Rewriting Batman and Copyright Infringement

By Aastha Mehta, a 5th Year law student of Amity Law School.

ABSTRACT

"Only one thing is impossible for God: To find any sense in any copyright law on the planet"- Mark Twain

Copyright law has certain interesting aspects to it, which will be showcased in this paper. The paper's main theme is understanding whether fictional and graphical characters from novels, cartoon strips in newspapers, comics and other literary work are subject to copyright law or not. This theme would not only demonstrate how the fictional characters and cartoons ingrained in our childhood memory are a part of the IPR regime, and makes "dry" subject of law, more interesting and relatable.

This paper delves into the law on copyrightability of characters, while also giving insights on different case laws of America and India, and exploring if the US law can be the correct approach to Indian copyright laws. While doing so, I would during the course of the essay also discuss the dearth of direct material in Indian law on this subject. It would also be necessary to understand the arguments in favor of having a copyright over fictional characters and cartoons, and also arguments opposing the sole use of such characters by authors and cartoonists, to the detriment of other creative souls and finally touching upon middle ground between the diagonally opposite theories.

Keywords: Copyrightability, fictional and cartoon characters, Indian law

Table of contents:

OVERVIEW OF THE ISSUE

The idea of this paper was inspired from a news piece some years ago, which was titled *"Don't copy 'Gutthi' warns Comedy Nights with Kapil producers"*[178]which was featuring how Viacom 18 has established its sole right over a famous character in a popular stand-up comedy show, and has given a newspaper notice for the same, indicating that anyone who would want to use the character even remotely, has to take prior permission of Viacom 18. Not considering the option of being a television gimmick, but the larger debate which has been sparked off is, is it possible to "own characters" by production houses, to the detriment of the artist, or to the detriment of other television shows which would want to tap into the talent of that same artist by offering him/her a similar role. Another question which needs keen research is what is the protection given to an author/cartoonist/artist for something which exists in recesses of his/her mind in the form of the character which he/she creates, and this is whatis going to be discussed in the upcoming sections.

Firstly, it is essential to demarcate the characters itself. Characters which can get copyright protection can be

1) a visual character e.g.: a cartoon character, or character of show/ drama etc.

2) a fictional character showcased by an author in a novel or a magazine.

The differences among them, though otherwise not relevant in terms of entertainment seems significant from point of view of copyright. Fictional characters havetheir visualization in varied form, since they do not have any visual reference anywhere in tangible form (with exception of it being reproduced in a movie or television show wherein it can get a visual

[178]*Sunitra Pacheco, The Indian Express available at http://www.indianexpress.com/news/dont-copy-gutthi-warn-comedy-nights-with-kapil-producers/1197206/2 (last visited on 25th January, 2016)*

representation). These characters come alive and are given shape only in the minds of the readers. So broadly categorized there are visually recognizable characters and there are characters which readers makefor themselves with their own fertile imagination, the latter though would have no solid form of depiction. Writing, sketching, playwriting are all creative medium of imaginative souls, and its association with law might seem a bit absurd at the beginning. However, copyright law has often witnessed the most bizarre form of human behavior, starting from dealing with stalwart actor like Amitabh Bachhan copyrighting his baritone voice to dispute over copyright issues on celebrity tattoos, a ready example of Mike Tyson's tattoo controversy. Copyright law adds chutzpahto the legal field.

Secondly, it would be important to know that copyright especially over characters, is also interlinked to trademark law, and also would enter the topic of unfair competition in the creative industry, but for the purpose of this paper, the author hassolely dealt with the theme of copyright.

Thirdly, the author would also like to point out the relevance of this topic in today's times. Fictional characters of novels or movies are of too much of an interest to the readers and movie-buff and many a times for them the protagonist, or even the antagonist's character might be more intriguing than the plot of the story itself. Readers will agree that these fictional characters and the different shades and nuances given to the character that make the story more worthwhile and makes the entire experience for readers and audience a satisfying mental and visual treat. The story wouldn't have been the same had it not been the character of Oliver Twist, or Harry Potter, set in their respective themes.

American Law on the copyrightability of fictional characters

American Law deals in depth with regard to the fictional characters of literary and cartoon works, not only expressly in their statue law, but also the plethora of case laws prove that the basic jurisprudence on this subject has grown from American law. Under the American law, copyright is form of protection for authors of "original authorship".[179] However one limiting factor which is relevant to the copyright over fictional characters is the tenet that copyright would not extend to any idea, process, system, method of operation, concept, principle or discovery regardless of the term in which it is described, explained, illustrated or embodied in such a work.[180] This indicates how copyright can be specifically for a particular literary or graphic work, but the essence or the broad theme can never be copyrighted since that would be in the public domain for the exploitation of all and other authors who can use the same general idea and make another work. A very classic example can be of the much acclaimed book "Twilight "written by Stephanie Meyer. The book can be copyrighted, however the theme behind the story i.e. werewolves and vampires cannot be copyrighted. These concepts should be available for the public and the artistic community for them to create newer stories and artistic works. It is a well-established principle of copyright law that in order to find copyright infringement one must "determine whether there has been copying of the expression of an idea than just the idea itself". [181]So the question arises that if idea themselves are not protected under the sphere of copyright law, then would specific characters get the protection from being abused or misused by other budding authors.

[179] *17 U.S.C § 102(a)*
[180] *17 U.S.C § 102(b)*
[181] *Sid & Marty Krofft Television Productions Inc. v. McDonald's Corporation 562 F.2d 1157,1163 (9th Circ. 1977)*

There are several tests by which Courts have tried to extend protection to many famous fictional personalities loved by all such as James Bond[182], Rocky Balboa[183] from the Rocky Film series, Tarzan[184] etc. however it should be kept in mind that these characters had specific screen persona to them, which made it easier for them to be copyrighted. However, when observed from a technical point, these fictional characters are abstractions and therefore have to be studied in detail for them to be copyrighted as compared to their visual counterparts which have a recognizable image and imprint on the minds of the viewers.

Therefore, the author would start by discussing the genesis of a well known test, which for the first time laid down a rule to demarcate which characters have the ability for them to be copyrighted by their authors. The first of it is ***"distinctively delineated test"***developed by Justice Learned Hand in *Nichols v. Universal Pictures*[185]which is the oft-quoted case when it comes to copyright over the fictional characters. The ratio of the case was the rule which was later proved to be of immense help for courts to understand the character's importance for a story line. The ratio was "**the less developed the character, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct"**. I further elaborate this by asking the readers how can a character be developed? While defining what is meant by a character it has been stated as follows in a famous case, as follows, *"character is said to be an aggregation of particular traits his creator selected for him"*[186]. There are some prominent characters the author has weaved to have their own independent characterization, completely distinct from the plot of the story itself. Therefore, the more unique and shaded a character is, or the more talented or differently described he or she is, the stronger the impression it would have on readers to have him fixed in their imagination, even if they would have forgotten the story itself. This makes it easier for courts to know whether such character is distinct and independent of the story plot. As described earlier, ideas or concepts cannot be copyrighted, however if a character travels beyond the idea i.e. James Bond is now associated beyond a British spy, assigning an unique identity of its own, and therefore copyrightable.[187]However for courts to know whether a particular character has an independent life of its own, it would have to delve it bit deeper, because an independent character is difficult to define or grasp clearly, since no two minds will conceive of it in precisely the same way. [188]

This led toevolution of different parameters that involved in knowing how a character would come within the ambit of copyright, which cannot be said to be supplementary to the delineated test, but is different way of approaching the same issue. The second test is the *"story being told test"*which was formulated in a dispute over a character named SAM SPADE which appeared in *The Maltese Falcon* novel written by Dashiell Hammett, wherein the Columbia Broadcasting System was sued by Warner Bros. as having exclusive contract of copyright over the use of this character in motion pictures, radio and television by virtue of grant given by the author to them.[189] Herein the court was of the opinion that character should be central figure, someone who was indeed an important character and ruling the issue at hand

[182] *Metro Goldwyn Mayer Inc. v. America Honda Motor Co. 900 F.Supp 1287 (C.D Cal 1995)*
[183] *Anderson v. Stallone 11 USPQ 2d 1167 (C.D Cal 1989)*
[184] *Edgar Rice Burroughs v. Metro Goldwyn Mayer 491 F.Supp 1320 (1980)*
[185] *45 F.2d 119 (2nd Circ.1930)*
[186] *Warner Bros Inc. v. American Broadcasting Cos. 720 F.2d 231,243 USPQ 97 (2nd Circ. 1983)*
[187] *Gregory Bernstein Understanding the Business of Entertainment: The Legal and Business essentials all Filmmakers should know (CRC Press, 2015) 22*
[188] *Leslie A. Kurtz The Independent Legal Lives of Fictional Character Wis. L. Rev. 429, 431 (1986)*
[189] *Warner Bros. Pictures v. Columbia Broadcasting System 16 F.2d 945 (9th Circuit, 1954) also read Dashiell Hammett v. Warner Bros Pictures 176 F.2d 145, 82 USPQ 27*

whether Sam Spade was covered under the copyright protection it said the following, *"It is conceivable that the characters really constitute the 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 the protection afforded by the copyright"*. In the end the author got the right of using his character in other stories, despite of the fact that he had assigned the rights in broadcasting to the Warner Bros. thereby reiterating the custom of the American law that a statutory right does not divest the author from other non-statutory or common law rights, for him/her to stop others from using his works.

But both these tests have been criticized at several points, due to new tests being created by different courts, which have proved to be more sound on legal reasoning. The main criticism offered by academicians about the distinctively delineated test is that it is too troublesome for judges and lawyers to make out one mental impression of a particular character, not only making the argument devoid of legality but leading to misapplication of copyright law. The peculiar characteristics of characters in novels are changing throughout the story, with the gradual development of the plot. The characters may have different moods and incidents associated to them in the book, which are the brainchild of the author. One can always err if one compares the original published work, and the copied version, since literary works can never have a uniform standard of comparing themselves with other similarly places works. As one author[190] who criticizes this test correctly puts it, this test makes *the judge sit in the place of the literary critic.* There are cases which demonstrate that this test is not a full-proof and complete test for determining copyrightability of the characters, since the end result of this test is protection of general abstraction on which the characters are based, or over-protection to the detriment of other artists. In the case of Cassidy [191]which is a classic example of mindless use of this test, wherein the Hopalong Cassidy was portrayed in the novel as someone who was violent and tobacco chewing, a typical rough cowboy image, whereas the Cassidy which was then brought live on the movie screen was kind and sentimental, clearly a contrasting depiction of the novel's character. The Courts here, still went ahead to protect the literary character, calling it an infringement of copyright, and ignoring the vast variations used by two mediums of the same character, based on aforementioned tests. Some authors have gone to the extent to saying that courts have laid down the words "distinctively delineated" and "fully developed" only to solidify their reasoning of granting protection to fictional characters.[192]

The same loopholes hold true for the *"story being told test"* since that test tries to differentiate between the character who is central to the story, and a character who acts as a vehicle in just building the story. This test expects judges to actually apply their individual understanding of the work, and decide accordingly which character was prominent in the literary work, based on his taste of literature and then afford copyright protection, which might not be accepted by readers, since one can never have a same view on the characters of a book. It actually means giving lot of "literary interpretational powers" to courts, which is was never their ambit to do so. It also adds subjectivity in law, which can be harmful for legal certainty.

There are other tests such as *intrinsic test* and *extrinsic test* which have been laid down, for the purpose of copyright of fictional characters which have helped the

[190] *Kurtz, supra note 10 at 457-459*

[191] *Filmvideo Releasing Corporation v. Hastings 509 F.Supp 60 (S.D.N.Y) 1981*

[192] *Gregory S. Schienke The Spawn of Learned Hand- A Re-examination of Copyright Protection and Fictional Characters: How distinctly delineated must the story be told? 9 MARQ. INTELL. PROP. LAW.REV 81 (2005)*

courts to ascertain which character can be brought under the ambit of copyright protection, when other previously laid down tests are not able to provide answers. *Twentieth Century Fox Film Corporation v. Stonesifur*[193] is the case which underlines what is the true nature of these tests. Extrinsic test is described as a scenario *where plot, characters, settings, dialogues and other details of the two works are compared.*It is a test which analyzes specific objective things in a story, making it appear like a better planned dissection, giving a judge various above mentioned elements to compare between two works.The intrinsic test is the one where *the two works involved are considered and tested, not hyper critically or with meticulous scrutiny, but by the observations and impressions of an average reasonable reader and spectator.*The same test is more eloquently carved out when it is said that intrinsic test asks whether the "*the total concept and feel" of the two works are substantially similar.*[194]Intrinsic test again, allows the judges to enter into the minds of book readers and comprehend whether the entire theme and idea is just a rip-off of an earlier publication. My independent opinion is, these tests if applied together can give a wholesome picture of both, original and allegedly infringing work. It answers the questions about whether there has been infringement to such an extent that one needs to make the character copyrighted, which also means taking him off the public domain for exploitation and giving the character's sole use to the author. The extrinsic and intrinsic test was developed as a two-tier test, to be applied simultaneously in a famous 9th Circuit Court decision of *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp*[195]., and as on 2013 has been cited in 309 federal court decisions, which gives an idea of the influence of the judgment.[196] The judgment of *Krofft*, relied on an earlier case of *Arnstein v. Porter*[197]for the purpose of the extrinsic/intrinsic application. But it is essential to note that *Porter* judgment was based on copying/unlawful appropriation dichotomy, whereby Court held, merely copying the idea isn't enough for copyright protection, unless the character hasn't been copied to the degree of the unlawful appropriation. Secondly, it is also stated by one author that *Krofft* is a misleading interpretation of the *Porter* decision, and the terminology of 'intrinsic/extrinsic'is confusing and inapt.[198] However, one US decision, goes on to say that for all practical purposes, the differences between *Porter* and *Krofft* is meaningless, and in its application the differences which come across are minimal.[199]However, the author respectfully disagrees with this academic criticisms levelled to show that these tests still hold true, and can be used.

Intrinsic/extrinsic test has undergone a gradual evolution, where courts have allowed some aspects in both these tests to be modified which has been described in detail in a book by Osterberg & Osterberg. [200] Author proposes a middle ground, whereby an amalgamation of both these tests is used, without one being given weight over the other. Primary reason for this is, neither of the tests in themselves are sufficient enough to be applied on its own. Application of both of the tests, though burdensome for interpretation, need not require strict interpretation. A middle path can be adopted by way of ensuring that a character is sufficiently protected from the angle of a reader (intrinsic) and also on the grounds

[193] *140 F.2d 579,582 (9th Circ.1944)*
[194] *Litchfield v. Speilberg 736 F.2d 1352,1357 (9th Circ.1984)*
[195]*supra fn.4*
[196] *Pamela Sameulson, A fresh Look at the tests for nonliteral copyright infringement Northwestern University Law Review, Volume 107, No.4, 1287 (2013)*
[197] *154 F.2d 464 (2nd Cir 1946)*
[198]*supra, footnote 19 at page 1829-1830*
[199] *Dawson v. Hinshaw Music Inc. 905 F.2d 731,732 (4th Cir 1990)*
[200] *Robert C. Osterberg & Eric C. Osterberg, Substantial Similarity in Copyright Law (Practising Law Initiative, 2016) §3:2.1*

of an objective piecemeal analysis (extrinsic). Simultaneous application will ensure that ideas and concepts are not easily made subject of copyright leaving ample creative space, and will also ensure that on fulfilling both the conditions the aggrieved creators gets his character back. The degree of proof is made higher by application of both the tests, to encourage new literary works, however, at the same time, authors of fictional character are not over-burdened, since in case of clear copying of character, the tests might not be difficult to meet. Academic literature, further, explains these "intrinsic/extrinsic" test by stating, that, intrinsic test is focusing on the "total concept and feel" of the works in question, whereas, extrinsic test is more about expert testimony and dissecting each component of the two characters and then listing them to find a similarity of ideas. [201]

By ensuring a middle ground, we include not only an ordinary reader's perspective of "total feel and concept"but there is also an evidentiary value attached by producing expert testimonies, and analyses on an objective plank, whether the infringing character, is really substantially the same as the one which the copyrighted author has used. This ensures, a layman's understanding is put into the decision, supplemented by objective and thorough dissection of the characters.

Here the author would like to bring in the concept of **"scenes 'a faire"** which is closely linked with the above mentioned intrinsic and extrinsic tests. Courts and literature world have undoubtedly agreed to one fact which is the essence of this French word that many characters naturally flow from a given topic and thus do not qualify for a copyright protection, since "expressions indispensable and naturally associated with the treatment of a given idea are treated like ideas and are therefore not protected under copyright.[202] Therefore something a concept like "Satan" was not given copyright protection, as it was a depiction of eternal damnation which was a story about Judas and his alleged betrayal of Jesus, which made the courts conclude that indeed, certain concepts which are abstract, and necessary for particular genre, can never be copyrighted[203], as it would hinder the creative expression and though process of other talented minds.

Therefore, a more balanced approach would be to look at intrinsic test and extrinsic test together, and analyze whether something like a "scenes a' faire" would apply to make sure that what the courts are doing does not categorize itself as copyright on an idea but on a character. There is sometimes a hairline difference between a character and an idea or general concept, such as an ape man like Tarzan, which is the same as "Mowgli" or a character of spy, who would invariably be described with certain common characteristics. It has been described quite artistically by one author who says that by saying that a generic Southern plantation belle character will not be protected under copyright but Scarlett O'Hara will not appear in any other work without the approval of copyright owner so long as "Gone with the Wind" is protected under a valid copyright.[204]

There have been instances in the copyright law, where characters from commercials and television advertisements have been copyrighted too, an example is given below. This shows the enlarged concept of copyrightability with which American law is taking strides in protecting true economic motives for creative minds in their country. One such instance is character Bill, which was aired on television commercials and

[201] *Katherine Lippman, The Beginning of the end: Preliminary results of an empirical study of copyright substantial substantiality opinions in the U.S Circuit courts Michigan State Law Review 529,530 (2013)*

[202] *Rice v. Fox Broadcasting 330 F.3d 1175, 66 U.S.P.Q 2d 1829 (9th Circ. 2003)*

[203] *Michael Porto v. Stephen Adly Guirgis 659 F.Supp 597 (2009)*

[204] *Lauren Vanpelt Commentary on Copyright Extension: Mickey Mouse- A truly Public Character http://www.public.asu.edu/~dkarjala/publicdomain/Vanpelt-s99.html(31st January, 2016 1:39 pm)*

print advertisements as "a bald Caucasian male dressed in a costume resembling a stack of US dollars bills" being a metaphor for money that is not earning interest or any other form of investment return, was also ruled to be under the protection of copyright since it was fully developed character looking at the totality of his costume, even though he only appeared in 3 commercials.[205]

All this shows how copyright law is highly developed, but also proves to be good source of litigations in America in the field of literature and creative industry, making the law on this subject, if not clear, but truly a worth reading from academic point out of view, making it a nice subject for discussions, which touches beyond the realm of law at times. But as no law, or test can be perfect, and with each case, the jurisprudence needs to take new dimensions, especially in a field like a copyright law, where different issues, which are often the "first timers", Justice Learned Hand expressed it as follows, which sums up the position very correctly,

"Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." [206]

Indian Law on Copyrightability of Fictional Characters

Indian law on copyright is governed by Copyright Act 1957, and is a legislation which has proved to be extremely fruitful for the people. However, on this particular topic, there isn't much of case law developing. Indian authors have started showing their presence on the global forum, by many Indian cartoonists and literature lovers writing, creating, sketching and showing their intellectual expressions in various mediums. Even then we fail to get any apex court judgment on this question, indicating a different scenario from that in America. In this section the author discusses various High Court rulings which have indirectly looked into copyrightability of fictional characters. However, unlike American case laws, Indian jurisprudence has been used interchangeably by courts, as most of the cases which will be discussed below have had infringement of play or movie as the direct issue, and not that of literary characters. But with the movie industry booming, courts have time and again laid down rules in the infringement cases of films or plays, and used it in cases of fictional characters also.

Starting by discussing one of the major landmark case on infringement of copyright, which also has discussed a lot of earlier judgments, and has a strong precedential value on this subject is *R.G.Anand v. Deluxe Films*[207]. The case was concerning infringement of a play which was successful, being converted into a film by the defendant production company. The court ruled certain important concepts, which still hold true, though they can be considered secondary for our discussion, since they deal with infringement of a theme of film, and not fictional characters. Yet it would be important to name a few rules which were formulated after digging into a multitude of case law from various jurisdictions.[208] The first point which the court laid down was, in order to determine whether there has been copyright infringement, the surest way to do this is by seeing whether the reader, spectator who has had the chance to look at both the works, the original and the alleged copy (herein the play and subsequent film) and after viewing both he/she gets an unmistakable impression that the subsequent work is copy than that would

[205] *J.B oxford & Co. v. First Tennesse Bank National Association 427 F.Supp 2d 784 (2006)*
[206] *Peter Pan Fabrics Inc. v. Martin Weiner Corp 274 F.2d 487 (2nd Circ. 1960)*
[207] *1979 SCR(1) 218*
[208] *Corelli v. Gray 29 T.L.R 570; Hawkes and Sons (London) Pvt ltd. v. Paramount Film Service Ltd. [1967] 1 W.L.R 723*

amount to infringement. [209]However, the court also cautioned what would not amount to infringement, and that situation would be when there are other dissimilarities, along with similarities which will negative the intention to copy, it would appear that the similarities were only co-incidental and not amounting to infringement. Secondly when there is same theme being shown, but the presentation is different from the earlier, which would make the subsequent work get the shape of a whole new art work, it would not amount to infringement. [210]

Another important case is *V.T Thomas v. Malaya Manorama Company*[211] which has not exactly ruled whether any fictional character be it cartoon or literary figure can be copyrighted or not, but has dealt with a different aspect of this subject, by taking help from American case authorities. Section 17 of Copyright Act lays down the rule that owner of the work shall be first owner of the copyright, however proviso under clause (a) states that when any artistic work is made in the course of the employment, in absence of the contract contrary, will vest in proprietor. However, this right only extends to publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published. Court herein held that proviso (a) of section 17 is applicable. Herein the Kerala High Court, ruled two things, which by and large discuss the ownership of copyrights over cartoons, whether they remain with publishing house even after cessation of employment of the cartoonist, or with the author of the graphics, that is the cartoonist himself or herself. The first major proposition which the high court ruled was, taking substantial support from American jurisprudence[212], was that once cartoonist is employed by a publishing house, they do not acquire any property rights in the work, even if they were published during the course of employment of the cartoonist, and therefore logically not even after the employment of the cartoonist after employment is over. Circumstances of the employer are such that it is mighty institution which is financially sound and there is no indication to show that not using the cartoon of the outgoing employee has dropped the circulation of the publication company. Second major which needs to be highlighted is, the court took a stand for the freedom of creative expression of artists and cartoonists and observed *"It is better not to place such a premium on the intellectual activity of an artist. The creative faculties of an artist cannot be equated with vendible chattels reckonable only in terms of money."*[213]On the same case, there has been one more view point which needs a mention; however, I must agree it based only on an inference. According to this view[214], the court has somewhere impliedly drawn a distinction between drawing made by using the cartoon character and the cartoon character separately. However, author does not really agree to it, since the court have never brought about this distinction clearly, only focusing on who would own the character once the cartoonist leaves employment. The court did not grant copyright protection to the disputed cartoon figures "Boban and Molly" but it was the case which shed some light on the ownership aspects of the copyright over characters.

Also one very well-known doctrine used in Indian Law, which has generally not been used by American law, and is based on common understanding, is the doctrine of *"test of fading memory"*which was used in *Raja Pocket Books v. Radha pocket Books*[215]. In this case there was a dispute between two publishing houses over a comic character. Both the characters the

[209] *Supra fn.25, p.29*
[210] *id. p 38*
[211] *AIR 1988 Ker 291*
[212] *Fisher v. Star & Co. 231 N.Y 41*
[213] *Ibid para 20*
[214] *Sourav Kanti De Biswas, Copyrightability over Characters 9 The Journal of Intellectual Property rights 148-156 (2004)*
[215] *1997 (40) DRJ791*

original Nagraj and the alleged copy Nagesh were visually the same, and the court applied this doctrine which focuses on the point of view of a man of average intelligence having imperfect recollection, and if there is likelihood of confusion from this person's point of view, or if the target audience would have a feeling of alleged work being a copy of the original then, it could be said that there was clear cut copyright infringement. The court also held that both the characters have the same central idea, and therefore court ruled out these characters were held to be copyright infringement. It is pertinent to note here, that test of fading memory is more closely associated with the intrinsic test of US Courts. Intrinsic test just like a test of fading memory has a subjective element attached to it. However, extrinsic test of the *Krofft* has been seldom resorted to by Indian courts. The balance of intrinsic/extrinsic will be addressed in the end by the author.

There are different other cases laws which also deal with copyright issues of fictional characters however, they would fall under the category of cases on character merchandising, which is a different topic in itself. But limiting the scope of the paper, it is essential only to discuss the judicial approach towards such issues by the courts.

Statutory provision

When we look at Copyright Act of 1957, it defines in section 2(c) what is an "artistic work" and under clause (iii) it includes any work of artistic craftsmanship. But with the dearth of any strong case law on interpretation, the issue whether fictional character is under the ambit of this clause, is difficult to state in regards the Act. But a plain reading of the definition, prima facie does allow fictional characters to be within "artistic works", be it a cartoon, or a character in a book. Section 2(y) defines "work" which under clause (i) includes a literary, dramatic, musical or artistic work. This definitely broadens the scope through which fictional characters to be included under the Act's protection.

Does Indian law address the issue properly?

As discussed in preceding section, there has been quite a vacuum when it comes to any direct commentary or precedent on this major academic theme. The idea of copyright is twofold, firstly to give the author their due for putting in their so much hard work, and creativity behind any artistic expression, but also, secondly at the time, to give access to other minds to make use of characters, maybe in the form of fan fiction novels, or borrowing from famous works which would further give us more soul food for book lovers.

One question, however which the author wishes to address is, can Indian jurisprudence be inspired from US case laws? So far, Indian courts have relied on common law, but when it comes to US court decisions, they have a persuasive value only. The tests which are propounded by US courts though useful, might not function well with Indian laws. Supreme Court has cautioned us to look West invariably whenever there is a void in our law, in the following words, *"But India is India, and its individuality, in law and society, is attested by its National Charter, so that the statutory construction must be home-spun even if hospitable to alien thinking"*[216]Agreeing to this, the legal regime and circumstances in US can be contrasted from what it is India. The tests laid down by US courts can be a good starting point, but there are certain Indian fictional characters like Chacha Chaudhary, Chotta Bheem, Shaktimaan etc. which will have to be given protection in view of Indian Copyright Act. One must also note that Indian readers and literary lovers have a different

[216] *Bangalore Water Supply and Sewage Board v. R. Rajappa and Ors. 1978 AIR 548*

impression of Indian fictional characters. It is said by some that US's character delineation test will be applicable to India, but there is no sufficient reason provided for the same. [217]In this nascent stage, we do have trademark cases over movie characters and names of movies[218], however, fictional characters haven't been touched upon, resulting in author not coming across any literature arguing the application of US copyright protection pattern to India.

Indian law has not yet opened up to such copyright issues, since many case laws which author reviewed during the research period, always had an element of marketing, broadcasting or merchandising, thereby the decisions did not touch upon copyright.[219] These casesdid notprovide lengthy discussion directly on the ambit of copyright protection,. Especially when the literature and comic cartoon industry is growing rapidly, not only in the English language, but also in various other Indian regional languages, there needs to be some identifiable test or guidelines that need to be followed by courts. There is a need to have certain clear stance, since such things are very important to the authors and cartoonists.

Having said that US law might not really help us with Indian characters, author would discuss now whether the middle ground of intrinsic/extrinsic test given in *Krofft* decision could be of any help to us. Indian courts have gravitated towards intrinsic test, which as earlier discussed is an analysis of "total concept and feel" of the two works. In various High Court decisions[220], not directly dealing with fictional characters, "law observer test" has been applied, which states that would the two works (plaintiff and defendant's works) appear to persons, who are not experts in that field, appear to be a reproduction. *The test which the Courts have been applying in such cases is as to effect produced on the mind of the person who has seen the work of the plaintiff and also comes across the work of the defendant. The degree of resemblance between two works must be such that it suggests an impression, in the mind of the observer, that the work of the defendant is, in fact, the work of the plaintiff.*[221] Clearly, this embodies the intrinsic test, however, we do not find mention of extrinsic test. Importance of extrinsic test cannot be undermined. It is important to note that Delhi High Court[222], while deciding if serial "24" which was broadcasted at prime-time on Indian channel was similar to a film"Time Bomb"of the defendant, relied on *Krofft* decision. Reading of this case shows that court has partly looked into extrinsic test also, whereby there is application of extrinsic test simultaneously with an intrinsic test. [223] However, the decision was never based on the ratio of *Krofft* judgment, and many Indian judgments were relied upon to reach the decision. [224]The Court finally held that serial 24 was completely different from the defendant's film in question. In view of the absence of any decision on extrinsic test, which allows expert testimony etc., author would propose that courts should be more open to applying the extrinsic test as well, since it adds objectivity to the copyright infringement. Furthermore, extrinsic test has one advantage over intrinsic test, which is, that it allows some predictability in law. A methodical dissection of two fictional characters, supplemented by experts of those fields, can add to the creation of some

[217] *Kumarjeet Banerjee & Dr. Sreenivasulu N.S Sholay, Gabbar and Aag: Analysing the Legality of Copyright and Trademark Protection for titles and characters in movies, Manupatra http://www.manupatra.com/roundup/319/Articles/Sholay%20Aag%20TM%20and%20copyright%20by.pdf(last visited on 18th September 2016)*

[218] *Kanungo Media (P) Ltd v. RGV Film Factory and Ors 138 (2007) DLT 312*

[219] *Star India Private Ltd v. Leo Burnett (India) Pvt. Ltd. 2003 (27) PTC 81 (Bom) ; Chorion Rights Ltd v. M/s Ishan Apparel 2010 (43) PTC 616 (Del)*

[220]*Mother Diary Food and Vegetable Pvt Ltd v. Mallikarjun Dairy Products Pvt. Ltd 2012 (49)PTC 346 (Del). ; Associated Electronic and Electrical Industries v. Sharp Tools AIR 1991 Kant 406*

[221]*Mother Diary para. 9*

[222]*Twentieth Century Fox Film Corporation v. Zee Telefilms Ltd & Ors. 2012 (51) PTC 465 (Del)*

[223] *para 19 and 109*

[224] *NRI Film Production Associates v. Twentieth Century Fox Films ILR 2004 Kar 4530; R.G Anand v. Deluxe Films 1978 (4) SCC 118*

judicially manageable standards. This does not solely depend upon, what a layman feels or thinks. Law requires some stability and clarity of propositions; which extrinsic test can put forward.

Therefore, author states that extrinsic test should be equally looked into by Indian courts together with the intrinsic test or 'lay observer test.'

Conclusion

The author has tried to summarize the law on copyrightability of fictional characters, under the American and Indian Law, and have also by use of various judgment given the way in which both the countries have created their own tests and parameters, in order to protect something which is imaginary, however given the status by law to be protectable entity and alive in the minds of spectators and readers worldwide. Moreover, the author concludes that US law, though comparatively advanced, might not fill the void of Indian Laws. The *"test of fading memory"* of Indian courts and the *"character delineation test" "intrinsic/extrinsic test"* of US, give us a general overview of the different approaches existing in the two systems. But neither can be a replacement of the other. The author, therefore proposes a middle ground of the extrinsic/intrinsic test, which ensures that Indian Courts have higher standard for deciding copyright infringement. Author also has stated the Indian law, is more in favor of intrinsic test, but copyright protection for fictional characters, equally requires the application of extrinsic test.