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Fictional Character Protection through Copyright

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ABSTRACT

The protection of fictional characters through copyright in India is a nuanced area of intellectual property law that has significant implications for creators, the entertainment industry, and the broader cultural landscape. Fictional characters, which often become central to various forms of media such as books, films, television shows, and comics, hold substantial economic and cultural value. The Indian legal system provides a framework for the protection of these characters, ensuring that creators can secure their rights and benefit from their creations. This comprehensive analysis explores the scope and effectiveness of copyright protection for fictional characters in India, examining statutory provisions, case law, and the challenges posed by emerging digital technologies. Copyright is a kind of legal protection that an author bears for the exclusive use of his creative work. The duration of the granted copyright is fixed.

Keywords: *Copyright, fictional, Intellectual property, protection.*

I. INTRODUCTION

The protection of fictional characters through copyright in India is a nuanced area of intellectual property law that has significant implications for creators, the entertainment industry, and the broader cultural landscape. Fictional characters, which often become central to various forms of media such as books, films, television shows, and comics, hold substantial economic and cultural value. The Indian legal system provides a framework for the protection of these characters, ensuring that creators can secure their rights and benefit from their creations. This comprehensive analysis explores the scope and effectiveness of copyright protection for fictional characters in India, examining statutory provisions, case law, and the challenges posed by emerging digital technologies. Copyright is a kind of legal protection that an author bears for the exclusive use of his creative work. The duration of the granted copyright is fixed. It enters public domain with the expiration of the copyright.² Throughout the previous two

¹ Author is a student at Libra College of Higher Studies, Dehradun, India.

² Yahaan Heerjee, "Copyright and Trademark Laws Underlying Disney's Characters : An Insight" (*iPleaders*, July 23, 2021) <<https://blog.iplayers.in/copyright-trademark-laws-underlying-disneys-characters-insight/>> accessed November 7, 2022

hundred years of copyright history, many statutory³ and legal modifications have virtually invariably resulted in a broadening of the legal protection of authorship.⁴ Copyright⁵ legislation has been extended from a renewable fourteen-year period to the author's lifetime plus seventy years after death.⁶ Modifications to the threshold for originality⁷ and other authorship standards⁸ result in a constant readjustment of the boundaries of what constitutes copyrightable material.

When authors can reap the rewards of their work for a defined length of time, it drives them to produce more material. The objective of copyright is essentially to grant monopolistic power to the creator. The copyright as a legal foundation and the defined length of protection encourage authors to express their creativity. The public and the author both benefit from the author's exclusive rights.⁹ The copyright is statutorily granted by the sovereign and is not inherent.

II. CRITERIA FOR COPYRIGHT PROTECTION IN INDIA

For a fictional character to be protected under Indian copyright law, it must satisfy two primary criteria:

1. **Originality:** The character must be an original creation, which means it should not be copied from existing works. The character must exhibit a degree of creativity and individuality that sets it apart from generic or stock characters.
2. **Fixation:** The character must be fixed in a tangible medium of expression, such as a book, script, film, or drawing. This means that the character should be sufficiently

³ See Jessica Litman, Copyright Legislation and Technological Change, 68 Or.L.Rev 275 (1989) for an overview.

⁴ Ben Depoorter, The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law, 9 Virginia Journal of Law & Technology 4 (2004)

⁵ Copyright law covers a diverse subject-matter: novels, plays, symphonies, paintings, computer programs, sound recordings, film, live performances, broadcastings, cable transmissions, etc. In this article, I refer to all of these non-invention creations as "authored works" or "copyrighted material."

⁶The Copyright Act of 1976, 17 U.S.C. S. 302 (1994), replaced the renewable fourteen-year term (which dated to the first copyright act, the Statute of Anne; see Act for the Encouragement of Learning, 1710, 8 Anne c. 19 (England) with the wider "life of the author plus 50 years" provision. The Sony Bono Copyright Term Extension Act brought the copyright term in line with the European Union norm of 70 years after the author's death. 17 U.S.C. s. 302 - Sony Bono Copyright Term Extension Act (2000). Cf. Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Duration of Copyright Protection and Certain Related Rights, 1993 Official Journal (L 290) 9. The directive was applied in the national laws of EU Member States; see, for example, Belgian Act on Copyright Law and Related Rights, article 2, section 1 (30 June 1994). (B.S., July 27, 1994)

⁷ Regarding the evolution of a lower originality test, see Ryan Littrell, Toward a Stricter Originality Standard for Copyright Law, 43 B.C. L. REV. 193, 196-205 (2001). (discussing the relevant case law). Littrell associates the decline in copyright protection with the emergence of a romantic view of writing. However, a more romantic idea of authorship may also indicate that originality criteria would be more stringent. Before creativity is accorded the prestigious title of "authorship," it must possess characteristics that distinguish it from the rest of society's creative endeavours. See Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of "Authorship," 1991 Duke Law Journal 455, for further information (1991).

⁸ *Supra* note 4;

⁹ *Ibid* 2

delineated through words, illustrations, or other forms of representation that make it recognizable and distinct.

Copyright protects movie characters in order to prevent their improper use. "A fictional character has three distinguishable and legally relevant characteristics: its name, its physical or visual appearance, and its bodily features and personality qualities, or "characterization."¹⁰ Copyrightability of a character is determined by the combination of these three factors. Copyright protection is awarded to a fictitious film character if it is distinctive, well-developed, and has its own personality. The courts in the US use two tests for deciphering the copyrightability of fictional characters.¹¹

III. THE CHARACTER DELINEATION TEST

This test, also known as the Nichols Test, was established in the case *Nichols v. Universal Pictures Corporation*.¹² It asserts that copyright protection may be awarded when the character has been sufficiently differentiated from the tale itself. It is predicated on the assumption that the less developed the characters are, the less likely they are to be copyrighted; this is the cost an author must pay for designating them too vaguely.

IV. THE STORY BEING TOLD TEST

This norm was established in the case of *Warner Bros. Pictures Inc. v. Columbia Broadcasting System*¹³. When a character is such a vital component of the tale that the character is the story itself, copyright protection might be extended to that character. However, if the character is only a chess piece in the game of presenting the tale, he does not qualify for copyright protection.

From the foregoing, it can be inferred that copyright protection for a fictional character may be granted if the character can be distinguished from the cinematograph film by specific character traits that have become recognizable, and/or if the character is the basis for the plot of the cinematograph film. It has been contended that a protection for characters independent from the main work is required for the protection to be effective, as the characters themselves might be considered original works of authorship. Had it not been feasible to protect characters apart from the works in which they first appeared, the author would not have been allowed the

¹⁰ Feldman David: Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection, California Law Review, Page 690.

¹¹Anand Desai and Shruti Chopra: 'Fictional Characters and Copyright Law', (Legal Era, 06 May 2014) (<https://www.legaleraonline.com/articles/fictional-characters-and-copyright-law>) (07 November 2022)

¹²*Nichols v. Universal Pictures Corporation* [45 F.2d 119 (2d Cir. 1930)]

¹³ *Warner Bros. Pictures Inc. v. Columbia Broadcasting System* [216 F.2d 945 (9th Cir. 1954)]

unique right to create derivative works extending the character.¹⁴

In *Detective Comics v. Bruns Publications*, the 2nd Circuit Court of Appeals ruled that while an author is "not entitled to a monopoly of the mere character of a 'Superman' who is a blessing to mankind," the character of Superman encapsulated a structure of incidents and literary expressions that were original to the author, and that the character could be conferred copyright protection on this basis.¹⁵ This is due to the fact that copyright protection may only cover an author's expressions and not the concepts behind the characters or works.¹⁶

The courts of the United States have also determined that when characters are taken out of context, they can be distinct viable works with their own economic value and copyright lives. In *Walt Disney Co. v. Powell*, the court argued that Mickey Mouse is always Mickey, whether he is smiling or frowning, running or walking, or waving his left or right hand.¹⁷

The copyright system provides a procedure for balancing the interests of compensating artists for their work and supplying society at large with raw materials for future creative works.¹⁸ The United States Congress employs copyright legislation to protect creators (artists, producers, etc.) against unauthorised duplication or use of their work for a limited time.¹⁹ Once the specified time period has expired, the works enter the public domain and may be freely used, reproduced, modified, or altered by anyone without compensating the original author or copyright holder.²⁰

"The 1976 Copyright Act greatly extended it to the length of the life of the author plus an additional 50 years or a total of 75 years for corporate authorship.²¹ In the 1998 Sonny Bono Copyright Term Extension Act (CTEA), Congress gave into the pressure of lobbyists (primarily Disney lobbyists who were hoping to extend the protection of Mickey Mouse)²² and once again

¹⁴ Kathryn M Foley, 'Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide' (2009) 41 Conn L Rev 921, 925-926.

¹⁵ *Detective Comics Inc v Bruns Publications Inc* 111 F 2d 432 (2nd Cir 1940).

¹⁶ Richard H Jones, 'The Myth of the Idea/Expression Dichotomy in Copyright Law' (1990) 10 Pace L Rev 551, 551.

¹⁷ *Walt Disney Co v Powell* 897 F 2d 565 (DC Circ 1990).

¹⁸ Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIAMI ENT. & SPORTS L. REV. 437, 439-40 (1994) ("Copyright strikes a balance between providing incentives to create and protecting the public domain from being stripped of the raw materials needed for new creations.").

¹⁹ *See id.*

²⁰ See Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1474, 1476 (2004); The traditional utilitarian justification for U.S. copyright law is reflected in the U.S. Constitution, which grants Congress the authority "to promote the progress of science and useful arts by securing for limited periods of time to authors and inventors the exclusive right to their respective writings and discoveries." [See U.S. Constitution Article I Section 8 Clause 8]. The ability of Congress to administer copyrights can be viewed as a "copyright bargain" because it allows Congress to simultaneously encourage innovation while avoiding the granting of unlimited monopolies [1478-88].

²¹ 17 U.S.C. S. 302 (2018).

²² *See generally* Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001) (referring

extended this term an additional 20 years, totalling the life of the author plus 70 years (or for a work made for hire—120 years after creation or 95 years after publication, whichever is earlier).²³ As a result of the CTEA, works that were set to go into the public domain in 1999 were “frozen” for another 20 years. No works entered the public domain between 1999 and 2018. While there was speculation that lobbyists might try to further delay and convince Congress to pass an additional Extension Act, this did not occur.²⁴ Therefore, as of January 1, 2019, works of famous authors, filmmakers, and musicians from the year 1923, such as Cecil B. DeMille’s *The Ten Commandments*,²⁵ Charlie Chaplin’s *The Pilgrim*,²⁶ and Edgar Rice Burroughs’ *Tarzan and the Golden Lion*,²⁷ finally entered the public domain just as creative works used to do every year prior to 1998.²⁸ Barring a change in the laws, works will continue to enter the public domain in each successive year.²⁹ Therefore, in under four years from now, on January 1, 2024, Mickey Mouse, too, will enter the public domain.³⁰ It will be followed in subsequent years by many of Disney’s other classic films including *Snow White and the Seven Dwarves*³¹ (in 2027), *Pinocchio*³² (in 2030), *Fantasia*³³ (in 2030), *Dumbo*³⁴ (in

to the CTEA as the Mickey Mouse Protection Act).

²³ 17 U.S.C. §302 (2018); see also *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding the constitutionality of the CTEA).

²⁴ See Timothy B. Lee, *Free Mickey—Why Mickey Mouse’s 1998 Copyright Extension Probably Won’t Happen Again*, ARS TECHNICA (Jan 8, 2018), <https://arstechnica.com/tech-policy/2018/01/hollywood-says-its-not-planning-another-copyright-extension-push/> (In the past twenty years, there have been significant changes in politics, lobbying efforts, and the rise of internet companies that oppose strong copyright).

²⁵ *The Ten Commandments* (Paramount Pictures 1923).

²⁶ *The Pilgrim* (Associated First National Pictures 1923).

²⁷ *Edgar Rice Burroughs, Tarzan And The Golden Lion* (A. C. McClurg, 1923).

²⁸ See *January 1, 2019 Is (Finally) Public Domain Day: Works From 1923 Are Open To All!*, DUKE L. SCH. CTR. FOR THE STUDY OF THE PUB. DOMAIN, <https://law.duke.edu/cspd/publicdomainday/2019/> (last visited Nov. 8, 2022) (containing a list of works entering the public domain in 2019 and a comparison of works that would have entered the public domain in 2019 absent the CTEA).

²⁹ See Lee, *supra* note 15 (discussing other works that will fall into the public domain in the next few years, including George Gershwin’s *Rhapsody in Blue*, F. Scott Fitzgerald’s *The Great Gatsby*, and Ernest Hemingway’s *The Sun Also Rises*. Additionally, the copyrights to Superman, Batman, Disney’s *Snow White*, and early Looney Tunes characters will all fall into the public domain between 2031 and 2035.).

³⁰ *Steamboat Willie* was published in 1928 and granted a 28-year term copyright under the 1909 Copyright Act (renewable for an additional 28 years). Disney renewed, and therefore the copyright would have expired in 1984 (1928+28+28). However, when the Copyright Act of 1976 was passed, it tacked on 19 additional years of protection for works published before 1978, to bring duration for pre-1976 Act works into line with those under the 1976 Act. 17 U.S.C. s. 304 (2012). Then, under the CTEA, an additional 20 years were added, bringing *Steamboat Willie* Mickey Mouse’s expiration date to December 31, 2023 (1984+19+20). Thus, Mickey Mouse will enter the public domain on January 1, 2024. *But see* Douglas A. Hedenkamp, *Free Mickey Mouse: Copyright Notice, Derivative Works and the Copyright Act of 1909*, 2 Va. Sports & Ent. L.J. 254, 255 (2003) (stating that legally Mickey Mouse is already in the public domain since Disney did not pursue the necessary registration procedures under the 1909 Copyright Act).

³¹ *Snow White and the Seven Dwarves* (Walt Disney Animation Studios 1937).

³² *Pinocchio* (Walt Disney Animation Studios 1940).

³³ *Fantasia* (Walt Disney Animation Studios 1940).

³⁴ *Dumbo* (Walt Disney Animation Studios 1941).

2031), *Bambi*³⁵ (in 2032), and *Cinderella*³⁶ (in 2040).”³⁷

V. COPYRIGHT ACT OF 1957

The Indian Copyright Act of 1957, along with subsequent amendments, provides the legal framework for copyright protection in India. The Act recognizes various forms of creative works, including literary, dramatic, musical, and artistic works, and grants exclusive rights to creators over their works.

Section 13 of the Copyright Act specifically enumerates the types of works that are eligible for copyright protection, which include literary and artistic works. Fictional characters, when embedded within such works, can benefit from these protections, provided they meet the criteria of originality and fixation.

Section 14 further elaborates on the exclusive rights granted to copyright holders, which include the right to authorize others to use the copyrighted work. This section is crucial for the protection of fictional characters, as it allows creators to control how their characters are used and exploited commercially.

³⁵ *Bambi* (Walt Disney Animation Studios 1942)

³⁶ *Cinderella* (Walt Disney Animation Studios 1950).

³⁷ *Supra* note 5.