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Is India Copyright Law Framework Adequate to Protect Fictional Characters and Character Merchandising?

Thomas Roy Kadichini
Ph.D. Research Scholar
School of Law, Presidency University
Bangalore

Dr. Saroj Sharma
Dean, School of Law
Presidency University, Bangalore

Is India Copyright Law Framework Adequate to Protect Fictional Characters and Character Merchandising?

*Thomas Roy Kadichini¹ & Prof. (Dr.) Saroj Sharma²

¹ Ph.D. Research Scholar, School of Law, Presidency University, Bangaluru,
thomasroykadichini@gmail.com;

² Professor & Dean, School of Law, Presidency University, Bangaluru, deansol@presidencyuniversity.in



“Unlike most paintings, photographs or novelty items, a character can take on a life of its own, and thus may be protected against copies in postures, settings and attitudes far removed from any in the author’s original depiction”³

Cambridge dictionary defines Merchandising as “the activity of making people aware of your products and increasing sales through advertising, special events, etc.”⁴ It is also defined as “to increase sales of goods by making people more aware of them through advertising, special displays or events, etc.”⁵ It is the promotion of goods and/or services that are available for retail sale⁶. Merchandising is the planning and promotion of sales by presenting a product to the right market at the proper time, by carrying out organized, skillful advertising, using attractive displays, etc.⁷ It involves the process of selling products to consumers and is also referred as marketing, promotion, and advertising of products intended for retail sale⁸. Merchandising is old as trade itself. Merchandising involves exploiting images, themes or articles that have become famous⁹. The manufacture or distribution of spin off products is referred to as merchandising, for example toys, posters, garments based on the theme or a character of a movie like Star Wars Episode I¹⁰.

Cambridge dictionary defines ‘Character’ as “the mental and moral qualities distinctive to an individual”¹¹; “the particular combination of qualities in someone or something that makes them or it different from others”¹². It also means ‘the qualities that are interesting and unusual’¹³.

³ Paul Goldstein & P. Berndt Hugenholtz, International Copyright: Principles, Law and Practice S.2.11.3 at 158, Oxford University Press, (2nd ed. 2010)

⁴ <https://dictionary.cambridge.org/dictionary/english/merchandising?q=Merchandising>

⁵ Ibid

⁶ Ibid

⁷ <https://www.dictionary.com/browse/merchandising>

⁸ <https://www.dictionary.com/browse/merchandising>

⁹ Halsbury’s Laws of India (IPR-I, Vol. 22) 2nd ed.

¹⁰ Ibid.

¹¹ <https://dictionary.cambridge.org/dictionary/english/character>

¹² <https://dictionary.cambridge.org/dictionary/english/character>

¹³ Ibid.



Merchandising goods or services using Characters is known as Character Merchandising. It is the commercial exploitation of the characters for the sale of goods or services by making an association between the goods or services thereby making the goods or services more appealing to the consumers. The characters used may be from literary works including fictions; artistic works such as paintings, drawings, cartoons etc.; cinematographic or digital work. The goods used may vary from toys, accessories, clothing to sports equipments and the services may include sporting events¹⁴ to educational institutions. In the context of character merchandising, the essential personality feature of a character, which is easily recognizable by the public is considered as the most significant element in merchandising. It is the appealing value of these characters that is used for merchandising thereby creating the economic value for the characters. The economic value of the characters sometimes exceed the original value of the works in which they originate. These appealing value refers to the distinctive traits that make a character identifiable and unique. These traits include the name, image, voice, appearance etc. of a character. It is often a combination of different traits that creates the uniqueness. The sources of these characters can be literary works, cartoons, and artistic works such as paintings or drawings etc.

The World Intellectual Property Organisation (WIPO) Report on Character Merchandising defines character merchandising as "the adaption or secondary exploitation, by the creator of a fictional character or by a real person or by one of several authorised third parties, of the essential personality features (such as the name, image or appearance) of a character in relation to various goods and/or services with a view to creating in prospective consumers a desire to acquire those goods and/or to use those services because of the consumer's affinity to that character."¹⁵ It is the use of the name, picture, voice and statements of a real or fictitious personality to promote the sale and use of certain products or services¹⁶. It is creating a merchantable product around a famous character, fictional or otherwise. It is an art of increasing the appeal of goods or services to prospective

¹⁴ The Olympic mascots used - Misha in Moscow, Wenlock & Mandeville in London - are some examples.

¹⁵ WIPO Report on CHARACTER MERCHANDISING, World Intellectual Property Organisation, International Bureau 1993 Document AB/XXII/2

¹⁶ Ibid



customers through the use of personality features. Businesses today are attempting to leverage the popularity of many fictional and real life characters by aligning their products – new as well as existing- in association with these characters¹⁷. The characters used may be fictional humans or non-humans. Spiderman is an example of fictional human and Donald duck is an example for fictional non-humans.

Currently the character merchandising market globally is valued at US\$166.78 billion in 2024 and is projected to grow to US\$ 268.81 by 2031¹⁸. In India the current market value for character merchandising has tremendously grown. As per a 2024 report by Licensing International, India's licensed merchandise market is growing rapidly at a average annual growth rate (CAGR) of 8.3%. The industry currently has around USD\$ 8 billion (INR 68,900 crores) market share in India¹⁹.

Character Merchandising and Intellectual Property

Intellectual property (IP) refers to the creations of the mind, such as inventions, literary and artistic works, designs, and symbols, names and images used in commerce²⁰. Intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time²¹. The Intellectual Property (IP) in patents, copyrights and trademarks are protected by law which enables people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP systems aims to foster an environment in which

¹⁷ Ibid

¹⁸ <https://www.prnewswire.co.uk/news-releases/global-licensed-entertainment-and-character-merchandise-market-set-to-reach-271-97-billion-by-2030--driven-by-apparel-and-collectibles-demand--valuates-reports-302585037.html>

¹⁹ https://www.business-standard.com/content/press-releases-ani/india-s-largest-official-charactermerchandise-company-dhananjai-lifestyle-ltd-launches-multiverse-fashion-125060300461_1.html

²⁰ <https://www.wipo.int/about-ip/en/>.

²¹ https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm



creativity and innovation can flourish. Adequate protection of IP is essential for promoting creativity and innovation.

Character merchandising is now an industry generating billions of revenue. Hence protecting the ‘characters’ is a concern of the stakeholders in merchandising for two reasons: the economic value generated by creative expression and preventing the unauthorized exploitation by third parties.

Character merchandising has become very well-known and involves the exploitation of fictional characters or the fame of celebrities by licensing such famous fictional characters to others. Ever since the Walt Disney Studios began licensing their famous characters in 1930s, Character Merchandising has evolved into multi billion business.

Anyone who seeks to commercially exploit a character, whether real or fictional, ordinarily does so through the grant of licenses to third parties for the use of the character’s name, image, or likeness²². These characters have attained fame and become popular among the public. It is essential to establish that the character or personality has acquired public recognition. Further, licensors must exercise effective quality control over goods and services bearing the licensed name or image, so that members of the public, upon encountering such products, would not only infer that they have been authorised by the rights holder but would also regard such authorisation as an assurance of quality²³.

Character merchandising has grown tremendously in past couple of decades generating millions of revenue, and growing as an industry by itself. Despite this commercial reality, the Indian copyright law does not provide for the protection of character merchandising.

Character Merchandising and Copyright

²² Star India Pvt Ltd v Leo Burnett (India) Pvt Ltd (2003) 27 PTC 81 (Bom); Tavener Rutledge Ltd v Trexapalm Ltd (1975) FSR 479.

²³ Ibid.



There is no sui generis protection for character merchandising. Hence, character merchandising often relies upon the intellectual property rights laws and its principles for enabling the protection. This is probably because the justifications for protecting character merchandising and intellectual property rights are footed on similar grounds. However the subject of protection in character merchandising is distinct from trade mark and copyright.

Copyright envisages the protection of “literary and artistic works”²⁴. It protects the expression of the ideas and not the idea itself. This is the basic principle of copyright recognised by international conventions²⁵, the statutes²⁶, and judicial decisions²⁷. Idea expression dichotomy is a basic premise of Copyright law. This premise demarks the boundary between the protectable and unprotectable subject matter. Copyright envisages the protection of the original expression of an idea and not the idea itself, themes or concepts thereby demarking the boundaries of the idea-expression dichotomy. Various decisions made by various courts in India emphasize this.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²⁸ states that “Copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such”²⁹. Berne Convention excludes from copyright protection

²⁴ Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works

²⁵ Article 9(2), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994.

²⁶ Section 13 & 14, Indian Copyright Act, 1957

²⁷ R.G. Anand v. Delux Films, (1978) 4 S.C.C. 118, 135; Eastern Book Company v. D.B. Modak, (2008) 1 S.C.C. 1 (India); Anil Gupta v. Kunal Dasgupta, 2002 (25) P.T.C. 1 (Del).

²⁸ To remove the barriers to trade and to promote adequate protection and enforcement of intellectual property rights the standards and the principles for the protection of intellectual property rights were laid in TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) Agreement. TRIPS recognized intellectual property rights as private rights and set the minimum global standard for its protection. The TRIPS provides a framework for the protection of copyright, trademarks, industrial designs and unfair competition. Article 9(1) of the TRIPS Agreement expressly incorporates Articles 1 to 21 of the Berne Convention for the Protection of Literary and Artistic Works (1971), thereby extending Berne’s substantive copyright standards to all WTO Members

²⁹ Article 9 (2) of TRIPS



the news of the day and facts, having the nature of mere items of press information³⁰. The rationale for this exclusion is the lack of originality or creativity factor.

The Copyright Act, 1957 implements India's international obligations under the Berne Convention³¹ and the TRIPS³² Agreement into the national law. It provides copyright for "original literary, dramatic, musical and artistic works, as well as cinematograph films and sound recording³³". "Works" as stated in the section indicates that only the ideas that are expressed are entitled to copyright protection. Originality serves as a critical principle in determining the protection. Section 13 of the Indian Copyright Act read with Section 14 envisages copyright protection only for original works i.e. for the expression of original ideas and not abstract ideas. Hence ideas and concepts are not entitled to protection under copyright law. The originality and fixation are two essential requirements to seek copyright protection. Fixation ensures that protection extends only to expression embodied in a tangible medium, such as text, drawings, or audiovisual recordings etc.

In the context of character merchandising, a "character" refers to a fictional persona embodied in a literary, artistic, dramatic, or cinematographic work. Section 13 of the Indian Copyright Act 1957 does not recognize characters as an independent category of protected works but they are protected as elements within a larger copyrighted work. But the difficulty is in distinguishing an unprotectable abstract idea from a protectable expression. Supreme Court of India laid the law in this regard by stating that "there can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author³⁴." The court further clarified that only when the fundamental or substantial aspects of the work are copied infringement happens.

³⁰ Article 2 (8) of the Berne Convention reads: "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

³¹ Berne Convention for the Protection of Literary and Artistic Works, 1886

³² Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Preamble, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994

³³ Section 13, Indian Copyright Act 1957

³⁴ R.G. Anand v. Delux Films, (1978) 4 S.C.C. 118, 135



The Supreme Court of India in *Eastern Book Company v. D.B. Modak*³⁵ laid down that the originality requirement under the copyright law demands only a “modicum of creativity”. This means there should be atleast a minimal but real degree of creative choice, judgement, or intellectual effort by the author, thereby rejecting the arguments for labour-based protection and excessive high standards. This standard excludes the generic or archetypal figures from protection but provides protection for characters with creative features.

Indian Copyright Act³⁶ confers a bundle of exclusive rights on the copyright owners including the right to reproduction; circulate the work to the public; the right to performance; translation; adaptation. The scope of copyright protection is covered by these rights and forms the statutory basis for controlling unauthorized merchandising. Several of these rights are directly implicated in character merchandising, including the right of reproduction, the right of adaptation, and the right to make copies in any material form, including three-dimensional reproductions derived from two-dimensional works. Unauthorised use of characters on merchandise may infringe these rights where the character constitutes a substantial part of the original work. The attempt to protect the ‘Character’ under the copyright law and the idea expression dichotomy doctrine generates several legal complexities. Character merchandising raises complex doctrinal questions. Firstly, to avail the copyright protection, the character has to be sufficiently delineated independent of the work in which it appears. Secondly, applying the characters from the ‘work’ to goods involve migration from narrative or visual media into physical or digital goods complicating the distinction between the reproduction and adaptation. There is a significant correlation between Reproduction and Adaptation. However a central doctrinal issue in character merchandising is the distinction between reproduction and adaptation. Reproduction involves copying a work or a substantial part of it in the same or substantially similar form, such as placing an existing character image on merchandise. Adaptation

³⁵ (2008) 1 S.C.C. 1 (India)

³⁶ Section 14 of the Indian Copyright Act.



involves transforming the work into a new form, such as converting a two-dimensional character into a three-dimensional toy.

TRIPS Agreement and Berne Convention does not address the concepts of ‘character’ and ‘character merchandising’. Nor do these instruments provide an independent or autonomous right for the characters. Indian copyright law is not different. Indian Copyright Act does not define nor recognise ‘character’ as an independent category of protected subject matter. The Act does not expressly contemplate the rights of ‘characters’ in the context of character merchandising. It does not provide specific provision for the protection of fictional characters. Indian courts have consistently held that copyright subsists in the work as a whole and not in abstract ideas or isolated elements. Hence the protection is available to characters by virtue of the works in which it is embodied. That means the fictional characters are safeguarded only as components of these works.

Indian courts have not developed a distinct jurisprudence recognising character merchandising as an autonomous right. Instead, disputes involving fictional characters have been resolved through conventional copyright doctrines such as originality, the idea–expression dichotomy, and substantial similarity. Indian courts have cautiously recognised this right where there is distinctive and original expression in the character itself and have attempted to protect this concept through its judicial interpretation.

The idea–expression dichotomy articulated in *R.G. Anand v. Delux Films*³⁷ continues to govern character disputes³⁸. Courts examine whether the defendant has copied the form and expression of the character rather than merely drawing inspiration from a general idea. A consistent judicial theme is the refusal to treat characters as independently copyrightable entities. In *Raja Pocket*

³⁷ AIR 1978 SC1613; 1978, 4 SCC 118

³⁸ The Core Principles established are: (i) Idea vs. Expression – Copyright protects the specific expression of an idea, not the abstract idea, theme or plot itself; (ii) Substantial Similarity – Infringement requires a material and substantial copy rather than coincidental similarities in general theme; (iii) The Observer Test – Whether an ordinary reader or viewer would instantly see the subsequent work as a clear copy of the original.



Books v. Radha Pocket Books³⁹, the Delhi High Court emphasised that copyright subsists in the literary work as a whole and cautioned against monopolising archetypal characters. This reasoning reflects judicial concern about overreach while acknowledging that distinctive expression may still attract protection.

Visual characters have received comparatively stronger protection due to their graphic fixation, as illustrated in *Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd.*⁴⁰ Mr. Justice F.I. Rebello of High Court of Bombay held that when the claim to reputation is based on the film and characters it does not extend to or separately exist in any particular person or dialogue in or part of a serial so that any particular incident or script or word or sentence or scene in the film with the owners of film and characters. In this case the attempt was to independently deal with the claim of passing off on the basis of character merchandising. The Court held: “Character merchandising involves the exploitation of fictional characters or the fame of celebrities by licensing such famous fictional characters to others. The fictional characters are generally drawings in which copyright subsists, e.g. cartoon and celebrities are living beings who are otherwise very famous in any particular field, e.g., film stars, sportsmen etc. It is necessary for character merchandising that the character to be merchandised must have gained some public recognition, that is, achieved a form of independent life and public recognition for itself, independently of the original product or independently of the milieu/area in which it appears. Only then can such character be moved into the area of character merchandising. This presumes that the character has independently acquired such reputation as to be a commodity in its own right independently of the goods or services to which it is attached or the field/area in which it originally appears.” It was held that to base a claim of character merchandising the tort of passing off has to be established on facts. No claim can be made to exclusive right to a character or be entitled to any reliefs on the alleged basis that the public associates any character in the serial exclusively with the claimants, in relation to the business of character merchandising. Prima facie, authorities show that an action based on character merchandising there must be in fact, character merchandising

³⁹ 1997 PTC (17) 355

⁴⁰ 2003 (27) PTC 81 (Bom)



and that mere potential for merchandising the character by itself is not sufficient. A character may have grown out beyond the film when the people would identify and therefore, there is a probability of it being potentially merchandised.

In disputes involving merchandising, Indian courts often analyse whether there is substantial similarity in the alleged infringement. In *Warner Bros. Entertainment Inc. v. Santosh V.G.*⁴¹, the Delhi High Court relying on orthodox infringement analysis found that the visual depiction of characters by the Defendant in merchandising constituted a substantial part of the copyrighted work. Hence the court restrained the defendant from the unauthorised use of Harry Potter characters in merchandising.

According to Indian Copyright Act⁴² exercising any exclusive rights, such as the right to reproduction, communication, translation, adaptation etc. belonging to the copyright owner, through copying, communicating, or exploiting the work, without the authorisation of the copyright owner constitutes an infringement of the copyright. Making, selling, hiring, displaying, distributing, publicly exhibiting or importing any infringing copies will also constitute infringement. The question whether there is copying of substantial part is significant in determining the infringement. The determination is qualitative rather than quantitative.

In *Eastern Book Company*⁴³ the Supreme Court of India emphasised that the characters must display sufficient creative input to qualify for protection. Generic heroes, villains etc. in a fiction are unlikely to qualify for this creativity. Graphically depicted characters—such as those in comics or animation—are better positioned for protection because they may qualify as artistic works under Section 2(c)⁴⁴ reinforcing their status as fixed expression rather than mere ideas.

⁴¹ (2009) 2 M.I.P.R. 25

⁴² Section 51

⁴³ *Eastern Book Company v. D.B. Modak*, (2008) 1 SCC 1

⁴⁴ Indian Copyright Act 1957



On an analysis, Indian copyright law does not recognise a standalone merchandising right and offers only limited protection to fictional characters. Protection is extended to well-developed and distinctive characters, but denied to generic or stock figures, and grounded firmly in copying of expression rather than in a character's commercial appeal. This reflects a pragmatic but cautious approach: protection is extended to well-developed and distinctive characters against blatant commercial copying, yet courts stop short of recognising characters as autonomous objects of copyright.

The lack of adequate protection for the 'character' used in merchandising is a serious concern for the stake holders in merchandising. The stake holders make significant investments in the character to convert it to merchandising. The lack of adequate laws for the protection of the characters would deny them the opportunity to take adequate legal measures against the unauthorised exploitation of the character thereby jeopardising their creativity and investment. This would handicap the growth of character merchandising.

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