AVATARS IN THE EYES OF THE LAW RE-IMAGINING INTELLECTUAL PROPERTY FOR FICTIONAL CHARACTERS IN INDIA'S DIGITAL AGE

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Abstract

In India, fictional characters are important cultural and economic assets, but it's not clear how to protect them legally. This article looks at how India's current intellectual property system isn't good enough because it doesn't give fictional characters a specific legal right. It answers the research question, to what extent does this legal gap hurt creators and transformative fan communities, and how might a sui generis 'copymark' system help? This paper uses a doctrinal, socio-legal, and comparative approach to argue that the current system, which relies on judicial tests from other countries that are not always applied consistently, makes business uncertain. This lack of clarity also stops fan communities from talking about their cultures, because India's strict "fair dealing" doctrine, as defined in Section 52 of the Copyright Act, 1957, wrongly classifies their creative works as infringement. Additionally, the rise of generative AI makes current legal tests for infringement useless, requiring a shift in the way things are done. This article ends by suggesting a hybrid 'copymark' right, which is a registered right that lasts for a set amount of time and protects a character's whole persona. This sui genris solution would make things clearer for creators, give non-commercial fan works a safe place to live, and set up a strong framework that can handle future technological problems.

Keywords*: Fictional Characters, Intellectual Property, Copyright Law, Sui Generis Right, Generative AI, Transformative Works, Copyright.*

INTRODUCTION

Fictional characters are what modern creative industries are all about. In India, they are cultural and economic giants, living in a world that includes movies, comic books, and more.[1]

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Gabbar Singh from the movie masterpiece is one of these icons. *Sholay*, the superhero Nagraj[2], and the beloved cartoon duo Boban and Molly[3] are more than just story elements; they are valuable intellectual assets that drive billion-dollar merchandising industries and form deep, lasting connections with the public. Yet, a profound paradox lies at the heart of their existence: their immense commercial value is built upon a foundation of profound legal ambiguity.[4] These characters, capable of transcending their original narratives to lead independent lives, exist in a doctrinal no-man's-land within Indian intellectual property (IP) law.

The Indian legal system for protecting these valuable works is a shaky patchwork made up of borrowed ideas from other countries' legal systems and statutory categories that were never meant to include them. The Indian Copyright Act of 1957 does not clearly define "fictional characters" as a separate class of protectable work, which means that creators and courts have to go through a complicated process of fitting these complex, multi-faceted entities into the pre-existing categories of "literary" or "artistic" works.[5] This lack of clarity has created a doctrinal mess, forcing the courts to borrow and adapt legal tests from the United States[6], resulting in an inconsistent and unpredictable legal system that does not serve the interests of creators or the public.

The main point of this article is that this ad-hoc system is not good enough for the digital age. Its problems go beyond uncertainty in business. It has a clear chilling effect on the legitimate cultural expression of transformative fan communities[7]- one of the main "downtrodden concerns" where creative engagement with beloved characters is often miscategorized as mere infringement instead of being celebrated as cultural dialogue.[8] Furthermore, the current framework is not ready for the disruptive challenges posed by generative artificial

[1] Leslie A. Kurtz, "The Independent Legal Lives of Fictional Characters", 1986 *Wis. L. Rev.* 429 (1986).
[2] *Raja Pocket Books* v. *Radha Pocket Books*, 1997 (40) DRJ 791.
[3] *Arbaaz Khan* v. *North Star Entertainment*, (2016) SCC OnLine Bom 1812.
[4] *Supra* note 1.
[5] The Copyright Act, 1957, s. 13.
[6] Amanda Schreyer, "An Overview of Legal Protection for Fictional Characters: Balancing Public and Private Interests", 6 *Cybaris* 51 (2015).
[7] "Copyright Law and Fanfiction: Navigating the Intersection of Creativity and Intellectual Property", Intepat IP (Feb. 4, 2025), *available at*: https://www.intepat.com/blog/copyright-law-and-fanfiction-navigating-the-intersection-of-creativity-and-intellectual-property/ (last visited on: 27.06.2025).
[8] "The Fandom Chronicles: An Analysis of the Copyright Conundrum in Fan-Fiction & Fan-Art", DNLU Student Law Journal, *available at*: https://dnluslj.in/the-fandom-chronicles-an-analysis-of-the-copyright-conundrum-in-fan-fiction-fan-art/ (last visited on:27.06.2025).

intelligence (AI), which threatens to shatter the very concepts of authorship and infringement upon which the law is built.[9]

This study tries to answer an important research question: How much does the lack of a unique legal right for fictional characters in India cause legal uncertainty that hurts both original creators and fan communities that change the characters? And how could a mixed 'copymark' system be a better and more stable solution?

This article uses a doctrinal method that is heavily influenced by social and legal factors as well as comparisons to answer this question.

- Part I breaks down India's current legal system, showing how doctrinal confusion comes from the lack of clear rules and the inconsistent use of borrowed judicial tests. It will show that trying to use other systems, like trademark law, to solve problems makes them worse.
- Part II moves on to a socio-legal analysis, looking at how this legal uncertainty hurts fan culture and making the case that India's strict "fair dealing" doctrine doesn't protect this important way for people to participate in culture.
- Part III looks at the new and serious problems that generative AI brings up and says that this technology makes old legal tests useless and requires a change in how we think about character rights.
- Finally, Part IV goes from criticism to construction by suggesting a comprehensive legislative reform in the form of a unique 'copymark' right. This proposed solution aims to make things clear for creators, give fan communities a safe place to be, and create a strong framework that can handle the technological challenges of the future.

THE DOCTRINAL QUAGMIRE: FINDING CHARACTERS IN INDIAN COPYRIGHT LAW

India's legal protection of fictional characters is not a clear doctrine but a patchwork of rules that have come about because of a lack of clear laws and the need for judges to make

[9] "Rights of Fictional Characters: Copyright, Trademark and the Challenge of A.I.", Esya Centre (Jan. 3, 2025), *available at*: https://www.esyacentre.org/perspectives/2025/1/3/rights-of-fictional-characters-copyright-trademark-and-the-challenge-of-ai (last visited on. 27.06.2025).

decisions.[10] Since, there is no clear legislative mandate, Indian courts have had to take on a quasi-legislative role, selectively using and applying foreign legal tests to disputes over these valuable intangible assets. This ad-hoc approach has led to a body of case law that is often contradictory and does not provide the predictability that creators, investors, and the public need. The systemic inefficiency that comes from this legislative inaction is not just an academic curiosity; it costs real money in the form of long legal battles and a lack of investment across the entire creative ecosystem.[11]

The Statutory Silence and the Difference Between Ideas and Expressions

The main problem with protecting fictional characters in India is that its main IP law has a big hole in it. Section 13 of the Indian Copyright Act, 1957 (the "Act"), lists the types of works that are protected by copyright: original literary, dramatic, musical, and artistic works, as well as films and sound recordings. There is no mention of "fictional characters" as a separate category of protectable subject matter. This lack of mention is the original sin of character protection in India, forcing stakeholders and courts to try to fit these unique creations into existing categories like "literary work" of Section 2(o),[12] "artistic work" under Section 2(c),[13] or "dramatic work" under Section 2(h) of the Act. This lack of action by the law immediately brings to mind one of the most important ideas in copyright law: the idea-expression dichotomy. The Supreme Court of India confirmed this idea in *R.G. Anand* v. *Delux Films*.[14] It is a widely accepted idea that copyright protects the unique, original expression of an idea, but not the idea itself.[15]

This difference is important for keeping the right balance between encouraging creativity and keeping a strong public domain for future creators to use. In the case of fictional characters, the general idea of a character-a brilliant but strange detective, a superhero with superhuman strength, or a star-crossed lover-is not protected. However, the specific, detailed embodiment

[10] "A Comparative Analysis of Copyright Laws in India and the United States", Lawful Legal, *available at*: https://lawfullegal.in/a-comparative-analysis-of-copyright-laws-in-india-and-the-united-states/ (last visited on: 27.06.2025).
[11] *Supra* note 9.
[12] The Copyright Act, 1957, sec. 2 (o).
[13] *Ibid*, sec. 2 (c).
[14] AIR 1978 SC 1613.
[15] "Hand Book of Copyright Law", Copyright Office, Government of India, *available at*: https://copyright.gov.in/documents/handbook.html (last visited on: 27.06.2025).

of that idea-the character of Sherlock Holmes with his deerstalker hat and Baker Street address, or Superman with his specific costume and origin story-is protected.

Because of this, the idea-expression split is the main issue in infringement cases. The main legal issue is whether the person who is accused of copying an abstract idea of a character that cannot be protected or the developed expression of that character that can be protected. This is a very hard distinction to make because it requires a court to decide where on the spectrum from abstract idea to concrete expression a character falls. As Judge Learnt Hand famously said, the line between idea and expression will always be ad hoc.[16] This subjectivity, along with the fact that there is no clear legal guidance in India, has led to a legal system that is full of uncertainty and inconsistency.

Judicial Bricolage: Bringing in and using US tests

Because there is no Indian law, the Indian judiciary has turned to foreign law, mostly American law, for help. This process of borrowing legal ideas, which was necessary, has led to a patchwork and often uncritical use of tests that were made in a different legal and cultural setting.

The "*Character Delineation*" test, which comes from Judge Learnt Hand's famous opinion in *Nichols* v. *Universal Pictures Corp.*[17], is the most important of these imported doctrines. This test asks whether a character is "*sufficiently and distinctively delineated*" to be protected as an expression rather than just an idea. Judge Hand stated the main point: "*the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct*." Indian courts have often, though not always, used this standard.

The Delhi High Court protected the comic book character "*Nagraj*" from the infringing "*Nagesh*" in the case of *Raja Pocket Books* v. *Radha Pocket Books*[18]. The court's detailed comparison of the characters' looks, origin stories, and powers, though not explicitly naming the delineation test, was a clear application of its principles, finding that Nagraj was a well-defined expression that had been substantially copied.

[16] 45 F.2d 119 (2d Cir. 1930).

[17] *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930)

[18] *Arbaaz Khan Production Private Limited v. Northstar Entertainment Pvt. Ltd.* 1997 (40) DRJ791. *See also*, *DC Comics* v. *Towle*, 802 F.3d 1012 (9th Cir. 2015).

Similarly, while looking at the character of "*Chulbul Pandey*" from the Dabangg movie series in the case of *Arbaaz Khan* v. *North Star Entertainment*[19], the Bombay High Court agreed that a character that is "*unique and the portrayal of that character as also the 'writing up' of that character*" is able to be protected.[20] This reasoning is in line with the delineation standard, which focusses on the character's uniqueness and development.

The "*Story Being Told*" test[21], which the Ninth Circuit came up with in Warner Bros., is a second, stricter standard in US law. *Pictures* v. *Columbia Broadcasting System*[22]. This test only protects a character if they "constitute the story being told" and are not just a "chess man in the game of telling the story." This sets the bar very high, implying that the plot must be completely subordinate to the character. Some US courts have used this test, but it has been widely criticised as unworkable for most literary and cinematic works. Indian courts have wisely been cautious about using it, generally preferring the more flexible delineation approach.

More recently, US law has moved towards a combined "*Especially Distinctive*" test, as shown in cases like *DC Comics v. Towle*.[23] This three-part test says that a character must (1) have both physical and conceptual traits, (2) be "sufficiently delineated" to be recognised in different works, and (3) be "especially distinctive" with unique ways of expressing themselves. This new approach effectively combines the delineation standard with a higher standard of originality and consistency. While this is the current state of American law, blindly adopting it in India would only continue the pattern of reactive borrowing without addressing the need for a unique Indian solution.

Parameters Different Court Tests for Copyrighting Characters

- Name of Test
- Test for Character Delineation
- Test for Telling a Story
- Test that is very different

[19] Notice of Motion (L) No. 1049 of 2016 in Suit (L) No. 301 of 2016

[20] The Trade Marks Act, 1999, s. 2 (1) (zb).

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

[22] *Star India Private Limited v. Leo Burnett (India) Private Limited*, 2003 (27) PTC 81 (Bom)

[23] *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015) ; "A Comparative Analysis Of Intellectual Property Rights Of Fictional Characters In India And The USA", Legal Service India, *available at*: https://www.legalserviceindia.com/legal/article-10610-a-comparative-analysis-of-intellectual-property-rights-of-fictional-characters-in-india-and-the-usa.html (last visited on: 27.06.2025).

How other protections don't work well enough

Creators have turned to other IP systems, mostly trademark and, more recently, personality rights, because it is hard to fit characters into copyright law. But these solutions don't fit well and cause their own problems with ideas and policies.

Trademark law can protect a character, but only if it gets a "secondary meaning" that goes beyond its artistic origins and becomes a way for people to find it in the market. The Trademarks Act of 1999 says that a character's name, image, or other traits can be registered as a trademark if they can be shown graphically and set one company's goods or services apart from another's.[24] The Bombay High Court in *Star India* case recognised this principle, saying that a character must have "achieved a form of an independent life and public recognition for itself" in order to be sold.[25] This idea is useful for characters that are commercially successful, but it is not correct in theory. Trademark law is not meant to give someone a monopoly over a creative work; its main purpose is to protect goodwill and keep consumers from getting confused. When trademark law is used to protect the core expressive parts of a character, it creates a dangerous paradox: copyright protection is limited and meant to eventually benefit the public domain, while trademark protection can last as long as the mark is used in commerce. This means that rights holders can get a de facto perpetual copyright through trademark law, which fundamentally undermines the policy balance of the copyright system.[26]

It is even more troubling that people are trying to compare the rights of fictional characters to the rights of real people. The court used the *Anil Kapoor* v. *Simply Life India* case as a guide in the Neela Film Productions case about characters from *"Taarak Mehta Ka Ooltah Chashmah."* This case protected a living celebrity's personality rights from being misused.[27] This comparison is very wrong. The right to privacy and dignity, which are basic human rights, are the basis for personality and publicity rights.

[24] See *Anil Kapoor v. Simply Life India & Ors.*, CS (COMM) 652/2023; *Neela Film Productions Private Limited* v. *Taarakmehtakaooltahchashmah.com & Ors*. CS(COMM) 690/2024, discussed in "Beyond the Ooltah Chashmah: Rethinking Copyright for Fictional Characters", S.S. Rana & Co. Advocates, *available at*: https://ssrana.in/articles/beyond-the-ooltah-chashmah-rethinking-copyright-for-fictional-characters/ (last visited on: 27.06.2025).

[25] *Justice K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

[26] *Icc Development (International) Ltd. v. Arvee Enterprises*, 2003 (26) PTC 245 (DEL).

[27] "Writings of an Aficionado: Fan Fiction and Copyright", Centre for Studies in IP Rights, NLIU, *available at*: https://csipr.nliu.ac.in/copyright/writings-of-an-aficionado-fan-fiction-and-copyright/ (last visited on: 27.06.2025).

Justice K.S. Puttaswamy v. *Union of India*[28], and the right of an individual to control the commercial exploitation of their identity. Fictional characters, being non-living entities, do not have any of these human traits. The Delhi High Court in *Icc Development (International) Ltd.* v. *Arvee Enterprises*[29] said that personality rights are only for people. Giving these rights to fictional characters is a legal fiction that could lead to a conflict between the rights of the creator and the actor who plays the character, and it could also lead to monopolisation and stifle creativity, as courts have warned before.

THE SOCIOCULTURAL DIVIDE: FAN CULTURE AND THE LIMITS OF FAIR DEALING

The legal uncertainty surrounding fictional characters doesn't just affect the law; it has major social and legal effects as well. One of the most important is that it has an unfairly negative effect on fan communities. These groups, which make transformative works like fan fiction and fan art, are an important and lively part of modern culture.[30] However, under Indian law, they are often in a grey area of possible infringement, with their creative works not being legally protected and vulnerable. This situation shows a major "downtrodden concern" where the law, by not adapting, stifles a legitimate form of cultural expression.[31]

Fan works as a way to Transformative Cultural Dialogue

It is a basic mistake to only look at fan-made works through the lens of infringement. Fan fiction, fan art, and other derivative works are not usually substitutes for the original works in the market; instead, they are a way for fans to talk about the original works.[32] These works come from appreciation and critical engagement, letting fans explore untold backstories, critique narrative choices, subvert character tropes, and build communities around a shared passion. In this way, fan works are inherently transformative; they add new meaning, new perspectives, and new expression to the source material.

Most of this activity is non-commercial. Fan creators are not trying to make money; they just want to express themselves and be part of a community. This is often made clear through disclaimers that say they don't own the original characters and aren't making any money,

[28] *Supra* note 25.
[29] *Supra* note 26.
[30] *Campbell* v. *Acuff-Rose Music, Inc*., 510 U.S. 569 (1994).
[31] *Supra* note 27.
[32] *Supra* note 7.

which shows that they respect the original creator's commercial rights. From a social and legal point of view, this participatory culture is not a threat but a benefit to the creative ecosystem. It gets people more involved, makes them more loyal to the brand, and can even be a form of unpaid research and development, testing out new storylines and character pairings that rights holders might later use. The law's failure to recognise and allow this valuable cultural activity is a big economic blind spot. The legal framework only looks at the negative effects of fan culture on the main intellectual property, which shows that it doesn't understand how culture is made and used in the digital age.

The "Fair Dealing" Cage That Limits

The Copyright Act of 1957, Section 52, lays out the main legal protection for fan creators in India, which is called "fair dealing." However, this protection is very weak. A close comparison shows that India's fair dealing doctrine is much stricter than the "fair use" doctrine in US law.[33]

The US fair use law is an open-ended, fair defence that looks at four things: the purpose and character of the use (especially whether it is transformative), the nature of the copyrighted work, the amount and substantiality of the part used, and the effect on the potential market for the original. This flexible, case-by-case analysis lets courts find that transformative, non-commercial fan works are fair use, which is a very important safe harbour for fan creativity. The idea of "*transformative use*" is very important, as shown in cases *like Campbell v. Acuff-Rose Music, Inc*.[34]

India's fair dealing doctrine, on the other hand, is not a flexible standard; it is a closed, exhaustive list of specific purposes that are allowed, such as private or personal use, research, criticism, or review. Fan fiction and fan art don't usually fit neatly into these categories. A fan story is not usually "criticism" or "review" in the traditional sense, nor is it "research." Some people might say it's for "private or personal use," but as soon as it's shared on a public forum, that argument falls apart. Indian courts, like The Chancellor, Masters, and

[33] "Copyright: An Interpretation of the Code of Ethics", American Library Association, *available at*: https://www.ala.org/tools/ethics/copyright (last visited on: 27.06.2025).

[34] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); "The interaction between intellectual property laws and AI: Opportunities and challenges", Norton Rose Fulbright, *available at*: https://www.nortonrosefulbright.com/en/knowledge/publications/c6d47e6f/the-interaction-between-intellectual-property-laws-and-ai-opportunities-and-challenges (last visited on: 27.06.2025).

Scholars of the *University of Oxford* v. *Rameshwari Photocopy Services* case recognised the transformative purpose, but Section 52's legal language is still a big problem.[35]

This strict legal system keeps fan creators in a state of constant uncertainty. Their actions, while culturally valuable and mostly harmless to the original creator's business, are technically breaking the law as it is written. This legal uncertainty has a big "chilling effect," making people less creative and making fan communities open to random takedown notices or legal threats from rights holders. Instead of encouraging a participatory cultural environment, the law treats fans as a "downtrodden" group of potential infringers, failing to balance the rights of creators with the public's right to express themselves.

THE UNEXPECTED CHALLENGER: GENERATIVE AI AND THE AUTHORSHIP CRISIS

The legal system is having a hard time adapting to the participatory culture of the internet. Now, it is up against an even bigger and more disruptive force: generative artificial intelligence. The rise of advanced AI models that can create text and images is not only a new technological challenge for intellectual property law, but it also fundamentally breaks the existing legal tests for character protection.[36] AI forces us to rethink the basic ideas of authorship, expression, and infringement, showing that the current doctrinal patchwork is no longer useful and that a new legal paradigm is urgently needed.

The Double Threat: AI as Both an Infringer and an Author

Generative AI is a two-pronged threat to the way character rights are set up now. First, it is an incredibly powerful tool for infringement. AI can easily create complex derivative works that copy or use existing characters in ways that are very concerning. This includes making "deepfake" videos that put copyrighted characters in situations they shouldn't be in, like in the case of the characters of *Taarak Mehta Ka Ooltah Chashmah*, to the creation of new stories and images that are "substantially similar" to protected characters without being direct copies.[37] Large language models (LLMs) and diffusion models, trained on vast datasets of existing works, can learn the essential traits, voice, and visual style of a character and reproduce them in novel contexts, making infringement scalable and difficult to detect. This

[35] *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Anr.,* FAO(OS) (COMM) 161/2020.
[36] *Supra* note 9.
[37] *Supra* note 24.

has led to a wave of litigation globally, with creators and news agencies suing AI developers for unauthorised use of their copyrighted material for training purposes.[38]

Second, and more difficult to think about, is the idea of AI as a possible author. Current copyright law, especially in the US, is clear that copyright protection requires human authorship.[39] The US Copyright Office has made it clear that works made entirely by AI without significant human creative input are not eligible for copyright protection and become public domain.[40] The Indian Copyright Act, on the other hand, recognises "*computer-generated*" works and **under Section 2(d)(vi)** gives authorship to "*the person who causes the work to be created*."[41] However, it is still unclear how much human input is needed, especially for advanced generative AI. This creates a legal paradox: an AI could create a completely new and original character that becomes a cultural phenomenon, but this character would have no legal owner. It would be born directly into the public domain, available for anyone to use commercially without recourse for the entity that developed and deployed the AI. This crisis of authorship throws off the whole system of economic incentives that copyright law is supposed to protect.

The End of Old Tests in the Age of AI

Because generative AI can do things that traditional infringement tests can't, like copying and creating, they are mostly useless. The "character delineation" and "substantial similarity" tests are really just about comparing two fixed expressions to see if they are the same. An AI doesn't just copy; it also synthesises and generates.

You can train an AI model on all of a character's appearances, like their "delineated" traits, voice, visual style, and speech patterns. Then, the AI can make a completely new visual or textual expression that isn't a copy of any one work but is still instantly recognisable as that character. For example, a user could tell an AI, "Show me Sherlock Holmes investigating a crime on Mars in the style of Van Gogh." The output wouldn't be a copy of any Arthur Conan Doyle story or Sidney Paget illustration, but it would still be clearly in the style of Sherlock Holmes.

[38] See, e.g., *The New York Times Co. v. Microsoft Corp. and OpenAI, Inc.,* No. 1:23-cv-11195 (S.D.N.Y. filed Dec. 27, 2023*).*
[39] *Supra* note 31.
[40] U.S. Copyright Office, *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16190 (Mar. 16, 2023).
[41] The Copyright Act, 1957, § 2(d)(vi).

This capability breaks a legal test that compares certain phrases. The copying of a static drawing or a specific paragraph is no longer the problem; instead, it's the stealing of the character's dynamic and recognisable identity. This means that the legal analysis needs to change. The question can no longer be just, "Is the defendant's work very similar to the plaintiff's copyrighted work?" Instead, it has to be, "Has the defendant taken the core, protectable persona of the plaintiff's character, no matter how new the expression is?" This is a question that traditional copyright law, which is very strict about the idea-expression dichotomy, can't answer. AI, then, acts as a catalyst, showing the limits of an expression-based protection model and showing the need for a new legal framework that can protect a character's identity as a whole.

SUGGESTIONS AND RECOMMENDATIONS: A PLAN FOR A SUI GENERIS REGIME

The doctrinal confusion, social-legal tensions, and technological pressures discussed in the previous sections show that there is a clear and urgent need for legal reform. The current patchwork of protections for fictional characters in India is unclear for creators, hostile to legitimate fan communities, and conceptually outdated in the face of generative AI. Relying on the slow, incremental, and often inconsistent evolution of judicial precedent is no longer a viable strategy. A proactive legislative intervention is required to create a clear, balanced, and future-proof framework. This section goes from analysis to a constructive, solution-oriented proposal that calls for a new angle towards India's unique intellectual property right for fictional characters.

The Case for Reform: Putting Together the Failures of the Status Quo

So far, the analysis has shown that the way the Indian legal system protects fictional characters is not working well in many ways. First, the doctrinal framework, built on the statutory silence of the Copyright Act, 1957, and borrowed US judicial tests, creates profound legal uncertainty. This lack of clarity increases litigation risk and costs, chilling investment in the creation and development of new characters, which are the engine of India's creative economy. Second, the attempt to use alternative regimes like trademark law is a conceptually flawed stop-gap that creates a policy paradox by enabling a form of perpetual copyright, undermining the fundamental balance of the IP system. Third, the rigid

and restrictive "fair dealing" doctrine under Section 52 of the Copyright Act provides no safe harbour for the transformative works of fan communities, stifling a vibrant and valuable form of cultural participation and dialogue. Finally, the advent of generative AI has exposed the conceptual limits of the entire framework, rendering tests based on "copying" of "expression" inadequate to address the appropriation of a character's core identity. The confluence of these failures makes a compelling case for abandoning the current ad-hoc approach in favour of a purpose-built legislative solution.

The "Copymark" Proposal: A Mixed Right for Made-Up Characters

This article suggests that India should create a unique intellectual property right, tentatively called a "Copymark," to protect fictional characters. This idea is based on academic suggestions that recognise that characters are a mix of copyrightable works and trademarks.[42] A Copymark would be a registered right, giving the trademark system the certainty it needs, but its content and scope would be based on the unique nature of fictional characters.

The main parts of the suggested Copymark system are:

- Subject Matter: The Copymark would protect the character's persona as a single, indivisible piece of intellectual property. The law would say that this includes the group of core identifying traits that make up a character's unique identity, such as their name, physical appearance or detailed description, voice, signature costumes, unique personality traits, and important parts of their backstory.
- Threshold for Protection: Protection wouldn't happen automatically. To be able to register as a Copymark, a creator would need to show proof that the character meets two requirements:
    i. Enough Detail: The character must be well-developed and described in enough detail to be more than just a stock type or an abstract idea, in line with the Nichols test.[43]
    ii. Public Recognition: The character must have gained some level of public recognition, which shows that it has a separate identity in the public mind that is not tied to the plot of any one work. This is based on the reasoning in

[42] *Supra* note 30.
[43] *Supra* note 16.

Star India, which says that only characters that have truly become valuable cultural and commercial assets should be protected.

- Term of Protection: The Copymark would be protected for a set amount of time, like 25 years from the date it was registered, with the option to renew. This term is meant to be longer than the one for industrial designs but shorter than the one for copyright, which lasts for the life of the work plus 60 years. This solves the problem of copyright and trademark by giving creators a long period of exclusivity to encourage them to make things, while also making sure that the character's persona eventually becomes public property, which stops monopolies from lasting forever.
- Infringement Test: The law would say that infringement is the unauthorised commercial use of a large part of the registered character's persona in a way that makes the public think of the original character. This test is very different from the "substantial similarity of expression" test used in traditional copyright. It focusses on taking the character's identity, which makes it stronger against AI-generated works that can copy a persona without actually copying it.

A Framework for Balance: Keeping Creators Safe and Giving Fans Power

The main benefit of the suggested Copymark system is that it would make the ecosystem fairer and more balanced for everyone involved.

The Copymark is a clear, reliable, and strong legal asset for creators and investors. A registration-based system takes away the guesswork and high costs of lawsuits that come with the current, unclear judicial tests. It makes an IP right that can be freely licensed, sold, and used as collateral. This encourages people to invest in making new characters and growing existing franchises.

For fan communities and other transformative users, the Copymark statute would have to have a clear, broad, and positive exception for non-commercial, transformative uses. This provision would act as a statutory safe harbour for activities including, but not limited to, parody, commentary, criticism, and the creation of fan fiction and fan art. By codifying this right, the law would resolve the debilitating ambiguity of the current "fair dealing" doctrine and formally recognise the cultural legitimacy of fan works. This directly addresses the "downtrodden concern" of fan creators, giving them the freedom to keep talking creatively without the fear of legal action, as long as their work stays non-commercial and

transformative. This balanced approach makes sure that the law protects the economic engine of creativity while also nurturing the cultural soil from which it grows.

CONCLUSION

In India, the law about fictional characters is full of contradictions. These avatars of our shared imagination are important to our culture and economy, but they move through the legal world like ghosts, with unclear rights and protection. This article says that India's current system-a hodgepodge of statutory silence, borrowed judicial tests, and alternative regimes that don't fit well-has failed. It makes the system less efficient, which hurts creators; it uses a restrictive "fair dealing" doctrine that ignores the important cultural work that fan communities do; and it isn't ready for the big changes that generative AI will bring. The stresses of participatory digital culture and artificial intelligence have pushed this ad-hoc system to its limits, showing how fundamentally flawed it is.

This article's main point is that the time for small fixes to the judicial system is over. A brave law is needed to fix this. The suggested sui generis 'Copymark' system is a model for this kind of change. The Copymark can give creators and investors the legal certainty and commercial predictability they need by making a registered right that fits the unique nature of fictional characters. Its set time of protection settles the disagreement between copyright and trademark law, making sure that these cultural icons will eventually add to the public domain. Most importantly, the Copymark framework can make the creative activities of fan communities legal by including a clear and strong legal exception for non-commercial transformative uses. This would change them from legally questionable infringers to recognised cultural participants.

This mixed right gives us a way to move forward that is fair, predictable, and safe for the future. It recognises that the law on intellectual property in the 21st century needs to do more than just protect business interests. It has to be a flexible and responsive system that supports the rich, participatory, and technologically complex cultural ecosystems that make up our digital age. Making such a law would not only solve a long-standing doctrinal issue, but it would also send a strong message about the kind of creative society India wants to build for the future.