

ILE CONSUMER PROTECTION LAW AND REVIEW

VOLUME 1 AND ISSUE 1 OF 2023



INSTITUTE OF LEGAL
EDUCATION



ILE Consumer Protection Law and Review
(Free Publication and Open Access Journal)

Journal's Home Page – <https://cplr.iledu.in/>

Journal's Editorial Page – <https://cplr.iledu.in/editorial-board/>

Volume 1 and Issue 1 (Access Full Issue on – <https://cplr.iledu.in/category/volume-1-and-issue-1-of-2023/>)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 – info@iledu.in / Chairman@iledu.in



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Investigating the Copyrightability of Characters with Respect to the Fair Distribution of Performers' Rights

Author - Shravani Gupta, Student at UPES, Dehradun

Best Citation - Shravani Gupta, Investigating the Copyrightability of Characters with Respect to the Fair Distribution of Performers' Rights, *ILE Consumer Protection Law and Review*, 1 (1) of 2023, Pg. 25-30, ISBN - 978-81-961120-4-2.

Abstract

The protection under intellectual property law that could be afforded to fictitious and graphic characters who are a part of our everyday lives is the topic of the paper that will be presented. When it comes to protecting intellectual property, a particular emphasis is placed on the copyrightability component. The decisions made by a number of different courts have been analysed in great depth in order to get a sense of how the judiciary feels about the various forms of protection that are available. This has become absolutely necessary due to the fact that the law does not contain any clear provisions that might offer copyright protection to characters. When it comes to graphic characters, the courts have not been reluctant to provide copyright protection; but, when it comes to fictitious characters, the courts have utilised numerous standards created over the ages to decide whether or not a character is adequately characterised. A copyright protection will only be awarded to a fictitious character if it can be demonstrated that the character is exceptionally well-developed, original, and possesses a personality that is distinct from that of other characters.

Keywords - Intellectual property law, Copyrightability, characters, Fictional, Protection.

Introduction

The copyright is a component of intellectual property that refers to the legal right that is granted exclusively to the person who first

created the work. The legislation governing copyright protects the intellectual creations that are contained inside original works. The protection begins as soon as the work is produced, and there is no need to go through any official registration procedures. When the copyright law was adopted during British control, there was no acknowledgement of the performer's rights. When the Copyright Act of 1957 was introduced after independence, there was no mention of performer's rights. The Bombay High Court declared in the case of *Fortune Pictures v. Dev Anand*⁹⁸ in 1979 that performer's rights do not have any copyright since their rights are not recognised under the Copyright Act. Following this decision, it was felt that the performer's right should be incorporated into the copyright laws. Therefore, in accordance with the provisions of Section 2(qq) of the Act, the term "performer" refers to an individual who gives a lecture, as well as an acrobat, musician, singer, actor, juggler, snake charmer, or anyone else who gives a performance. Actors, musicians, jugglers, dancers, and other performers were afforded protection under the 'Performers Rights' heading according to Section 38 of the Act. A sports player, on the other hand, cannot be considered a performer because the outcome of a game is never predetermined, and because he or she must adhere to a strict set of regulations that prohibits any improvisation. Hence athletes cannot be considered performers.

⁹⁸ Fortune Pictures v. Dev Anand AIR 1979 Bom 17

A fictional character is typically portrayed graphically, by an actor, or in the form of a word portrait that includes detailed descriptions of all of the attributes of the character. The existence of fictitious characters as a creative work distinct from the work it originated is recognised by copyright laws around the world. At the moment, the country of India does not have any laws that are particularly geared at protecting fictional characters. However, the piece of the Copyright Act that was passed in 1957 that deals with the protection of original works of literature, art, music, and theatre, as well as sound recordings and cinematography films, may be found at section 13 of the act. It's possible that the protection of fictional characters falls under the purview of this provision as well. This article addresses the pertinent legislation and international agreements pertaining to the copyright protection of performers.

The History and Evolution of Performer Rights

Performers help authors and lyricists improve their work. The 1961 Rome Convention was the first to recognise performers' rights. ILO, UNESCO, and WIPO administer the Rome Treaty. In the past, people who helped creators of intellectual property get their work out to the public were not recognised for their work. For example, if a lyricist writes a song, it has no value unless the singer sings it. If the performer has given their permission for the incorporation of their performance into any audio-visual or visual medium, then the Rome Convention's requirements will not be relevant to the situation. This is stated in Article 19 of the convention. Performer's rights are shielded against infringement in India for a period of 50 years at a time. Article 7 of the Rome convention safeguards the performers' rights, it states: they have the legal right to forbid anyone else from recording or reproducing their live performance without first obtaining their permission, further they are entitled to the right to prevent the commercial exploitation of their performance for any purpose other than the one for which

they have given their approval and they have the right to stop others from recording their live, unfixed performance without their permission.

The WIPO Performance and Phonogram Treaty (WPPT) was established in 1996. The moral rights of the performers were acknowledged in this convention for the first time in a global agreement. The performers' financial rights are also covered. Performers should be paid for their work, and they are also entitled to royalties if the work is used for any other reason than that for which they have granted approval. In 2012, the World Intellectual Property Organization (WIPO) approved the Beijing Treaty on Audio-Visual Performance, which included an extensive discussion of the performers working in the audio-visual realm. The rights of actors who work in movies, television shows, or short videos, among other media, were a topic of discussion among the contracting states. The WPPT did not address the performer who works in television or movies; rather, they focused on the Beijing Treaty.

Performer's right under Copyright Act, 1957

The Copyright Act categorizes performers into these three groups:

- **Performers performing live performances:** A performer has the right to any performance he engages in or does in front of an audience (live).
- **Performers in cinematograph films with credits:** The performer is entitled to royalties or some other financial advantage when he transfers his rights to the person under any written agreement to make it a part of any commercial use.
- **Performers in a cinematograph without credits:** There are many performers in supporting cast, sometimes known as "extras," in any play, movie, or other production. The Copyright Act currently offers these individuals just moral rights protection, which may harm their reputation.

The relevant portion of Section 38A Clause 2 of The Copyright Act, 1957 states plainly that once an artist's performance is included in the film, the producers enjoy the performers' rights outlined in Section 38A(1)⁹⁹. The performers' rights described in Section 38A(1) are clearly enjoyed by the makers of a cinematographic film after an artist's performance is included in the picture, according to Section 38A(2) of the 1957 Act. Additionally, in *Fortune Pictures International v. Dev Anand*¹⁰⁰, same stance was emphasised. The Bombay High Court made its decision regarding whether copyright persisted in the performer's performance in this case. The court ruled that only motion pictures, including soundtracks, are entitled to copyright protection; actors in motion pictures are not covered by this protection. In *Malayala Manorama v. V T Thomas*¹⁰¹, the Kerala High Court enjoined a publishing house from claiming ownership over the characters created by the cartoonist before joining the publishing house, and the Court held that the publishing house could not restrain the cartoonist from continuing to draw the cartoons after leaving employment. This is because the characters were invented by V T Thomas before to joining Malayala Manorama, and the publishing firm had no hand in their development. The Kerala High Court did not directly address the subject of character copyrightability, but rather resolved the issue of character copyright ownership.

It is important to note that the Court made a distinction between ownership of the characters themselves and ownership of the cartoon strips that were created by V. T. Thomas. While ownership of the characters themselves was deemed to be a right that belonged to the cartoonist, ownership of the cartoon strips would be regarded as

belonging to the publishing house. The 'character delineation test,' often commonly referred to as the 'Nichols test,' was established in the case of *Nichols v. Universal Pictures*¹⁰² as a yardstick to assess whether or not a character in the United States is protected by copyright. The test is to determine if a character is sufficiently developed in the imagination of the reader or viewer to merit legal protection; more specifically, the figure needs to be unique and cannot be a "stock character."

Performer's right under Copyright Act

1) A performer has the legal right to make an audio or video recording:

An performer has the legal right to make an audio or video recording. Also, he is able to provide permission to other individuals to record the live performance.

2) Performers have the right to broadcast their performances and they have the ability to stop others from streaming their live shows¹⁰³. If the performer's permission is not sought and another person broadcasts the performer's work without the performer's knowledge, this is a violation of the performer's copyright.

3) The performer has the right to convey the work by means other than broadcasting:

The performer is permitted to utilise methods other than broadcasting in order to communicate with the general audience. The term "broadcast" refers to the dissemination of information to the general audience by wire or wireless transmission.

4) Performer has the right to produce the sound or visual recording:

A performer may also become producer of the sound or visual recording and can enjoy all the rights that a producer enjoys, such as reproducing

⁹⁹ Dr.V K Ahuja, Law Relating to Intellectual Property Rights, 110, (2007).

¹⁰⁰ *ibid*

¹⁰¹ *Malayala Manorama v. V T Thomas AIR 1989 Ker 49*

¹⁰² *Nichols v. Universal Pictures* 45 F.2d 119 (2d Cir. 1930)

¹⁰³ Competition and Enterprise Branch Ministry of Economic Development, Performers' Right A Discussion Paper, available at <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/performers-rights-discussion-paper-pdf>, accessed on 20/02/2023

a number of copies, giving the copies for commercial rental, communicating the work to the public, and so on. The performer also has the right to produce the sound or visual recording¹⁰⁴.

Moral rights of a Performer

Even if the actor has granted the producer of the cinematograph film all of his rights, he still has the right to be credited for his effort and to be identified. Even if the performer gives up their rights to the work, they still have the right to be acknowledged for their contributions to the project. They also have the right to object in the event that any changes are made to the job that they have been responsible for performing¹⁰⁵. The moral right of the performer is not considered to be violated in the event that the producer of the cinematograph film cuts down on the duration of the performance or eliminates a piece of the work as a result of certain technical problems or limitations on the amount of time available. The moral rights that are exercised by the legal representatives of the performer and the legal representatives of the owners of the copyright are distinct from one another and cannot be exercised in the same way.

Punishment upon infringement of Performer's right

- **Copyright Act-** The remedies that can be taken against the person who violates an artist's right can be found in Section 55 of the Copyright Act, in addition to Sections 63 to 70.
- **Criminal Remedies-** In addition to the civil remedy, there is also the possibility of criminal recourse being taken against the infringement. The person who violated the law might

get a term of six months in jail, which could be extended up to three years, or they could be required to pay a fine ranging from 50,000 to 200,000 Indian rupees (or both).

- **Civil Remedies-** The person who owns the performer's right or his sole licensee has the option of going to court and obtaining an injunction that is either temporary or permanent. Alternatively, they have the option of suing for damages¹⁰⁶.

Protection of Graphic Character

There are two kinds of characters: those that are drawn and those that are made up. It is important to tell them apart and deal with them in different ways because the courts have given them different levels of copyright protection by setting up different tests to see if a character can get copyright protection. Graphic characters can be drawn. Readers see character and appearance. A fictional character is a word picture, and the reader imagines their look and personality.

As an artistic production, a graphic character cannot be granted copyright protection.

A piece of art is a sketch, painting, picture, sculpture, etc. The copyright law can preserve the specific visual expression of a creature shown in drawings, but the creature's character and personality develop via the artist's many events. It is only perceivable by the human mind, hence it cannot have a visible manifestation. Hence, the character's emotions and personality cannot be protected under copyright law as "artistic works." Judges have been more indulgent in preserving characters with concrete visual aspects than they have been in protecting literary characters, whose images are based largely on mental abstractions. In the case of *Hill v. Whalen Mortell*¹⁰⁷, the court determined that the

¹⁰⁴ Available at <<http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/performers-rights-discussion-paper-pdf>>, accessed on 20/02/2023.

¹⁰⁵ Anhita Ambast, Protecting Performers' Right: Does India need Law Reform, Vol13, Journal of Intellectual Property, available at <<http://nopr.niscair.res.in/bitstream/123456789/2432/1/IIPR%2013%286%29%20574-582.pdf>>, accessed on 21/02/2023

¹⁰⁶ Performers right under Copyright law, available at <<<https://blog.ipleaders.in/performers-rights-under-copyright-law/>>>, accessed on 20/02/2023.

¹⁰⁷ 220 F 359 (S D NY, 1914)

theatrical personas of Nutt and Giff were identical to the plaintiff's characters 'Mutt' and 'Jeff'. The court determined that the theatrical presentation infringed on the Plaintiff's animation because the characters Nutt and Giff were actually Mutt and Jeff, and because everyone who saw these characters knew the connection.

Walt Disney v. Air Pirates¹⁰⁸ was a case that established a precedent for the protection of characters. In this case, the defendants had represented Disney's characters in inappropriate situations. The court decided that a two-step analysis should be used to evaluate whether or not there was an infringement of copyright. First, the visual similarities of the characters are to be evaluated, and second, if it does not indicate infringement, then the court will analyse the personalities of the cartoon characters. If that does not determine infringement, then the court will move on to the next step. In this case, the court found the defendants responsible for the infringement of the copyright¹⁰⁹.

The 'Character delineation' test was devised by Judge Learned Hand in the **Nichols v. Universal Pictures**¹¹⁰ case as the second phase in the process of analysing the personalities of the cartoon characters. The question that has to be answered in order to pass the "Character delineation" test is "whether the specific character is adequately and distinctly characterised in order for it to justify protection." It follows that the less developed the characters are, the less they may be copyrighted, which is the penalty an author must face for making them too vague, as noted by Judge Hand.

The two decisions that were just covered shed light on a general tendency among the courts, which is that protection will only be awarded to a graphic character if it is adequately developed and characterised to give the figure

an uniqueness and personality that is unlike any other character. It ought to be so one-of-a-kind and one-of-a-kind that any other creature with identical features would bring to mind the original character. The concept of the character that existed in the mind of the author before only becomes an expression and is thus eligible for protection in such a scenario. The only Indian case which has recognized a character to be protectable is **Malayala Manorama v V T Thomas**¹¹¹, though indirectly.

Rights of a fictional character

The financial and popular attraction of fictional characters makes it vital to ensure that the authors of those characters are safeguarded from the unlawful use of their inventions in a fair and consistent manner. Therefore, the important question that arises is who owns the copyright over a character: an actor who perceives a character and infuses life into it by adding his own innovation and expressions, or the producers who, although they are not the creators of the work, are its distributors and who invest significantly in the shows as well as incur advertising and promotion costs to make the character more well-known. For Example Sunil Grover's departure from "Comedy Nights with Kapil," a comedy programme that was shown on Colors TV, was heartbreaking for all of the show's devoted followers, of whom I was one. On November 23rd, the show's producers released the following public notice that "A certain artist and stand-up comedian who has been involved with the programme Comedy Nights With Kapil, which is shown on the Colors television channel, is making plans to establish additional shows or become associated with other shows.... Take note that Viacom18 possesses the sole ownership rights, exclusive ownership rights, absolute ownership rights, and limitless ownership rights to all intellectual property rights belonging to artists affiliated with the programme, including rights to the format of the programme".

¹⁰⁸ Walt Disney v. Air Pirates 439 U.S. 1132 (1979)

¹⁰⁹ Jessica Litman, Mickey Mouse Emeritus: Character Protection and the Public Domain, 11 U Miami Ent & Sports Law Review, 429 (Spring 1994).

¹¹⁰ Id 4

¹¹¹ Id 3

Therefore, this means that because of this, Sunil Grover will no longer be able to portray the role of Gutthi, whom all of us have grown to know and adore, on any other show¹¹².

Constitutionality of Copyrightability of Character

A claim that a performer and the character's creator are one and the same, given that the performer imparts his or her individual flavour into an already established or formed character, resulting in the formation of a unique character, is permissible under current legal scenario? The fundamental purpose of laws protecting intellectual property and copyright is to ensure that individuals have access to knowledge, and the fundamental purpose of these laws is to motivate the appropriate individuals to produce information in a way that benefits the general public. An actor visualises a character and breathes life into it; the producers, who are not the original authors of the work but rather the distributors of the work generated by the actor, want the copyright to the work that the actor has created. In accordance with the notion of the appropriate distribution of rights, this is not acceptable behaviour.

In accordance with the "sweat of the brow" theory, the actor who is credited with creating a character must be granted authorship rights to that character's work.

Conclusion

Despite the visual impression that graphic characters have on the minds of readers, the case laws demonstrate that the courts are fairly tolerant in the protection that they offer to graphic characters. When it comes to imaginary characters, the courts are reluctant to make decisions.

Protection is only awarded in cases where the court is convinced beyond a reasonable doubt

that the characters have clear distinctions between them. Even though this is a subjective criteria, the courts have consistently held that the only time characters are eligible for legal protection is when they are used as an expression. The protection afforded by copyright laws has been denied to ideas. Yet, there is still one question that has to be answered, and that is under what category of 'work' would we consider a character to be eligible for copyright protection.

Thus, in the area of intellectual property law, the rights that were granted to the artists represent an extremely positive development. They have always held a unique position in the copyright work, but their contributions have never received the kind of recognition that is necessary for the job. Now that copyright legislation has come into effect, their legal rights are safeguarded, and this also helps to enhance their financial situation.

¹¹² Don't copy 'Gutthi', warn 'Comedy Nights With Kapil' producers, available at <<http://archive.indianexpress.com/news/dont-copy-gutthi-warn-comedy-nights-with-kapil-producers/1197206/>> , accessed on 19/02/2023