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## CHARACTER MERCHANDISE UNDER COPYRIGHT LAW IN INDIA: A LEGAL STUDY INTELLECTUAL PROPERTY LAW

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### INTRODUCTION:

In India, copyright in character merchandised work is an important part of intellectual property rights. It entails safeguarding the distinctive expressions and qualities of fictional characters, such as their look, personality traits, and backstory when they are employed in commercial items and merchandise. Character merchandising has grown in importance in India's entertainment and consumer products businesses. The popularity of prominent fictional characters such as Chhota Bheem, Doraemon, and Mickey Mouse has increased their utilization in a variety of products such as toys, clothing, and stationery.

In India, copyright protection is governed by the Copyright Act of 1957, which recognizes literary, dramatic, musical, and artistic works as being eligible for copyright protection. Characters might be deemed literary or artistic works and so protected by copyright law. In recent years, Indian courts have taken an active role in determining the scope and level of protection given to fictional characters. This has been especially important in cases involving character merchandising rights infringement, where unlawful usage of popular characters by third parties has resulted in legal problems. Character merchandising rights must be protected in order to stimulate creativity, innovation, and commercialization in the entertainment and consumer goods industries. As a result, it is critical for businesses and creators in India to grasp the legal structure governing copyright protection in character merchandised work.

## LITERATURE REVIEW:

- **Nishant Kewalramani And Sandeep Hegde M, Sandeep Hegde M, Manupatra**

Character merchandise, which initially emerged in the entertainment sector as a secondary means of exploitation, quickly overtook other methods of generating income. This article specifically focuses on personality marketing while highlighting the key legal concerns surrounding character marketing. The article examines the many court rulings that have had a significant impact on how the entertainment industry and those of like mind handle this sector as well as highlighting the core tension between the various regulations that are now in place in India that govern character merchandising in various ways.

- **Character Merchandising, World Intellectual Property Organization, (3rd April 2023), Wo/Inf/108**

The goal of the study is to investigate the issue of "character merchandising," which is one of the most cutting-edge strategies for making products or services more appealing to potential buyers. Additionally, the study focuses on the legal provisions and case law pertinent to the commercialization of characters in several nations, including Australia, Canada, France, Germany, the United Kingdom, and the United States of America, on the one hand, and, to a lesser extent and to a lesser degree, Chile, India, Japan, and Nigeria.

- **Amankumarsinha, Character Merchandising And Copyright Law In India, Legal Service India**

The historical context of character merchandising is covered in this article, along with the legal frameworks for doing away with it. The article also focuses on the problems and obstacles that illicit character merchandise is now facing, as well as the safeguards that are in place to stop it in India. It also tries to highlight a few court rulings that have increased the range of character merchandise available in the entertainment sector.

- **Shreya Chaddha, Character Merchandising Under Copyright Law, Academia**

The article critically examines the distinctions between character and personality merchandising, it focuses on potential remedies for each, scope, and other differences. The essay also considers whether the UK should have "publicity rights" in terms of personality at its last stage, as well as whether there is a basis for personality with regard to commercialization in the country.

## DISCUSSION:

### THE VIEWPOINT OF CHARACTER

#### (A) DEFINITION

In general, the term "character" refers to both fictitious humans (such as Harry Potter or Sherlock Holmes) and non-humans (such as Doremon and Peppa Pig) as well as real people (for example, famous personalities in the film or music business, sportsmen).

In the context of character merchandising, it is primarily the essential personality traits that are easily recognised by the general public that will be relevant. These personality traits include, for example, a character's name, image, appearance, or voice, as well as symbols that allow such characters to be recognised.

#### (B) SOURCES AND PRIMARY USE OF CHARACTERS

##### (i) Fictional Characters

The following are the primary sources of fictional characters:

literary works (such as Pinocchio by Collodi or Tarzan by E.R. Burroughs), Strip cartoons (such as Tintin by Hergé or Astérix by Uderzo and Goscinny), artistic works (such as Leonardo da Vinci's Mona Lisa) or sketches (the World Wide Fund for Nature panda) (WWF), cinematographic works (such as Crocodile Dundee, King Kong, Rambo or E.T. with respect to movies, McGyver or Columbo with respect to television series or Bambi with respect to motion picture cartoons).

In most circumstances, the principal purpose of a fictional character is referred to as a "entertainment function." Such a figure may emerge in a novel, a tale, or a strip cartoon (for example, Tarzan in the novel "Tarzan, King of the Jungle," Mr. Brown in the tale "Squirrel Nutkin," or the characters James Bond or Tintin), and the success of the work presenting the character usually leads to further stories. The creator of the character will make such primary use; however, if a character has achieved a high level of reputation and the creator has died, the heirs, if any, or the holders of the publication rights, may organize the "survival" of the character in future stories through contracts (for example, the books featuring James Bond after the death of Ian Fleming). Some creators, on the other hand, may want that their characters not become the focus of new stories after their deaths (for example, Hergé, the creator of Tintin). The issue is somewhat different in the case of cinematographic works, since the principal usage is rarely made by the creator of a character (the developer of the original drawings or screenplays) (but exceptions do exist, such as the "little man" character created by Charlie Chaplin).

##### (ii) Real Persons

The movie and show business, as well as sporting activities, are the primary sources where a character is based on a real person. In the case of real people, "primary activity" should be used instead of "principal usage." The issue with real people is that performers, for example, may have a reputation as both a person and as the character they performed in a film or television series.

## CHARACTER MERCHANDISING:

### (i) DEFENITION

Character merchandising is defined as the adaptation or secondary exploitation, by the creator of a fictional character, a real person, or one or more authorised third parties, of a character's essential personality features (such as the name, image, or appearance) in relation to various goods and/or services in order to create a desire in prospective customers to acquire those goods and/or use those services due to the customers affinity with the character.

It should be noted that the person or legal entity in charge of organising the marketing activity (the merchandiser) is almost never the creator of the fictional character or the real person in question. The character's numerous property or personality rights will be the subject of contracts (such as transfer or licence agreements or product or service endorsement agreements) that will allow one or more interested third parties to be considered authorised users of the character.

### (ii) ORIGIN

The concept of character merchandising is thought to have originated in South East Asian countries, more specifically in India. Ramayana has been an important element of Indian mythology, and it has been told in Indian civilization through puppet plays, dramas, and engravings on temples, among other things. Even if the goal of all of this was not to commercialise folklore, but rather to teach a belief and ideology. Character marketing began with Walt Disney's invention of cartoon characters like Mickey Mouse and the following exploitation of the character by one of their employees by selling things such as shirts and other delights having the images of the cartoons.

These characters were further marketed during this time period in the shape of posters, bags, badges, and so on. The merchandising programmes linked with films such as Star Wars, Rambo, and James Bond that emerged in the second part of the twentieth century elevated the phenomena of character commercialization to a whole new level.

Few examples of character merchandise :

- A toy is a three-dimensional replica of the cartoon character Mickey Mouse.
- A T-shirt with the name or image of the (Ninja Turtles)fictional characters.
- a perfume bottle label carries the name "Alain Delon" • tennis shoes bear the name "André Agassi" • a Coca Cola Light advertising video campaign depicts pop icon Elton John sipping Coca Cola Light

## CHARACTER MERCHANDISING TYPES:

Character merchandising comes in three varieties: fictional character merchandising, personality merchandise, and image merchandise. fictional character merchandise includes creative creations like Cinderella or Pinocchio as well as films starring Mickey Mouse, Batman, Donald Duck, and other fictional characters. When these personalities and their basic components are used to brand items, customers are drawn to them more than the products themselves.

Then there is personality merchandising, which involves marketing not only the character but also the actor who portrays it. Iron Man is a perfect illustration of this; for instance, red and gold t-shirts are readily connected to Iron Man, and people purchase them as a result of this link. On the other hand, if a cricketer is supporting a deodorant brand, people would purchase the product because the cricketer is linked with that brand due to the distinctive personality the player has developed.

There is also image commercialization, in which there is no distinction between the actor's real identity and the role he performs. Instead of the person's true personality, people tend to link them with the character. For instance, Robert Downey Jr. is more well-known as Tony Stark and Iron Man than he is as himself, or his true personality, therefore people would want to purchase Iron Man items including his voice or face (in a toy).

In a manner similar to the above, a fourth category of character merchandising can be distinguished: the merchandising of artistic works. This category includes artworks that are used for products. For example, Leonardo Da Vinci's Mona Lisa is a well-known piece of art, and numerous products are based on it, even in museums.

## COPYRIGHT ABILITY OF CHARACTERS:

The owners and creators of characters are given copyright protection under the copyright law, although the protection is only offered to them for a short period of time. It's important to keep in mind that a character's copyright protection covers far more than physical their appearance; it also covers their name, traits, and other characteristics. Characters have been ruled to be protected by the copyright law in numerous circumstances. The Carly instances, however, did not address whether a character's unauthorised use might expose a new work to copyright infringement liability if it simply used the character and not the other components of the original work ". If simply a likeness in how the character was depicted without a similarity in the character's personality existed, there was some question regarding copyright infringement liability."

In Warner Bros., Inc. v. American Broadcasting Cos. "Courts have traditionally weighed not only the visual resemblance but also the whole of the characters' qualities and traits in assessing whether a character in a second work infringes a cartoon character," the court stated.

In the earlier case of Detective Comics, Inc. v. Bruns Publications, a similar outcome was demonstrated "where the court determined that a competing comic book publication that featured the character Wonderman

violated the character Superman's rights. The copyrights defending Superman were violated, according to the court, because "the graphic and literary details inherent in" the infringing work were appropriated.

Determining how the characters will be protected when such characters grow larger than life and their existence is no longer in the same way as it was first published is one of the most challenging difficulties of applying copyright law analysis. Infringement in such characters is found by examining if the character is being used by anybody who is not authorised to do so, according to copyright law.

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### TEST TO DETERMINE COPYRIGHT ABILITY OF CHARACTERS:

A two-part test has been developed by the courts to evaluate whether characters are entitled to copyright. Although widely used in US courts, this test is less well-known in India. The initial evaluation of a character's ability to exercise copyright. In other words, a hazy, underdeveloped persona might not even be able to exercise copyright. The "distinct delineation" test is the name of this assessment.

#### (i) Character Delineation Test

The courts typically use the "character delineation test" to determine whether a character is eligible for copyright protection. The key question in deciding whether or not there is such protection is whether or not the specific character is sufficiently and uniquely defined to deserve protection. Courts won't defend character types since copyright law only protects the expression of ideas, not the ideas themselves, against infringement. Because of this, the courts have granted Superman copyright protection without giving the title "superman" a monopoly, even though a court would presumably not provide copyright protection to any man with superpowers. The best approach to ensure that a graphic character is protected under copyright law is to make sure that the character has a distinct personality and appearance.

#### (ii) The story being told test

There was a need to create a second test because there were no defined criteria in place. The Story Being Told Test developed in the case of Warner Brothers Pictures Inc. v. Columbia Broadcasting System". The test essentially stated that if a character is not actively involved in telling the story, it is not protected by copyright and others may use it without infringing on anyone's rights. To claim copyright protection, the character must be the main focus of the narrative. For the most part, however, this criteria effectively eliminates characters from copyright protection because it has been viewed as being too stringent a requirement for copyright protection.

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## PROTECTION OF CHARACTER MERCHANDISING

### COPYRIGHT ACT 1957:

In India, character merchandising is a thriving sector in which numerous characters from movies, novels, and other media are used for commercial purposes. Toys, clothing, accessories, and other objects bearing the likeness of a specific character are examples of character merchandise. It is protected under copyright law in India, and registration of it can bring several benefits. Section 51 of the Copyright Act of 1957 allows for civil and criminal remedies for the infringement of copyright. If a product of character merchandise is protected by copyright, the owner has the sole right to reproduce, distribute, and sell it. In the event of unlawful use or infringement, the owner may file a lawsuit against the infringer and seek remedies such as injunctions, damages, and profit accounting. A registered character merchandiser has market exclusivity, which implies that no one else can use the same character for commercial reasons without the owner's consent. This can lead to greater revenue and profits for the owner because people are more likely to acquire items connected with a familiar character. Section 14 of the Copyright Act of 1957 specifies the copyright owner's exclusive rights, which include the right to reproduce, distribute, and sell the item. Character merchandising registration provides a solid foundation for licensing and merchandising arrangements. When a piece of character goods is protected by copyright, it becomes a valuable asset that can be licensed or merchandised for commercial purposes. Licensing and merchandising agreements can generate cash for the copyright owner by paying royalties or other fees for the usage of character products. The licensing of copyrighted works is provided for in Section 30 of the Copyright Act of 1957. Character merchandising registration also provides a competitive edge in the marketplace.

Copyright registration in India is recognized globally under a number of treaties and conventions, including the Berne Convention, which protects literary and artistic works. This means that character registered in India is protected in other countries that have signed the treaty. This can be especially profitable for owners of popular characters with international appeal. Copyright to foreign is recognized in India under Section 40 of the Copyright Act of 1957. Character merchandising registration under Indian copyright law provides a variety of benefits, including legal protection, commercial advantage, licensing and merchandising options, competitive advantage, and worldwide protection. To maximize their legal and commercial rights, copyright holders should consider registering their character items. Sections 14, 30, 40, and 51 of the Copyright Act of 1957, for example, allow for exclusive rights, licensing, acknowledgment of foreign copyrights, and remedies for infringement.

## TRADEMARK ACT 1999:

Despite the difference in some respects, licensing of characters and pictures to be used in merchandise lures the principles governing licensing of trademarks under India's Trade Marks Act, 1999. The act mandates control of the proprietor over use of the mark, which can be through an impact over quality of the underlying products and services. The provisions of the act by implication serve to stop trafficking or use of a trademark as a commodity, not primarily for the aim of identifying or promoting merchandise within which the proprietor is interested. Additionally to the Trade Marks Act, the Advertising Standards Council of India prescribes certain self-regulatory guidelines referring to the employment of celebrities in product advertisements.

## DISPUTE BETWEEN CHARACTER MARKETING AND TRADEMARK LAW

Brands do not have marketing properties because they do not have an inherent value of their own apart from the goods or services to which they are associated, their main function being the identification of goods by the general public. It means that the trademark would not protect the fictional character in its entirety, but only in its association with the products or services for which it is used. This raises the question of whether a trademark owner can protect her trademark from unlicensed use, for example, whether an unlicensed user can use a trademark for some other purpose. In this regard, the courts have various opinions, some courts have ornamental trademark uses protectable under current trademark law with relevant evidence to be consumer confusion as to sponsorship rather than source, however, others have held that the commercial interest of the mark is the basis for such protection, while others have cited the acquisition of secondary meaning and dilution of the mark as the basis for such protection.

However, in the case of Chorion Rights Ltd. v. Ishan Apparel & Ors., Where the plaintiffs were involved in "Noddy" trademark marketing activities in India and the world. However, it was unable to file an injunction against the defendants as they were unable to establish their claim as a prior user and the dilution could not be sustained because the defendants had registered and used the same Noddy trademark with respect to apparel before the plaintiffs. In this case it was concluded that if a trademark owner wishes to engage in marketing, he must protect his trademark accordingly for the relevant products and services in order to provide additional protection.

In addition, there is a dispute between character marketing and traffic mentioned in the 1958 Act. The term traffic refers to the trade of the trademark as a commodity without attributing any reputation to the brands of the products in question. Similarly, character merchandising involves decorating goods with a character that may have a different reputation than the goods it is being used for, this can lead to trafficking that was prohibited under the Trademark Act of 1958. However, the 1999 Act that repealed the 1958 Act has removed any prohibition in relation to trafficking. This is because trademarks registered in the 1999 Act can be treated as merchandise and are granted by the owner to the extent that the trademark can stand on its own.



Pros to registering character merchandising under copyright law:

- Character merchandising involves using a popular character to sell merchandise such as clothing, toys, and accessories. While both copyright and trademark laws provide protection for character merchandising, there are some pros to registering under copyright law.
- Exclusive rights: Copyright law provides the copyright owner with the exclusive right to use, reproduce, and distribute the copyrighted work. This means that the copyright owner has the sole right to make and sell merchandise featuring the character.
- Longer protection: Copyright protection typically lasts for the life of the author plus 70 years after their death, while trademark protection lasts as long as the trademark is used in commerce. This means that copyright protection provides longer-lasting protection for character merchandising.
- More flexible: Copyright law allows for more flexibility in the types of merchandise that can be sold featuring the character. For example, a copyrighted character can be used on clothing, toys, books, and movies without the need for separate trademark registrations.

### LEGAL FRAMEWORKS IN OTHER COUNTRIES REGARDING THE CHALLENGES OF CHARACTER MERCHANDISING THROUGH COPYRIGHT LAW:

- JAPAN:

Character merchandising is a substantial industry in Japan, and the country has a well-developed legal framework in place to safeguard intellectual property rights in character merchandising. The Copyright Act protects characters as artistic creations, and the Trademarks Act protects characters as trademarks. Furthermore, Japan has a one-of-a-kind system known as the "character product certification system," which allows designers to register their characters with the government in order to restrict others from using identical characters.

- CHINA:

Character merchandising in China faces considerable issues due to copyright infringement, piracy, and counterfeiting. Nonetheless, the country has lately made attempts to improve its legal environment for character merchandising by updating its Copyright Law in 2021 in order to provide better intellectual property rights protection. The Copyright Law now contains statutory and punitive damages, as well as higher compensation for copyright infringement. Furthermore, the Trademark Law protects characters as trademarks, and China has established specialised intellectual property tribunals to handle character merchandising matters.

## SUGGESTIONS AND CONCLUSION:

Registration of character merchandise is an important aspect of copyright law in India. In this regard, there are several suggestions that can be made to improve the registration process and strengthen the protection of character merchandise.

Firstly, there should be a clear and detailed procedure for registering character merchandise in India. This procedure should be easily accessible to all applicants and should provide a comprehensive list of requirements and documents that need to be submitted.

Secondly, there should be a fast-track registration process for character merchandise that are particularly valuable or unique. This will help to expedite the registration process and provide greater protection for these valuable assets.

Thirdly, the Indian government should establish a specialized tribunal or court to deal with copyright disputes related to character merchandise. This will help to ensure that disputes are resolved in a timely and efficient manner, and that the rights of creators and owners of character merchandise are protected.

Character commercialization is a new concept that has gained prominence in recent decades and is still growing as licensors are able to commercialize different aspects of characters, therefore laws will need to keep pace with the changing nature of the concept to that to prevent exploitation and unauthorized use. In conclusion, registration of character merchandise is an important aspect of copyright law in India. By implementing the above suggestions, the Indian government can improve the registration process and provide greater protection for creators and owners of character merchandise. This will not only benefit the rights holders, but also promote creativity and innovation in the Indian market.

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- Swift v. Blackwell, 84 F 2d 130 (1936).
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#### LEGISLATION:

- THE COPYRIGHT ACT 1957
- THE TRADEMARK ACT 1999