
INTERPLAY OF INTELLECTUAL PROPERTY RIGHTS & THE ENTERTAINMENT INDUSTRY: INDIA

Divyanshi Chandra & Sankalp Tiwari, Jindal Global Law School

ABSTRACT

— The intersection between Intellectual Property Rights (IPR) and the entertainment industry in India has been termed as a “critical nexus.”. Intellectual Property plays a pivotal role in incentivizing creative endeavors while simultaneously safeguarding the rights of artists and creators. This research paper delves into the multifaceted landscape of IPR within the Indian entertainment sector by exploring the legal aspect and getting an insight into the industry. An attempt has been made to navigate into the complex interplay of copyrights, trademarks, piracy & parody within the ambit of cinematic, musical, and digital productions, through an amalgamation of rigorous legal analysis, case studies, and insight into the industry. A holistic inquiry is significant to illuminate the inseparable connection between IPR and the Indian entertainment industry to help contribute to a deeper understanding of this sector.

Introduction

Intellectual Property Rights refers to a human mind's invention or creation that is protected legally and owned by an individual or a group of individuals. Intellectual property law comprises several exclusive rights offered to the producer to prevent others from copying or wrongfully using certain intangible creations. Intellectual Property and its rights have been granted since ancient times. In the 1300s in the Alp Mountains, for the first time, people identified mines and used them to dictate terms on the available resources like water and wood. Moving forward, in 1409, Germany gave a special privilege in the construction of a model mill to store the grains. The U.S. granted exclusive rights to Hopper Boy, however, in England only stained glass was granted the respective rights. On the other hand, France was the first country to take a step in the registration and examination of intellectual property rights before granting intellectual property rights. In India, during the Harappan civilization, trademarks were introduced in the form of special marks on the pottery. British Patent Law of 1852 established the Act VI in 1856. This act was soon modified in 1859 as Act XV, it enabled the making, selling, and use of inventions within India and allowed others to do so for 14 years from the date of filing. In contemporary times there are some regulations that govern the intellectual property rights of citizens whose scope or coverage is trademarks, patents, copyrights, industrial designs, geographical indications, information technology, cybercrimes, and data protection. These rights come into play in the Entertainment industry, which is regarded as one of the largest industries in the world. Specifically, trademarks and copyrights are considered to be the two most significant rights for this industry. For instance, the rights of artists and directors such as music, screenplay, and writing i.e., the script, direction, cinematography, location, lyrics, background score, and other processes involved in production are protected under the copyright laws. The Censor Board of India has introduced laws to safeguard film literary and artistic creations. It aims to prevent film and music directors or producers from imitating or borrowing the original work and ensure that both monetary and non-monetary benefits are given to the original creator. This paper seeks to examine the intricate relationship between intellectual property rights and the entertainment industry in India, in the context of copyright infringement, piracy, parody, and publicity rights.

IPR Issues in the Entertainment Industry

Copyright Infringement

The way that we produce, consume, and spread information has been fundamentally altered as a result of the widespread impact of digital technology and the internet. The ease with which digital replicating and distribution may be accomplished has posed unprecedented challenges to conventional ideas about intellectual property rights. As a result, copyright infringement has arisen as a significant problem since the beginning of the digital era. The bundle of rights that are connected with each piece of copyrighted work, such as a literary, theatrical, or musical work (but excluding computer programs), is clarified in Section 14 of the Copyright Act 1957.¹ According to Section 14 (a), a "copyright" is defined as an exclusive right, the holder of copyright for a literary, dramatic, or musical work (excluding computer programs) acquires several rights. These rights include the ability to reproduce the work in any material form including storing it electronically and distributing copies of their work to the public if they are not already in circulation. The owner of the copyright also has the right to publicly perform or distribute the work. In addition, they have the authority to create cinematograph films or sound recordings based on the original work, as well as translations and adaptations. These rights also extend to translations and adaptations, allowing the holder of the copyright to carry out any of the acts mentioned above about their original work. 14(b) In the case of a computer program, the copyright owner has the right to perform any of the acts mentioned in clause (a). In addition to this, the copyright owner also has the right to sell, commercially rent, offer for sale, or offer for commercial rental any computer program copy. These rights ensure that the copyright holder has control over the distribution and commercial use of the computer program. 14(c) In the case of an artistic work, the holder of the copyright may reproduce the work in any tangible form, including storing it in any electronic or other means, depicting a two-dimensional work in three dimensions or a three-dimensional work in two dimensions, distribute it in public, issue copies of the work that are not in circulation, include the work in cinematograph film and make any adaptation of the work. For a cinematograph film, Section 14(d) gives the right to the copyright owner to make a copy of the film (a photograph of any image and storing it in any medium by electronic or other means), to

¹ The Copyright Act, 1957, §14

sell, commercially rent, offer for sale, or offer for commercial rental any copy of the film. They also have the right to create copies of the film, including photographs of any part of it, or store it electronically. Additionally, they have the right to communicate about the film to the public. Section 14(e) further states that in the case of a sound recording, the owner of the copyright has the right to sell, commercially rent, offer for sale, or offer for commercial rental any copy of the sound recording and also be able to circulate the same in public.

R.G. Anand Vs. Delux Films and Ors. (1978)² is one the most significant and landmark cases that have set a precedent for copyright infringement in the digital age. In this case, R.G. Anand was the plaintiff; the writer of the play “Hum Hindustani” achieved success and decided to produce a film along the same lines. As the news spread, the producing company, herein the defendant, approached the plaintiff with the intent of him becoming the producer of the film. However, there was no further communication, and the defendant did not inform the plaintiff regarding the same. It came to the plaintiff's attention that the respondent produced a film in September 1956 and titled it as “New Delhi” of which he was convinced after watching that this new film was the replica of his play. The plaintiff contended that the respondent had violated his rights and subsequently filed a suit for a permanent injunction against the defendant which would restrain them from demonstrating the film to the public at large. The defendant rebutted that there was no violation of copyright as the subject matter of the film was related to provincialism which can be adopted and interpreted by anyone in their way. They also submitted before the court that the plaintiff's contention that the decision to make the film only after they read the script of the play was false. The trial court held that the plaintiff was the rightful owner of the copyright in his play “Hum Hindustani.” However, it further held that the production, distribution, and demonstration of the film “New Delhi” did not infringe the plaintiff's copyright. The plaintiff moved to the High Court, which agreed with the trial court's decision and held that there was no violation of the plaintiff's rights and dismissed the suit. It highlighted that based on the facts there is a significant distinction in the spirit and content between the play “Hum Hindustani” and the film “New Delhi.” The appeal in the Supreme Court, however, was dismissed and no costs were imposed.

The Supreme Court laid down guidelines in this case which are used to determine whether there

² R.G. Anand v. Delux Films, AIR 1978 SC 1613

has been a violation of copyright and to check whether the defendant has also replicated the details, mannerisms, sequential arrangement, and any additions that have been added in the original work. Justice Guha pronounced whether in a case, the work in question contains legitimate use of another man's work and further that there is an element of 'mental operation' by which the work could be termed as 'original work.' The reproduction of the original work into a different one, containing a different form, and a tone different from the original work, and overall just adds on to the original idea of the copyrighted work which is adapted by him.

Further, the guidelines laid by the court that set a precedent for copyright laws in India are as follows;

1. An idea, a subject matter, a theme, a plot, or a historical or legendary fact and copyright violation in these cases is restricted to the form, manner, arrangement, and expression of the idea by the owner of the copyright.
2. When the same idea is represented differently, and the source is common then similarities are inevitable. Herein, the court has to determine if the similarities are on fundamental or substantial aspects of the work that has been copyrighted. If the defendant's work is a "literal imitation" of the plaintiff's work, then it can be said that the defendant is liable for infringement of the copyrights of the plaintiff.
3. The safest measure given to decide whether a copyright has been violated or not is to understand it from the point of view of the viewer/reader/spectator, i.e. it is pertinent for them to opine that the film is a replica or gives the impression that the work appears to be a copy of the original.
4. For a work to be termed as a new work, it has to be presented and treated differently even when the theme is the same.
5. Where the similarities between the two works do not overpower the dissimilarities, and these differences should negatively the intention of copying the original. This implies that any similarity between the two is accidental.

6. A violation of copyright leads to committing the act of piracy. In the case of K.R. Venugopalan Sarma v. Sangu Ganesan 1972, the court stated that even when the work produced is not exact, however, the impact on the mind of the viewer after watching both the films is same and they are of the opinion that defendant's movie is a second copy of the plaintiff's film. This was thus known as the test of resemblance between the two productions. Another case of C. Cunniah and Co. v. Balraj & Co. held that understanding one picture as a copy of another picture has to be done only when a substantial part of the plaintiff's picture forms a part of the defendant's picture. A division bench in Calcutta High Court further elaborated on these tests in their judgement, Mohini Mohan Singh and Ors. v. Sita Nath Basak 1931. The court said that the test of similarity/resemblance is not enough as it could be due to (1) a mere chance, (2) work being taken from a common force, (3) plaintiff's work being taken from the defendant's and (4) defendant's work being taken from the plaintiff. Therefore, each case has its facts and circumstances and therefore different outcomes which cannot be restricted under one test.
7. If the question of violation of the copyright is similar to that in the case of R.G. Anand, the burden of proof lies on the plaintiff, and it becomes more difficult for him to prove piracy. It is significant to note that a film has a broader perspective, wider field, and a large background, therefore, if the defendant is covering other themes and gives a different colour or complexion which is different from the manner in the copyrighted work then he cannot be held liable. Even after this if the viewer believes that the film "by large" is a copy of the original play then there is a violation of copyright.

This case is regarded as the "locus classicus" and is relevant in determining the violation of copyrights. It is said that with the commencement of advanced technology, several OTT platforms like Amazon Prime, Netflix, Hotstar Disney, and Sony Liv are in demand. There is both a pro and a con to these websites and platforms because to gain money people can create pirated websites and illegally stream the original work of the original owner. The concept of piracy was first introduced in the law known as "Queen Anne's Statute in 1710. This law was confined to the rights of authors of books and the right to reprint them. Other creative and original works such as sketching and painting were not included. To get past this issue, a new act was introduced in 1735 named the "Engravers Act". The literal meaning of piracy is producing an unauthorised copy of

the original work, as it gives the right to owner to enjoy exclusive rights over their work. Piracy causes economic loss and their societal and creative position. Different types of piracy are; when a computer software is pirated or hacked and copies the data into another machine. A performer's right is violated when live performances happen and the public records and surfaces the video without the artist's permission. An author's right is violated when someone else sells their work in the market. In the film industry, cinematographic work is pirated through unauthorised reproduction of the film in the form of a video and displaying of the video on different cables without any authorisation from the copyright owner. In this case with the test laid down; the Test of Substantiality/Similarity/Resemblance helped the creators to protect their work and distribute it with their consent with proper authorisation and license.

Parody

A parody is a work that playfully and critically remarks on an existing work in order to show the original work's flaws. A parody must be borrowed from and be based on an existing original work. In the Indian context, substantial law is absent on the intricacies of parody and copyright infringement. The idea of parody is under the purview of the Indian Copyright law. It is lawful if parodies are done with the author/owner's consent. The part of India's Copyright Act 1957 that deals with the concept of parody is Section 52 (1)(a),³ which is mostly about "fair dealings."

Section 52 (1) (a) says that; Fair dealing of a literary, dramatic, musical, or artistic work 1 [other than a computer program] for—

- (i) Private use, including research;
- (ii) any criticism or review of the work or any other work;

Fair dealing is a plaintiff's privilege to protect their copyright by controlling the utilisation of their work. The Copyright Act 1957 permits you to utilise others copyrighted material with the intent to examine, privately investigate, school, parody, spoof, parody, or audit.

³ The Copyright Act, 1957, §52

In the Indian scenario, the concept of fair dealings was discussed in the case of *Civic Chandran v. Ammini Amma* 1996.⁴ The facts in this case state that the late Malayalam dramatist Thoppil Bhasi wrote *Ningal Enne Communistakki* in 1952. Plaintiffs claimed the drama addressed some of the most pressing social and political issues of the day. According to plaintiffs, the 1st defendant created another drama, *Ningal Are Communistakki*, as a counter-drama to Thoppil Bhasi and published it in 1995 in the annual issue of *India Today* (Malayalam), owned by the 2nd defendant, a private company whose executive Director, Printer, and Publisher is the 3rd defendant. The 1st defendant's counterplay duplicated large parts of the drama with some comments. The drama and counter-drama possessed the same characters and language. Moreover, it was alleged that the 1st defendant further attempted to degrade and discredit Mr. Thoppil Bhasi through the counterplay. The plaintiffs have requested a permanent injunction against defendants 1 to 3 preventing them from releasing the counter play and against defendants 1, 4, and 5 preventing them from producing it. Plaintiffs further sought damages from defendants 1 to 3 for publishing the counterplay in the literary yearly edition of *India Today*, the owner of which was the 2nd defendant, a Private Limited Company whose Executive Director, Printer, and Publisher is the 3rd defendant.

The court laid down a three-pointer test which would be used to determine whether the rights of the plaintiff have been violated or not. In the mentioned test the court, the court takes into consideration (1) the quantity and the value of the materials taken in proportion to the remarks or criticism; (2) The purpose of taking such material; and (3) the probability of competition between the two works. The court further went on to do a comparative analysis of the drama and the counter-drama, after which it concluded that the duplication of the parts of the play was not meant for the reproduction of the drama as a whole or to communicate the author's message. The goal was not to copy the drama or create a comparable one by stealing its concept, presentation, characters, dialogue, and writing style. It was also observed that except for those scenes of the counter drama wherein there was the incorporation of some parts of the scenes from the original drama, the counter drama's concept, ideology, events, conversation, and style are wholly different from the drama. The dialogue exchanged between the characters in the counter drama mostly criticizes the play and the ongoing social and political events in Kerala. Moreover, the court also

⁴ *Civic Chandran v. Ammini Amma* 1996 (16) PTC 670

said that it would be difficult to establish that the counter drama is a mere reproduction or imitation of the drama with minor changes to avoid plagiarism or literary piracy.

There were three important aspects of the case, which were also highlighted by the court. Firstly, even if the counterplay is printed and produced, it will not compete with the drama. No one can establish this as a fact that people who wished to read or watch the play would read or see the counter drama. As such, one of the important grounds stated in the case of *Hubbard v. Vosper* to award an injunction was that there should likely to an element of competition between the two works, which is not being fulfilled in this case. Second, the counterplay was published in January 1995, but the action was filed in July 1995, a day before the drama was scheduled to be performed. The Plaintiffs should have acted soon once the counterplay was printed and published if they were unhappy. Though the following factors may not be fatal to the complaint, they should have been considered when deciding whether to award the Plaintiffs' injunction in this case. Thirdly, the apex court pointed out that the learned District Judge should have taken note of the defense's specific contention that the Defendants, especially Defendant 2, have made all arrangements for staging the counter-drama spending a huge amount and that if the staging is stayed, it will result in irreparable loss and hardship to them and that if an injunction is not granted, no irreparable injury will occur. The court further said that as long as no evidence performing the counter drama will affect the profits expected from staging the play, the Plaintiffs may not suffer monetary loss by staging the drama. It was concluded by the court the learned Judge was not warranted in granting an injunction in this matter. The defendants have also established that copying sections of the play, even though considerable, was for critique and hence a "fair dealing" and not a violation of the copyright and that even if the counter drama copies parts of the drama, the defendants may be able to use the statutory defence of "fair dealing" to defend against the plaint claim. The court revoked the injunction and denied the motion.

Celebrity Rights

The rights enjoyed by celebrities are a bundle of rights including publicity rights, reproduction rights, distribution rights, rental and lending rights, making available rights, personality rights, privacy rights, and so on. But broadly, these rights can be classified under three major categories, namely, personality rights, publicity rights, and privacy rights. Publicity is also a form

of Intellectual property. Celebrities have the right to restrict commercial use of their name, likeness, voice, appearance, or other attributes.

The first case in India to address the concept of publicity was *DM Entertainment v Baby Gift House & Ors.*⁵ in the High Court of Delhi. D.M. Entertainment Pvt. Ltd., the plaintiff in this lawsuit, was founded by Daler Mehndi in 1996. It was constituted to raise money for charities, issues, and the Green Drive initiative. The defendant in this case was Delhi Toy and Gift Business, they started selling Daler Mehndi-like dolls that could sing some of his songs. He then filed a suit against the defendant and alleged that the defendants violated the plaintiff's exclusive rights to market the artist's personality and infringed the copyright to his song. The defendants' exploitation of the plaintiff's exclusive right of publicity and continued sale of infringing items with false endorsements is malicious and subject to restraint. In addition to causing commercial loss to the plaintiff by infringing their exclusive right to market, the defendants attempt to induce consumers and purchasers of such products to believe that the plaintiff has either licensed or the Defendants have some connection with the artist to use its exclusive right to market images of the artist. This may lead to a big loss in terms of money and damage to reputation.

The court observed that the right of publicity is the individual's right to allow or deny commercial use of his name or personality traits. Over-emphasis on a famous person's publicity rights can limit the practice of free speech in a free and democratic society. Thus, caricature, lampooning, parodies, and other things that highlight some of the individual's personality features may not violate their right to publicity. Moreover, the court held that False endorsement requires proof that the use of a person's identification likely deceived people into believing that the concerned personality approved of the goods. In this case, the use of Mr. Mehndi's persona to capitalize on his name by using it with a commercial product is not legitimate. It dilutes his unique personality and gives the false impression that the plaintiff has licensed, or the Defendants have some connection with them (i.e., the plaintiff or the artist) to use its exclusive right to market images of the artist.

With regards to the passing off action, the court said that one must determine if the defendant is selling goods/services marked to deceive buyers into thinking they are the plaintiffs. Even if a

⁵ *DM Entertainment Pvt Ltd v. Baby Gift House CS (OS) No 893 of 2002*

person uses another's well-known trademark or trademark similar thereto for goods or services that are not similar to those provided by such other person, it may damage the trademark by reducing or diluting its power to indicate the source. Further, unfair competition occurs when a person uses another's well-known trademark or trademark similar thereto to dilute it even if it does not confuse the consumers. Thus, the court concluded by saying that the permanent injunction petition should succeed. However, the court believes that the plaintiffs are entitled to nominal damages and costs in the absence of proof of continuous or widespread appropriation of the identity for commercial advantage.

Another case that talks about the concept of publicity, the definition of celebrity, and the protection of celebrity rights is the case of Titan Industries Ltd. vs. Ramkumar Jewellers.⁶ Titan Industries, the plaintiff in this case has a brand called “Tanishq” which is a known brand in the jewellery industry. Mr. Amitabh Bachchan and Ms. Jaya Bachchan were the endorsers of ‘Tanishq’ and signing the ‘agreement to service’ made them abide by the terms and conditions and primarily promote the brand. The plaintiff alleged that the defendants had put up billboards that depicted Mr. Amitabh Bachchan and Mrs. Jaya Bachchan promoting the defendant’s jewelry. Further, the plaintiff alleged that the defendant infringed their copyright in its “True Diamonds” advertisement, this act misrepresented the plaintiff’s advertisement and misled the public to believe that both these advertisements are related. The court began by defining the term "celebrity," stating that a celebrity is someone who is renowned or well-known among a large number of people and is a topic of conversation among them. Further, the court stated that the rights of the celebrity’s identity and how, when, and where it wants to use it lies with the celebrity itself and that the right to publicity is the right to control the commercial usage of a person’s identity.

The two basic elements of the infringement of publicity rights were highlighted. These are :

1. Validity – which means that the plaintiff owns the identity rights of a person.
2. Identifiability: The celebrity must be identifiable in the defendant’s illegal usage of the celebrity’s identity. When the celebrity is recognizable, the right of publicity infringement

⁶ Titan Industries Ltd. vs Ramkumar Jewellers (2012) 50 PTC 486

requires no proof of falsehoods, confusion, or deception. Publicity rights go beyond false advertising laws.

There was also a mention of methods that would help in proving the identification of the plaintiff. The unaided intention is one such method. Unaided intention means that if the plaintiff is a celebrity, comparing the defendant's usage to the plaintiff's distinguishing attributes may be enough to infer identifiability. The defendant's hoardings portray Mr. Amitabh Bachchan and Mrs. Jaya Bachchan, which is an exact reproduction of the plaintiff's hoarding advertising its Tanishq Diamonds.

Some other methods that would help in proving the identification of the plaintiff are:

- a) The number of elements about the defendant's usage and supporting evidence. This further adds up at a geometric rate to point at the plaintiff
- b) The circumstantial evidence of the defendant's intent to trade upon the identity of the plaintiff. Through this, the identifiability can be inferred.

Therefore, the court granted a permanent injunction to the plaintiff against the defendant.

Conclusion

The basic goal of copyright laws is to establish and protect authors' intellectual property, therefore providing them with long-term financial benefits. The scope of copyright protection has been broadened to include the entertainment and media industries. Copyright is extremely important in the entertainment industry because it protects authors' rights and allows them to improve their unique work without fear of unlawful usage. The entertainment industry must take precautions to protect itself against the growing frequency of fraudulent activities in society. Certain preventative steps must be implemented to protect the entertainment industry against piracy. Prioritizing the successful execution and application of Copyright laws is critical. It is critical to conform precisely to existing copyright infringement regulations, without any prejudices or prior beliefs. The imposition of criminal penalties for digital piracy is deemed vital since it provides an effective means of discouraging such behaviour. In India, there is a need to expand public understanding of

copyright laws and to improve the copyright framework. Publicity rights cover an individual's proprietary rights; it showcases one's ability to monetise and prevent any external control over their work from the exploit. These rights are still at an inchoate stage and have not been sanctioned by a statutory provision in India, even though the decisions in case laws are divergent.

The growth of Intellectual Property Rights in the entertainment industry is critical for the advancement of artistic and inventive activities in the industry. Furthermore, laws for protection, exclusions, and remedies in connection to the rapid development of publicity rights are required to accomplish both legal harmonization and consistent implementation throughout all Indian states. Until then, Indian courts can adopt and incorporate the tests used by the US, such as the Roger's Test, the Predominant Use Test, and the Transformative Test. The three tests together form a framework: Roger's Test aims to reduce customer misunderstanding, as supported by the Predominant Use Test. This test says that if a product heavily capitalizes on the commercial value of an individual's identity, it violates the right to publicity. Finally, the Transformative Test asserts that if there is a significant inclusion of inventive components that results in a work that is more than a simple likeness or duplicate of a celebrity, it would not constitute a danger to such celebrity's economic interests. In this way, parodies are an excellent example. The integration of the aforementioned measures would serve as a model for protecting celebrities' and artists' financial interests. The provision of protection would not only encourage celebrities to engage in socially beneficial endeavours for the general public, but it would also ensure that they receive appropriate compensation for their rightful ownership of any financial benefits derived from their self-generated renown, which is the result of their significant dedication and hard work.