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# EDITORS' NOTE

**Dear Readers,**

We proudly present Volume 3, Edition 3 of *Intellectualis* with the theme of 'A Vibrant Kaleidoscope of Influence: IPR & Pop Culture'. Through this issue, we have thrived to keep the tone of the e-newsletter contemporary while ensuring practical relevance of the same by mapping how Popular Culture has changed over a period of time.

You may have noticed that we have introduced various elements in the design of the e-newsletter along with other structural changes. We are grateful for the captivating and enriching contributions by our contributors, who have chosen divergent topics and created a beautiful amalgamation of Popular Culture and Intellectual Property Rights.

We hope that you take the time to read what our e-newsletter has to offer. We would like to extend our gratitude to the student body of School of Law, CHRIST (Deemed to be University) for their overwhelming response to the newsletter. We would also like to thank our Chairpersons, Dr. Avishek Chakraborty and Dr. Aradhana Satish Nair for constantly supporting us and guiding us through the drafting of this newsletter.

We hope you enjoy reading this Edition!

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# FOOD PRESENTATION- PROTECTION TO A PALATABLE ART

- Sahana R

## Introduction

Cooking and the presentation of food has become a dexterous and creative job today. Plating and food presentation are a culinary skill that requires innovation and craftsmanship. Pop culture has influenced the food industry immensely, mainly the food plating and presentation. The beliefs, trends, and ideas are recreated by chefs to enhance the dining experience in the restaurant. The increase in food photography, food blogs, programs etc. have given a new facet to the food and intellectual property rights industry. This article revolves around the intellectual property rights pertaining to food plating and the need for its protection under the Copyright Act, 1957.

## Need for protection

Food has always been an art and also an all-round experience of taste, visual appeal and smell. In today's world, having food at a restaurant is not merely for the sake of good tasty food but also to have an enriching experience which is enhanced by food presentation on a plate and various other tricks to attract the consumers. The chefs spend several hours to create a piece of mastery with the food and its presentation. This presentation makes the chef stand apart from the crowd and also is a valuable asset to the restaurant. Michelin star chefs around the world are known for their unique recipes and presentations such as Daniel Son's Soy Paper King Crab Hand Roll, Manish Mehrotra's Tuna Bhel Ceviche and many more that make these World class chefs special. There may be an attempt to plagiarize these recipes and plating, one such incident took place in 2006 where a Chef Robin Wickens from Melbourne tried to imitate the food plating of renowned American Chef Wylie Dufresne. As culinary science widens and has a great scope in India, in order to protect artistic food plating of chefs

there is a need for protection. In India, protection has not been granted for artistic food plating yet, however, with the advent of fine dining and culinary expertise there is a dire need for protection of original and artistic food plating styles.

Foodstagram and food blogging are certain new concepts in which bloggers capture photos of aesthetic food and put it up on social media and this is the order of the day. However, with this growth in popularity comes a serious concern among chefs that Foodstagram infringes on their intellectual property rights. The German Supreme court in the judgement "Birthday Train" lowered the threshold of originality traditionally required for obtaining copyright protection in the "applied arts." Due to this change in the law, the consumers who click photographs of the food may be held in copyright infringement.

## Protection under Copyright law

In India, The Copyright Act, 1957 protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized uses. Section 13(1)(a) of the Copyright Act protects original literary, dramatic, musical and artistic works. Artistic work is defined under Section 2(c)(iii) of the Copyright Act which states that any work of artistic craftsmanship shall be protected as under the Act. Furthermore, According to the Practice and Procedure Manual of the Copyright Office, Government of India, Works neither used nor capable of being used in relation to goods or services may include but not limited to paintings, photographs, sculpture, drawing, sketches, maps, charts etc. Therefore, food plating and presentation shall be treated as artistic works as it is an outcome of craftsmanship and art.

The test of originality must be used in order to determine whether the food presentation is an original work or not because the copyright law grants protection only to original artistic works. The Indian Supreme in the case *Eastern Book Company v D B Modak*, adopted the originality test and stated three parameters to consider whether a work is original or not. The parameters are minimal amount of creativity, the work must be independently created, and skill and judgment exercised by the creator. If the food plating done by the chef qualifies these parameters then, the artistic work is copyrightable under the Copyright Act 1957.

### Conclusion

A chef uses the plate as the base to create his form of art through food. As there is a rising concern about food plagiarism and plating designs, food plating and presentation must be brought under the purview of the Artistic work under Copyright Act 1957. The copyright protection is important to both the chef and the restaurant as it is a signature dish of the chef and helps to foster innovation and art. This protection to the chef will help the chef and the restaurant reap the benefits of the innovation. Furthermore, it is important to safeguard the food plating from food piracy and one such way is to have a 'No Photography Policy' of the food in the restaurant. This will not only protect the

intellectual property rights of the chef but also will not reduce the adventure for other consumers.

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## INTERSECTION OF POP CULTURE, VIDEO GAMES AND IP

### Introduction

With the advancement of technology and the interaction of mass media and popular culture, video games have become a driving force in the entertainment industry. It is not uncommon for video game producers to incorporate multiple aspects of pop culture to boost the game's appeal. These references to

-Sanjana Rebecca

pop culture also serve as a distinguishing factor and add uniqueness and value to the game in entirety, especially since the target audience for video games are mostly teenagers or young adults. In feeding the insatiable hunger for new games, as a video game developer or company it becomes imperative to adopt a proactive IP strategy owing to the collective

elements that encompass the making of a single video game. Video games are a form of artistic and creative expression and are therefore copyrightable excluding those elements of creative in-game artwork falling under the doctrine of *scène à faire* that are mandated to be included in a particular genre without which the genre cannot be executed. For instance, in a video game belonging to the sports category like FIFA, footballs, football nets and green grass are standard elements in a soccer game that cannot be exclusive to only one game as all game producers are required to include a football in order to produce a game based on soccer. However, certain compositions and sequences of standard elements of gameplay can be copyrighted.

### **Incorporation of Pop Culture**

Recently, Fortnite has emerged as a popular game, particularly owing to its extensive pop culture references such as its celebrity/character skins and signature dance emotes unlocked through in-game purchases. Fortnite is in risk of copyright infringement for the incorporation of these references into its gameplay especially in case of their dance emotes. Epic Games faced a lawsuit in 2018 by Rapper 2 Milly claiming that Fortnite infringed the copyright to his “Milly Rock” dance. Furthermore, Russell Horning, the “Backpack Kid” who invented the “Floss” dance, and Alfonso Ribeiro, who played Carlton Banks on *The Fresh Prince of Bel-Air*, also filed lawsuits against Fortnite for selling their dances as emotes and cashing in on their popularity. The legal representative on behalf of the “Orange shirt kid” also filed a lawsuit against a popularized dance which Epic Games turned into an emote known as “Orange Justice.” Under U.S Law, to prove copyright infringement, a copy rights-owner must prove that they own a valid copyright and that the alleged infringer copied original elements of that work. Under the Copyright Act 1976, there need not be a registered copyright by the author to entertain a copyright infringement claim. In the Fortnite lawsuits, the major question is whether the choreographed dances that are

utilized by Epic Games as emotes extending as 30 second sequences or compositions can be subject to copyright protection. If they can be indeed be protected under copyright law, then Fortnite must take a controversial stance of removing such emotes, obtain licensing for the same or stand in risk of copyright infringement. Furthermore, if the Court finds that the dances would not fall under the doctrine of fair use or de minimus use, then Fortnite would be entitled to pay damages to the respective plaintiffs and this would also open a portal for more litigation of the same nature to arise in the future.

Pop culture is intertwined with fan culture revolving around admiration for video games which leads to more IP related issues. Acquiring rights for derivative works can be difficult. As in the case of Lord of The Rings, in 2001 a licence had to be obtained by Electronic Arts from Peter Jackson who had obtained a licensing right over Tolkein's films. However EA could only produce derivative game content based on the LoR films. However, in 2005, EA also acquired a license to also produce a game based on Tolkien's published works. Taking into consideration, fan-creation games or parodies of games which have been recently been made easily accessible by the platform Dreams. This platform allows for derivative creative works and enables users to create emulations or remixes of games that are already protected under IP law. The End User's License agreement of the platform states that copyright ownership will lie with the content generators and the licensing is with the publisher Sony Interactive Entertainment. In terms of fair dealing, U.K extended its fair dealing protection to "parody and pastiche" in 2014 which would cover fan creations subject to exceptions. With reference to Indian copyright law, there is a lack of comprehensive understanding in the area of copyrightable content for game developers. However, the problem arises in determining permitted fair use that will not amount to infringement under Indian Copyright Act, 1957 fair

dealing or under Section 52(1) (a) of Copyright Act with respect to fan creations as transformative works that do not fall under any of categories under Section 52(2). The fair dealing protection for transformative works such as fan creations which is a creative derivation of the original work and is an imaginative expanse appreciating fan culture is not accorded protection through Indian precedent.

Under trademark law, the title or name, tagline, logo, character and distinctive packaging of gaming material can be trademarked. Companies also tend to register catchphrases or taglines associated with the game as a trademark to create brand identity and increased recognizability of the game through its overlap with pop culture. For example, Pokemon's trademarked tagline "Gotta Catch Em' All" is a popular reference that is undoubtedly associated with Pokemon and can be categorized as a suggestive mark that enables the user's imagination as it does not directly refer to the game but indirectly alludes to the game's objective which is catching poke balls. Similarly, in 2018, Nintendo trademarked its old and popular statement "It's On Like Donkey Kong" to protect the distinct catchphrase. In the above cases, the trademark rights belonged to the game producers who can sue against trademark infringement.

On the other end, in 2017, a gaming company by the name Anonymous Game Inc was sued for attempting to cash on the popular catchphrase "Cash me Ousside" and "How Bow Dat" by creating two games with Danielle Bregoli, the creator of the tagline, as an avatar voicing the catchphrases. Anonymouse Game Inc was forced to drop the pop culture reference and change the name of their games as the creator had filed a trademark for the phrase. Thus, it is important for video game producers when adopting pop culture references to ensure that the name or title of the video game does not lead to trademark infringement. In India, taglines have been granted protection under Section 2(m) of Trademarks Act, 1999 which defines

"mark". For instance, Ludo King, a game developed by the Indian studio Gametion Technologies Ltd tagline reads " Recall Your Childhood". For the tagline to be trademarked, as held by the Karnataka HC in the case of *Reebok India Company v. Gomzi Active*, the person claiming the benefit of distinctive usage has to establish that over a period of time the concerned trade slogan has developed a secondary meaning and goodwill. If Ludo King can prove that the tagline is unique and has specific distinctiveness only to the game, then the same can be trademarked.

### Conclusion

Pop culture has heavily influenced video game creation and promotion. Recently, gaming companies have started to notice that the best marketing strategy to adopt would be to use mass media to create a popular culture around the game or incorporate pop culture references to draw the target audience. In light of this, it becomes essential to look into the implications of intellectual property to safeguard the rights of creators. In India, the current position on gaming law and jurisprudence is very rudimentary and is not adequate enough to deal with the recent advancements in the field but the same can be dealt with by relying on complimentary laws from countries like the US that have made considerable progress in the area of gaming law.

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# THE WRITINGS ON THE WALL AND THE WRITINGS OF IP LAW

- **Nidhi Rachel Kurian**

Who would have imagined that drawing and writing on walls, the very thing that children are scolded for, would one day become a popular art form often questioning the various fallacies of political systems. The essence of graffiti itself lies in its illegality, in that they are normally done without the permission of authorities. Seeing as how it is quite often anti-establishment, seeking permission would be quite paradoxical. Thus comes the dilemma of providing legal rights to something that is inherently illegal.

## **Graffiti in Western Cultures vs. Graffiti in India**

Graffiti culture began to rise in New York around the 1960's when citizens took to the streets to express their discontent with capitalism or racism and rose to popularity with the explosion of hip-hop culture in the 1990's. Even though graffiti may be protected constitutionally under the drapes of freedom of expression, it's implications on intellectual property law is quite different. In India however, graffiti is of two kinds- creative and defacing. The defacing types normally include those cringe worthy love notes or phone numbers that is a common sight on ancient structures while the creative types bring colour and vibrancy to cities.

Unlike the rise of graffiti art in Western countries, graffiti has only sparingly been used to its true form in India and the notions of illegality differ. In countries like the United States where defacement of public spaces and property is governed by strict regulations, graffiti would be considered an act of vandalism and hence is anti-establishment, however in India, public urination, spitting, posting of bills etc. on walls is almost normal and hence graffiti art would only be a

welcome change as opposed to being treated as defacement or anti-establishment.

## **Graffiti under Copyright law**

The legality of an artwork, in this case graffiti, does not affect it's protection under copyright law because of the application of the sweat of the brow doctrine. Section 13(1) of the Copyright Act, 1957 provides that a copyright would subsist in any "original" literary or artistic work. According to the sweat of the brow doctrine, an author gains rights over their work by the mere diligence of producing it and does not require a substantial amount of creativity.

The meaning of the term originality was expanded in an English case, *University of London Press v. University Tutorial Press*, which held that originality was limited to the extent of the work originating from the author and the requirement of "labour, skill and judgement". Therefore as long as the graffiti is original, the artist would be entitled to a copyright to their work by the sheer fact that they took the efforts to create it. The purpose or intention with which the graffiti was created, which brings forth the question of legality, is irrelevant.

## **Drawbacks**

The drawback with copyright law, however, is that the protection provided does not prevent sale of the original work, its use in a manner that was not intended by the creator or it's destruction. In the case of *Creative Foundation v. Dreamland* which was majorly a property dispute, since the wall in question held an artwork by famous street artist Banksy, the court held that Banksy had copyright in the work and

that he was entitled to part of the proceeds received by the defendants by selling the wall carrying his artwork.

Similarly, in a 2018 New York case where the works of almost 45 street artists, painted over some buildings with the required permissions, were destroyed when the owner of the buildings whitewashed over it, the court declared a compensation of around \$7 million. While the artists in both cases were compensated for the unauthorised sale or destruction of their work, thereby establishing that the ownership of the artwork itself lies with the creator, their copyright in essence was infringed as their work was either used in a manner not intended by the artist or was completely destroyed. This can be traced to the fact that the artwork itself was created on property not owned by the creators. The owners of the property have a right to maintain and control their property itself regardless of what is painted on it. Due to this clash in ownership of the art and the canvas, the creator is ultimately at a disadvantage regardless of their work being put on the property legally or illegally.

This is a severe lacuna in copyright law that needs to be addressed. While India has not yet seen cases which bring about such dilemmas, with the rise of

graffiti in India and its growing commercial value there must be modifications made to the law such that the owner of the artwork can control and protect their artwork. A middle ground must be reached which benefits both the owners of the art and the canvas.

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# ELEMENTARY- COPYRIGHT PROTECTION AND DERIVATIVE LITERARY CHARACTERS

- Lian Cicily Joseph

## Introduction

The recent Netflix original show, *Enola Holmes* has been the subject of a recent copyright controversy. The estate of Sir Arthur Conan Doyle, the author of the famous series about the detective Sherlock Holmes sued Netflix and others alleging that the series was a copyright and trademark infringement. This article will only cover the case of copyright infringement as detailed by the estate. As per the original series, Sherlock has only a brother Mycroft and the addition of Enola been made via a spin off series authored by Nancy Springer in *The Enola Holmes Mysteries* published between 2006 – 2010. In a decision by the Seventh Circuit Court of Appeals, the court concluded that the character Sherlock Holmes was in the public domain and that the copyright for the works that were published before 1923 have all expired meaning that there were around 10 stories that were published between 1923 and 1927 that would still be legally protected and they would not expire until 95 years after the date of publication. This extension was provided vide the extension Copyright Extension Act and so depending on the date of publication, the copyright would expire between 2018-2022.

Interestingly in 2014, the court looked at whether copyright protection to a fictional character could be extended beyond the expiration of the copyright if the author has made changes/ altered the character in a subsequent work. The court answered in the negative but noted that the original elements of such derivative work can be given protection. In the current suit, the estate has argued that the characters in the last ten stories were drastically altered mirroring the experiences of the author Sir Arthur Conan Doyle and that the series both the books and the Netflix film

borrow from the derivative works of the fictional characters which are currently protected.

## Sherlock the ‘complex’ character Holmes

The argument primarily revolves around the changes made to the character Sherlock as he began to deviate from his “*his old stoic, rational and analytical self and became a warmer, more emotional, more respectful, and more altruistic character*” with the estate arguing that these changes were original additions to the character and thus were protected by copyright law. The question is therefore whether these incremental additions, something that the court in 2014 noted could make the character more well rounded and therefore original would be enough to gain protection and whether the versions appearing in the novels and the film could be perceived as copies of the protected derivative works.

In a motion filed to dismiss the petition, the counsel for Netflix argued that this is merely an attempt to create a ‘*perpetual copyright*’ since most of Sir Doyle’s work is in the public domain and is in opposition to the purpose of having a limitation on the period of protection of copyrighted material. It was also argued that while copyright law protected characters and specific traits, it does not protect generic concepts/ personality traits like ‘*warmth*’ and ‘*kindness to women.*’ In a bid to counter the claims that these traits and concepts were lacking in the previous works, the counsel brought up examples of occurrences from works in the public domain in which Sherlock apparently exhibited such traits concluding that they were in fact not original additions.

**Is being kind and respectful to women copyrightable material?**

The argument that the growth and development of the character warrants copyright protection is an interesting route to take. The defendants argued that this case was an example of copyright misuse a doctrine that is a dense in cases of copyright infringement in the United States. This ground is currently not accepted under Indian Law. The exceptions to infringement are found in section 52 of the Copyright Act, 1957 and recognises the grounds of fair use. The requirement in most cases of infringement is that the material so produced copies a substantial portion of the copyrighted material i.e. the test of ‘*substantial similarity*’. Courts in India have granted protection to the themes and major plotlines of copyrighted material and in the recent decision of the Bombay High Court in the case of *Shamoli Khan v Falguni Shah*, extended that protection to the theme plot and storyline that constituted the essence of the literary work.

While the facts of the case aren’t necessarily similar primarily since the literary work in question currently enjoys copyright protection, a web series was created based on the literary work with the author arguing that the central theme of the story i.e. a vanity box owned by a courtesan goes missing during riots and lands up in the hands of the looter. Courts have applied multiple standards and tests in the past in addition to the test of similarity with the primary goal of ensuring that creativity and freedom of expression is protected while preserving the essence of copyright law. In the aforementioned case the court stressed on a novel process known as the ‘*abstraction process*’ whereby aspects that do not have any bearings on the actual theme or plot i.e. embellishments are stripped away to reveal the actual material that can be protected which in this case is the ‘theme, plot and storyline’ of the protected work.

The case of the estate is complicated, it depends on whether or not the aspects that they claim to be original additions can be truly perceived as such. Character growth and development that forms part of

a larger storyline cannot be perceived as novel additions. On an application of the abstraction process identified by the court, the actual storyline, plot and themes discussed fall within the ambit of works currently in the public domain and if the only protectable material that is found in both works reflects commonly found traits and behaviours, the claim would fall short of the requirement of substantial similarity for cases of copyright infringement.

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# DETERMINING THE BOUNDARIES OF COPYRIGHT IN SEQUELS AND THE LIKE

- Shefali Fernandes

The film industry in India and the world is expanding by leaps and bounds. Movies and books are an integral and crucial part of pop culture today. The artistic world comprising of books, movies and cinema in general are known for the elements they bring in which are larger than life. So many of these are iconic and because of the immense popularity have not been limited to only one film or book. Sequels or in many cases prequels too are foreseen to mint money at the box office, on the basis of the first films popularity. Authors or Producers have made multiple parts to it as in the case of so many of fan favourites. Novels and Films like *The Lord of the Rings*, *Toy Story*, *Harry Potter*, *The Star war series*, have a common element. All of them are a series of books or movies, in other words, they all have sequels, prequels or multiple instalments.

While to cinephiles and bookworms, these sequels may be very much anticipated as in the case of *Avengers: endgame*, *Fast and Furious franchise*, however from a legal perspective, both book and movie sequels have difficulties in getting intellectual property rights for their works. The first problem is that contrary to popular belief, a sequel cannot be de facto granted copyright protection. If the original copyright holder thinks ahead, then while making the first film or book itself, he/she will ensure that they have been granted all rights that they require in case they ever wish to make a sequel in the future.

However, if the first film or a book is written by someone, and if another person wishes to make the next one, they need to take prior permission from the person who has a copyright over this material or is also known as the author of the work or legal heirs. This is necessary for publishing and sale of the same.

It is intriguing to know that if a book has been in a public domain for a long time, a sequel can be written to it after the copyright protection to it has expired. This is not the same for films. Fan fiction and parodies however do not require permission of the copyright holder as they generally come under the ambit of what constitutes fair use. Fair use permits any use of a copyrighted work which is either review, criticism, parody or for any academic purpose. When one adds, their creativity to an already existing work, enhances it and makes changes to this under the ambit of fair use, it will not attract legal action.

Therefore, while sequels are difficult to get copyright protection for, a person can create a parody which is essentially a manner of criticising, making fun or mocking icons, celebrities and public figures. Fanfictions also are not problematic however there is a clause, that being while one can write about movies, characters and so on, they are not permitted to write on real persons, that is the actors. These come in the domain of fair use under copyright law.

There are many barriers as to why sequels may not be able to get copyright protection on its own. This is mainly because of the idea-expression dichotomy as in the case of *Baker v. Selden*. The major problem arises in the fact, that plots and characters that form these films are generally ideas and it is a known principle that copyright does not protect ideas but their creative expression form to be the subject matter of copyright. This can lead to issues, as a sequel would generally reproduce a chunk of the main film or book in regard to characters and in continuity of the story line.

One would require to seek the permission of the original copyright holder to avoid getting tangled with lawsuits of unauthorised use. One must be careful with assignment and licensing of copyright for film sequels and movies as one can land in soup if due care and caution is not exercised over the same. Assignment deeds have to be clear and no ambiguity should be present. No person should assume that copyright protection for as many sequels as they wish is implied in the agreement, if the agreement itself is only to

grant rights for remaking a film. Furthermore, as copyright over the original matter vests with the author of the work that is in such case, the scriptwriter who writes the plots and scripts of the film, this constitutes literary work, but as the right of adaptation is not mentioned properly in the Act, one cannot claim that also. Therefore, exercising diligence and caution with regard to intellectual property while making a sequel to a popular film must be of paramount importance so as not result in a jeopardy later.

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## IN VOGUE: EXAMINING SUSTAINABILITY AND COPYRIGHT CHALLENGES IN THE WORLD OF FASHION

In today's world, the fashion industry has turned out to be one of the most polluting industries. Textile production constitutes 10% of the total carbon emissions, exhausts many water resources, and renders others unfit for consumption by releasing pollutants into these water bodies. In such a situation, sustainable fashion has become the need of the hour. It is important to create a legal framework which would force the various entities of the fashion industry, both large and small scale, to make fashion that is more sustainable. One obvious area of law that will find application here is environmental law. However, it

**-Amala G**

may surprising to know that intellectual property law plays a key and indispensable role in achieving this goal.

The legal environment in the fashion industry is a highly complex one, primarily because of a multitude of IP (particularly copyright) issues. It is these copyright issues that have resulted in an rampant and unbridled increase in fashion copying. The fashion world is infamous for its production of 'knock-offs' which is the practice of low-cost fast fashion retailers to overtly copy and produce the fashion designs of high end fashion houses and brands. At this juncture,

one might wonder as to why it is so easy for these retailers producing knock-offs to do so without facing any legal consequences. This can be answered by making a distinction between fashion designs, and other forms of art that receive copyright protection such as literature, movies, paintings and music, known collectively as 'pure arts'. The first reason for the distinction is that unlike the pure arts, fashion designs are mass produced and are of a highly commercial nature. The second reason is that it has been historically difficult and problematic for fashion designs to fulfil the criteria necessary for receiving copyright protection.

One might ask as to how this is related to the sustainability crisis in the fashion industry. Since the fashion industry operates in a vacuum devoid of copyright law, retailers are able to mass produce knock offs at a very low cost. This kind of mass production of textiles results in uncontrolled amounts of greenhouse gas emissions. Therefore, having copyright free spaces in the fashion industry encourages fashion copying further, having a detrimental effect on any hope for the sustainable development of the industry.

### **General copyright issues in the fashion industry**

Acquiring copyright protection for fashion designs is difficult for a number of reasons. As we know, copyright subsists from the moment in which a creative work comes into existence or is expressed. The first reason is that it becomes difficult to determine whether such a copyright subsists in a fashion design or not. The second reason is that fashion designs are predominantly influenced by the current trends, due to which different designers end up creating similar styles of clothing. It becomes difficult to distinguish between what is merely inspiration and what is copyright infringement. Further, some forms of copying like imitation, quotation and allusion are culturally accepted in the fashion industry.

If a designer simply takes inspiration from the work of another designer, it will typically not constitute copyright infringement. However, if a designer either duplicates completely or takes a substantial part of another designer's work, that might be construed as infringement. This is provided that the other designer's work enjoys copyright protection. This difficult problem of drawing a line between whether designers are simply participating in the ongoing fashion trend or are blatantly copying the work of another relates to the famous idea/expression dichotomy in copyright law.

The difference between pure arts and fashion designs was noted earlier in this article. Fashion designs fall under the category of applied art. If we examine the historical evolution of copyright law, it becomes apparent that applied art often falls outside the ambit of copyright protection as the originality threshold for applied art is very high. Lowering of this standard is slowly taking place but only in certain jurisdictions like the European Union. When it comes to applied art like fashion designs, the element of functionality is involved. During the designing process of such a design, if the process is dictated by the need for the product to fulfil a technical function, then the criterion of originality is not met. This is because the technical function of the garment has a vast influence on the design.

Therefore, very few fashion designs actually manage to satisfy the originality threshold and qualify for copyright protection. This absence of protection is what has helped fast fashion companies to mass produce cheap knock-offs with impunity.

### **Changing landscape due to the advent of Artificial Intelligence (AI)**

In recent years, AI is being employed in almost every aspect of the creation process in the fashion industry. One way that AI is used is to predict upcoming trends in the industry by data mining. However, this type of trend forecasting does not attract any copyright related

problems. Another way is when the AI assists the human fashion designer in certain key creative aspects. However, as there is significant human contribution here, the use of the AI does not give rise to further copyright issues. This scenario changes with the development of AI as an independent designer. For example, a GAN (a type of generative model) could be trained to design new garments by relying on a vast dataset of images of existing garments. An AI of this type is susceptible to infringe the copyright of the designers whose work it relies on. Further, if the copyright law system completely excludes AI-generated works from copyrightability, these designs will directly enter the public domain.

The copyright issues already existing in the fashion industry such as the inability of most fashion designs to fulfil the originality threshold is only increased manifold by the inception of AI-generated fashion designs. In the current copyright landscape, the works of the AI are even more likely to end up in the public domain without any protection whatsoever than the creation of the human counterparts.

## Conclusion

This trend is dangerous from the sustainability perspective. Several studies have already made it clear way too much clothing is being produced in the world. Consumers also are disposing off their clothing much more frequently than is required and are purchasing new trendier clothes. Many fast fashion brands also resort to the practice of burning unsold out of trend clothes. There is clearly a problem of overproduction and overconsumption. Under current copyright law, with much of the fashion designs being a part of the public domain, there is an incentive for the fast fashion companies to produce even more knock-offs in massive numbers as they do not face the risk of being sued for copyright infringement. Further, from the AI perspective, if all AI-generated fashion designs go directly to public domain, it may disincentivize

potential investors from investing in AI innovation. The low-IP environment allows for overproduction to flourish. Changes in the copyright system to reduce this trend is the need of the hour.

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# COPYRIGHT PROTECTION AGAINST PIRACY : THE RUNWAY EDITION

- Nanditha Vijay

Blurring the line between paying homage versus plagiarising the work of other designers continues to exist as a 'way of life' in the fashion industry. While high fashion houses and designers spend months crafting their best works, their nemesis, the fast-fashion industry, stays true to its name and makes sure to hit the streets with counterfeit and knockoffs in half the time. The act of over-exposure of designer goods to large retail markets has contributed to monetary loss for the original designers and fashion houses and caused a surge in fashion piracy. Unfortunately, the fast fashion industry is not the only enemy; there are numerous designers, irrespective of their status, known to have copied the works of others.

Piracy is defined as the unauthorized and illegal copying, distribution of materials or works of another that may or may not be protected by copyright, patent, or trademark. Piracy is categorized as counterfeits, where the counterfeiter imitates or copies the original work as well as the name of the original owner or any other trademark with an intention to pass-off or sell the product as an original; and knockoffs, where the copyist closely imitates the original work or mimics certain elements of it, and are sold under a different label or brand. Unfortunately, the global fashion and apparel industry valued at a trillion dollars enjoys very little intellectual property protection, making it a breeding ground for counterfeits and knockoffs.

Despite being a million-dollar industry in India, the fashion industry doesn't quite enjoy the cult following the tailors (master ji's), stores, and street sellers. One is quite familiar with 'Chandni Chowk' in Delhi, a bridal haven that is notoriously famous for its exact replicas of designer bridal couture at one-tenth of the

price of the original. From Sabyasachi and Manish Malhotra to Anamika Khanna and Abujani Sandeep Khosla, they have it all. These sellers go to great lengths to produce the exact replicas- from procuring close-up photographs of the original works from the fashion shows to attending ramp walks and go as far as purchasing the original couture. It is deemed an investment since the thriving market stores are flocked by customers the very day a famous celebrity is photographed wearing, owning, or endorsing the original couture. This is a reflection of how deep-rooted the problem of piracy is.

## The Piracy Paradox

Though fashion piracy has plagued the industry from time immemorial, legislators continue to debate the necessity of the implementation of stricter intellectual property protection. The advocates of intellectual property rights protection for fashion stress the need for more stringent laws to discourage the 'free-riding' of copyists, which curb innovative spirits of the original creators and lead to monetary loss. However, the opponents believe that piracy is a blessing to the industry, boosting creativity instead of stifling it. The Piracy Paradox by Raustiala and Sprigman highlights the lack of intellectual property rights, which has contributed to the industry's novelty and innovation by providing inspiration and has created the concept of 'trends'. However, they focus only on the lower groups of the fashion industry, replicating the works of higher groups of the fashion industry. In contrast, piracy is committed by all groups of the hierarchy in the fashion industry.

Chandni Chowk, the thriving market for bridal couture replicas, has won the hearts of the middle class who

yearn for a taste of luxury at an affordable price tag, but these boutiques and stores have been accused and called out by popular designers including Rohit Bal, Tarun Tahiliani, Sabyasachi Mukherjee for plagiarising and functioning as an organized racket sending people to their shows and factories to capture the designs to enable the smooth functioning of piracy market. This is a classic example of lower groups of the fashion industry trying to replicate the luxury designers' couture, which has invited numerous lawsuits. However, piracy exists between all layers of the fashion industry; luxury fashion houses also tend to free-ride on the works of local artisans, small scale brands, and independent designers.

In the recent case of People Tree Vs. Dior, the popular luxury fashion house was accused of copying the distinct block prints created by People Tree, a socio-commercial brand that works with local artisans in India using traditional techniques. This act would have gone unnoticed, had the copied couture not been worn by a celebrity featured on Elle's cover. The French luxury house was also accused of cultural appropriation and not honouring the work's cultural significance, as the original work had the artwork depicted using a traditional hand block print 'Dabu', a technique unique to artisans in Rajasthan.

### **Copyright Protection in India**

Fashion has evolved from its functional or utilitarian nature to being innovative, artistic and aesthetic works. In India, creators and designers often seek protection under the Copyright Act, 1957 that lays down the foundation of the copyright laws in the country. Designers register their works under Section 2 (c) of the Copyright Act which protects 'artistic works' whereas their designs can be registered and protected under classes of articles under the Designs Act 2000.

The Copyright Act, 1957 read along with the Design Act, 2000 provides a basic framework for the

protection of their original works and a small sense of relief to designers. Nevertheless, the Acts overlap, especially in the case of protection of registered designs. Section 11 of the Design Act prescribes for copyright protection of designs, registered as per the provisions, for a period of 10 years, while Section 22 of the Copyright Act, 1957 grants protection to copyright holders for the whole lifetime of the holder and for 60 years after the holder's death. However, Section 15 of the Copyright Act dictates that protection under the Act applies only to those designs that are not already registered under the Design Act, but any unregistered design can seek protection under this section. The Copyright Act not only protects unregistered designs but also designs incapable of being registered under the Design Act, 2000; however, under Section 15(2) the copyright protection ceases to exist in case the work with original design has been reproduced over 50 times. The case of Rajesh Masrani Vs. Tahiliani Design Pvt. Ltd was one of the first cases that addressed the distinction between copyright protection of an 'artistic work' versus that of a 'design', though an elaborate and clear distinction was made only in the case of Microfibres Inc. Vs. Girdhar & Co. where the original work was to be called 'artistic work' whereas the design developed for production from the original work was to be considered as 'design'.

Therefore, the Copyright Act, 1957 may offer better protection of the designers' original works under the category of 'artistic work' than the Design Act which only extends protection to registered designs, yet the protection offered is limited. The dilemma was addressed in the case of Ritika Private Limited Vs. Biba Apparels Private Limited, where the laws worked in favour of the petitioner, due to the copyrighted work with the design being reproduced over 50 times, thus losing copyright protection according to Section 15(2).

### **Conclusion**

Charles Caleb Colton may endorse imitation as the sincerest form of flattery, but it has been proved time and again that rampant plagiarism and imitation result in grievous consequences to the original creators, both ethically and commercially. Owing to the short shelf life of couture, the expensive and tedious process of copyrighting each design, designers often choose to not protect their works, which open up avenues for the piracy industry, which despite being sued by designers and called out by fashion piracy vigilant social media handles like Diet Prada, Diet Sabya, designers, and common people alike, continue to thrive. The jurisprudence of fashion law has evolved in the country over time to provide fair and better protection from piracy; however, the implementation of exclusive legislation to protect the fashion industry still stands to be the need of the hour.

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# APPLICABILITY OF THE FAIR USE DOCTRINE TO POP ART

- Joanna L Mathias

Pop art is an art movement that emerged in the United Kingdom and the United States in the mid-1950s. The movement presented a challenge to fine art traditions, including images from popular and mass culture, such as advertising, comic books and worldly mass-produced cultural objects. One of its aims is to use images of popular (as opposed to elitist) culture in art, highlighting the banal or kitschy elements of any culture, most often through the use of irony.<sup>1</sup> It is also associated with the use by artists of mechanical means of reproduction or rendering techniques. In pop art, material is sometimes visually removed from its known context, isolated or combined with non-related

material. Pop art often takes pictures that are currently used in advertising. Product labeling and logos feature prominently in the imagery chosen by pop artists, as shown on the Campbell's Soup Cans label, by Andy Warhol.

Fair Usage describes how copyrighted content may be used for commentary or criticism purposes without the permission or approval of the rights holder. In the United States this principle is based on the protection to freedom of expression provided for in their First Amendment of the Constitution. "Fair uses" are

strictly limited and are defined by four factors as follows:<sup>2</sup>

1. The intent and extent of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.;
2. The nature of the copyrighted work;
3. The volume and content of the section used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work

The law tries to straddle artist's rights to express themselves against other artists whose works they use. The question this article poses is whether pop artists' use of famous, trademarked or copyrighted products in the context of artistic expression is in violation of any IP laws and whether such uses are protected free speech, or are really nothing more than infringement and dilution cloaked in the guise of art. The legal analysis is not simple, and depends largely on the factual circumstances surrounding the use of the trademarked products.

The use of copyright content by an author is "appropriate" will depend solely on the facts and circumstances of the situation. The distinction between equal dealing and violation is a thin one. In India, there are no rules that specify the number of words or passages that can be used without the author's permission. This can only be decided by the Court applying simple common sense. However, it can be argued that the derived part should be such that it does not impact the author's significant interest. Fair trade is a major restriction to the copyright owner's exclusive privilege. It has been viewed by the courts on a variety of occasions by determining the economic effect it has on the copyright owner. Where the economic effect is not important, the use can constitute a reasonable deal. Fair use promotes "socially laudable purposes," generally, if not

exclusively, the use of copyrighted works by a second person.

The U.S. Copyright Act stipulates that "fair use of copyrighted material, including any use through duplication of copies... for reasons such as critique, comment, news reporting, teaching (including several copies for classroom use), scholarship, or study, is not a violation of copyright."<sup>3</sup> Some artists in an effort to address concerns about exposure to claims for trademark infringement, incorporate disclaimers in their catalogs or on websites that advise the consumer that the use of the trademarks is not licensed or authorized by the trademark owner. Although disclaimers can help to resolve potential misunderstanding, it does not guarantee freedom from liability. The legal result, as well as the enjoyment of pop art itself, can very well depend on the opinion of the spectator.

There is always a degree of uncertainty to what constitutes fair use. If the image is being used for commercial purposes then that would possibly be wrong but if the image is being used for a non-profitable or educational or even in the form of a parody then the artist is more likely to be protected from going to court.<sup>4</sup> More broadly, fair use does generally protect an artist when he or she appropriates a copyrighted work for a collage or composited result and the balance of other circumstances is in the artist's favor. It also depends on the nature of how you're using the copyrighted work. The "less original" or less creative your use, the weaker your fair use claim. The rights around artwork are much less straightforward than one would assume. In conclusion since pop art is a subjective concept and is always evolving, it can be said that fair use is a good defense for a copyright infringement but it solely depends on the facts of each case.

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## CASE INGOTS

-Anjali Saran

### **Bobbs-Merrill Company V Isidor Straus and Nathan Straus, 210 US 339, 1907**

This case was a [United States Supreme Court](#) decision concerning the scope of rights accorded owners of a [copyright](#) versus owners of a particular copy of a copyrighted work. This was a [case of first impression](#) concerning whether the [copyright laws](#) permit an owner to control a purchaser's subsequent sale of a copyrighted work. The court held first that the copyright statutes protect an owner's right to "multiply and sell" the work on their own terms. The [statutory right](#) to sell, however, did not also create a right to limit resale. The Court's ruling established

### **Chorion Rights Ltd. V Ishan Apparel[(2010) 43 PTC 616 (Del)]**

In this case, the defendants used 'Noddy', a popular fictional character for merchandising, which the plaintiffs claimed, was a violation of their trademark which they had registered first and also has been in use long before the defendant started using it. The Court here, due to lack of documents provided by the plaintiff, established that the defendants were the first party to get it trademarked.

### **Sulamangalam R. Jayalakshmi V Meta Musicals, Chennai(2000 PTC 681)**

The plaintiffs here, had filed a case for declaration and for other reliefs, seeking for interim relief through an order of interim injunction restraining the respondents/defendants from in any manner reproducing the Kandha Sashtl Kavacham and Kandha Guru Kavacham in audio cassettes or Compact Disc or any other media using the name of the first plaintiff and her deceased sister. Here, the case ruled that rights of the plaintiff have been Infringed by the respondents and consequently, the plaintiffs/applicants would be entitled to interim injunction sought for in this application against the defendants/respondents pending disposal of the suit.

# INTELLECTUAL PROPERTY RIGHTS, MOVIES AND COMIC CHARACTERS

-Abhisvara K

## Introduction

Some of the movie and comic characters have immense popularity among the public. Hugely popular characters like Mickey Mouse, Chotta Bheem, Shaktiman etc., have become a part and parcel of the life of millions of viewers. The owners and creators have several ways of making profits and goodwill arising from the popularity of these characters. Characters like the ones mentioned above are created by the artists by using their imagination in uniquely sculpting the character with specific traits so that the audience can easily recognize it, paving the way for the expression of an innovative idea. The creators of such unique characters would like to monetize their intellect as well as labor in shaping the character. Hence, they would seek avenues for getting protection for their creations.

It will help in preventing the misappropriation of these characters by third parties. In addition to the creators of the characters, licensees and advertisers too hold a common interest in getting economic benefits from these characters and so, wish to prevent their unauthorized usage by a third party and do not wish to lose the financial benefits. These reasons serve as the strong motives for the 'intellectual property rights' protection of characters, leading to their copyrightability gaining significance as the major avenue.

## Copyright Protection

The 1940 case of *Detective Comics v Bruns Publication* clearly illustrates the importance of determining copyright protection to graphic characters. In this case, the defendants produced a new character by the name 'Wonderman'. It exhibited similar physical as well as emotional features of the already popular cartoon character of 'Superman'. The court opined that the defendants largely borrowed several ideas from 'Superman' and also liberally copied pictorial and literary features from the plaintiff's copyright of the character. The court however refused to protect general ideas about Superman's character. The court opined that only when the character is portrayed in a significantly detailed manner, protection to such character can be given. The character needs to be fully developed from an idea stage to the status of clear expression. The mere concept of a person possessing superhuman powers is not a fit case for protection. Only when that idea is developed with characteristic features of 'Superman', the character gets transformed into an expression. Others have the liberty in developing a character with powers qualifying as superhuman. However, those characteristics and personalities should not be similar to the present character of Superman.

## Protection by Trademarks

Besides the copyright, a character can get protection under trademark law. Film studios utilize the trademarks to secure their principal characters and movie elements like Harry Potter, Spiderman, Superman and James Bond. Trademark law enables people to recognize the source of a product or service accurately, so that there is no possibility of confusion.

Trademarks are typically signs, slogans, brand names, and logos, but trademarks also include characters given the character is used with products or services (such as a logo, tag, or toy packaging). A trademark must be used in accordance with the use or selling of products or services. According to Section 2(i) (ZB) of the Trademarks Act, 1999, "a trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others."

Trademarks do not terminate as long as the trademark continues to be used in commerce by the owners. Characters as entertainment products function as marks that are recognized under the trademark law. For instance, both trademarks, the name and illustration of "Mickey Mouse" are owned by Disney. The registration of these iconic movie characters through trademarks will in turn open the door to lucrative deals for licensing and merchandising that can help mitigate movie production and promotion costs.

Hollywood's major production house, Walt Disney was perhaps the first to showcase the huge earning potential additional revenue from films as well as their popular characters. For example, their Mickey Mouse, globally the most famous iconic cartoon character was

registered as a trademark way back in 1928. By 2018, the iconic Disney mascot had clocked up global retail sales worth US\$12 billion and continues to show strong growth potential.

## Case Laws

Two court cases are quoted below to illustrate the protection of the copyrights of characters from the movies:

i) *Sholay Media and Entertainment Pvt Ltd. v. RGV Productions Pvt. Ltd.*

The Honourable Delhi High Court ordered the noted film director Ram Gopal Varma to pay Rs. 10 Lakhs as punitive fine. It was imposed for "intentionally and deliberately" copying the 1975 Hindi blockbuster movie 'Sholay', for violating the exclusive copyright vested with Sholay Media and Entertainment Pvt Ltd as well as for wrongfully utilizing the original protagonists of Gabbar Singh, Jai, Veeru and Radha from that film.

Justice Manmohan Singh's judgement went like this: "The publicity material coupled with the impugned film gives an overall impression that it is a remake of the film Sholay. The use of similar plot and characters in the impugned film coupled with the use of the underlying music, lyrics and background score and even dialogues from the original film Sholay amounts to infringement of the copyright of the film Sholay."

ii) In the *Arbaaz Khan v. Northstar Entertainment Pvt. Ltd. (Suit (L) No. 301 of 2016)* case, the Bombay High Court permitted the copyright to the character named 'Chulbul Pandey' from the Hindi film 'Dabangg', with the judge opining that this particular character is quintessentially distinctive with his

special characteristic style and makes it one of a distinctive kind. This character is easily recognizable from the entire film.

### Protection of Character

A landmark judgement related to the 'character protection' was *Walt Disney v Air Pirates*, where the defendants depicted Disney's characters in a completely inappropriate manner. The court ruled that a two-step test needs to be followed for determining the infringement of copyrights. The first step was to determine the visual similarities of the characters. It is followed by the second step when the first step fails to bring out the infringement. In the second step, the court would analyze the personalities of the cartoon characters. Here, the court held the defendants liable for copyright infringement. The second step of analyzing the personalities of the cartoon characters had to be done with the 'Character delineation' test, developed by Judge Learned Hand in the *Nichols v Universal Pictures* case. This test also came to be known as 'Nichols test'. It helps to determine 'whether the particular character is sufficiently and distinctively delineated so that it warrants protection.' Judge Hand in his judgement wrote that "It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct." In another famous case of *Anderson v. Stallone*, the judge opined that

when a character is identified with specific character traits spread across speaking mannerisms and physical characteristics, copyright protection is available for granting to such characters with unique characteristics.

### Conclusion

The widespread use and implementation of emerging digital technologies, including the Internet, are greatly shaping the industry hence requiring protection by the way of intellectual property rights.

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# FIRST BATTLE OF US SPACE FORCE: A TRADEMARK BATTLE

- Prateek Singh

A trademark is a sign capable of distinguishing one enterprise's goods or services from those of other enterprises.<sup>1</sup> Trademark and trademark registration are two different things but are almost universally treated as synonymous in Pop culture and social media. It is given for symbols, devices or names that are used to distinguish one manufacturer from another. Any distinctive name or symbol will be marked with <sup>TM</sup> at the top right of the same.

A registered trademark is designated with the symbol ®. This is when the company decides to register the Trademark against another company's name or image. This registration is a federal and legal registration of the mark.

A popular new comedy show was released on Netflix on May 29, 2020 starring Steve Carrell and several other big names in the industry titled "Space Force." The show revolved around the premise of the sixth branch of the military in the United States. This concept was taken into consideration after the Space Force was announced by President Trump and authorized by Congress on December 20, 2019. The "U.S. Space Force" (USSF) is a new branch of the Armed Forces. It was established on December 20, 2019, with the enactment of the Fiscal Year 2020 National Defence Authorization Act and will stand-up over the next 18 months. "The United State Space Force was established within the Department of the Air Force, meaning that Secretary of the Air Force has overall responsibility for the USSF, under the Secretary of Defence's guidance and direction. Additionally, the four-star general known as the Chief

of Space Operations (CSO) serves as the senior military member of the USSF."<sup>2</sup>

Netflix had applied to register "Space Force" as a trademark in other countries worldwide, but Netflix had not sought to register the title as a trademark in The United States. Although, on June 5, 2020, the Hollywood reporter wrote a headline that "Trump's Space Force already lost its first battle" bearing reference to United States Air Force's first battle defeat to a Netflix show in getting a trademark on its name. This may not have been accurate as they might have applied for a trademark, but the legal conclusion is something else. In the United States, trademarks are received the moment you use the mark in commerce in connection with particular goods and services. There is no process for acquiring trademark rights other than "Use in Commerce". Congress approved and authorized the sixth division of the defence called space force in December 2019 and began the organization that constituted as "use in commerce" in the United States; this is sufficient to acquire the trademark rights.

The reality of the situation is that the Department of Air Force is losing the race to protect the name "Space Force" as a trademark before Netflix can claim rights to the name for its television show as the government can easily claim priority to use the name. And in the race to protect the Trademark, the priority of use always trumps the filing date for the application of the trademark. Even if Netflix seeks to fight for the Trademark, there shouldn't be any issues with the government. The government will apply for the

trademark in classes of goods and services that do not include television shows or entertainment, or media.

Trademark and trademark rights exist to protect the consumer. In the absence of chance of any confusion, it is possible for both the Department of Air Force and Netflix to simultaneously own trademark rights in the name "Space Force." These titles can peacefully coexist with the government entities of similar or same names. Many government entities encourage these shows. The movie "Top Gun" is the most fantastic advertisement for recruitment by the U.S. Navy.<sup>3</sup> There was only a loose affiliation between the filmmakers and the government on that project. No one was confused.

No government trademark rights are currently at risk by any of Netflix's use of the name "Space Force." Presently, Netflix has secured the protection rights for the television series in various regions such as Australia, Europe, and Mexico (Europe and Mexico do not follow the *first-to-use* principle) and has

applied for registration of the mark for a wide range of products. On the contrary, the United States Air Force has only filed an *intent-to-use application* currently pending before the USPTO. Thus, even though no specific applications seeking protection of rights have been filed in the United States by Netflix, it appears that the latter may be able to show that it made use of the branding first and is therefore entitled to trademark protection. However, even if Netflix loses the case, it would still have a First Amendment right to continue selling the Space Force merchandise on the grounds of *satire and parody*.

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# THE CURIOUS CASE OF CAPTAIN MARVEL

**-Potluri Rakshit Keshav**

This article deals with the comicverse (comic universe) conflict over the name and character called Captain Marvel. Legal implications include the importance of trademarks and copyrights and maintaining them. Practical implications here deal with complications that arise in comic book names. The issue is that comic book titles are protected by copyright. Still, characters are protected by copyright, and Character names are protected by trademarks. Copyright is granted to the author automatically<sup>1</sup> (though legal registration is the best way to secure the copyright), a trademark is not<sup>2</sup>. This has led to the below case.

Captain Marvel, the protagonist of the 2019 movie, derives her origin from the comic book character of the same name, published by Marvel Comics. Captain Marvel, by Marvel comics - should have been an obvious pairing, right? Wrong. Captain Marvel found *his* (the first captain Marvel wasn't even a woman) origins in the books of Fawcett Comics, published in the late 1940s and early 1950s. A young boy, Billy Batson, became Captain Marvel until they were sued by Detective Comics (DC). And Marvel Comics wasn't even in the scene. In *National Comics Publications, Inc. v. Fawcett Publications, Inc. et al*<sup>3</sup> the suit was copyright infringement, alleging that

Captain Marvel had too many similarities to Superman; indeed, they could cite nearly 160 plagiarized panels. The appearance of Superman on the comics scene was progressive. His 1938 introduction in "Action Comics #1" brought forth the hero class. Captain Marvel was another legend that made his introduction in "Whiz Comics #2" in late 1939, distributed by Fawcett Comics. DC's contention was straightforward that Captain Marvel's driving forces and attributes were excessively like Superman and, in this way, infringed on its copyright. Fawcett contended that although these two characters were comparative, it wasn't to the point of encroachment. Relative accomplishments have just been performed by other anecdotal characters like Popeye or Tarzan. To demonstrate their view, National Comics arranged a cover more than 150 pages long with boards from their funnies of "Superman" compared to comparative boards of "Captain Marvel" featuring the too exceptional likenesses.

In the long run, the appointed authority decided that "Captain Marvel" was a duplicate of "Superman," however it was Fawcett who won the preliminary. Fawcett's attorneys found that McClure Syndicate, the news organization that distributed the "Superman" funnies, neglected to put the copyright images on a few of their strips and contended that DC had no copyright "Superman," and the court concurred. DC quickly bid, and the decision was overturned. Learned Hand, the adjudicator of the case, pronounced "Captain Marvel" an intentional and audacious copy of "Superman" and ordered Fawcett to stop the entirety of its distributions and pay DC for the damages it owes. In 1953, Fawcett settled with DC as much as two or three hundred thousand dollars and consented to quit distributing Captain Marvel <sup>4</sup>.

By 1967, Fawcett's brand name for Captain Marvel had slipped by, as they'd concurred with DC never to distribute tales about the character until "Kingdom

Come". Thus, Marvel Comics took advantage of the occasion to register the trademark themselves.

It wasn't until 1972, after five years, that DC purchased the rights to Fawcett's Captain Marvel, looking to clean off a lot of old superhuman properties and once again introduce them.

By that point, though, Marvel Comics had already been publishing comics centering around their own Captain Marvel for some time. DC had not used the character for years, and the rules with trademarks are "use it or lose it." Once Marvel Comics had a "Captain Marvel" character, they got the title's exclusive use. Hence they couldn't title the book *Captain Marvel* nor refer to the name as Captain Marvel in merchandising. Instead, DC titled *Shazam!*, the phrase Billy Batson uses to transform into Captain Marvel. This is why for years, many people not familiar with comics assumed the Fawcett/DC Captain Marvel was called Shazam.

This, however, hasn't led to a lengthy series of litigation between Marvel Comics and DC Comics over the use of "Captain Marvel" because, frankly, the trademark rights are unambiguous. Eventually, DC had to give up on the use of the name. They still owned the rights to the characterization and to "Shazam!" With the "New 52" reboot, they just decided to call their character Shazam and drop the Captain Marvel name altogether. This then led to one of the big jokes in the recent "Shazam!" movie because they are trying to find a character name. Of course, they can't use "Shazam!" because that word changes them back and forth between mortal and superhero.

Thus it is essential to note that research beforehand is better than lawsuit after.

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## *CASE INGOTS*

*-Anjali Saran*

### **Cadbury India Limited V Neeraj Food Products[ (2007) 35 PTC 95 (Del)]**

This case was filed against the defendants for using the trademark 'JAMES' or 'JAMES BOND' or any other trademark deceptively or confusingly similar to the plaintiff's registered trademark 'Gems'. The Court here accepted that the plaintiff's trademark had been used to defraud the customers and ordered the defendants to stop using the same with immediate effect.

### **Aamir Raza Husain V Cinevistaas Limited[(2003) 27 PTC 425 (Bom)]**

The case was based on questions with respect to the copyright in the script of an unfinished cinematograph film based on the Kargil War. This case was due to a fallout between the director and producer of the film. Ultimately, the Court decided in favour of the plaintiff.

# HARRY POTTER V. HARI PUTTAR OR INVISIBLE MAN V. MR INDIA: AN INTERFACE BETWEEN IPR AND FILM MEDIA

**-Ruthu Shivani**

Movies are a form of artistic expression that seeks to in-still a sense of wonder by inspiring and creating a powerful impact on minds across the world. Movies attempt to create a reflection of society and sheds light upon those social challenges and stigmas that are never openly discussed and are usually side-lined. Through movies, one traverses into the mind of another, and by doing so, not only does it involve the process of identifying with the character, it also gives room to perceive the world from a different point of view. The process of movie-making involves a fusion of multiple intricacies and complexities since it integrates the efforts of many professionals.

By the virtue of Section 13 of the Indian Copyright Act 1957<sup>1</sup>, the right to claim protection subsists only for expressions and not for ideas. Many Indian moviemakers usually base their contention on the fact that copyright cannot be claimed for concepts that they have acquired from the initial work of another producer. Therefore, there exists friction between expressions and ideas. The subtle difference between these two terms has posed a plethora of challenges before the Court since they too have not found a clear cut answer for the same. A cluster of thoughts, beliefs, and opinions concerning a particular theme is defined as ideas, and implementation of those ideas are expressions. The Indian entertainment industry has borrowed its ideas, music tunes, contents, and screenplays from Hollywood, Korean, and Cinema of Japan, etc. for quite a while now. With a significant

rise in box office collection, the Indian film industry claims to be one of the most colossal entertainment industries across the world. Being one among the highest revenue-generating industry, there emerges a need for developing a powerful IP regime that prevents infringement of such expressions and safeguards the rights and interests of the professionals involved in this movie-making process.

## **1. Ip Protection To Movie Titles**

One of the most important components of a movie is its title. A movie title is said to be one of the most crucial marketing technique since it creates the first impression on the viewer's mind. Therefore, devising an attractive title that attempts to convey the theme of the movie is the first step in paving way for a successful box office collection. Protecting original movie titles from being replicated has consistently been a daunting task for the producers based on the fact that there exists no separate provision for providing a remedy against the infringement of movie titles under the IP laws. Protection of movie titles is not incorporated under Section 13 of the Copyrights Act, 1957 and the same can also be deduced where the term 'movie titles' has not accounted for under Section 2(f) which is the definition clause of Cinematograph Act, 1952<sup>2</sup>. In *Krishika Lulla and Ors. Shyam Vithalrao Devkatta and Anr*<sup>3</sup>, the court carefully analyzed the matter in hand by referring to the term

‘literary work’ defined under Section 13 of the Indian Copyright Act, 1957 and rejected the plea on the basis that providing protection to movie titles is something very superficial and insignificant in nature.

The Madras High Court in the case *Lyca Productions vs. J. Manimaran and Ors*<sup>4</sup> reiterated the principle of *de minimis non-curat lex*, a Latin expression which states that “law does not govern trifles, the law ignores insignificant details”. This legal maxim means that law does not consider minor aspects of a matter. The Court dismissed the appeal by further rejecting the claim for protection over the movie title. But this took an interesting turn in the *Sholay, Gabbar, and Aag* case, a landmark judgment where the Court analyzed the definition of ‘marks’ defined under Section 2(zb) of the Trademarks Act, 1999<sup>5</sup> where the Court arrived at a conclusion that protection can be granted over movie titles under the Trademarks Act, 1999 provided that there exists innate uniqueness in the movie title<sup>6</sup>. The Trademark Act, 1999 clearly establishes that there is a likelihood that both the terms are interwoven and this link has constantly created uncertainties in the minds of the public with respect to the novelty of a trademark and therefore shall not be safeguarded under the Act.

## 2. Ip Protection To Movie Characters:

In addition to movie titles, movie characters are considered to be another domain which gives room to a lot of controversies with respect to claim copyright protection. Whether it is Amir Khan or PK, Thanos or Mickey Mouse, the unconventional qualities of these characters have become an integral part of our lives. In order to claim protection over a movie character, such a character must have the ability to possess features that can be distinguishable from another character<sup>7</sup>. In *Detective Comics vs Bruns Publications*<sup>8</sup>, the Court held that the creators of the character ‘Wonderwoman’

have borrowed more than required features and characteristics from the character ‘Superman’ and by doing, they have violated the copyright. In this manner, the Court believed that for a character to be yielded protection, it must be delineated in detail.

The Court has established multiple tests in order to determine the grounds on which a movie character can be granted copyright protection. In *Walt Disney Productions vs Air Pirates*<sup>9</sup>, the Character Delineation Test was applied. The court set out that the test analyzed the visual commonalities as well as the characteristics of the animated characters and arrived at a decision that the respondents were liable for copyright infringement. The Character Delineation Test, therefore, ascertains whether the unique features of the character is appropriately depicted with the goal that claims for protection over such titles is legitimate. The above cases highlight the fact that novelty forms an important part of claiming successful copyright protection over movie characters. Copyright protection of movie characters has always been a hot topic of discussion since it is often accompanied by confusion as to who is the real owner of the copyright of the character. In *Malyayla Manorama vs V.T Thomas*<sup>10</sup>, the plaintiff sued the defendant who was the original creator of the characters for infringing their copyright. The court dismissed the suit and stated that the copyright belongs to the original owner of such a creation and the plaintiffs had the opportunity to acquire rights over the character after employing the defendant for their newspaper but did not do so. When we carefully analyze the Indian and American copyright laws, we encounter some traces of commonalities between the two laws since both countries incorporate the Character Delineation Test to determine copyright infringement.

## Conclusion:

The Indian film industry is an amalgamation of multilingual Cinemas like Telugu, Kannada, Bengali,

Hindi, etc. and continues to remain the most massive out of all entertainment worlds. Borrowing ideas, themes, music tunes, and scripts have become a habitual process for Indian Cinemas and they have been inculcating the same in their everyday lives. This process has raised several questions upon their creativity as well as the originality they showcase. India must take adequate measures and borrow the concept of penalizing IP law infringers from nations like Malaysia and Taiwan. In order to witness a much stronger and stringent form of the IP regime, it is imperative that India adopts adequate measures to strengthen copyright enforcement as well as create forums that aim at educating the public about trademark and copyright laws.

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## IPR AND MERCHANDISING

- Anjali Saran

### Introduction

In layman's term, Merchandising stands for the promotion of goods, ideas, etc., for sale or trade. Earlier, it used to come under the ambit of 'Marketing', however, this has now become a full-fledged industry. Nevertheless, many famous logos & names, faces of prominent personalities, popular fictional characters, etc., are used for merchandising of different products with due permission of the required authorities and keeping all safety measures in place. But, it is sometimes misused by people with malicious intentions to gain illegal profits. It is even said that <sup>xv</sup>20 % or one out of every 5 products sold on e-commerce sites are fake, with unlicensed merchandising taking place.<sup>xv</sup> All this leads to substantive losses (which amounts to millions) to the actual owners of the product who have created it or

paid a royalty for merchandising. As stated by the US Supreme Court in *Bobbs-Merrill Company V Isidor Straus and Nathan Straus* [(1907) 210 US 339], <sup>iii</sup>"Infringement of a copyright is a trespass on a private domain owned and occupied by the owner of the copyright, and, therefore, protected by law, and infringement of copyright, or piracy which is synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by the statute on the owner of the copyright."<sup>iii</sup> Due to the transgression of these fundamental rights of the copyright owners, the need for IPR in this field has grown substantially in recent years.

### Requirement Of Ipr In Merchandising

There have been numerous cases of copyright and trademark infringements in the recent past. The famous cartoon character <sup>xv</sup>*Chhota Bheem's* parent company Green Gold Animations, in 2018, filed a case against Tech Connect Retail and Acme Housewares for unlawfully using the character for sale of various things ranging from pillow covers, bed sheets, shirts, pencil boxes, etc., on e-commerce sites like Flipkart, Snapdeal, and so on. Unsurprisingly, this is not a problem which only India suffers from.<sup>xv</sup> Even in <sup>xv</sup>China, a Shanghai based company filed a case against two other companies in the Zhenjiang city, who were then asked to pay US \$ 18,878 <sup>xv</sup>for violating the rights of the plaintiff and misusing '*Doraeman*', a famous Japanese cartoon character for selling their products.

In <sup>iv</sup>*Chorion Rights Ltd. V Ishan Apparel*[(2010) 43 PTC 616 (Del)], the plaintiff sought protection in respect of its worldwide trademark rights in the fictional character *Noddy*, based on a fantasy character created by Enid Blyton in the 1940s.<sup>iv</sup> The plaintiff filed a suit, alleging that the defendants were manufacturing and selling low-quality readymade child apparel under the trade name *Noddy*, thus capitalising on the popularity of the character. In this case, both the parties held registrations in respect of the trademark "*Noddy*". However, since the plaintiff couldn't prove that he was a prior user in India, but since the defendant was the first party to get a trademark registered, therefore the Court ruled in favour of the defendant. These cases just substantiate the importance of IPR in merchandising for the parent companies and it is the need of the hour.

### Different Types Of Merchandising

Merchandising today, according to me, can be classified into 2 broad categories- Character Merchandising and Sports Merchandising. Character Merchandising occurs when the face of a famous personality from any field like Amitabh Bacchan, Shah Rukh Khan, Chetan Bhagat, etc., or even fictional characters like Mickey Mouse, Elsa & Anna from *Frozen*, etc. are used for promotion of goods. In

the US, for example, during Halloween, candy wrappers flaunt of some famous cartoon characters to increase sales. Even in India, it is common to see images of characters on notebooks, water bottles, tiffin boxes, etc., being used. On the other hand, Sports Merchandising involves the promotion of Sports personalities or items related to teams & clubs, as well as things related to events, leagues, and tournaments. In India, the Indian Premier League is an event which enjoys pan-India viewership, and many people tend to buy shirts with their favourite team's logo or insignia on it. All this leads to huge profits to the owners of the copyright.

### Trademark Vs. Copyright

Most of the time, a person may use the words copyright and trademark interchangeably. However, although both of them are a part of the intellectual property rights of a person, yet they signify different things and are governed by different laws.<sup>viii</sup> The Copyright Act, 1957, which governs copyright laws in India, protects the original literary, dramatic, musical and artistic works, cinematograph films and sound recordings. It was passed to protect the original work, as well as the derivative works (as per Section 13 of the Act), and also provides for commercial manifestation of original work and the fields therein.<sup>viii</sup> On the other hand, <sup>ix</sup> Trademarks, which are governed by the Trade Marks Act, 1999, normally performs functions such as

- identification of goods of one trader and distinguishing them from another,
- it signifies that all goods bearing a particular mark come from one source
- it signifies that all the goods bearing a particular trademark are of the same level of quality
- it acts as a prime instrument in advertising and selling the goods.<sup>ix</sup>

<sup>v</sup>In *Sulamangalam R. Jayalakshmi V Meta Musicals, Chennai*(2000 PTC 681), the Madras High Court opined that "*copyright law is to protect the fruits of a man's work, labour skill or test from annexation by*

other people”.<sup>v</sup> <sup>vii</sup>In another case, the Bombay High Court ruled that “the idea in providing the copyright of a statutory protection is to encourage art and originality and not stifle it”<sup>vii</sup>. On the other hand, <sup>vi</sup> in *Cadbury India Limited V Neeraj Food Products*[(2007) 35 PTC 95 (Del)], which was regarding trademark, the Delhi High Court observed that “the spirit, intendment and purpose of the trademark legislation is to protect the trader and consumer against dishonest adoption of one’s trademark by another with the intention of capitalizing on the attached reputation and goodwill”.<sup>vi</sup>

## Conclusion

Although, the dimensions of IPR Laws are increasing, and the present laws are stringent enough, yet there is still a lot to be done to make the required people aware of their rights. Many a time, people fall prey to violation of their rights and are not able to enforce it because they are not aware of it. <sup>xiv</sup>In a survey, it was found that 35% of people were not aware of the IPR Laws.<sup>xiv</sup> Nowadays, the Government is trying to make people aware of the various provisions put in place through for their security with the help of their online sites. With time, we can only hope that this 35% decreases to 0 % in future.

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# PREVENTING DAMAGE TO GOODWILL: UNWANTED ASSOCIATIONS AND BRAND NAMES

- Shreya Sampathkumar

In order to ensure that a product or service empire prospers to its maximum extent, it is necessary that one safeguards and maintains the company image to capture consumers and considerable market share. Branding and marketing are vital so that competitors don't destroy the perception of goodwill that a brand has established. Customers stay loyal to a particular brand once they have proof and belief of its quality. However, this goodwill and brand equity can be destroyed in a number of ways by several competitors or saboteurs within or separate from the business. Perceiving this from an intellectual property rights standpoint, there can be threats to merchandising and sale such as counterfeiting, passing off, trademark squatting and cybersquatting.<sup>1</sup> Although there are several ways to prevent and curtail this kind of market behaviour, there is one type of inherent IP right violation that mostly goes unattended to, at least by traditional IP perspectives. The usage of brand names, even within copyright limits, by certain undesirable consumers slyly evades infringement, while also causing the brand extreme damage to the goodwill established by decades of hard work, especially for fashion houses.

For instance, Anders Behring Breivik, a mass murderer, responsible for a gruesome incident in Norway, released a manifesto entitled "2083, a European Declaration of Independence" where he explains his ideology as well as the preparations for the attacks. In that document, the mass murderer refers to the French sports brand "Lacoste" on a few occasions, clarifying that it is his favourite brand. This manifesto was heavily publicised, and several

associations were suspected to be present between the brand and Breivik. According to the media and various specialists, there is no doubt that Lacoste wanted to make sure that Breivik immediately would stop wearing their label.<sup>2</sup> This is a very understandable decision, considering the horrendous attacks that Breivik led. Rational brand owners would naturally try to overcome this damage to their reputation and preserve the brand. In today's scenario of rising social media influence, companies find it increasingly difficult to track how their brand names are being misused, and the extent of this misuse. The threat to brand reputation through unwanted associations is thus a fast, upcoming problem that is yet to be satisfactorily tackled by intellectual property law.

The Black Lives Matter movement has also triggered a mass revoking of brand associations by large companies with any entity or group that has or does not comply with the movement.

Psychological studies show that the classes of consumers that buy a particular product also contribute to its reputation. Burberry is a British luxury fashion brand, targeting especially higher-class consumers. The brand has had an increased popularity among hooligan groups, which has called for a reaction from the company. This action of Burberry is because the company is aware that the consumer base does play a vital role in its future reputation and the goodwill it will hold. While Burberry and Lacoste took unconventional ways of claiming them back to the good side, several other fashion brands such as Abercrombie & Fitch, which paid Michael "The Situation" Sorrentino, one of the stars of MTV's

controversial reality show ‘Jersey Shore’, in order to stop him from wearing its clothes on the show. The teen retailer asserted at the time that it was “deeply concerned” over the association between itself and Sorrentino and the brand. “We understand that the show is for entertainment purposes, but believe this association is contrary to the aspirational nature of our brand, and may be distressing to many of our fans,” the statement read.<sup>3</sup>

Examining all the current cases studies surrounding this issue that will potentially impact every global brand at least at some point in its venture, has a pattern of being tackled by first identifying the source

that is at the centre of the threat to goodwill damage. The quicker this source is identified, the faster this threat will be curtailed.

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# SOMETHING IN THE WAY: NIRVANA LLC V. MARC JACOBS

- Ishwarya Singh

## Facts

Nirvana, a rock band best known for popularising the grunge and the alternative rock genre of music, was formed in the late 1980s. The popular “Happy Face” with two Xs for eyes and a wriggly smile with the tip of the tongue jutting out of the left side of the mouth, has become synonymous to the band ever since it first appeared in 1991 on a flyer announcing the release of the bands second album, “*Nevermind*”. In 1992, Nirvana sought copyright over the “Happy Face”. The ‘Happy Face’ is used till date on the merchandise that is sold by Nirvana LLC, an estate of the band.

In November 2018, Marc Jacobs released its “Bootleg Redux Grunge” collection which reintroduced some of

the clothes that Marc had designed for the 1993 Grunge collection for another fashion designer. The collection featured a black t-shirt with the “Happy Face” that Nirvana has a copyright over, however the crossed eyes are replaced by the letters ‘M’ and ‘J’, the initials the of the brand, and ‘NIRVANA’ is replaced by the word ‘HEAVEN’ in the same Onyx font and yellow text. The same replication is made on 28 December 2018, Nirvana LLC filed a suit against Marc Jacobs before the Central District Court of California, for allegedly infringing their “Happy Face” logo. Neiman Marcus and Saks Fifth Avenue were also made defendants to the suits for selling the infringing apparel.

## Claims made by Nirvana

In its suit, Nirvana claimed that the use of the “Happy Face” by Marc Jacobs amounts to (i) copyright infringement, (ii) trademark infringement, (iii) false designation of the logo, and (iv) unfair competition. It further claimed that the use of the logo in the said collection was done intentionally, in order to make its grunge collection look more authentic, as it not only used the logo with the said modification as the face of the promotion campaign of the collection, but also made “conspicuous references” to two of the grunge band’s songs while promoting its collection online. It is claimed that the use of the “Happy Face” is “calculated to mislead the public into falsely believing that Nirvana endorses the entire 'Bootleg Redux Grunge' collection and [the] products [in] that collection that display [the “Happy Face”]...” The band fears that the unauthorised use of its logo poses a threat of dilution to the license to use the logo.

### **Marc Jacob’s Contention**

In response to Nirvana’s suit, Marc Jacob’s contended that (i) Nirvana has shown no sufficient proof of ownership over the copyright on the logo, as the logo was allegedly designed by the late lead singer of the band, Kurt Cobain, (ii) the copyright claim over the logo is invalid as the band failed to mention the date of publication of the logo design, and (iii) Nirvana has failed to show any similarity between the “Happy Face” logo and the design used by Marc Jacob’s in its collection. It further motioned for the dismissal of the infringement suit that was claimed by Nirvana.

### **Judgement**

The Court denied Marc Jacobs’ motion to dismiss the infringement suit, as it found that Nirvana had a valid claim against infringement. It found that firstly, there was substantial similarity between Nirvana’s “Happy Face” logo and the smiley face on Marc Jacobs’ clothing. It noted that both designs had an asymmetrical face, a “squiggle” smile, and a tongue sticking out on the same side of the face. The only difference that the Court noted was that the letters ‘M’ and ‘J’ had replaced the two ‘X’s as the eyes.

Secondly, as for the ownership over the copyright on the logo, the Court found that Nirvana LLC had the right to proceed with the suit as the logo and the name ‘NIRVANA’ was first assigned to the band in 1997, and then to Nirvana LLC in 1998.

Finally, the Court on the issue of publication and ‘first use’ of the logo, decided that the use of the logo by the band did not amount to “publication” under the Copyright Act. As per the Act, “publication” is defined as *“the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication”*. The Court held that the use of the logo by Nirvana on the flyers promoting the release of their new album in 1991 did not amount to publication of the logo as per the Act, since the posters were publicly displayed and that it did not amount to distribution through sale or transfer of ownership of the logo in any way.

The Court thus dismissed the motion moved by Marc Jacobs and its co-defendants.

### Conclusion

With brand equity becoming more and more important for companies, brands, and artists to sustain the tough competition in the entertainment industry, the intellectual property of brands becomes an imperative element that must be protected. Although the grunge band stopped creating music in the early 1990s, the band and its songs are still remembered and well-known amongst the masses that belong to the subsequent decade's generation. Nirvana has been able to maintain its popularity and cult-following for the

past two decades solely through the merchandise that it sells by licensing its trademarks to certain retailers like Target and Urban Outfitters. While the decision of the 9th Central District Court of California can be appealed against, the timely action taken by Nirvana against Marc Jacobs and its retailers must be appreciated. With a brand's reputation at stake, it is important that the requisite legal action must be taken timely in order to safeguard the invaluable intellectual property against the risk of dilution.

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## E-SPORTS AND IPR LAW

- PL Sravanti

*“To be a programmer, it is required that you understand the law as well as you do technology.” - Eric Allman*

In a case relating to eSports litigation in India, the fantasy cricket game Dream11 (operating on digital platforms) and developed by Sporta Technologies Pvt Ltd (Sporta) has engaged in a legal battle with DREAM 11 Team for the unauthorised usage of its trademarks. The court ruled in favour of Sporta Ltd as it had established a prima facie usage of its trademarks and gained an as-interim injunction. This marked the beginning of integration of e-sports within the realm of IP Laws.

A recent trend in IP laws has observed the increasing exposure to e-sports. E-sports are understood to be a competition held via digital platforms and corresponding simulations. The International Olympics Committee has announced that eSports or video games can be recognised as a sporting activity.

While sports and esports include characteristics such as skill, training, immediate judgement and training; there exist fundamental differences.

Sports reflect a feature of official partnership between events and partners (which usually does not include the athletes), but esports include the players within the circle of professional relations. While sports are constant in nature, e-sports represent a fad or a fluid trend.

The operation of a sporting activity is based on the development over years; whereas e-sport operates according to the market and the environment of the game.

Sports (such as football) do not fall within the category of works that are protected by copyright

laws. However, esports represent major issues for legal systems-

- a) There exists no links between the e-sport and legal system
- b) Any recognition may involve drastic implications for the traditional understanding of sports

The software of games under esports can be protected under the Indian Copyright law, as per the judgement of *Sony Computer Entertainment Europe v. Harmeet Singh*.

The development of e-sports have raised questions such as the role of cheat bots; and whether the gamer's techniques and interpretation of the game would act as a prerequisite for copyright.

End-user license agreements usually give gamers the right to play a video game on a non-commercial basis. The gamers create a persona "skin" which graphic or audio file, which, for example, can be used to change the appearance of the user interface to a program or for a game character, weapons, and other elements shown in the video game. "Skins" have been a subject of gambling, wherein third party websites have allowed persons to gamble/bet on esports matches. A recent spectacle of such sites on YouTube has highlighted the gray area and the lack of regulation over such activities. The legality of these domains have necessary implications for IPR regime. Currently, companies have resorted to suing on breach of terms of service, and not under gambling or IP issues.

In light of this, the American courts have held that players only generated a version of the creator's game and thus could not be considered as an author. The copyright Act 1957 defines adaptation to extend to 'any use of such work involving its rearrangement or alteration, also allows the copyright holder the right to 'make any adaptation of the work. Since, the usage of skins and performance in the game is merely a modification of the original content, the gamers are creating derivative works (which are allowed by the creator) and thus cannot be commercialised without authorisation.

Cheat bot is a software that autonomously processes certain tasks in a computer game. German courts have consistently allowed the usage of cheat bots by persons under the guise of observing, studying, or testing the functioning of said program to determine the ideas and principles which underlie any element of the program. However, using a cheat bot as a medium of sale undermined the copyright of the creator, does not amount to fair use, and result in unfair competition. This requires the creator to show the necessary element that the cheat bots are harmfully interfering with the rights of the players and loss of revenue.

A significant advantage in esports in the level of control exercised over image rights. In traditional sports, persons such as Michael Jordan and Roger Federer bear trademarks. In esports, this is controlled by clubs. While individual image rights have not gained momentum yet, it would raise important implications in the future, such as trademark of user tag, which forms the core of any player.

Esports present numerous challenges to the legal system, particularly in the adjudication of parties such as eGamers, game publishers, and organizers of eSports events. Given the issues of usage rights, scholarly opinions suggest inclusion of esports within the exception of "fair use", to reduce copyright infringement litigation. However, such modifications will not be lucrative for emerging e-gaming societies such as India, which will have to resort to compulsory licencing to attract developers on the grounds of free and fair competition in the realm of esports.

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