IJCRT.ORG ISSN : 2320-2882

INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

You shall not reap where you have not sown? Misappropriation, fictional characters, and the copyright law

Bhumika

BA LLB (Honours), LLM

Abstract: The paper discusses the extent to which a fictional character from a literary piece is liable for protection under copyright law.

Lord Halsbury begins his judgment in *Walter v Lane*,[1] with the words '*I should very much regret if I were compelled to come to a conclusion that the state of the law permitted one man to make a profit and to appropriate to himself that has been produced by the labour, skill and capital of another.*'

It cuts across the grain of justice to permit an intruder to profit not only by the efforts of another but at his expense as well. This is the emotional basis of copyright protection against '*concurrence parasitaire'*, '*unlauteres wettbewerb*' and '*slaafse nabootsing*' (slavish imitation). It is the basic moral feeling against free riding and parasitism.[2] Amongst legal scholars, there will probably be a lot of opposition to the very idea that there might be something like a basic moral feeling or principle against misappropriation because for them "*imitation is the life blood of competition*"[3]

We stand at a point where the incorporeal world is broadening its dimensions and the legal framework is on the evolving juncture. There remains the rough practical test that what is worth copying is prima facie worth protecting.[4] Now the question that arises is to what extent a fictional character from a literary piece is liable for protection and to what extent it is not? Can there be an absolute copyright over it?

A number of intrinsic (involving substantial similarity in the protectable expression) and extrinsic (involving substantial similarity in the general ideas) tests have been laid down in courts to find out whether the first character was so originally conceived and presented sufficiently developed to command

[1] 1900 AC 539.

[2] Dirk Visser, 'Misrepresentation and Misappropriation: Two Common Principles or Common 'Basic Moral Feelings' of Intellectual Property and Unfair Competition Law' (2012) <https://openaccess.leidenuniv.nl/bitstream/handle/1887/18699/247-254%20%20Visser.pdf?sequence=1> accessed on 22 August, 2016.

[3] American Safety Table Company v. Schreiber 269 F.2d 255 (19 June 1959), http://open jurist.org/269/f2d/fn7.

[4] *University of London Press Limited v University Tutorial Press Limited* [1916] 2 Ch D 601.

copyright protection and if so, did the alleged infringer copy such development and not merely a broader and more abstract outline.[5]

Whether there was substantial taking?

It is pertinent to note that copyright in a work is infringed by taking a substantial part of it.[6] The question whether the defendant has copied a substantial part depends much more on the quality than the quantity of what he has taken.[7] The quality or importance of the part taken is at times more significant than the proportion which the borrowed part bears to the whole work.[8] This can be explained by way of an example: A person photocopying one page from a report running into a hundred pages has not taken a 'substantial part' of the report. But if he copies one page of recommendations and suggestions of the report then it would certainly comprise 'substantial part' of the work.[9]

The Delhi High Court in the case of *Raja Pocket Books v Radha Pocket Books*[10] applying the Doctrine of Fading in Memory compared from the point of view of a man of average intelligence and imperfect recollection. The Plaintiff was the registered owner of Copyright of its artistic snake like comic character "NAGRAJ" in a comic series and sought injunction against the Defendant whose work closely resembled the title and Nagraj like character "NAGESH". Also, the Defendant was publishing comic series under similar title "Radha Comics" depicting similar snake like comic character with same artistic manner. The Defendant was guilty of infringement.

Whether there was *de minimis* copying?

The Delhi High Court[11] held that *de minimis non curat lex* a valid defence for copyright infringement. The maxim *de minimis* is translated as: (i) the law does not concern itself with trifles;[12] and (ii) the law does not regard trifles; Thus applying '*de minimis*' as an adjective and giving it meaning: trifling, unimportant or insufficient would be treated minor legal violations and hence would either be non-actionable or would be a good defense to an action for violation of legal right.

Where the character is nothing more than a stock character or has been barely mentioned, giving copyright protection to such a character will be against the spirit and essence of the principle of *de mininmis* and it will be against the very idea behind Copyright Law which seeks to promote and flourish further creativity.

[5] Cathy J. Lalor, 'Copyrightability of Cartoon Characters' (1995)PTC Research Foundation of the Franklin Pierce Law IDEA: The Journal of Law and Technology.
[6] *S K Dutt v Law Book Co* AIR 1954 All 570; *ESPN Stars Sports v Global Broadcast News Ltd* 2008 (36) PTC 492 (Del); *Dorsey v Old Surety Life Insurance Co* 98 F 2d 872 (10 Cir 1938).
[7] *Ladbroke v William Hill* [1964] 1 WLR 276, 293.
[8] *Ladbroke v William Hill* [1964] 1 WLR 276; *Warwick Films Productions Ltd v Eisinger* [1969] Ch 508; *Catnic Components Ltd v Hill and Smith Ltd* [1982] RPC 183.
[9] *Catnic Components Ltd v Hill and Smith Ltd* [1982] RPC 183; *Warwick Films Productions Ltd v Eisinger* (1969) Ch 508.
[10] 1997(17)PTC84(Del).
[11] *India TV Independent News Service Pvt Ltd v Yashraj Films Pvt Ltd,* 2013 (53) PTC 586 (Del).
[12] Black's Law Dictionary (7th edn, 1999) 443.

Whether Story being told test is applicable?

In *Nichols v Universal Pictures Corp,*[13] Hand, J. Stated that 'it follows that the less developed the character, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct.' In the aforesaid case, the test of 'Story Being Told was evolved which provides copyright protection to literary character only if the plot of the story where the character appears focuses on the development and relationship of characters.

Reliance can be drawn to the case of *Warner Bros Picture v Colombia Broadcasting System,*[14] wherein it was observed that 'it is conceivable that a character constitutes story being told, but if the character is only the chessman in the game of telling the story he is not within the area of protection afforded by the copyright.'

The Indian Supreme Court in *R G Anand v Delux Films,*[15] observed that 'where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. Therefore, *where the defendant has reworked the plaintiff's material there comes a point beyond which the plaintiff has no claim*.'[16]

Whether the character was especially distinctive?

Courts have recognized that copyright protection extends not only to an original work as a whole, but also to 'sufficiently distinctive' elements. The character must be 'especially distinctive' and 'contain some unique elements of expression.' In *Comic v Towle,* [17] the court said that 'the Batmobile is "especially distinctive" and contains unique elements of expression.'

If the first work has some special distinct features such as a fictional superhero that possesses a specific name, physical appearance and character traits and who might take on a life of its own and can exist without the context in which it was born. The character's uniqueness and its overall personality would be considered protectable.

Whether there was Originality?

The Supreme Court of USA held in *Feist Publications Inc v Rural Telephone Service Co Inc,*[18] that the *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. It means only that the second work is the product of sweat of the brow and involves certain modicum of creativity, skill and judgment.

Also, no copyright subsists in ideas, subject matter, themes, plots, legendary facts - only original expression of such thought or information in some concrete form is protected.[19] So if the abstract characteristics of a literary character are taken that form the mental image of the reader and put together

[13] 45 F 2d 119 (2d Cir 1930).
[14] 216 F 2d 945 (9th cir 1954).
[15] (1978) 4 SCC 118.
[16] WR Cornish, *Intellectual Property* (2nd edn, Universal Law Publishing Co Pvt Ltd 1999) 290.
[17] *Comics v Towle* MANU/FENT/2518/2015.
[18] 499 US 340.
[19] *R G Anand v Delux Films* (1978) 4 SCC 118.

into a more prominent form such as graphic representation, as characters deem to easily move from one medium to another, then the copyright law distinction between an unprotected idea and protectable creative expression may prevent copyright law from protecting the literary character.[20]

Whether the Ordinary Observer Test is in favour?

The ordinary observer test is based on the subjective reactions of lay observers. in *Associated Electonics & Electricals v Sharp Tools*,[21] it was held that the surest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or viewer after reading or seeing both the works would get unmistakable impression that the subsequent work appears to be a copy of the first.

Whether an adapted work infringes exclusive rights under copyright?

Section 14 of the Copyright Act 1957 categorically provides that copyright 'means the exclusive right to do or authorizing the doing of any of the acts mentioned in Section 14 (a) to (e) or any- substantial part thereof'.[22] Sub clauses (vi) and (vii) of section 14 (a), state:

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi).

It is pertinent to note that according to Section 2 (a) (v) 'adaptation' means- in relation to any work, any use of such work involving its re-arrangement or alteration. Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.[23]

Where a person has copyright in a literary work, and any other person produces or reproduces the work or any substantial part thereof in any material form, he is committing an infringement of copyright.[24]

Lord Reid held in *Ladbroke v William Hill*[25] said, 'the question whether the defendants has copied a substantial part depends much more on the quality than the quantity of what has taken.

Reliance is further placed on section 51(a) (i) which states that:-

> Copyright in a work shall be deemed to be infringed-
>
> (a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-
>
> (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright.

[20] Dean D. Niro, 'Protecting Characters through Copyright Law: Paving a New Road upon Which Literary, Graphic, and Motion Picture Characters Can All Travel' (1992)DePaul Law Review.
[21] 1995 PTC 85.
[22] *Indian Performing Right v Aditya Pandey* 2012 (50) PTC 460 (Delhi).
[23] The Berne Convention 1971, article 12.
[24] *Fateh Singh Mehta v OP Singhal* AIR 1990 Raj 8.
[25] [1964] 1 WLR 273.

In *K Marari v Mupalla Ranganayakamma*,[26] the learned K Rama Swamy, J held that 'by making a cinematograph film, if a substantial part thereof is infringement of copyright of any other literary work, without any assignment or license it is an adaptation and offends against Section 51 and acquires no copyright in the cinematograph film.'

Whether a derivative work infringes exclusive rights under copyright?

Broadly speaking, there would be two classes of literary works: (a) primary or prior works: These are the literary works not based on existing subject-matter and, therefore, would be called primary or prior works; and (b) secondary or derivative works: These are literary works based on existing subject-matter. Since such works are based on existing subject-matter, they are called derivative work or secondary work.[27]

As regards to the need of license, the Delhi High Court in *Super Cassettes Industries v Chintamani Rao*[28] observed that the defendant cannot seek to bypass the said procedure and use the derivative copyright works of the plaintiffs without obtaining a valid license.

Conclusion

> *"Properly understood and wisely handled copyright law may at the same time be a powerful stimulus to creation and a means of increasing the flow of information and ideas. Misunderstood, and with its true purpose lost sight of, copyright can become a limitation on creation and a barrier to free interchange and expression."*[29]

From the jurisprudential point of view, intellectual property rights are about balancing two competing and important interests, the individual interest and the societal interest. It is important to see that in protection of one's right the society at large does not suffer. Protecting an unsubstantial character is nothing less than creating barriers which hinders others' creative rights.

[26] MANU/AP/0276/1987.
[27] *Eastern Book Company v D B Modak* 2007 (14) SCALE 191.
[28] 2012 (49) PTC 1 (Del).
[29] The Rajya Sabha Official Debate on the Copyright Bill, 1955