

Copyrightability of Characters: A Study Considering Proper Allocation of Performers Rights

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Abstract— Under Section 2 (qq) of the Act "entertainer" incorporates an aerialist, performer, artist, on-screen character, performer, wind charmer, a man conveying address, or whatever other individual who makes an execution.

Area 38 of the Act offered assurance to performing artists, artists, performers, artists and so forth under the head of 'Entertainers Rights'.

In November 2013, the copyright given by Viacom18 for 'Gutthi'- a character made in Comedy Nights with Kapil incited me to imagine that is it legitimized that an on-screen character sees a character and imbue life in it and the copyright over it is requested by the makers who are not makers of the work but rather wholesalers of the work made by performing artist.

The performer when he performs in front of the audience (live) or engages in any performance he has right over that performance.

The court held that copyright protection is available only to film including the soundtrack, the cine artists who act in the film are not protected by copyright law for their acting.

However, the instant case of 'Gutthi' involves an issue unanticipated by the 1957 Act – 'whether the right to 'copy' the character in a subsequent different show where the character is played by the actor who had originally played the character, is a right of the actor?' The Kerala High Court did not directly address the issue of copyrightability of characters but it decided the issue of ownership of copyright on character; one may therefore conclude that copyright on character could be claimed successfully by the cartoonist.

While Sunil Grover, the actor who plays Gutthi, declined to comment on the issue, fellow artistes had opined that Gutthi had become popular because of the efforts of the actor playing it and therefore, the copyright on the character should belong to the actor and not the channel.

An actor perceives a character and infuses life in it and the copyright over it is demanded by the producers who are not creators of the work but distributors of the work created by actor.

A performer adds his own flavour to the already existing/ created character thereby creating a distinct character- so in effect the performer and the creator become one and the same.

Index Terms— Copyrightability

I. INTRODUCTION

Copyright is the piece of licensed innovation which gives select legitimate ideal to the first maker of the work. The copyright law secures the scholarly manifestations in works that

are unique. It secures the work when it is made and no enlistment conventions are required. Lexical Analysis according to the Oxford English Dictionary, discloses to us that 'copyright' is "the restrictive right given by the law for certain term of years to a creator, author and so on (or his appointee) to print, distribute and offer duplicates of his unique work."

The Copyright Act, 1957 was quiet on the entertainers' rights. The 1994 revision of the Copyright Act perceived the privileges of the entertainers. Under Section 2 (qq) of the Act "entertainer" incorporates an aerialist, performer, artist, on-screen character, performer, wind charmer, a man conveying address, or whatever other individual who makes an execution. Area 38 of the Act offered assurance to performing artists, artists, performers, artists and so forth under the head of 'Entertainers Rights'. This guaranteed the rights are not misused and the inventive endeavours of the individual who takes the necessary steps are remunerated.

In November 2013, the copyright given by Viacom18 for 'Gutthi'- a character made in Comedy Nights with Kapil incited me to imagine that is it legitimized that an on-screen character sees a character and imbue life in it and the copyright over it is requested by the makers who are not makers of the work but rather wholesalers of the work made by performing artist. Then again, there was another contention at the back of mind that makers put tremendously in their shows and acquire publicizing and advancement expenses to advance the character. Indeed, even their copyright assert can't be denied. I trust this is a state of research as characters made by on-screen characters are excluded in the IPR law and along these lines I have taken this subject for my task to examine that what is the law on this point and who is and who ought to be given security in such manner (spicyip.com, 2013).

II. NEED FOR PROTECTION OF PERFORMERS RIGHTS

The need for the protection of "performers" right arose with the passage of time. The fundamental reason was the technological development that enabled recording & broadcasting of the performers' right. But earlier these rights were not there and as per Adam Smith, there could be mainly two reasons for not recognizing the performers' rights.

A. Social and Historical Reasons

During the formative period of copyright, the actors were regarded as 'vagrants' by law. The players, buffoons, musicians, opera-singers, opera dancers, etc. were the classical examples of 'unproductive labour'.

B. Historical and Technological Reasons

The work of all the performers used to perish in the instant of its production.

However, the development of technology in the late nineteenth and early twentieth century enabled performances to be recorded and broadcasted to the public locally, regionally, nationally and eventually internationally.

The Copyright Act divides the performers into three categories:

a) Performers giving live performances

The performer when he performs in front of the audience (live) or engages in any performance he has right over that performance.

b) Performers in a cinematograph film with credits in the film

The performer when he gives his rights to the person with any written agreement to make it a part of any commercial use, the performer shall be entitled to have royalties or some monetary benefit.

c) Performers in a cinematograph film without credits in the film

There are many performers in supporting cast which are commonly termed as "extras" in any play, film etc. The Copyright Act till now doesn't give any protection to such people except moral rights which might be prejudicial to their reputation.

The acts of stand-up comedians will be covered under the first category. Hence, we can safely say that Sunil Grover has a right over the character- 'Gutthi'- created by him.

III. PERFORMERS RIGHTS UNDER S.38A OF COPYRIGHT ACT

Section 2(q) of the Act defines 'performance' as "any mode of visual or acoustic presentation, including any such presentation by the exhibition of a cinematograph film, or by means of radio-diffusion, or using a record, or by any other means and, in relation to a lecture, includes the delivery of such lecture."¹

Section 2 (qq) of the Act defines a 'performer' as "an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance"

Section 38A Clause 2 of The Copyright Act, 1957 is relevant in this regard clearly that the performers' rights detailed in s. 38A (1) are enjoyed by the producers of a cinematographic film once an artist's performance is incorporated in the film. Section 38A (2) of The Copyright Act, 1957 makes it clear that

the performers' rights detailed in S. 38A (1) are enjoyed by the producers of a cinematographic film once an artist's performance is incorporated in the film. This position was also emphasized in *Fortune Films International v. Dev Anand*². In this case, the question whether copyright subsisted in the performance of a performer was decided by the Bombay High Court. The court held that copyright protection is available only to film including the soundtrack, the cine artists who act in the film are not protected by copyright law for their acting.

However, the instant case of 'Gutthi' involves an issue unanticipated by the 1957 Act – 'whether the right to 'copy' the character in a subsequent different show where the character is played by the actor who had originally played the character, is a right of the actor?'

A similar case on the issue was decided by the Kerala High Court in *Malayala Manorama v. V T Thomas*³ where a publishing house was enjoined from claiming ownership over the characters created by the cartoonist before joining the publishing house and the Court held that the publishing house could not restrain the cartoonist from continuing to draw the cartoons after leaving employment. This is because 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. The Kerala High Court did not directly address the issue of copyrightability of characters but it decided the issue of ownership of copyright on character; one may therefore conclude that copyright on character could be claimed successfully by the cartoonist (lawctopus, 2015).

The case of stand-up comedians on TV shows is unique because it cannot be said to be purely a cinematic work nor is it a dramatic work. For example, in the Sunil Grover case, he himself had created the character of *Gutthi* (evidenced by the fact that he had played *Gutthi* on shows prior to Comedy Nights with Kapil). While Sunil Grover, the actor who plays *Gutthi*, declined to comment on the issue, fellow artistes had opined that *Gutthi* had become popular because of the efforts of the actor playing it and therefore, the copyright on the character should belong to the actor and not the channel. Further, as per Sunil Grover, he had *Gutthi* on other TV shows prior to his stint on Comedy Nights with Kapil and Viacom18 was erroneously claiming that they had created "*Gutthi*". [Sunil Grover had played *Gutthi* on an earlier show 'Comedy Circus'.]

IV. CONCLUSION

The basic aim behind copyright law is that the society should get information and the basic aim of IPR law is to incentivise the right people so that the public benefits from the creation of information. An actor perceives a character and infuses life in it and the copyright over it is demanded by the producers who are not creators of the work but distributors of the work created by actor. This is not in compliance with the theory of proper

allocation of rights. The ‘sweat of the brow’ doctrine demands that the actor who has created the character should be getting copyright over his work.

Sunil Grover had himself created the character of *Gutthi* (evidenced by the fact that he had played *Gutthi* on an earlier show ‘Comedy Circus’). This means that the producers did not play a role in the creation of the character and therefore, would most likely not be able to claim ownership over *Gutthi*. A performer adds his own flavour to the already existing/ created character thereby creating a distinct character- so in effect the performer and the creator become one and the same. Such a claim might also defeat the rights of producers over the character created by an actor.

It may not be appropriate to state that the public notice given by Viacom could possibly violate Art.19 (1)(g). Artists are paid a reasonable number of fees for the assignment of rights/ waiver of rights taken by them. This means that the producers did not play a role in the creation of the character and therefore, would most likely not be able to claim ownership over *Gutthi*.

REFERENCES

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- [2] <https://www.lawctopus.com/academike/copyrightability-characters-study-light-proper-allocation-performers-rights/>
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