

Character'less Copyright In India: A Case Comment On Arbaaz Khan Productions V. Northstar Entertainment*

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PART A: CASE BACKGROUND

On April 5th 2016, the Bombay High Court (hereinafter referred to as Bombay HC) denied an ad-interim application filed by Bollywood production house Arbaaz Khan Productions (hereinafter referred to as AKP) against the Tollywood production house North Star Entertainment (NSE). The plaintiff in this application claimed that the defendants infringed their protectable copyright in the *Chulbul Pandey* character. The court judged in favour of the defendants, denying the request, based on its finding that there is no subsistence of copyright in the stock generalities of the character Chulbul Pandey and declaring exclusive copyright in character Gabbar Singh.

The case note¹ addresses the forum's findings in respect to the subsistence of character copyright, formulation of character copyright standards in India, the effect of the case on character copyright jurisprudence in India and finally the shortcomings of the judgment concerning the contradicting opinion of court when equated with the idea/expression dichotomy.

I. BACKGROUND OF THE ISSUE

In 2010, the plaintiffs produced a movie called Dabangg and made it into a franchisee of two movies. Both the films of the franchisee, there are varying levels of unique aspects inherent to it, including a plethora of characters having a separate status of existence within the structure of the storylines. The plaintiffs have alleged that the defendants infringe the copyright in the character of *Chulbul Pandey* in their upcoming film *Sardar Gabbar Singh*, a remake of *Gabbar Singh*, which was itself an authorised remake of the plaintiff's franchisee. The issue arose in respect to the assignment being exclusive for *Gabbar Singh* and the unauthorised making of

¹ Arbaaz Khan Production Pvt Ltd v. Northstar Entertainment Pvt Ltd, 2016 SCC On-line Bom 1812.

Sardar Gabbar Singh, for which the plaintiff moved an ad-interim application just a day ago to its worldwide release.

II. CONTENTIONS OF THE PLAINTIFF

The plaintiff, in this case, being the owners of the Dabangg movie franchisee contended that the defendants *Northstar Entertainment* violated a catena of copyrights exclusive to them including the character copyright in character *Chulbul Pandey* which has separated existence in comparison to the movie itself. It was further argued by the plaintiffs that the defendants who were only given the limited rights of remake² through an agreement³ in a film titled *Sardar Gabbar Singh* committed an infringement when they substantially replicated the characters in the sequel to the official remake *Sardar Gabbar Singh*. On the argumentative front, the plaintiff dictates that being a franchise consisting a different series of films having a common status of the connection, similar to *Rocky Balboa* in the west or the domestic *Singham*, there exist categorical copyrights in individual ingredients enlisted in the film *Dabangg* under both the common law and statutory law. Firstly, the Plaintiffs primarily claimed that ‘*what was created was the unique character of Chulbul Pandey, portrayed by Mr Salman Khan. This character is described as "a corrupt but fearless police officer" and has features unique to it*’ including the moniker of Robin Hood attached to the character’s personality, declining relationship with his family members and bizarre tactics being deployed by him to deal with rough and rogue elements. Hence, it has no ordinary characteristics of a stock hero but holds separate status in copyright. Secondly, it was averred that Defendant No. 5 (*Producers of the original Sardar Gabbar Singh*) had specific remake rights (as per the limited agreement entered into by the parties) for the first movie remake only, i.e. *Sardar Gabbar Singh* and could not have reused the underlying literary work in the *Chulbul Pandey* character even though the agreement was absolute and stylised as an assignment. Thus, the use of *Chulbul Pandey* character which has rendered a Midas touch to *Dabangg* out of its unique characteristics constitutes a case of copyright infringement and passing off on behalf of Defendants 1 to 3, the parties related to the sequel of *Sardar Gabbar Singh*. Two significant limbs of the plaintiff’s contentions revolved around the issue of firstly, copyright infringement in the character of *Chulbul Pandey* and secondly, claiming a remedy in passing off for the same cause. The third limb was about the timing of the filing for an injunction (was done at the brink) which coincided with the film release of *Sardar Gabbar Singh*.

² CONSTANTINE VEREVIS, *FILM REMAKES* (Edinburgh University Press) (2005).

³ Remake Rights Agreement, Clause 1 contains several definitions, some of which are important. Clause 2 has the operative portion of the grant, transfer and assignment and Clause 4 speaks of the rights of the Assignee, AKP, *supra* note 1.

III. DECISION OF THE COURT

Plaintiff relied heavily on the jurisprudence from the United States of America⁴, credibly due to the early development of character copyright in the US. However, the court rejected the citation of *Metro-Goldwyn-Mayer v. American Honda Motor Co.*⁵ as it was a US District Court ruling. The invocation of two other cases namely *Samuel D. Goodis et al. v. United Artists Television*⁶ and *Warner Bros Pictures Inc. v. Columbia Broadcasting System Inc.*⁷ (hereinafter referred to as WBP) was held to be acceptable though Judge Patel was quick to rebuff the plaintiff on the latter one of these. Judge Patel found *Samuel Goodis* to be a rapid generalisation of contractual law principle of reading the contract with the restrictions imbibed in it but held that the agreement in question before him was yet to be tested for the inclusion of such restriction. In terms of *WBP*, Judge Patel remarked that the plaintiff's usage of it is against the strength of their argument primarily since the plaintiff wrongly supposes that *Gabbar Singh* is nothing but a copycat reincarnation of *Chulbul Pandey*, even when there are glaring differences in the tabulation presented by the plaintiff himself.

Furthermore, Judge Patel accepts the argument that there can be copyright in characters having iconic characteristics based on specific pre-qualified parameters, but fail to reach on a conclusion based on this point of reference, making it a mere obiter dictum. After a closer perusal of the arguments and a naked eye comparison of the two characters (declining to go in detail of the two movies), Judge Patel rejects the plaintiff's claim of copyright infringement on the part of defendants given the fact that the character *Gabbar Singh* is unique in its expression and has been excelled and polished by Defendant No. 4 himself. He notes and it can be quoted that '*As I have noted, that stirs up a hornet's nest of ownership of the Gabbar Singh character well beyond what is imagined in this Plaintiff*'. In addition to dismissing the claim of copyright infringement, Judge Patel also ruled in negative on the passing off remedy claimed by the plaintiff. This was done at the behest of the finding that there are glaring differences between the setting and portrayal of the two characters and that the qualities possessed by the alleged copyrighted character in *Chulbul Pandey* are nothing but stock archetypical elements of indistinctive nature. Lastly, Judge Patel noted emphatically on the urgency and delay in the initiation of injunction proceedings filed by the plaintiff that,

⁴ Hereinafter 'US'.

⁵ *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287 (C.D. Cal. 1995).

⁶ *Samuel D. Goodis & William Goodis v. United Artists Television and American Broadcasting Company*, USCA 2nd Cir (3-9-1970).

⁷ *Warner Bros Pictures Inc. v. Columbia Broadcasting System Inc.*, 216 F.2d 945 (9th Cir. 1954).

'Apart from the additional and entirely avoidable pressure on this or that Court, what matters is the hijacking of judicial time that could have been made available to other litigants, some of them needy, all of them patiently awaiting their turn. These last-minute luxury applications arrogated by plaintiffs should not be tolerated; they come at very considerable cost, not just in terms of judicial time spent, but in time stolen from other litigants waiting in the queue'

Rejecting the case of the plaintiffs, Judge Patel writing on behalf of the court declared that, *'Unable to find for the Plaintiffs on either a prima facie or balance of convenience, I decline ad-interim reliefs. For what it is worth, I clarify that this is a prima facie view for the ad-interim application'*.

PART B: COMMENTS

I. SUBSISTENCE OF CHARACTER COPYRIGHT

Even though Section 13⁸ of the Copyright Act, though recognises the different form of copyrightable work, it fails to categorise the fictional characters within any black letter of the law or accept it as a separate work having significant secondary characteristics of its own, distinct from the original parent copyrighted work. However, Judge Patel through the decision in *AKP* does pursue the existence of character copyright under the provision of Section 13⁹ as an underlying work of ‘writing up’ (altogether arguing for fictional characters recognition under the rubric of Copyright Law), albeit invariably under an indirect reference. Quite similar to India, in the US too, there is no de jure recognition to fictional characters under the copyright statute, but unlike India, the jurisprudence has developed in the US through judge-made expositions¹⁰. For instance, the courts in the US have effectively differentiated among a set of characters ranging from literary to comic to motion pictures with the latter having the most flexible classification for copyright and the former, the most stringent and negligible.¹¹ In contrast to India, the courts in the US have been dealing with the further sub-categories or components of the copyrightable works including the likes of Batmobile and Freddie Kruger gloves as good enough character copyrights.¹² Although *AKP* does not adopt such an in-depth approach to the character of *Chulbul Pandey*, it infuses the three tests referred to by the US courts.

Given the glaring inconsistencies, *AKP* still presents a novel picture for Indian character copyright development. On a bare perusal of American jurisprudence, it can be deduced that for qualifying as character copyright, there are no standard criteria.¹³ This holds in the Indian setting too, as there are only a few precedents of credibility which makes a passing reference

⁸ 13. Works in which copyright subsists.—

(1) *Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,—*

(a) Original literary, dramatic, musical and artistic works;

(b) Cinematograph films; and

(c) Sound recording.

⁹ *AKP*, *supra* note 1 at ¶ 19.

¹⁰ Michael Deamer, *DC Comics v. Towle: Protecting Fictional Characters Through Stewardship*, 32 BERKELEY TECH. L.J. 437 (2018).

¹¹ Dean D. Niro, *Protecting Characters through Copyright Law: Paving a New Road upon Which Literary, Graphic, and Motion Picture Characters Can All Travel*, 41 DEPAUL L. REV. 359 (1992).

¹² Prateek Susiretti, CAN LITERARY CHARACTERS BE COPYRIGHTED? A REFORMULATION OF THE "ESPECIALLY DISTINCTIVE" TEST-I, SPICYIP, <https://spicyip.com/2016/04/can-literary-characters-be-copyrighted-a-reformulation-of-the-especially-distinctive-test.html> (last visited Jan 1, 2020).

¹³ Kenneth E. Spahn, *The Legal Protection of Fictional Characters*, 9 U. MIAMI ENT. & SPORTS L. REV. 331 (1992).

to character copyright and the allied issues¹⁴. On a few occasions, characters have been accorded protection in India¹⁵, through the usage of Idea-Expression dichotomy and Trademark Law, but an express rule, standard or test to obtain character copyright is still mostly absent.¹⁶ Even though the decision in *WBP*¹⁷ (Maltese Falcon Case) derecognised the copyrightability of literary characters in the USA, *Klinger v. Conan Doyle Estate Ltd.*¹⁸, otherwise granted recognition to the literary character in Sherlock Holmes as copyrightable due to its distinctiveness.

On the contrary, comic strip characters have been long successful in satisfying the basic tenets for character copyright right since the invocation in *Walt Disney Productions v. Air Pirates*.¹⁹ Although visual representation accentuates the existence of protection, it does not guarantee all the visually representable characters, having no original or distinctive characteristics, automatic copyright²⁰. In fact, this is interesting in the context of *AKP* as Judge Patel emphasised that the character of *Chulbul Pandey* was nothing close to original and similar characters having near-identical characteristics²¹ have been part of the world cinema for decades, rendering its status as a mere stock character²² of gullible nature.²³ Such an analogy is akin to the first test used by the US Courts in determining the subsistence of copyright, popularly known as the ‘*Sufficiently-Delineated*’ or the ‘*Character Delineated*’ test

¹⁴ *Star India Private Limited v. Leo Burnett*, 2003 (2) BomCR 655; *Disney Enterprises & Anr. v. Santosh Kumar & Anr.*, MANU/DE/1382/2014; *Raja Pocket Books v. Radha Pocket Books*, 1997 (40) DRJ 791; *Diamond Comic Ltd. & another v. Raja Pocket Books & Ors.*, 125 (2005) DLT 35; *Mr. Shivaji Rao Gaikwad v. M/Varsha Productions*, 2015 (62) PTC 351 (Madras).

¹⁵ ‘*The fictional characters are generally drawings in which copyright subsists, e.g., cartoon and celebrities are living beings who are otherwise very famous in any particular field, e.g.; film stars, sportsmen. It is necessary for character merchandising that the characters to be merchandised must have gained some public recognition, that is, achieved a form of independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears*’, *Raja Pocket Books vs Radha Pocket Books*, 1997 (40) DRJ 791.

¹⁶ Swaraj Paul, GUEST POST: COPYRIGHTABILITY OF CHARACTERS, SPICYIP, <https://spicyip.com/2013/12/guest-post-copyrightability-of-characters.html>. (last visited Jan 1, 2020).

¹⁷ *Supra* note 7.

¹⁸ *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496 (2014).

¹⁹ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

²⁰ The courts and the judicial opinions have reshaped a ‘*character*’ to be an ‘*aggregation of the particular talents and traits his creator selected for him*’ (Quoting in this reference *Warner Bros. Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 243, 211 USPQ2d 97 (2d Cir. 1983)). Such character are deemed to be copyrightable only on the ground that the specific traits, particular talents could be considered expressive enough in contrast to mere ideas or dreamy fancies. Unless the conditions laid down are adhered to, the character on a legitimate publication ‘*instantly becomes available for public exploitation*’ (Quoting in this reference *Eldred v. Ashcroft*, 537 U.S. 186, 219, 65 USPQ2d 1225 (2003) (65 PTCJ 224, 1/17/03).

²¹ *Supra* note 5; See Also *Anderson v. Stallone*, 11 USPQ 2d 1161 (Rocky Balboa Franchise).

²² ‘*Stock characters having archetypal qualities and hackneyed elements have been classified as scenes a faire devoid of any sort of copyright*’, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); See Also *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004).

²³ *AKP* at ¶ 26 and ¶ 31.

promulgated in the case of *Nichols v. Universal*,²⁴ wherein it was held that to satisfy the requirement of copyright, specific prongs need to be conclusively derived;

- A. Whether the character's expression is sufficiently delineated (to mean originality, detailing and sufficient development and not mere generic delineation) to be copyrightable.²⁵
- B. Whether the character has in the arsenal, some physical and conceptual qualities.²⁶
- C. Whether there has been some infringement of this unique expression by another party without legitimate interests and rights.²⁷

Another exposition of Judge Patel during the judgment closely resembles the 'Story Being Told Test' formulated by the Second Circuit in *Warner Bros v. Columbia Broadcast Systems*. The basic premise on which this test stand is that the character to stand copyright must form a quintessential element orchestrating the story arc.²⁸ Although the test has been long eroded by the decisions that followed this erroneous opinion²⁹, Judge Patel paradoxically discerns that the character of *Chulbul Pandey* does not relay the story of the Dabangg movie, although he neither alludes specifically to the test nor challenge the subsistence of copyright (Character) in fairer terms.³⁰

Not all characters qualify for protection, and neither the ones who do, are accorded the same status. The Ninth Circuit in *Olson v. National Broadcasting Co.*³¹ has extended the status of copyright to characters in motion pictures using the 'Especially Distinctive Test' euphemised in the case of *Halicki Films, LLC v. Sanderson Sales & Mktg.*³² where an automotive was granted valid copyright. Inside of the 'Especially Distinctive Test', the courts (*DC Comics v. Towle, No. 13-55484 (9th Cir. 2015)*) have floated a novel three-prong criterion to satisfy this

²⁴ Judge Hand quoted that '[t]he less developed a character in a play is, the less it can be copyrighted; that is the penalty an author must bear for marking them too indistinctly', *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

²⁵ *Id.* at ¶ 121-123.

²⁶ *Rice v. Fox Broadcasting Co.*, 330 F.3d at 1175 (9th Cir. 2003).

²⁷ *Supra* note 13.

²⁸ '[I]t is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright', *Warner Bros Pictures Inc v. Columbia Broadcasting System Inc.*, 425 F.2d 397.

²⁹ Amanda Schreyer, *An Overview of Legal Protection for Fictional Characters: Balancing Public and Private Interests*, 6 CYBARIS, 50 (2015).

³⁰ *AKP* at ¶ 21.

³¹ *Olson v. National Broadcasting Co.*, 855 F.2d 1446 (9th Cir. 1988).

³² *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008).

reformulation of the ‘sufficiently delineated test’ and ‘the story being told test’, both of which has been incredibly used together cohesively by a few courts³³.

- A. The first limb to satisfy the test is the ‘physical as well as conceptual qualities’ including unique protectable characteristics.³⁴
- B. Character alleged to be replicated must be sufficiently delineated to exhibit congruent likeness throughout its expression across the medium.³⁵
- C. Lastly, the character must be especially distinctive in a manner that its representation and characteristics must be expressive in a unique sense without being a foil for stock attributes.³⁶

Keeping in tune with the decisions in the US that followed an infused approach of test such as *Anderson v. Stallone*, the Bombay HC in *AKP* interestingly adopted a kindred genus of modus operandi. Although a pervasive paradox of ‘idea-expression doctrine’³⁷ is created by Judge Patel in the course of recognising the unique expression and distinctiveness in both *Chulbul Pandey*³⁸ and *Gabbar Singh*³⁹, and further attributing this distinctiveness to the separate scripts or underlying works in the primary copyright motion pictures⁴⁰. Such an analogy of attributing the copyright to the cinematograph film, underlying script and the actors essaying the roles (Salman Khan and Pawan Kalyan respectively) is antithetical to the purpose of recognising separate copyright in the characters in question.⁴¹

In a similar tone, Judge Patel in *AKP* has also remarked abruptly that, “*It would be, I think, stretching it too far to say that such a fully developed and uniquely depicted character because*

³³ *Metro-Goldwyn-Mayer v. American Honda*, 900 F. Supp. 1287 (C.D. Cal. 1995); *Supra* note 25.

³⁴ *Supra* note 20.

³⁵ ‘*The requirement here is less of consistency and more of identifiable peculiarities and attributes*’, *Rice*, 330 F.3d at 1175.

³⁶ *Supra* note 33.

³⁷ Discussed later in Part B, § 3 of the Case-Comment; See Also *AKP* at ¶ 31.

³⁸ *AKP* at ¶ 19, 30.

³⁹ *Id.* at ¶ 21, 23, 32.

⁴⁰ *Id.* at ¶ 24, 26, 27.

⁴¹ Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 768 (2013); See Matthew D. Bunker & Clay Calvert, *Copyright in Inanimate Characters: The Disturbing Proliferation of Microworks and the Negative Effects on Copyright and Free Expression*, 21 COMM. LAW AND POLICY 3, 281-300 (2016).

See Also *AKP* at ¶ 21, 22, 23, 32.

it is 'merely a character', falls wholly outside the realm of all protection."⁴² The US court in *Harper House*⁴³ noted explicitly in the context of copyright law that,

*"The question is a mix of fact, and law and judgment is necessitated to arrive at the values that make these legal principles alive, the question should be therefore classified as one of law and reviewed de novo."*⁴⁴

It can also be discerned from the court's strict reference to *Star India v. Leo Burnett*, stating absolutely that there is no question on the general proposition of law that character copyright exists, but only that the more significant issue the court was dealing with was whether the character of *Gabbar Singh* is identical to *Chulbul Pandey*.⁴⁵ Therefore, on a coherent reading of the judgment, it can be said that a novel case for exclusive copyright in characters can be advocated.

Such a finding of the court though is not novel as such, but it becomes excruciatingly relevant in the context that previously the recognition was with respect to the artistic expressions and labour of the author/artist in its ownership, limiting the categorization to the sweat of the brow principle⁴⁶ but with this novel exposition of character-uniqueness, the character copyright fairytale can be further developed.⁴⁷

II. TEST-MATCH IN CHARACTER COPYRIGHT

There is no flexible test-based approach in India to comprehend the complex issues of character copyright. What has been followed till now is the *Merchandise Test*⁴⁸ which claims that,

"It is necessary for character merchandising that the characters to be merchandised must gain some public recognition that is, achieved a form of an independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears..... A character

⁴² *Supra* note 1 at ¶ 18.

⁴³ *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 201 (9th Cir.1989); See Also, *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir.2008).

⁴⁴ *Id.*

⁴⁵ *AKP* at ¶ 20.

⁴⁶ *Malayala Manorama v. V T Thomas*, AIR 1989 Ker 49.

⁴⁷ Sourav Kanti De Biswas, *Copyrightability of Characters*, 9 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 4 149-156 (2004).

⁴⁸ *Star India Private Limited v. Leo Burnett*, 2003 (2) Bom CR 655.

*may have grown out beyond the film when the people would identify and, therefore, there is a probability of it being potentially merchandise.”*⁴⁹

Star India court ruled on this test in the context of merchandising associated with the increasing commercialization of the intellectual property in characters. Given this, it must be made clear that the ruling was based on the value of the source-identifying and promotional enterprise of the associated trademarks in characters and less on the copyright protection of such characters.⁵⁰

On a similar note, the Delhi HC concluded in the case of *Disney Enterprises, Inc. and Ors. v. Pankaj Aggarwal and Ors.*⁵¹

*“The importance of preventing well-known characters from being misused for commercial products lies in the fact that the creation of fictional characters requires a great amount of creativity and an innovative mind. Characters such as "Lightning McQueen" have transcended the movie in which they are featured, as children recognise the said characters and treat them like living humans. India has its tradition of having a large number of home-grown characters which are liked and wanted, and such characters have immense commercial value. While fair use of the characters is permissible, within the legally prescribed norms, unlicensed use of the image of a known character.....would be unlawful and illegal.”*⁵²

Therefore, it can be safely concluded that the merchandise test which states public recognition of characters as an independent ingredient in TV media and motion pictures regardless of the milieu it appears in, is a novel test for testing the subsistence of copyright in characters.⁵³ Irrespective of this hypothesis, it must not be overlooked that this is a Bombay HC judgment and thus may not be followed by other similarly placed high courts if such an issue arises in light of the lack of Supreme Court jurisprudence.⁵⁴

⁴⁹ *Id.*

⁵⁰ GIVING DUE PROTECTION TO FICTIONAL CHARACTERS: THE POSSIBILITY OF 'COPYMARK', SPICYIP, <https://spicyip.com/2016/04/giving-due-protection-to-fictional-characters-the-possibility-of-copymark.html>. (last visited Jan 1, 2020).

⁵¹ *Disney Enterprises, Inc. and Ors. v. Pankaj Aggarwal and Ors.*, 2018 SCC On-Line Del 10166.

⁵² *Id.* at 11.

⁵³ *Id.*

⁵⁴ *Neon Laboratories Limited v. Medical Technologies Limited*, (2016) 2 SCC 672; See Also *Commissioner of Income Tax v. Thane Electricity Supply Limited*, 1993 SCC On-line Bom 591.

Quite surprisingly the Single Judge Patel, in *AKP*, explaining the context through a laborious side-by-side comparison of the similarities and substantial taking between the works of the parties, formulates a *new test*,

“The thrust of the argument is that it is possible to hold copyright not just in a literary work, but in a character. I understand this to mean the realization of a persona with iconic characteristics and traits that make him or her unique. Where such a character is developed and realized by a person entitled in law to hold copyright, there should be no difficulty in accepting that such copyright does subsist in that character and that a person or entity is entitled to it. The on-screen persona of Rocky from the Rocky franchise, James Bond from the film franchise (distinct from the literary character), certain characters from the Star Wars series (Darth Vader, Obi-Wan Kenobi, Han Solo, Chewbacca, and others), John McClane from the Die Hard franchise, and the many characters in Star Trek (most especially Kirk, Spock and McCoy) are all possible examples”.⁵⁵

Unlike the more reformed tests followed in the US by the 2nd Circuit⁵⁶ and 9th Circuit⁵⁷ respectively (discussed above), the criteria formulated in India are mainly driven by non-referred obiter dicta within the context of variable-conclusion based judgments.

III. THE CONFUSING BATTLE WITH IDEA-EXPRESSION THEORY

The courts in India on several occasions have restricted their finding to the side by side comparisons made on the ground of substantial taking or similarity⁵⁸, without going into the merits of the case and deciding upon the larger question of the existence of copyright, copyright infringement in characters and fair dealing provisions in such claims of infringement.⁵⁹ As per the idea-expression dichotomy, it's only ideas, that are protected and not the underlying non-protectable expression⁶⁰. Every concept which is capable of being expressed in a tangible medium does not qualify for protection either, primarily because it may lack creativity or originality.⁶¹

⁵⁵ Cf. *DC Comics v. Towle*, No. 13-55484 (9th Cir. 2015).

⁵⁶ The Sufficient Delineation Test formulated in *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930).

⁵⁷ Story Being Told Test formulated in *Warner Brothers Pictures Inc. v. Columbia Broadcasting System*, 216 F.2d 945 (9th Cir. 1954).

⁵⁸ *Raja Pocket Books v. Radha Pocket Books*, 1997 (40) DRJ 791.

⁵⁹ *Supra* note 1.

⁶⁰ *R.G Anand v. M/S. Delux Films*, 1978 AIR 1613.

⁶¹ *Id.*

Based on the court's ruling, it can be deduced that there exists a confusing lacuna within the reasoning, multiplied by the fact that instead of adopting a step by step analysis of the case, as in the case of *Nagaraj (Raja Comics)*, the court straight away shot to launch the side by side comparison. This fact is put out in the open on the ruling that *Chulbul Pandey* has not been reckoned as a full-grown character⁶², and the majority/essential characteristics⁶³ of it are a mere generality⁶⁴. After coming to this conclusion, the court still goes on to recognise the existence of copyright over it through the writing medium-literary character analogy. Therefore, the reasoning of the court complexes the idea-expression dichotomy, by presuming *Chulbul Pandey* to be a valid expression but after that diluting its standards on originality and creativity. At best, this can be called a contradiction and asymmetry, primarily driven due to the absence of systematic granulation of legal principles.

⁶² *AKP* at ¶ 19.

⁶³ *Id.* at ¶ 27.

⁶⁴ *Id.* at ¶ 32.

PART C: CONCLUDING REMARKS

Although the ruling in *AKP* case and the analysis behind it, is lacking in the fluidity of its course and technicality of its matter, it can still be termed as a landmark ruling for the reason that it has partially recognized character copyright in substance. There can be a different purposive interpretation of this judgment to make a case for/against the copyright, but still, largely the jurisprudence on character copyright in India remains seemingly scattered and convoluted for its own good. It must be noted though that *AKP* was followed in spirit and vindicated albeit as an *obiter dicta* by the Delhi HC in a celebrated judgment of *Mr Shivaji Rao Gaikwad v. M/Varsha Productions* which primarily dealt with the right to publicity claims. What good this judgment or the subsequent affirmation in *Shivaji Rao* has in the kitty for the creators, producers and independent artists working out of India, that is something only time will tell. Though till the gateway is not open for a home-based remedy, internationally recognized tests can be borrowed and applied for the better.