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Character Merchandising: From Mickey Mouse to Chhota Bheem

by

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ABSTRACT—*In present times, it is hardly surprising to come across young children glued to the television set watching their favourite cartoon characters come alive, for hours together at a stretch. The influence of cartoons on kids today is undoubtedly tremendous. Hence, it is little wonder why the marketplace is brimming with merchandise related to cartoon characters. It is not just the merchandise related to cartoon or animated characters that are specifically targeting the kids demographic, the recent popularity of superhero movies among the young adults and the kids alike is also driving growth in the merchandise market. Moreover, the sustained growth in the merchandise market is not just limited to motion pictures industry, as it is largely becoming clear that it is not just the kids who inhibit a dedicated desire to follow and emulate the characters, adults too are influenced.*

It all goes back to the commercial success of Walt Disney's work starting with Mickey Mouse which heralded a new era. Accordingly, by the mid-20 th century, character merchandising became a popular source of revenue for the artists of characters. This paper aims to analyse the concept by tracing it from its foundational days, with Mickey Mouse in the United States of America in the 1930s to the Indian commercial and entertainment market of 2010s. The intention of this research paper is to compare and evaluate the successful strategy employed by Disney with its counterparts in India. While doing the same, we have analysed several research papers from India and elsewhere and have come up with an objective to provide effective guidance to the character creators with regards to their legal rights over their creation as well as the mechanism for unhindered exclusive commercial exploitation of the same. Accordingly, this paper presents a strategy that a company might follow in order to safeguard its rights



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from proliferation of its characters for the purposes of commercial exploitation, or in other words, Character Merchandising.

INTRODUCTION

Mickey Mouse and Chhota Bheem are two of the biggest stars in their originating home countries as well as salesmen who continuously serve without pay. Though they are entertainers, they do not have union cards. They do not require food, transportation or lodging. However, one thing is certain, they surely need lawyers! Their stories come and go, but their characters are always in use and continue to remain anew. As such, fictional characters have entertained the public while bringing substantial financial reward to their creators for years.

What started as a simple animated cartoon series in 1928, Mickey Mouse is worth billions of dollars today? The potential of commercial exploitation of animation business was contemplated by Walt Disney soon after the creation of Mickey Mouse. It is indeed remarkable that within four years of the appearance of Mickey Mouse to

children worldwide, the company successfully exploited its characters as it released the first merchandise in the form of a watch, which is still one of the most decorated merchandise of Disney.

On the other side of the world, in India, one of the most famous cartoons is Chhota Bheem. Though the fundamental purposes of this cartoon series owner are production and broadcasting of animated television series, their main business revenue lies in the merchandising industry.

In this paper, the authors have aimed to analyse the rights of the intellectual property holders of the characters that are merchandised without due permission and further, to suggest a strategic framework to enforce rights against such proliferation of characters.

With these two objectives, we essentially propose improvements in the present Indian legal scenario on character merchandising to give Indian artists a comprehensive right to prevent the unauthorised use of his creations by third parties.

CHARACTER MERCHANDISING

'Merchandising' is any practice or plan that contributes to the brand image of a character by concentrating on the sale of a product or service, related to the said character, to a retail consumer. It encompasses marketing the right product or service at the right place, at the right time, at the right price and to the right audience.



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'Character merchandising' is the business of licensing, inter alia, of the name and likenesses of real or fictional character on goods, or in connection with services with which the licensor or owner of the relevant rights has little, if any, direct nexus.¹ For the purpose of this paper, this term can be defined as the secondary exploitation of a popular fictional character in respect of commercial products to encourage prospective customers into buying such products in furtherance of their affinity for the character. Simply put, it is commercial exploitation of a popular character, using its wide appeal to sell products and services.

The commercial exploitation of fictional characters is rarely done by the creators themselves. In most cases, it is another entity that is given limited rights of licensing for merchandising.

TYPES OF CHARACTER MERCHANDISING

Broadly, there are three types of character merchandising:

Fictional Character Merchandising

The first type is the use of characteristic features of a famous *fictional human or non-human character*, appearing in a literary work, cinematograph film or in an artistic work, for merchandising.

The examples of fictional character merchandising include toys and clothes of GI Joe, Mickey Mouse, Donald Duck, Popeye and Powerpuff Girls.

Personality Merchandising

In this type of merchandising, the persona or any of their essential personality features of a *famous person*, who may be a celebrity from the entertainment or sports industry, are used for merchandising. This is also called celebrity merchandising.

Examples include the use of Paris Hilton's name for perfumes; branding of Virat Kohli inspired clothes under the name 'WROGN'.

Fusion Merchandising

The third type is an amalgam of the first two types. It includes the use of personality features of a *fictional character from a movie or television series that is portrayed by a real person*, for merchandising. The association of the character with the actor is such that the public at large is not able to



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distinguish the actor from his character and therefore, the merchandising is based on the fictional image of the actor who has portrayed the character

For instance, clothing inspired by the character of Hermione Granger portrayed by Emma Watson in the adaption of the fictional series Harry Potter, character of Captain Jack Sparrow portrayed by Johnny Depp in Pirates of the Caribbean movie series.

Thus, the basis of merchandising could range from a simple cartoon character to a non-human character derived from a literary source, to a character played by a real person in a movie, drama or television series to a real celebrity. Character merchandising based on fictional non-humans is relatively simpler than the character merchandising based on non-fictional and real persons, as in case of the latter, identification of essential characteristics of one's image or personality for merchandise is critical and of key consideration.

This paper primarily deals with character merchandising of animated creations that have been a runaway success.

FICTIONAL CHARACTERS: COPYRIGHT OR TRADEMARK

Before analysing character merchandising of animated creations, it is important to understand the legal perspective surrounding fictional characters in the field of intellectual property law. In approaching a potential merchandising program, special emphasis should be placed on relying on the form of intellectual property protection best suitable to the owner's needs in the event of possible infringement. Whilst, the merchandiser may prefer to rely on common law protection in the event that statutory protection is not sought or obtained, such protection may not always serve the owner's best interests and should only be utilized as a last resort.²

Therefore, to best protect merchandising property, statutory protection under copyright and trademark laws should be sought wherever possible.

Copyright

There is an inherent copyright that subsists with creators of animated characters in the drawings involved.³ Thus, in the case of the fictional characters, the law of copyright is capable of providing some degree of protection, providing reasonably effective sanctions against third parties who may indulge in the unauthorised use of any aspects of such characters.⁴



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Although these characters originally appeared in two-dimensional form, it has become well-established by the *Spark Plug* and *Betty Boop* cases⁵ that they may not, without infringing the copyright, be reproduced in three-dimensional form.

Trademark

A fictional character cannot be trademarked for its own protection.⁶ However, it can function as a trademark when used to indicate the source of a product.⁷ Thus, when a copyrighted character is used in such a way that it becomes something more than an adornment of the article but suggests to the purchaser that the article comes from a certain source, the character then achieves trademark significance. Notably, a trademarked work can be protected for an indefinite period of time.

A character can function as a trademark in a number of ways:

- I It can be used as the title of a book, movie, or an ongoing literary or audio-visual series, thereby indicating the source of that particular entertainment good or service.⁸
- II If used as the character's name, it denotes the source of the character itself as an entertainment product or service and the goodwill that has built up in it.⁹
- III It may be used on goods or services not employing the character, but for which the trademark owner nevertheless wants the source known.

CHARACTER MERCHANDISING: MICKEY MOUSE

Introduction

Mickey Mouse made his debut in 'Steamboat Willie' in 1928.¹⁰ Since then, the lovable rodent mouse, with bright red shorts, a pair of gigantic yellow shoes, and circular ears, has achieved what no other animated character has, an Academy Award.¹¹ He has spawned social clubs, theme parks, and every



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piece of merchandise imaginable. He has a worldwide brand awareness of 97%, which is higher than Santa Claus. For his efforts, Forbes has dubbed him the world's 'richest fictional billionaire', placing his estimated worth to Disney at \$5.8 billion per year.¹²

Merchandising

The Walt Disney Corporation has for many years been involved in the marketing of products connected with its fictional cartoon characters. The reason for the success of their merchandised goods can be attributed to the 'personification' properties of its characters.

Personification of Mickey Mouse

'Personification' properties identify certain desirable characteristics and create demand for products on which they are used, to target that segment of the public wishing to be identified with the particular characteristics to which they aspire. The purchasers of products bearing personification properties seek to psychologically associate themselves with such desirable characteristics. The best known personification properties are derived from names and images of personalities or characters who exhibit particular characteristics themselves.

In the case of *Mickey Mouse*, its name and image has appeared on a myriad of merchandising products. The success of Mickey Mouse is attributable to its triumph over adversity. Mickey has got human qualities that make him larger than life. Mickey was the first cartoon character that always succeeded against the villain. He became a part of American folklore, a symbol of the ability to overcome by being smart, clever and witty.¹³

Merchandised Products

The most successful merchandised goods are those that involve the use of the merchandising properties in connection with right priced, 'impulse' products, often referred to as 'mass market merchandise'. This merchandise includes, for example,

posters, T-shirts, toys, games, buttons, badges, patches, combs, baseball trading cards, etc.

The products to which the Mickey Mouse properties have been applied are exemplary of the low-priced, impulse items on which merchandising properties, in general, are used. Mickey Mouse products have ranged from the famous Mouseketeer beanie and ears to watches, drinking glasses, placemats, posters, colouring books, toothbrushes, combs, dolls, undergarments and shower curtains. It has been estimated that the Mickey Mouse name or


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image has, over the past fifty years, been applied to over fifty thousand different products and today more than two hundred worldwide manufacturers are licensed to produce Mickey Mouse products.¹⁴

Motivated and Sophisticated Usage

As with any valuable asset, those in a position to profit from character exploitation are eager to preserve control over the character's commercial use. Such character owners have a great incentive to oversee any and all character-related uses once their character becomes an indicator of source, as untoward uses may damage the goodwill of the owner. Accordingly, owners and creators seek to wrap their fictional characters in a net of invulnerability—a net created through an artful interweaving of copyright, trademark, and unfair competition laws.

Especially when a character such as Mickey Mouse takes on a near human life of its own, character owners are far less willing to endure unauthorized uses that would be considered non-infringing fair uses. Such owners and creators desire greater legal protection in part to ensure that no one harms the character by putting it in unflattering or disharmonious situations.


For instance, the Walt Disney Company does not permit its licensees to depict Mickey Mouse in an unattractive manner, such as drinking liquor or smoking cigarette.¹⁵

Liberal Expressive and Ornamental Use

When the owner of a fictional character uses that character both in expressive works and for trademark purposes during most, if not all, of its copyright term, there arises an absolute association between the character and the owner. This association becomes hard-wired in the public consciousness over time.

The Walt Disney Corporation uses Mickey Mouse so extensively on most of its basic corporate materials, such as letterhead and envelopes that sometimes, the character even stands in place of the corporate name. It was recognised that Mickey Mouse is more than just an animated cartoon character; he has become the most recognizable symbol of Walt Disney Corporation.¹⁶

A poignant example of Mickey's pervasive use by Disney was his appearance in a full-page advertisement paying tribute to the late Jim Henson. The advertisement depicted a formally dressed Mickey Mouse, with a tear in his eye remembering Jim Henson (1936-90).¹⁷

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Enforcement of Merchandising Rights

The Walt Disney Corporation's fictional characters have existed for decades and in all this time, their creative and financial value has skyrocketed. A major attribute of this is the company's aggressive protection spurred on by the near-human quality inherent in its fictional characters. One only needs to look at the longevity and financial success of Mickey Mouse (over 89 years old) to understand this proposition. One can even look at the extensive litigation engaged in by Walt Disney Corporation to both clarify and logically extend the scope of copyright and trademark protection to its characters.

Copyright

Mickey Mouse's copyright was registered under the US Copyright Act, 1909. Works created under this Act were protected for 28 years, plus a renewal term of 28 years.¹⁸ The current law on the subject in USA is Copyright Act, 1976. Under the 1976 Act, the duration of copyright for works created on or after January 1, 1978, is the author's life plus 50 years.¹⁹ Once the term of protection ends, a copyrighted work falls into the public domain, and the exclusive rights of the owner are lost. In 1997, Congress introduced the Copyright Term Extension Act, which extends corporate copyrights from 75 to 95 years. As per the current legal scenario, Mickey Mouse's copyright protection will expire in 2023.

Trademark

The law of trademark is governed by the Lanham Act, 1946. The duration of trademark protection is potentially perpetual. Provided, the mark is not abandoned or has lost its indicative qualities, the owner's rights continue in perpetuity since a registered trademark is always renewable for periods of ten years.²⁰

Thus, even if Mickey copyright does expire in 2023, Disney has no less than 19 trademarks on the words "Mickey Mouse", ranging from television shows and cartoon strips to theme parks and videogames, that could shield him from public use.

*Walt Disney Productions v. Air Pirates*²¹

The Walt Disney Corporation has pressed a wide range of intellectual property causes of action to shield their creations. In most of the cases, the Courts have shown active willingness to structure their reasoning that Disney



characters would be protected. One of the most notable cases is *Walt Disney Productions v. Air Pirates*.

In this case, the Court addressed the copying of the world's most famous rodent in an adult-oriented, counter-culture comic book. Mingling the elements of copyright infringement with trademark infringement, the court expanded its copyright analysis to note that the characters had achieved a high degree of 'recognition' and 'identification.' It was these elements that made the work protectable.

The Court considered defendant's reliance on an earlier Ninth Circuit decision, *Warner Bros Pictures Inc. v. Columbia Broadcasting System Inc.*²² The Court reiterated the rule of law from Warner Bros. that if a character is only the chessman in the game of telling the story, then that character is not within the area of the protection afforded by the copyright. The Ninth Circuit Court distinguished its earlier Warner Bros. decision from the facts before it, on the grounds that in Warner Bros. literary, not comic book, characters were involved and comic book characters, which include physical and conceptual qualities, are more likely to contain some unique elements of expression.

CHARACTER MERCHANDISING: CHHOTA BHEEM

Introduction

Chhota Bheem is a comic character that was introduced in a television series in 2008. It was conceptualized by Rajiv Chilaka and popularized through his production company 'Green Gold Animation'. Bheem of Mahabharata is conceptualized in his childhood avatar as 'Chhota Bheem', a nine year old boy who is brave, strong and intelligent.²³ The series premiered on and is carried on air by POGO, one of the biggest carriers of kids' shows in the television industry. The series focuses on 'Bheem' and his friends on their regular adventures while living in the fictional town of Dholakpur in rural India. These adventures usually involve bheem and his friends protecting their King and his kingdom from evil forces, maintaining a line on the historical character of the Hindu epic Mahabharata's Bheem. Although, the similarity between the two ends there.

Today, it is one of the most notable fictional characters of the country. In fact, it would not be an exaggeration to say that Chhota Bheem has become the biggest and the most popular animated creation in the history of Indian Television. The show is also gaining popularity in international markets like



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Indonesia and Singapore, where it is telecasted in local languages.²⁴ The popularity of the show and the growing maturity of the Indian Market and its integration with the rest of the world has helped in bringing the best practices with respect to the commercial exploitation of such dedicated popularity.

Merchandising

Chhota Bheem has emerged as the Indian success story in the commercial exploitation by merchandising segment. Green Gold Animation, launched merchandise and comics related to Chhota Bheem in 2009, followed by toys in 2010. The brand is now associated with several daily use products and eatables. They also produced mobile games including educational ones. The merchandise portfolio expanded to more than 300 products and they established merchandise selling stores in several stores in India.²⁵

Personification of Chhota Bheem

The creator, Rajiv Chilaka had conceived an adventurous young boy with the strength and attributes of Bhima from Mahabharat living in an unspecified period in medieval India. He was also influenced by his childhood spent on Disney's animated shows, Tintin, Amar Chitra Katha and other superhero comics. The importance of the epic Mahabharata and the dedicated approach of portraying noble characteristics of the Amar Chitra Katha, has been crucial in its sustained popularity even today. Naturally, a character that seems to bring an association with the epic through an effective storytelling approach of the Amar Chitra Katha, was bound to strike a chord with the Indian audience.²⁶

Accordingly, Chhota Bheem was created as an adventurous and fun loving nine year old boy who is gifted with extraordinary strength. This power is a boon for his village Dholakpur, which is beset with all kinds of perils. Everyone in the village looks up to Bheem for solutions to their problems, ranging from mysterious disappearances of people and cattle to infrastructural issues. Bheem comes across as the boy with a big heart who uses his strength to help those who are poor, wronged and needy, like a guardian of the villagers and animals alike. He is also shown being the village's representative to many competitions like cycling, wrestling etc.



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These characteristics associate Bheem as a friend of his audience who guides them to follow the path of aid, innocence, and bravery-traits that are generally approved by parents, thereby gaining the trust of the parents' of its consuming audience. The general theme is similar to the dominant religious trait in India i.e. the victory of the good over evil. It accordingly personifies Bheem as a friend of children who shall guide them in the desired path and puts him up as a role model who has similar traits to heroes depicted in Hindu scriptures.

He is depicted as a fit and decently intelligent boy, whose only fault is stealing laddus, his favourite food. He is shown as brunette, wearing a loose orange dhoti and sporting a tilak on his forehead.

The show became highly successful due to its relatable characters to kids and vernacular nature. It is considered India's largest children's entertainment brand. The show has a viewership of 40 million in India and beyond. The brand was valued around Rs. 300 Crore in 2013.²⁷

Merchandised Goods

Today, Chilaka's Chhota Bheem has not only managed to create a storm in the cartoon world but even in the world of retail, Chhota Bheem's merchandise is a hit. Green Gold stores have a strong franchise network selling exclusive Chhota Bheem merchandise. Green Gold set up its licensing and merchandising division in 2008. The growth rate witnessed by the company is close to 200 percent year-on-year (YOY).²⁸

Additionally, the characters have extensively been used on toys, children's apparels and numerous other articles of merchandise. Most revenues associated with the Chhota Bheem series are earned from licensing and merchandising activities. The company started with designing and producing its merchandise like comics, DVDs, and apparel. However, as the popularity of this icon grew over the past few years, Chhota Bheem tied up with a range of products and brands including McDonalds, Johnson & Johnson, Pepsodent, United Biscuits, Usha Fans and Microsoft.²⁹

Additionally, the company's in-house games division has developed several apps for Android and Apple smart phones, and plans are also on the anvil for



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launching a Chhota Bheem theme park.³⁰ These merchandised products are available across the country via a store network of Green Gold stores, along with an e-commerce site related to this icon. Green Gold is currently focused on expanding the merchandising strategy for Chhota Bheem and as part of this strategy, is working on expanding the range of co-branded products, along with restaurants, live shows and plays related to this theme.³¹ Green Gold has also partnered with Netflix to launch another animated series 'Mighty Little Bheem'.³²

Motivated and Sophisticated Usage

The production company led by Mr. Chilaka has had a dedicated strategy for the commercial exploitation of Chhota Bheem. The primary trait has been the exclusive commercial exploitation rather than opting for numerous licensees for the same. However, the public at large is still unaware that the Green Gold Animation is the

owner of the Bheem brand. There is a requirement of constant and coordinated efforts to associate Bheem in specific and other characters of the series in general, along with their personality traits to the Company in the manner identical to the one followed by Disney. This will enable enhanced protection of intellectual property for a much longer period of time.

Enforcement of Merchandising Rights Protection under Indian Law

Piracy as an issue is not just restricted to movies and books but has also crept into character licensing. It is not uncommon to find Batman and Superman t-shirts floating in the market at roadside stalls. And it goes without saying that these are not officially licensed. Chhota Bheem could face a similar threat from such proliferation.

Accordingly, character merchandising is not only a battleground for conflicting business interests but also for legal interests.

It is interesting to note that there is no special law in India to deal with issues related to character licensing. Hence, any concern is dealt with by



taking into consideration copyright law, trademark law and common law principles.

Copyright

The Copyright Act, 1957 is the enforcer of rights of the producers or the creators of the characters in India. Accordingly, 'Green Gold Animation', if Mr. Chilaka has designed the series under the name of the company, has complete copyright over the series and its characters; otherwise it rests with Mr. Chilaka. The Act identifies the producer i.e. Green Gold Animation as the author of the cinematic series³³ and provides the owner of the cinematographic film, the exclusive right to make a copy of the film including a photograph of any image forming a part of the film.³⁴


Courts in India have recognized merchandising rights of characters created; such as, in *Raja Pocket Books v. Radha Pocket Books*,³⁵ the Delhi High Court was called upon to decide the copyright of the comic book character 'Nagraj'. The character is usually attired in green colour body stocking giving the impression of serpentine skin and red trunks with a belt which appears to be a snake. The defendants also started publishing a comic book with the character 'Nagesh' having similar characteristics to 'Nagraj' and possessing the magical powers of snakes which was the most similar feature. The Court pronounced that the copyright in the Nagraj character rests with the producer publishing house and any attempt by the defendant to use the likeness of the character in stickers, posters or any other advertising material will be considered infringement.

Trademark

Although copyright is the best mechanism to protect the ownership of the creation, it is the trademark law that helps in protecting the legal right of commercial exploitation. Most provisions of the Trade Marks Act, 1999 are broad in meaning and extensive in their application and therefore are easier to apply to character merchandising disputes.

The Act defines trademark to include any mark capable of being represented graphically and distinguishable with regards to goods and services of different persons.³⁶ Marks such as name, signature, word, device, letter, shape of goods, packaging or combination of colours are capable of being registered as trademarks if they are distinctive in nature and not descriptive of the goods they represent. The characters of Chhota Bheem which are currently being or are planned to be

commercially exploited are also registered as trademarks.

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A registered owner of a trademark can prevent others from using an identical or deceptively similar mark without permission on goods/services for sale, offering or advertisement and can also prevent the import of such goods and services.³⁷ A registration is accompanied by the presumption of validity. The Act also provides for registration of users of the registered trademarks which shall also be a focus strategy of the company if they intend to bring in additional licensees for character merchandising. Apart from the protection of the mark's identity in the market, the Act also provides for quality control provisions to maintain the market goodwill of trademark.³⁸

Rights of the owner in relation to the reputation and goodwill enjoyed by the character, whether such character is fictional or otherwise, have been recognized; provided that the popularity of a given character grows beyond the program or series to which the character is associated.³⁹ The concept of characters as marks has been accepted even when the character is a personality and the brand is unregistered in the Trade Marks Act.⁴⁰


In the absence of a definite law to protect character merchandising, people prefer to resort to the Trade Marks Act for legal protection against illegal acts including proliferation.

SUGGESTED CHARACTER PROTECTION STRATEGY

As analysed already, character merchandising rights rests with the rights holder i.e. the copyright holder or the licensee. However, the legally supported commercial exploitation is usually interfered into by the reckless disregard for the rights of the owner of the copyright, his rights related to the character and to the law. There is a huge proliferation of character merchandising business around the globe and more so in India. In order to prevent the image of the character, a company or the rights holder should formulate a strategy for enforcement of rights.

Our suggestion emphasises a policy that focuses on the following:

- I Concentrate on the online e-commerce market platforms to find and to hold accountable for the infringing proliferation of the brand. If the seller of products is not a licensee of the rights holder, the owner should make it a policy to enforce his legal rights under trademark law unflinchingly.
- II In order to check further proliferation, the owner should incorporate a licensing policy to enlarge the base of registered users of the characters

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for the purpose of commercial exploitation. The policy should include the quality to be maintained, the products to be manufactured and the place of manufacture and sale.

- III The owner should follow an aggressive marketing campaign and dedicated association of the character(s) with the company in order to make the two indistinguishable.
- IV The owner should make all efforts to bring the character to life like status i.e. a real and breathing character that keeps the character in public memory.

V All such characters of a series, not just the best-selling ones should be registered under copyright and trademark law for present and future exploitation to create an extensive portfolio of characters.⁴¹

CONCLUSION

The authors have tried to elucidate the concept of character merchandising through a comparison between its status in the United States of America where it originated and developed; and in India where it is still in nascent stage. Since, enforcement of rights against infringement of characters for the purposes of commercial exploitation has not yet caught up and advanced, we have tried to propose an alternative that lays down emphasis on extensive commercial exploitation and have prepared a strategy for countering proliferation in character merchandising. The authors believe that incorporation of such a two-pronged approach is a must for the creators and the persons responsible for its commercial exploitation in order to create and benefit from a developed character merchandising regime in India.

SCOPE FOR FURTHER RESEARCH

The authors could only concentrate upon the enforcement of rights and create a strategic enforcement mechanism for the creators of characters. However, we did not deal with other kinds of character merchandising which are introduced and explained in the paper.

Accordingly, there can be further studies that lay down or rather incorporate a strategy to benefit from personality merchandising. It is debatable whether the sportspersons or the people associated in the film and television industry can afford to have a robust mechanism to safeguard their rights as characters either in the form of personality-centric merchandising or image-centric merchandising.

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