



Character Merchandising: Exploring the Intersection of Intellectual Property and Commercial Exploitation

Sakshi Mehta[†], Suneel Kumar and Monika Kothiyal

ICFAI Law School, The ICFAI University, Dehradun – 248 011, India

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The evolution of character merchandising from its initial role as an adjunct to exploiting the distinctive traits of real or fictional personalities has resulted in significant revenue generation. However, stakeholders in India's entertainment landscape have encountered legal disparities amidst this evolution. This article elucidates the legal intricacies of character merchandising, focusing on celebrity or personality merchandising. It examines the inherent conflicts among Indian laws governing character merchandising and analyzes recent judicial developments, and the need for a balanced dispute resolution framework between copyright holders and celebrities. Through this analysis, the article provides valuable insights into navigating legal challenges and fostering equitable solutions in character merchandising within India's evolving legal framework. It delves into recent judicial pronouncements about character merchandising within the Indian legal landscape and examines the existing legal framework. Moreover, the study endeavors to devise a framework for harmonizing the interests of copyright holders and celebrities within the realm of character merchandising.

Keywords: Character Merchandising, Celebrity Rights, Personality rights, Domain Name, Image Rights

An effective merchandise strategy necessitates substantial effort and investment, with product packaging playing a pivotal role in consumer appeal. Leveraging well-established brands, particularly in India's burgeoning market for fictional character merchandising, has emerged as a lucrative approach. This entails utilizing intellectual property to enhance the attractiveness of goods and services, stimulating consumer purchasing behavior. Despite the escalating trend in character-based merchandise, India lacks a precise legal framework delineating the intellectual property rights associated with character sales.

In technical parlance, character merchandising is explained as the derivative or secondary exploitation, undertaken by the creator, a real individual, or authorized third parties, of a character's the fundamental attributes (e.g., name, likeness, appearance). This exploitation spans various goods and/or services, aimed at instigating consumer desire for acquisition or utilization due to their affinity with the character in question.¹ Consumers purchase merchandise featuring his/her beloved cartoon characters, such as bags, watches, and pens, often without consideration for the underlying licensing agreements or the creative efforts invested by the original creators.

Character merchandising, the process of developing marketable products based on recognizable characters from media such as movies and TV series, is on the rise. This trend sees companies strategically linking their products and services with renowned characters, whether fictional or real, to leverage their widespread appeal and capitalize on their established popularity.² Character merchandising has undergone significant evolution, surpassing the film industry as a primary source of commercial exploitation in terms of sales. Originating from the early days of character licensing by entities like Walt Disney Studios in the 1930s,³ character merchandising has evolved into complex forms, including modern film product placements like those seen in Toy Story. Diversifying of character merchandising methods necessitates systematic categorization to identify areas requiring protection.

Character merchandising constitutes a multifaceted arena, intersecting various commercial and legal interests. Copyright law primarily safeguards characters, while their commercial exploitation through sales invokes trademark law. Additionally, personal rights, contract law, and licensing agreements play pivotal roles in character merchandising protection. The interplay of trademark and copyright laws can further complicate matters, with characters often falling under the purview of both.

[†]Corresponding author: Email: m11sakshi@gmail.com

Copyright law safeguards the specific way ideas are expressed, not the underlying ideas themselves. For instance, if someone opened a café inspired by the Vampire Diaries TV series, featuring a Mystic Falls theme, they wouldn't be legally liable for copying Julie Plec's copyright because ideas aren't covered by copyright laws. However, if they used identical or similar visual elements directly from the show, like referencing characters such as Damon Salvatore or Elena, it would likely be considered infringement. This approach to intellectual property rejects the idea of protecting databases lacking originality or creativity. Instead, it suggests that copyright protection should only apply to the unique arrangement or presentation of facts within the database, not the facts themselves.⁴

In jurisdictions such as the United States, disclosure rights afford protection to characters, even those of lesser renown. Unauthorized use of characters without the owner's permission may constitute infringement, particularly when characters attain significant popularity. However, distinguishing between situations involving well-known characters and lesser-known ones can present challenges. Amidst this complexity, it's crucial to acknowledge the historical context, storyline, and supporting cast, as characters often take center stage in public memory while their broader narrative contexts are overlooked.⁵

Celebrity Merchandising

Celebrity merchandising is usually of two types – personality merchandising and image merchandising. Personality merchandising is the use of well-known people's identities in the promotion of products and services. Celebrities from a variety of fields, including sports, movies, politics, music, and others, cause some aspects of their identity to be associated with goods and services. Since such people are usually well-known by a wide segment of the population, this form of merchandising is often known as “*reputation merchandising*.” The trend of selling merchandise based on fictional characters played by real-life actors is relatively new. In picture merchandising, memorable photographs of characters from memorable movie scenes are used in product ads and marketing. It is often ambiguous whether the merchandise's subsequent market reaction is due to the character or the actor portraying the character. Image merchandising is a cross between fictional character and personality merchandising.⁶ If the character is fictional or played by a real person,

Indian courts have recognized the character's owner's interests in the character's prestige and goodwill, as long as the character's visibility grows beyond the show or series with which the character is affiliated.⁷

Sources of ‘Characters’ in Merchandising

The merchandising of fictional and cartoon characters represents a longstanding form of commercialization, leveraging distinct attributes of renowned characters, encompassing visual elements, names, imagery, and audio components like sounds or dialogues across consumer products. These manifestations span two-dimensional renditions such as drawings and stickers, as well as three-dimensional representations like dolls and key rings. Character origins stem from a variety of sources including literary, artistic, and cinematic creations.⁸

Literary Works

From timeless classics like Snowwhite and Cinderella to popular cartoon strips such as Garfield, Simpson, Shinchan, and Doraemon, literary creations have served as a significant wellspring of fictional and cartoon characters. While literary works themselves are copyrightable, the individual characteristics of characters remain within the realm of imagination, presenting challenges in legal protection.⁹

Cinematographic Works

Cinematographic productions, including animated movies, television serials, and multimedia commercials, wield substantial influence over audiences through character portrayal and characterization. The dissemination of characters in cinematographic works extends their reach significantly, amplifying their impact on viewers through visual and narrative engagement.¹⁰

Artistic Works

Artistic endeavors entail the creation of characters from imaginative constructs, elevating the visual prominence of fictional and cartoon characters beyond literary depictions. While readers typically visualize characters based on textual descriptions, characters originating from artistic works possess greater visual clarity and resonance.⁸

In the realm of cinematographic works, character creators may not always serve as primary users, with characters often fulfilling promotional, advertising, and recognition functions. Characters in such works are perceptible to viewers through visual and auditory

stimuli, as they are dynamically portrayed in motion. Notable examples encompass a plethora of animated films and series, including Mickey Mouse, Dora the Explorer, Inside Out, and The Jungle Book, among others.

Justification for Legal Protection

The following three key justifications for the right to merchandising or image rights should be considered:

- i Misappropriation of value,
- ii Privacy for personality,
- iii Economic justifications

Misappropriation of value - Locke's Theory of property

The theory of John Locke is based on the idea that a person who works on resources that are either not owned or shared has a natural property right to the fruits of his or her labour, and that the state has a responsibility to protect and enforce that natural right. These theories, which originated in John Locke's writings, are generally considered particularly relevant to the area of intellectual property.¹¹ Intuitions about self-ownership, according to Locke, point toward appropriating the fruits of one's labour based on creativity. Each person has a property in his or her own person, which includes the labour of his or her body and the work of his or her hands. It only makes sense that whatever he combines that labour with should also be his. The majority of the value of items useful to men comes from the labour that goes into making them, rather than the value of the raw materials used to make them. According to this viewpoint, intellectual property allows the inventor to be compensated for his work in order to enable him to continue to innovate. As a result, he will be more motivated to create and willing to share his work with the public. This creates a labour criterion of land, allowing individuals to assert ownership of all things they appropriate from nature through their labour.¹¹

When it comes to intellectual property, the labour principle has a flaw. Although the intellectual labourer has the same right to own the immediate fruits of his or her labour as anybody else, this right does not dictate the terms of publication. Such terms will probably be negotiated between the intellectual labourer and those desiring the intellectual good in a completely laissez-faire environment. According to Locke, in the state of nature there is no clear legislation dividing up ownership or granting

someone the right to do so. Moral obligations, on the other hand, bind people's actions towards one another, except in rare circumstances, everyone has a responsibility not to hurt others. Individuals have several privileges because of what we do or who we are and others we have as a result of our humanity. Locke's property theory is based on the following logic: *"Labour is mine, and when I appropriate objects from the commons, I add my labour to them. Since I've added my labour to the items in question, if you take the objects I've collected, you've also taken my labour. This is harmful to me, and you should not do so. As a result, you have a responsibility to leave these items alone. As a result, the objects do hold a right of property"*.

The definition of celebrity image or character value easily fits into the Lockean moral, which holds that an individual's right to his property is based on the labour that produces property. This, however, ignores the degree to which celebrity images reach the cultural public domain, and the financial gain that celebrities have already reaped from their practices.¹²

Privacy for personality - Hegelian Philosophy

The Hegelian approach, which is based on Kant and Hegel's writings, holds that private property rights are essential for the fulfillment of certain basic human needs.¹³ Intellectual property rights can be justified on the basis that they foster social and economic conditions that encourage innovative intellectual activity, which is critical to human flourishing.¹⁴ Individuals have a right to privacy under international human rights law. Weber also bases media protection (along with the right to privacy) on a natural right to human dignity.¹⁵

Economic justifications - Incentive theory

The economic justifications are based on the motivation to ingenuity that a publicity right will offer, as well as the avoidance of market misinformation by more effective allocation of the resource that celebrity offers. The development of a publicity right, on the other hand, is unlikely to stimulate the production of fame, which is a by-product of other activities. It will only defend against fake endorsements if used alone.¹⁶ If a celebrity's name, image, and likeness cannot be completely exploited, the celebrity may be less motivated to develop a valuable persona. The case of *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁷ the Supreme Court decided that Zacchini should be protected in

order to preserve the entertainer's opportunity and promote the development of this form of work. Courts have equated this opportunity to the US Constitution's one referred provision, which states that copyrights are given to "promote the advancement of science and useful arts."¹⁸

The basic idea is that a celebrity's life is dependent on the celebrity's goodwill or public image, and their income is dependent on the success they receive by public attention. As a result, protecting one's reputation as a celebrity is extremely critical. As celebrities' importance in society has grown, media abuse of their privacy rights has grown at a faster rate, as the media serves as the primary interface between the public and celebrities. In today's world, advertising costs a lot of money, and a celebrity's public image is extremely valuable.¹⁹ People are so closely acquainted with celebrities that they regard them as friends or sources of motivation, so they are keenly interested in anything that happens in their lives.²⁰ Also, the right to publicity can be passed down through the generations. As a result, a celebrity's descendants will benefit from the celebrity's fame or the image rights during his or her lifetime.²¹

Legal Landscape: Navigating Complexities

Companies are increasingly associating their new and existing products and services with well-known characters to capitalize on their success, due to the sheer popularity of both fictional and real-life characters. Character merchandising has evolved in several ways over the years, and it has now exceeded the film industry's primary source of commercial exploitation in terms of sales. Licensing their famous characters in the 1930s, to today's film product placements like *Toy Story*. Since character merchandising has taken on so many different forms, it's critical to categorize them to recognize the places that need to be protected. Character merchandising is a battleground for not only competing commercial interests but also competing legal interests. The following review of various legal concerns relating to character merchandising demonstrates the complexities of this modern-age market phenomenon:

- (i) ***The issue of personality rights:*** the right to privacy and the right to publicity are the two key personality rights that any citizen has under the law. A celebrity is a real-life individual with legal rights and responsibilities. Any commercial use of his or her personality and the characteristics that go

with it should be done with due consideration for his or her personal rights. A celebrity or public figure that consents to the public relations to the point of attracting public attention is considered to have given his consent to the publication of his image and conduct related to his public life.²² A celebrity has the right to commercially use his fame and goodwill as a result of his celebrity, which is known as the right to publicity.

- (ii) ***The Copyright issue:*** If the work is appointed by someone else, in which case the individual dispatching the work possesses the copyright, the creator of the work is normally the essential proprietor of copyright. A cinematographic film's producer is often considered as the film's creator. In the case of a film based on a fictional or cartoon character, the director is free to manipulate the character as he sees fit. At the point when a genuine individual plays the character being referred to, in any case, the maker won't be able to completely control the character without the individual's consent. The concept of copyright is based on the idea of incentivizing the author to contribute further by granting exclusive rights to his works in exchange for his labor and effort. In the case of image merchandising, the copyright issue is at its peak. On one side, the film's maker claims selective rights to utilize the photographs from the film, on the other the celebrity encroaches infringement of his or her right to publicity and false endorsement if the maker utilizes the picture for product promotion causing a conflict of interest.
- (iii) ***The Trademark issue:*** To avoid anyone from using a character's name and other indicia to misrepresent to customers that the products have any relation with the character, the owners of characters often register trademarks or resort to passing off action. In general, an item or service is known by its mark, and the mark alone reflects the product or service's goodwill. As a result, a product's trademark is what propels it into the marketplace. In the case of celebrity merchandising, however, the celebrity's reputation is crucial to the success of the merchandise. The association of a celebrity with a product confers value on the product, and the celebrity's popularity allows

consumers to associate with the product right away. As a result, determining which of the brand name and celebrity affiliation has a greater effect on merchandise success is difficult. The task of demystifying character merchandising, more precisely personality and image merchandising has become a laborious task for India due to the lack of a clear law or legal provision firmly governing such merchandising practice and issued.

- (iv) **The Contractual issues:** In the realm of celebrity merchandising, conflicts often arise when both the copyright owner and the celebrity engage in merchandising activities concurrently. For instance, consider a scenario where a celebrity endorses a specific brand of home décor, committing to refrain from endorsing competing brands during the contractual term. Meanwhile, the producer of a cinematographic film, featuring the celebrity, licenses a still image from the film to another home décor brand for merchandising purposes. This dual endorsement action by the celebrity and the film producer creates a conflict of interest between the two home décor companies. The company with an existing endorsement contract may pursue legal action against the celebrity for breaching the contractual obligations, highlighting the intricacies of managing conflicts arising from celebrity endorsements in merchandising ventures.²

Protection for Character Merchandising under Indian Law

Copyright Act, 1957

Character merchandising in India, which involves the commercial exploitation of characters from various media, is primarily protected under the Copyright Act, 1957. However, the absence of specific legislation addressing this area leads to reliance on overlapping intellectual property rights, resulting in ambiguities and legal complexities. Registration under this Act provides numerous advantages. Section 51 allows for both civil and criminal remedies against copyright infringement. Owners of copyrighted character merchandise possess exclusive rights to reproduce, distribute, and sell their products. In case of infringement, owners may seek remedies such as injunctions, damages, and profit accounting. Registered character merchandisers enjoy

market exclusivity, preventing unauthorized commercial use of the character. This enhances revenue potential as consumers are drawn to familiar characters. Section 14 outlines the copyright owner's exclusive rights, including reproduction, distribution, and sale. Copyright registration facilitates licensing and merchandising agreements, enabling owners to profit from their assets through royalties. India's adherence to international treaties like the Berne Convention extends copyright protection to registered characters globally, benefiting owners with international appeal. Sections 14, 30, 40, and 51 of the Copyright Act afford exclusive rights, licensing provisions, recognition of foreign copyrights, and remedies for infringement.

Trademark Act, 1999

Character merchandising aligns with trademark licensing principles outlined in India's Trade Marks Act of 1999. The Act grants proprietors' control over trademark usage, ensuring quality standards are upheld. Provisions aim to prevent the commodification of trademarks for purposes unrelated to product identification or promotion. Additionally, the Advertising Standards Council of India mandates self-regulatory guidelines for celebrity endorsements in product advertisements.

Trademark protection serves as a pivotal initial measure in safeguarding characters prior to their utilization in merchandising endeavors. By securing trademarks, character names and likenesses can be shielded, enabling the establishment of a robust intellectual property portfolio centered around the characters. This facilitates the structuring of licensing arrangements to support a flourishing business model.

However, it is evident that relying solely on trademarks, passing off actions, or publicity rights violations to adjudicate character merchandising disputes in favor of celebrities is inherently inequitable towards copyright holders. Such approach also signifies a regulatory lag in Indian law vis-à-vis evolving business paradigms. Consequently, the imperative arises for the development of a comprehensive dispute resolution framework tailored for character merchandising disputes. Such a model should prioritize fairness among all stakeholders while delivering consistent and foreseeable outcomes.²³

International models such as WIPO's regulations could provide a foundation for a comprehensive dispute resolution framework for character

merchandising in India. This may entail a Hybrid Dispute Resolution Mechanism that ensures efficiency and justice by commencing with negotiation, progressing to mediation, and concluding with arbitration. Establishing a specialized Character Merchandising Tribunal within the Intellectual Property system, empowered to adjudicate disputes with overlapping rights such as copyright, trademarks, and publicity, constitutes an additional method. In situations when character rights holders refuse commercial use, a mandatory licensing system could be implemented to strike a compromise between ownership rights and the public interest. To give legal clarity over personality-based rights, such as voice, likeness, and character identity, a Publicity Rights Registry might also be established. Lastly, the establishment of a Uniform Licensing Code based on WIPO standards will standardize licensing agreements, assuring transparency in fee frameworks, territorial usage, and quality assurance - factors essential for preventing exploitation and preserving brand integrity.

Judicial Trends

In the case of *DM Entertainment v Baby Gift House & other*,²⁴ the defendant was in the business of selling dolls with the voice and appearance of singer Daler Mehndi, thus profiting from his fame. Enraged by the defendant's illegal act, the plaintiff sought a permanent injunction to prevent the defendant from infringing on Daler Mehndi's right of publicity and false endorsement or misrepresentation leading to a passing-off action. The use of Mehndi's persona to capitalize on the defendant's name by using it in conjunction with a commercial product was neither proper nor legitimate; rather, it amounted to a clear dilution of such personality's uniqueness, giving rise to the false belief that either the plaintiff had granted the license for such use or that the defendant was associated with Mehndi who allowed the Defendant to use it. The court awarded the plaintiff a permanent injunction against the defendant, as well as damages in his favour.

In the other case of *Chorion Rights Limited v Ishan Apparel and Ors*,²⁵ the plaintiff claims to be the rightful owner of the NODDY trademarks, which include the NODDY name and character image. The plaintiff contended that NODDY is a well-known fictional character who has gained goodwill in the marketplace, and thus falls under the definition of

well-known mark and plaintiff's key claim was that the defendant is engaged in producing and selling children's clothing under the name NODDY. Furthermore, the clothing is of poor quality, and the second defendant is a dealer for Delhi and nearby towns. In this case, there is a fictional character named NODDY, and the defendant uses the same name, which might lead people to believe that the apparel is somehow connected to the fictitious character, and that by using the name, they may attract large customers, as the name NODDY is very common among children in India. But the plaintiff was unable to show that they were using the trademark NODDY before the defendant's use. As a result, the court did not prohibit the defendant from using the mark. This is an example of merchandising for fictional or cartoon characters.

In *Disney Enterprises, Inc. & Anr. v Gurmeet Singh & Ors.*,²⁶ the respondent was selling items depicting Hannah Montana and other cartoons without first obtaining the petitioner's permission. According to the High Court of Delhi, the respondent was in charge of marketing goods featuring depictions of characters such as Harry Potter, Hermoine, and others whose sale rights were held by the claimant. The court also confirmed that there was a strong connection between the applicants' arguments and the above character, which is the sole explanation why any mention of those characters makes customers think of the applicants.

In a different controversy in 2009, Montblanc launched luxury pens in India in called "Mahatma Gandhi Limited Edition 241" and "Mahatma Gandhi Limited Edition 3000", with Mahatma Gandhi's portrait etched on the nib. The launch had received prior approval from Tushar Gandhi (Gandhi's great-grandson); however, the launch was met with immediate opposition due to the Protection under the Emblems and Names (Prevention of Unauthorized Use) Act 1950.²⁷ Names and photographs of nationally important personalities cannot be used for any trade, service, or professional function unless the government permits it. As a result, Montblanc was forced to pull its ads and the pens in question from the market.²⁸

In the *Disney Enterprises v Pankaj Aggarwal*²⁹ case, the plaintiff asserted ownership of the U.S. copyright to the cartoon race vehicle Lightning McQueen. The defendants produced Choco Car chocolates featuring a likeness of Lightning

McQueen. Alleging permanent injunction and infringement damages, the plaintiff pursued legal action. The High Court recognized characters as potential trademarks, thereby meriting protection under copyright law. It underscored the significance of prohibiting the commercial use of renowned characters, citing the creative process and innovation involved in character creation. The plaintiff's copyright entitlement was upheld in India, supported by the International Copyright Order, the Berne Convention for the Protection of Literary and Artistic Works, and the Universal Copyright Convention. Consequently, the plaintiff's claims were validated, resulting in a permanent injunction against the defendants. Additionally, the defendants were ordered to pay damages amounting to Rs 5 lakhs to the plaintiff.

With the rise in the number of exorbitant endorsement deals signed by popular people and the enormous importance attached to such brand endorsement, it has become imperative to address the multi-faceted definition of personality rights in India. Given the importance of a personality's economic value in making a commodity well-known in the market, unauthorized access to such a personality's right should be prosecuted for such embezzlement.

Conclusion

The burgeoning character merchandising industry presents multifaceted legal challenges stemming from the subjective nature of character perception and the inadequacies of existing intellectual property laws in India. While provisions within the Copyright Act, 1957, and the Trademark Act, 1999 offer certain protections, they fall short of adequately addressing the complexities of character merchandising, particularly in safeguarding personality rights and character images.

To address these shortcomings, enacting specific legislation dedicated to character merchandising is imperative. Such legislation should prioritize stringent enforcement mechanisms to ensure justice for creators and owners of characters. Such mechanisms may include a variety of remedies, including legal fines like injunctions, compensatory damages, and profit accounting. Furthermore, establishing statutory damages would allow courts to award fixed compensation without needing proof of real loss, simplifying remedy in infringement cases. Punitive penalties and administrative fines may be effective deterrents in cases when infractions are purposeful or

repeated. In more serious cases involving widespread commercial misuse, the law may even impose criminal penalties, provide comprehensive protection and emphasize the value of original innovation.

By establishing clear legal frameworks, creators are incentivized to innovate while gaining assurance that their characters will not be exploited without consent.

Furthermore, amendments to existing laws, such as the Trademark Act, to explicitly incorporate rights of publicity would provide additional safeguards for celebrities and creators. This necessitates expanding the definition of trademarks to encompass character attributes associated with reputation, thereby enhancing legal clarity and consistency in jurisprudence.

Additionally, the introduction of comprehensive definitions for "*character merchandising*" within the legislative framework is essential to mitigate ambiguity and ensure lawful conduct in merchandising activities. This would enable stakeholders to confidently navigate legal complexities while facilitating effective enforcement against unauthorized activities. Moreover, recognizing the significance of licensing and merchandising agreements is crucial, emphasizing adherence to licensing policies to foster a culture of compliance within the industry. The best practices for such agreements include precisely identifying the grant of rights - outlining the specific character elements being leased (such as name, appearance, or voice), the scope of usage, duration, geography, and exclusivity. Financial arrangements should be clear, with royalty provisions that specify payment percentages, minimum guarantees, and audit rights. Furthermore, implementing quality control clauses guarantees that all products or services embodying the character adhere to the criteria established by the rights holder, so maintaining the brand integrity. Additional terms addressing termination, infringement resolution, and indemnity protect both parties' interests, promoting a culture of legal compliance and mutual trust in the merchandising business.

In sum, a cohesive legislative approach, coupled with robust enforcement mechanisms and clear definitions, is essential to address the India's intricate legal landscape surrounding character merchandising. Such measures are pivotal in fostering innovation, protecting intellectual property rights, and maintaining legal coherence in character merchandising practices.

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