

# CHARACTER COPYRIGHT LAW

# Is a Fictional Character protected by Copyright?

Like Superman  
James Bond  
Chacha Chaudhri



# TESTS IN UNITED STATES

- ❑ SUFFICIENT DELINEATION TEST
- ❑ Nichols v. Universal Pictures Corporation; 45 F.2d119 (2d Cir. 1930)
  - ❑ Character must have “sufficient delineation”.
  - ❑ The plaintiff, playwright Anne Nichols, was the author of Abie's Irish Rose, a motion picture play about a young Jewish man who marries an Irish Catholic girl against the wishes of both of their fathers, with hilarity ensuing.
  - ❑ A lawsuit followed, with the plaintiff asserting copyright infringement based on the defendant's use of similar story elements.
  - ❑ The question before the Court was whether the defendant's film infringed the plaintiff's copyright in the play by using similar elements.

- Judge Learned Hand observed that “It is indeed scarcely credible that she should not have been aware of those stock figures, the low comedy Jew and Irishman. The defendant has not taken from her more than their prototypes have contained for many decades. If so, obviously so to generalize her copyright, would allow her to cover what was not original with her. .... It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”
- Thus, this case gave rise to the “sufficiently delineated” test.

- **“Story Being Told” test**
- Warner Bros v ABC; 216 F. 2d 945 (9<sup>th</sup> Cir, 1954)
- Dispute regarding copyright in the characters in ‘The Maltese Falcon’ story.
- Held: If Congress had intended the sale of the right to publish a copyrighted story would foreclose the author’s use of its characters in subsequent works, specific provisions would have been made.
- It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.
- The Court held that there exist copyright over the characters made by the plaintiff. New Position from the 9th circuit
- DC v Towle; 802 F.3d 1012 (9<sup>th</sup> Cir. 2015)
- Question before the Court was whether copyright exist over the batmonbile?

# CHARACTER COPYRIGHT LAW IN INDIA

- V.T Thomas v Malayala Manorama; AIR 1989 Ker 49
- The publishing house was enjoined from claiming ownership over the characters created by the cartoonist before joining the publishing house.
- The Court held that the publishing house could not restrain the cartoonist from continuing to draw the cartoons after leaving employment.
- The Court held that the publishing house could not restrain the cartoonist from continuing to draw the cartoons after leaving employment.
- The characters had been created by V T Thomas before joining Malayala Manorama and the publishing house had no role in the creation of the characters.

- Justice K. Sukumaran impliedly established that literary characters can be protected under Indian Law. Here, the primary question in the case was regarding who owned the copyright, rather than whether the copyright existed in the first place. The Court did not discuss the cases under which conditions a character could gain protection, nonetheless, allowed the creator to retain ownership over the characters so developed.
- Raja Pocket Books v. Radha Pocket Books; 1997 (40) DRJ 791
- Claim – action for temporary injunction against the defendant from circulating cover jackets, stickers or any other advertisement material promoting the impugned character under the impugned name "NAGESH", in any manner whatsoever, so as to be likely to amount to infringement of the plaintiff's copyright in the character "NAGRAJ"

- Justice Gupta of the Delhi HC did a comparative analysis of the two characters, assuming that the character “Nagraj” was copyrightable, without offering a test for character copyrightability and held that the character “Nagesh” infringes the copyright in the character “Nagraj”.
- Star India Private Limited v. Leo Burnett (India) Private Limited; (2003) 27 PTC 81
- The case revolved around using the TV show Kyunki Saas Bhi Kabhi Bahu Thi as a basis for a Tide detergent commercial and whether this violated copyright law.
- It was argued that by telecasting/broadcasting the commercial with the title Kyun Ki Bahu Bhi Kabhi Saas Banegi with identical characters. viz., Tulsi, Savita and J.D. , the defendants are infringing copyright in the character.



- An interesting test of “state of mind of public” – similar to the likelihood of confusion test for passing – off was applied by the court.
- The court held that “The characters to be merchandized must have gained some public recognition, that is, achieved a form of independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears”
- Arbaaz Khan Production Private Limited v. Northstar Entertainment Private Limited and Ors.; 2016 SCC OnLine Bom 1812
- The subject matter of the dispute was whether a copyright would subsist in one “Chulbul Pandey” from the Dabangg franchise and further, whether the same was infringed by the Defendants in their forthcoming film ‘Sardar Gabbar Singh’

- Justice Patel held that it is “possible to hold copyright not just in a literary work, but in a character. I understand this to mean the realization of a persona with iconic characteristics and traits that make him or her unique. The screen persona of Rocky from the Rocky franchise, James Bond from the film franchise (distinct from the literary character), certain characters from the Star Wars series (Darth Vader, Obi Wan Kenobi, Han Solo, Chewbacca, and others), .....are all possible examples”.
- The Judge declined to hold that character ‘Sardar Gabbar Singh’ of the Defendants was infringing ‘Chulbul Pandey’, at the interim stage.