available in given instances including trademark law and the law of unfair competition, but in an effort to keep this difficult subject matter of legal protection of characters somewhat simple, the present paper does not deal with the other forms of protection and is limited to the availability of copyright protection to characters.

Characters: Graphic and Fictional

Characters can be differentiated into two categories—Graphic characters and fictional characters. It is necessary to differentiate them and deal with them separately because the courts have themselves granted different levels of protection by laying down different tests to determine whether a character can be granted copyright protection.

A graphic character is one, which can be depicted by a cartoon or other graphic representation. The physical appearance and characterization are visually apparent for the readers. On the other hand, a fictional character is a word portrait and

the physical appearance and characterization reside in the mind of the reader. Such imagination is brought about by reading about the character through the pages of a book and not just by reading a single paragraph or line. Therefore, the character is not apparent for the reader.

Since images are more identifiable than literary descriptions, pictorial characters are more easily protected independently of their original context.²

Protecting Graphic Characters

A graphic character cannot be provided copyright protection as an 'artistic work'. Artistic work implies a drawing, painting, photograph, sculpture, etc. What the copyright law can protect is the particular visual expression of the creature depicted by drawings, but its character and personality evolve from the various episodes created by the artist. It can only be perceived by the human mind, and hence it cannot have a visual expression. Therefore, the moods and personalities of the character cannot be protected under copyright law as an 'artistic work'.

Courts have been more lenient in protecting characters that have some kind of tangible visual elements than in protecting literary characters, whose image relies solely on abstractions of the human mind.³ This can be observed in the case of *Hill v Whalen Mortell*⁴ where the court opined that the stage characters of Nutt and Giff were carbon copies of plaintiff's characters 'Mutt' and 'Jeff'. The court held that the theatre production infringed the Plaintiff's cartoon since the characters Nutt and Giff were, in reality,

Mutt and Jeff and that everybody viewing these characters understood the association.⁵

The 1940 case of *Detective Comics v Bruns Publication*⁶ is also important to determine copyright protection to graphic characters. Here the defendants had created a character called 'Wonderman', which had the same physical and emotional characteristics of the well-known cartoon character 'Superman'. The court held that the defendants had copied more than the general types and ideas from 'Superman' and also appropriated pictorial and literary details and embodiments in the complainant's copyright. The court declined to grant protection to general ideas about a character. It is only when the character is sufficiently portrayed in details, protection could be granted. The character has to be converted from being just an idea, to become an expression. The concept of a man with 'superhuman powers' is not capable of protection, but if that idea is clothed with specific features like that of 'Superman', then the character becomes an expression. Any other person is free to develop a character with 'superhuman powers', but having characteristics and personalities different from the existing character of 'Superman'.

A landmark case on character protection was *Walt Disney v Air Pirates*,⁷ where the defendants had portrayed Disney's characters in incongruous settings. The court held that a two-step test should be applied to determine copyright infringement. First, the visual similarities of the characters are

to be determined and secondly, if that does not determine infringement, then the court would analyse the personalities of the cartoon characters. Here the court held the defendants liable for copyright infringement.⁸ The second step of analysing the personalities of the cartoon characters had to be done with the 'Character delineation' test, developed by Judge Learned Hand in the *Nichols v Universal Pictures*⁹ case. The 'Character delineation' test means 'whether the particular character is sufficiently and distinctively delineated so that it warrants protection.' Judge Hand stated that "It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct."

The two cases discussed above reveal the trend of the courts that protection would be granted to a graphic character only if it is sufficiently developed and described to give the character an individuality and personality like no other character. It should be so unique and distinct that any other creature with similar characteristics would remind the viewers of the original character. Only in such a circumstance, the idea of the character in the creator's mind becomes an expression and would be eligible for protection.

A graphic character is considered to be much more easily perceivable and more apparent for the reader. Hence, the courts have been more inclined to grant protection to them than to pure fictional characters. Therefore, the best way to protect a graphic character is by making

its appearance specific and unique. Without the distinctiveness and uniqueness, the character would remain an idea devoid of any legal protection.

The only Indian case which has recognized a character to be protectable (although indirectly) is *Malayala Manorama v V T Thomas*¹⁰ where the court allowed Mr Thomas to carry on with his work of drawing the characters in Toms Boban and Molly even after leaving employment. The publishing house was restricted from claiming copyright over the character and continuing to draw the same character after terminating Mr Thomas's employment. The High Court had opined that since V T Thomas had created the character before entering into employment with the publishing house, he is the one who should be allowed to carry on the exploitation of his work even after leaving employment. The publishing house did not play any role in creation of the character, and hence they would not get copyright over the character. Their right would be limited only to the extent of the particular cartoon strips (episodes) created by V T Thomas during the course of employment, for being published in the newspaper. The court impliedly distinguished between the drawings made using the cartoon character and the cartoon character separately. From the opinion of the court it can be inferred that, copyright over the drawings made using the character would vest with the publishing house (as an artistic work) while copyright over the character would remain with Mr Thomas. Thus, the publishing house was restricted from

employing others to create new episodes using the same character.

The court impliedly recognized that characters can have a copyright over them, but does not delve into the details to determine under what circumstances a character can be entitled to legal protection.

As said before, although the court did not explicitly grant copyright protection to the characters of 'Boban and Molly', but applying the Nichols test in the present circumstances, the characters would have perhaps got copyright protection. It was recognized that the cartoons created by the author had a large number of readers solely because of certain unique attributes and personalities of the characters. They were extremely well-known and had created a deep impression in the minds of the readers. In such circumstances, it can be said that the characters of 'Boban and Molly' were sufficiently delineated to warrant a legal protection in the form of copyright.

Protecting Fictional Characters

A literary work is entitled to protection for the purposes of intellectual property. Whether this protection should be extended to the fictitious characters within, and separate from the work, remains uncertain. If protection is granted, then even an original literary work would not be allowed to use the same character in its storyline. A question many commentators have asked is, "What constitutes a protectable fictional character?"

David B Feldman simply wrote:

“A fictional character has three identifiable and legally significant components: its name, its physical or visual appearance, and its physical attributes and personality traits or “Characterization.”¹¹

While the concept of what would be required for a character to be protected in its own right developed, the standard against which the concept was to be measured varied. The test that was developed in *Nichols v Universal Pictures*,¹² is also applied in case of determining copyrightability of fictional characters. Yet the decisions in cases have been inconsistent, although the prevailing view has been to grant copyright protection. Generally in those cases where the fictional character was found to be protected, the character that was copied was “distinctively delineated” (or fully developed) in the original work and that the character's delineation was misappropriated in the copier's work.

The decision of the court in the case of *Anderson v Stallone*¹³ reveals how the courts have used the ‘character delineation’ test to protect fictional characters. The appellant had written a story based on the character of ‘Rocky’, which appeared in the earlier ‘Rocky’ movie series. He tried selling the story to Sylvester Stallone to make Rocky IV. On being alleged with infringement, the appellant claimed that the character of Rocky was not copyrightable. The court ruled in favour of the defendant saying that the physical and emotional characters of ‘Rocky’ were set forth in tremendous detail and hence the character was highly

delineated. The court went on to state “this court has no difficulty ruling as a matter of law that the Rocky characters are delineated so extensively that they are protected from bodily appropriation when taken as a group and transposed into a sequel by another author.”

A different test was applied in *Warner Brothers Pictures v Columbia Broadcasting Systems*,¹⁴ where the “distinctively delineated” standard was replaced with the ‘story being told’ standard. In this case, the court stated: “No character is protectable under copyright law unless the character is extremely well-delineated as to constitute ‘the story being told’ rather than merely being a ‘chess man in the game of telling the story’¹⁵. This indicates that the story has to revolve around the particular character, which is sought to be protected. This standard has been applied in cases like *Universal City Studios v Kamar Industries*¹⁶ where the character ET was held copyrightable because of the copyrightable component of plaintiff's movie, was a ‘unique and distinctive character about whom the movie revolved’.

Applying the same standard, the court refused to grant copyright protection to the character of ‘Regan’ in the movie *Exorcist* because the story was not subordinated to the character of Regan.¹⁷

The problem with the ‘story being told’ standard is that, it envisages a ‘story’ devoid of any plot, wherein character study constitutes all, or substantially all of the work. There may be rare examples of such works, but for most practical purposes, such a rule if followed would

effectively exclude characters from the orbit of copyright protection.

Dilution of the “Story Being Told” Standard

The decision in favour of the plaintiff in the *Air Pirates* case, did not explicitly overrule the “story being told” standard. But the court went on to state that the *Sam Spade* decision was based on the recognition that “It is difficult to delineate distinctively a literary character...put another way...many literary characters may embody little more than an unprotected idea.”

Therefore, it appears that even if the ‘story being told standard’ is not met, the character can be copyrighted, provided it is sufficiently developed and finely drawn so as to cross the line from ‘idea’ to ‘expression’.

This leads to the most important question as to ‘at what point of time does an idea become an expression?’ This is also known as the idea-expression dichotomy. Although most literary characters embody little more than a protected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression. Such elements have been held to include what the character thinks, feels, says and does and the descriptions conveyed by the author through the comments of other characters in the work as well as the visual perception...which tends to create a dominant impression.... Therefore, when the idea is clothed with such unique features, attributes and a particular combination of the various elements discussed above, it no longer remains an

idea, but becomes an expression of the idea.

An analysis of the various case laws reveals that the courts consider a character to be an expression and hence copyrightable, only when it is sufficiently delineated. Therefore, the ‘character delineation’ test can be said to be the point where an idea converts itself to an expression and hence becomes protectable. But this would always remain a subjective concept. It is upon the court to determine whether the character is sufficiently delineated. Hence, every such dispute over character protection has to be dealt with on a case to case basis and no objective standard can be laid down to determine the same.

What is the Protection When Some Part of The Character Enters the Public Domain and Later it is Cast in a New Copyrighted Work?

The case of *Silverman v Columbia Broadcasting Systems*¹⁸ seems to have settled this controversy by stating that the character may be entitled to protection for any new traits that have been added in the subsequent work, but the character is not protected as to traits, which were available in the original work. This implies that anyone can use the character that has already entered the public domain. But when the new traits are also added on to the character and then subsequently portrayed before the reader, a copyright violation takes place only to the extent of the new character traits that have appeared in the subsequent work.

Ownership of Characters

The case laws have revealed that a character can certainly be granted

copyright protection, provided, they are distinctly delineated so as to form the story being told. But determining 'ownership' over that character i.e. the copyright over it, still remains a crucial factor, because a number of people share a common interest over the character.

It is a settled law in every jurisdiction that the creator of a work is the person with whom the copyright over the work vests. Applying this rule, the one who creates a character is always considered to be the owner of it. But in circumstances where a person creates a character in the course of employment, the employer becomes the owner of such work although the author (creator) is someone else. Section 17 of the Indian Copyright Act, 1957 vests this right with the employer when the character has been created in the course of employment or under a contract of service.

This dispute had arisen in the case of *Malayala Manorama v V T Thomas*¹⁹ where as discussed before, the issue of ownership over a character had come up. It is important to keep in mind that the court did not address the issue of 'copyrightability' of characters but limited its judgment only to the issue of ownership. But with its decision with respect to ownership, an inference can be drawn that the court did recognize the fact that a character could be granted copyright protection.

The court clearly opined that since the character 'Boban and Molly' of 'Toms' was created before Mr Thomas got employed with the publication house, and not while in the course of employment, the ownership over the character would

continue with the creator. If the character would have been created by Mr Thomas while in the course of employment or under a contract of service, the copyright (ownership) would vest with the publishing house and they could create new episodes with the character although the creator of the character would still be Mr Thomas (who would have no rights in this situation).

Here, it would be important to distinguish between copyright over the character independently and the episodes in which the character appears. The episodes are the environment in which the character resides or performs a role. Copyright over the particular episode including the character, resides with the artist generally if it is created outside the course of employment. Thus, anyone who has a copyright over the character could create a new environment every time (and thereby create new episodes). Therefore, having copyright ownership over the character is the most crucial factor. With ownership over the character, the artist could then license out the episodes and exploit the character accordingly. Anyone who does not have copyright over the character would then not be able to portray the character in new episodes.

Hence, the publishing house was given copyright over only those episodes created using the characters and published in the magazine during the course of employment. The publishing house could carry on publication of the specific cartoon episodes drawn by Mr Thomas for them, but not on the character. So they were prevented from engaging other artists and creating episodes using the characters.

In most circumstances, the creator of the cartoon licenses his work to others for exploitation. The ownership of the character is not passed to others. Or even if the character is created while in the course of employment, it is advisable for the benefit of the artist that he specifically mentions in the contract that the copyright over the work including the character that he creates in the course of the employment would remain with him. He should only grant licence to the publishing house for publishing the particular cartoon episodes he creates, albeit with conditions of licence deriving from their negotiations.

This ensures that the ownership rests with the creator and he is able to exploit the character at a later point of time for his own benefit. Otherwise the employer retains right over the work and the creator would lose his right to exploit the character after termination of employment. Warner Brothers having right over the characters of Batman and Superman is an example of such a situation, where the creators of the cartoons are employees of Warner Brothers.

Conclusion

An analysis of the case laws reveal that the courts are quite lenient in granting protection to graphic characters because of their visual impact on the mind of the readers. With respect to fictional characters, the courts are hesitant. Protection is granted only when the court is made to believe beyond doubt that the characters are well delineated. Although a subjective test, the courts are consistent

about the fact that characters can get protection only when they become an expression. Ideas have been refused copyright protection.

But one doubt remains - under what category of 'work' would we consider a character to be granted copyright protection.

Examining the definition of 'artistic work'²⁰ in India, we find that "a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph..." has been described to be an artistic work. Nowhere has character been included in the definition. What can be protected under 'artistic work' is the specific drawing of the cartoon and the episodes based on it. The characteristics of the character remains out of purview.

Similarly, 'literary work' has been given an inclusive meaning under Section 2(n), thereby leaving wide open the ambit of its meaning which is to be determined by the courts. But whatever be the meaning imputed to the definition of 'literary work', the work has to be written down and that particular work in that particular form, is protected. However, 'characteristics' of a character in the story, resides in the imagination of the reader. What can be copyrighted under 'literary work' is the entire story, from where, the character can only be perceived by reading it in its entirety.

Therefore, under the existing Indian law, characters do not seem to fall under any of the categories of 'work' enlisted in the Statute to be given copyright protection. It is the same position in the law for the United States. Yet the courts

have themselves taken this bold step to give them protection separately. It is only hoped that the ambit of the expression 'work' be widened enough to bring in characters within its scope for being granted copyright protection.

References and Endnotes

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- 2 See also Davidow Lawrence L, Copyright protection for fictional characters: a trademark-based approach to replace Nichols, *8 Columbia Journal of Law and the Arts*, 1984, 513, 544
- 3 Kurtz Leslie A, The Independent Legal Lives of Fictional Characters, 1986 *Wisconsin Law Review*, 429 (1986), 444
- 4 *Hill v Whalen & Martell*, 220 F 359 (S D NY, 1914)
- 5 Most courts have recognized trademark protection for graphic characters and have found trademark infringement liability under both trademark and unfair competition law. In *Fisher v Star Co* (231 N.Y. 414, 132 N.E. 133 cert. denied, 257 U.S. 654 (1921)) the cartoon characters *Mutt* and *Jeff* were protected by the court under trademark and unfair competition principles which found the Star Company liable for their unauthorized use of the characters
- 6 *Detective Comics v Bruns Publication* 111 F 2d 432 (2d Cir, 1940)
- 7 *Walt Disney Productions v Air Pirates* 581 F.2d 751 (9th Cir, 1978), cert. denied, 439 U.S. 1132 (1979)
- 8 See also *United Artists Corp v Ford Motor Co*, 483 F Supp 89, 91 (SD NY1980). This case involved the cartoon character 'Pink Panther'. Though court said that defendant's animated 'cat' did not resemble 'Pink Panther' in appearance, manner of movement or personality, it acknowledges the importance of examining both the personality of the appearance of characters
- 9 *Nichols v Universal Pictures Corp*, 45 F 2d 119 (2d Cir 1930), cert denied, 282 US, 902 (1931)
- 10 *Malayala Manorama v V T Thomas*, AIR 1989 Ker 49
- 11 Feldman David B: Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection, *78 California Law Review*, 687 (1930)
- 12 *Nichols v Universal Pictures Corp*, 45 F 2d 119 (2d Cir. 1930), cert denied, 282 US 902 (1931)
- 13 *Anderson v Stallone*, 11 USP Q 2d 1161 (C.D. Calif. 1989)
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- 15 *Id* at 950, 104 US P Q at 107
- 16 *Universal City Studios v Kamar Indus*, 1982 Copyright L Decisions (CCH) 25,452 (SD Tex. 1982)
- 17 *Warner Bros v Film Ventures International*, 403 F Supp. 522, 525, 189 US PQ 591, 593 (C.D. Cal. 1975)
- 18 *Silverman v CBS*, 870 F 2d 40, 9 US P Q 2d 1778 (2d Cir. 1989), cert. denied, 492 US 907, 106 LEd.d. 569, 109 S Ct. 3219 (1989)
- 19 *Supra n 10*
- 20 *The Copyright Act*, 1957, Section 2(c)