

**'Analyses of infringement of Moral Rights: Focus on memes and cinematographic films' in India and USA.**

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**ABSTRACT**

This research work focusses on infringement of moral rights of an author when the work is used in memes and cinematographic film. Moral rights are different from copyright which includes the economic rights given to copyright holder. The author also cannot assign away the moral rights as these rights protect the author from distortion of his work as a work is a manifestation of personality of an author. For example JK Rowlings novels on Harry Potter.

USA and India is taken for Comparison in context of moral rights provision in these two jurisdictions. USA is taken for comparison with India as in USA Moral Rights are provided to limited set of works, unlike India where there is no such restriction regarding the type of works entitled for moral rights. Further moral rights are subject to fair use doctrine in USA but there is no such relationship between moral rights and permitted acts in India.

How moral rights can be related to memes and personality rights is seen in context of USA and India. When a still from a cinematographic film is used for a meme, would it affect the moral right of the producer is analysed.

Lastly, moral rights in context of paternity right of a contributor in a film is analysed. Further how placing of credits in a film can affect the author's moral right is analysed. Under the umbrella of moral rights, when an author work is showcased in a web-series, how it affect the right of integrity of the author is discussed.

**Keywords:** Moral Rights, USA, India, cinematographic films, memes, personality rights, Paternity right, Right of Integrity.

**Chapter 1****1.1 INTRODUCTION**

*“Moral rights of the author are the soul of his works.”*<sup>30</sup>

Moral rights are not copyright.<sup>31</sup> Moral Rights stays with author irrespective of the fact that the author has assigned his economic rights in the work, which is the copyright. The reason for this could be that creation is inherently connected to author that is he has placed his own experiences and personality in that creation and that is why somebody else should not be allowed to make changes in that creation and this is largely derived from Hegel's personality theory.<sup>32</sup> Moral rights are important so that author expressions reach in its original form to public.<sup>33</sup>

Now there are three types of moral rights of which two are explicitly mentioned in the statute under moral rights. Before going into the types it pertinent to mention that scope of moral rights as provided by India and USA differs which we would be analysing in this project.

Now let's see the types of moral rights. First is the right of integrity, under which the author can prevent modifications and alterations of his work which is prejudicial to his reputation.

We can understand this right by comparing the original painting of Monalisa painted by Leonardo da Vinci[Pic 1] and its distorted version[Pic 2] as shown below:-

<sup>30</sup> [Amar Nath Sehgal v. Union of India](#), 2005 (30) PTC 253 (Del), para 24.

<sup>31</sup> Copyright Act, 1957, § 57(1) and 38B, No. 14, Acts of Parliament, 1957 (India) In India under both these sections it is said moral rights are independent of copyright ; Copyright Act 1976, § 106A 17 U.S.C.(USA), it is said moral rights are independent of exclusive rights in copyrighted works. In Bern convention under Article 6bis starts with 'Independently of the author's economic rights.'

<sup>32</sup> M. J. Radin, 'Property and Personhood', Vol 34, StanLR, 957 (1982).

<sup>33</sup> Patrick Masiyakurima, The Trouble with Moral Rights, Vol 68, The Modern Law Review, 411 (2005).



Pic 1



Pic 2

So, the right of integrity protects artists' reputational interests. If changes in the artists work is made by some other person and it affects the artist reputation, then it can also affect demand of the future works of the artists.<sup>34</sup> In India this right is protected under section 57(1)(b) and section 38B(b) of Copyright Act 1957 where to prove infringement of right of integrity, it is to be proved that the modification of the work is detrimental to author reputation, which is there in above pic 2. In USA also this right is recognised with regard to author.<sup>35</sup>

Second is the right of attribution or paternity, which means the right of a person to claim that a particular work belongs to that person. That is to be recognised as the author of one's work. Paternity right is important as by recognising an author for his contribution and work, it helps people to associate the quality of work to the author's future works<sup>36</sup> and thus helps the author to develop a market for his future work. In India such right is protected under section 57(1)(a) and section 38B(a) of Copyright Act 1957. In USA also this right is recognised with regard to author.<sup>37</sup>

Then the last one is not explicitly recognized in the statute under moral rights, that is the right of divulgation, which is alternatively also called right of publication, which provides the right to author to decide when the work would be published.

<sup>34</sup> Henry Hansmann and Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, Vol 26, *The Journal of Legal Studies*, (1997).

<sup>35</sup> 17 U.S. Code § 106A(a)(2).

<sup>36</sup> *Supra* 5 at pg 132.

<sup>37</sup> 17 U.S. Code § 106A(a)(1).

## 1.2 INTERNATIONAL FRAMEWORK

By the Rome Act of 1928, Moral rights or 'droit moral' was added to the Berne Convention of 1886.<sup>38</sup>

Under Article 6bis of Bern convention, moral rights of paternity/attribution and integrity are mentioned.<sup>39</sup> It is also made clear in this article that moral rights are distinct from the economic rights given to a copyright holder.

Under TRIPS agreement under Article 9(1), it is on the WTO Members discretion to provide protection of moral rights under their copyright statute.<sup>40</sup> So TRIPS leave it to the members to decide if they want to include moral rights in their statute or not.

The WIPO Copyright Treaty[WCT]<sup>41</sup> like TRIPS obligates Contracting Parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention with the difference, that it does not exclude from the provision on moral rights as it is in TRIPS. We see this this would not create problems for member states who are part of both WCT and TRIPS as under WCT Article 1(1) explicitly says that WCT shall not prejudice rights given in other treaties, so the right with respect to discretion of member states in respect of application of moral rights in their jurisdiction given in TRIPS shall not be affected by WCT obligation.

## Chapter 2- Moral Rights and Memes: Comparing USA and India

<sup>38</sup> Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967 828 U.N.T.S. 221; Prof. Dr. Bindu Ronald & Ors, *Protecting The Rights Of Filmmakers In A Cinematographic Film*, Vol 6 , *Journal of Critical Reviews* (2019).

<sup>39</sup> "Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right . . . to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

<sup>40</sup> provisions on moral rights, partly at the insistence of American negotiators, remain outside the reach of TRIPS dispute-settlement and enforcement mechanism.

<sup>41</sup> WIPO Copyright Treaty Article 1(4), Dec. 20, 1996 S. Treaty Doc. No. 105-17 (1997); 2186 U.N.T.S. 121; 36 I.L.M. 65 (1997).

Memes usually take pre-existing content, like a screenshot of a film and add some form of humorous commentary to appeal to a common situation.<sup>42</sup> How moral rights can be related to memes are seen when we relate it to personality rights.



## 2.1 USA

Moral rights in USA provided to authors of works of visual art<sup>43</sup>, in form of Rights of Attribution and Integrity<sup>44</sup>. In 1989 Congress enacted the federal Visual Artists Rights Act (VARA), which incorporates these above mentioned two rights.<sup>45</sup> These moral rights are subject to fair use doctrine in USA.<sup>46</sup> So moral right of author of a work of visual art would not be violated if the work satisfies the 4-step test of fair use<sup>47</sup> in which all the 4 factors to be satisfied to claim fair use defence in USA.<sup>48</sup> These 4 factors are provided below with the analysis if memes can satisfy these factors.

<sup>42</sup>Mark Marciszewski, *The Problem of Modern Monetization of Memes: How Copyright Law Can Give Protection to Meme Creators*, 9 PACE. INTELL. PROP. SPORTS & ENT. L.F. 61 (2020). Available at: <https://digitalcommons.pace.edu/pipsself/vol9/iss1/3>.

<sup>43</sup> 17 U.S.C. § 101.

<sup>44</sup> 17 U.S.C. § 106A.

<sup>45</sup> Visual Artists Rights Act of 1990 (VARA), codified at 17 U.S.C. § 106A.

<sup>46</sup> Supra 17 §106A(a)RIGHTS OF ATTRIBUTION AND INTEGRITY.—‘Subject to section 107’; 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use-‘ Notwithstanding the provisions of sections 106 and 106A’.

<sup>47</sup> 17 U.S.C. § 107.

<sup>48</sup> Campbell v. Accuff – Rose Music, 510 U.S. 569 (1994).

## The Purpose and Character of use

Under this we need to see if anything new is added to the original work which is not merely an incidental change but a qualitative change that is with a different character that is to what extent a new expression is given to the original work, and is the new work transformative?<sup>49</sup> So If meme

creators “transform” a protected work into a new meaning by building on it that is by giving a new expression to the work by adding the humorous content in form of a meme, the new creator can rely on the fair use defense. The test is if a reasonable observer can perceive this use as transformative.<sup>50</sup>

Lets understand the first factor by using a meme as given below!

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## The Nature of the copyrighted work

Based on the "value of the materials used." Works which are core of the copyright's protective purposes and if that is copied. This would not favour memes since memes reproduce and copy the original work, so core of the copyrighted work is copied.<sup>52</sup>

## The Amount and Substantiality of the portion copied

<sup>49</sup> Ibid Campbell.

<sup>50</sup> Supra 13 at pg 23.

<sup>51</sup> Ibid at pg 21.

<sup>52</sup> Supra 19 Campbell at pg 586.

Courts must examine the quantitative and qualitative aspects of the portion of the copyrighted material taken.<sup>53</sup> A meme if it is based on a photograph, it copies or reproduces the photograph as whole so there is quantitative and qualitative portion copied in meme. But when the meme uses a still photograph from a movie, we can say the copying of original cinematographic film qualitatively and quantitatively is not done as only a still from the movie is taken. So this factor depends on what kind of meme it is, that is based on whole photograph or on a still from a cinematographic film.

### The Effect of the use upon the Potential market

This talks about market substitution.<sup>54</sup> So if the infringing work can act as a substitute for original work, then fair use would not be applicable for the infringing work. When we apply this to memes, like a still from a movie we do not see in any way that could act as a market substitute as a still from a movie does not represent the heart of the movie, so qualitatively won't be copying and also a still from a movie is also not quantitative copying. But where the whole original work is incorporated in the meme, it may create a negative effect on the potential market, as something that would otherwise not be available freely to the public is now being made available because of its incorporation in the meme. Again, this could pose to be a potential problem for the legality of the meme.<sup>55</sup>

So justifying a meme under USA fair use doctrine under the 4-step test would be difficult but not impossible, unlike

India where memes does not come under any of the permitted acts.<sup>56</sup>

### 2.2 INDIA AND COMPARISON BETWEEN INDIA AND USA MORAL RIGHTS PROVISION

In India it is not clearly given that section 52 which deals with permitted acts that would not be copyright infringement would also apply for moral rights. But in USA clearly given that fair use test would apply for moral rights<sup>57</sup>. Since in India Under section 52 there is mention of 'infringement of copyright' and we know moral rights are not part of copyright, so we can infer that in India section 52 is used in context of economic rights in the copyrighted work, and maybe that's why in USA, they have made clear in moral right section<sup>58</sup> that it is subject to fair use test which is not done in India.<sup>59</sup>

Another important differentiation between USA and India moral rights clause is that in USA very limited moral rights given, that is authors of work of visual art only given moral rights, So, VARA of USA, does not protect artists in the film industry. Works made for hire, such as films, are excluded from VARA's definition of visual art.<sup>60</sup> But in India moral rights have wide application that is not limited to only one kind of work, further even performers also given moral rights with authors<sup>61</sup> which is not there in USA.

Another difference between the two jurisdictions is with respect to definition of right of attribution/paternity. The common element in this definition in both jurisdictions first is the right to claim authorship, but in USA apart from this

<sup>53</sup> Ibid.

<sup>54</sup> Ibid Campbell at 591-92 ("We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act."); Fisher v. Dees, 794 F. 2d 432, 438 (9th Cir. 1986) (the role of the courts is to distinguish between "biting criticism that merely suppresses demand and copyright infringement which usurps it.")

<sup>55</sup> Anushka, De'meme'stifying the tussle between Memes, Copyright and Personality Rights, The IP Law Post, [De'meme'stifying the tussle between Memes, Copyright and Personality Rights – The IP Law Post \(wordpress.com\)](https://www.thepost.com/De-meme-stifying-the-tussle-between-Memes-Copyright-and-Personality-Rights-The-IP-Law-Post-(wordpress.com).).

<sup>56</sup> Copyright Act 1957, § 52.

<sup>57</sup> 17 U.S.C. §106A(a)& §107.

<sup>58</sup> 17 U.S.C. § 106A- starts with 'Subject to section 107....' Which deals with fair use.

<sup>59</sup> If we see section 57 and 38B copyright Act 1957, we see no mention usage of subject to section 52 which deals with permitted Acts.

<sup>60</sup> Kaplan B, Visual artists' rights in a digital age, (1994),Harvard Law Review, 107 (8) (1994) 1988.

<sup>61</sup> Copyright Act 1957, § 57 and § 38B.



right, additional right given under right of attribution,<sup>62</sup> that is right to prevent usage of author name for works which he did not create. This right is not there in India explicitly under moral rights in the statute. Interestingly we feel this additional right can be compared to passing-off remedy provided under trademark law from one perspective, as this remedy also prevents a passing off by a person of his own goods as those of another.<sup>63</sup> So just like you cannot use another name for your goods in passing off, you cannot use another author name for your work of visual art in USA under right of attribution.

Lastly we see that in USA that the moral rights provided to works of visual art cannot be transferred but can be waived by the author.<sup>64</sup> There is no such option of waiver of moral rights in Indian Copyright Act, 1957.<sup>65</sup>

### 2.3 MORAL RIGHT, PERSONALITY RIGHTS AND MEMES

Certain memes use the likeness of a famous personality. Like shatrughan sinha iconic '*Khamosh*'. Such memes can exploit the personality rights of these public figures, so we would try to relate these personality rights to moral rights.

In context of Personality right a US court held that, "*A man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture.*"<sup>66</sup> The ruling was reiterated by the Delhi High

Court<sup>67</sup> where the Court laid down criteria for liability for infringement of personality right.<sup>68</sup>

So using an image/photograph for a meme of a celebrity or the character portrayed by him, can it violate moral rights of producer and the actor, in the sense their photograph used for a humorous purpose that it affects the reputation of the producer and the actor.

#### 2.3.1 USA

Here we see that moral rights are given only to authors of works of visual art.<sup>69</sup> Then we see a work of visual art<sup>70</sup> does not include works 'made for hire'.<sup>71</sup> And work for hire includes contribution in a motion picture as part of collective work, so the actor contribution in the motion picture would come under work for hire definition and when the actor works on the script which is a dramatic work, he performs<sup>72</sup> it. So in USA since motion pictures are not given any moral rights as they are not coming under visual arts definition<sup>73</sup> as they are audio visual works<sup>74</sup> and also the actors performance in motion picture is coming under work for hire, so in USA neither the producer would get moral right for modification of the pictures/stills from the motion picture for memes, and neither the actor who is performing in the motion picture. So the personality rights of the actor which are used in the meme would not get any moral right for usage in the meme in context of USA.

#### 2.3.2 INDIA

<sup>67</sup> [Titan Industries Ltd. vs M/S Ramkumar Jewellers](#), 2012 (50) PTC 486 (Del).

<sup>68</sup> Ibid Titan [The court in this case laid down the basic elements comprising the liability for infringement of the right to publicity as:

(i) validity (the plaintiff owns an enforceable right in the identity or persona of a human being) and

(ii) identifiability (the celebrity must be identifiable from defendant's unauthorized use)].

<sup>69</sup> 17 U.S. Code § 106A.

<sup>70</sup> 17 U.S. Code § 101 "[work of visual art](#)".

<sup>71</sup> 17 U.S. Code § 101 A "[work made for hire](#)".

<sup>72</sup> 17 U.S. Code § 101 To "[perform](#)" a work means to recite, render, play, dance, or act it.

<sup>73</sup> 17 U.S. Code § 101 specifically removes audiovisual work from definition of visual art.

<sup>74</sup> 17 U.S. Code § 101 "[Audiovisual works](#)".

<sup>62</sup> 17 U.S. Code § 106A(a)(1)(B)- to prevent the use of his or her name as the author of any [work of visual art](#) which he or she did not create.

<sup>63</sup> ITC Limited Vs. Nestle India Limited, 2020(84)PTC395(Mad).

<sup>64</sup> 17 U.S. Code § 106A (e) (1).

<sup>65</sup> Mannu Bhandari vs. Kala Vikas Pictures Pvt. Ltd. and Ors AIR1987Delhi13 '*the author had special right called moral rights in addition to the copyright under the Act. Assignment of rights could not negate the moral rights of the author under the Act. So the contract of assignment would be read subject to the provisions of Section 57*'.

<sup>66</sup> [Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.](#) 202 F.2d 866 (2d Cir. 1953).

Author's special right given under section 57 does not speak of publishers or owners special right, but only of the author. So moral right violation of author only seen in this section and not the owner of copyright.<sup>75</sup> So now when we see definition of author<sup>76</sup> in relation to a cinematographic work, we see producer is the author of such work<sup>77</sup>.

A producer moral right can be infringed by memes when the memes incorporate something from cinematographic film like a picture or say a 'still' without giving credit to producer of such film for using that picture, so right of paternity infringed.

But applying the infringement of integrity right by incorporating a still/picture from a cinematographic film with a dialogue from that film and incorporating that in the meme in such a way that a humorous element is added to it, can be seen from two viewpoint. One which says that right of integrity can be applied and the other one says it cannot be applied.

Now one view is that in context of Author special rights which provides the right of integrity<sup>78</sup> there is usage of '*in relation to said work*' instead of '*in the said work*', which means that if by incorporating anything from cinematographic film in a meme, it would be '*in relation to said work*', that is the meme is made in relation to the film by incorporating still picture from the film in such way that it leads to distortion of that dialogue in the movie as the usage for which the dialogue was intended in the movie is distorted by using the still picture and dialogue in humorous way in the meme and thus affects producers moral rights.

Another view to this is that there is no infringement of right of integrity of producer as there is no modification or mutilation of the cinematographic film, just by taking a still picture from the film for using it in the meme. This taking would not be prejudicial to reputation of the producer. But

<sup>75</sup> Wiley Eastern Ltd v. Indian Institute of Management, 1995 PTR 53 (Del).

<sup>76</sup> Copyright Act, 1957, § 2(d), No. 14, Acts of Parliament, 1957 (India).

<sup>77</sup> Copyright Act 1957 § 2(y)(ii).

<sup>78</sup> Copyright Act 1957 § 57(1)(b).

when parody is made of such a cinematographic film then this logic might not apply, though that's a different issue and here we would stick with usage of still pictures from the film to be used in the memes and in that direction this could be another view.

Now moral rights provided to author of work are also provided to performers. To relate personality right of an actor with moral rights of performer, we see definition of performer<sup>79</sup> which includes an actor. For performers moral rights under right of integrity<sup>80</sup> there is usage of words '*of performers performance*', so the modification or mutilation has to be in the performance which is incorporated in the film. So when an iconic dialogue from a film is used in a meme which also inculcates the personality of the character like Gabbar from Sholay film or the personality of the actor himself like Shatrughan Sinha when he said the iconic 'KHAMOSH' dialogue, so such usage in the meme cannot affect right of integrity of such actor as by incorporating the dialogue in a meme, there is no modification or distortion of performance<sup>81</sup> of the actor as the meme does not affect the visual or acoustic presentation made by the performer that is the actor in the original cinematographic work. So if modification done in the performance of the actor which is incorporated in the cinematographic film, then the actor can claim right of integrity under moral rights.

### **CHAPTER 3- MORAL RIGHT ISSUES IN CINEMATOGRAPHIC WORK- FOCUS ON INDIA**

Section 57<sup>82</sup> includes not only literary and artistic works but also audio visual manifestations.<sup>83</sup> Here we would focus on right of paternity and integrity related issues in context of cinematographic films.

#### **3.1 PATERNITY RIGHT AND CINEMATOGRAPHIC FILM**

<sup>79</sup> Copyright Act 1957 § 2(qq).

<sup>80</sup> Copyright Act 1957 §38B(b).

<sup>81</sup> Copyright Act 1957 §2(q).

<sup>82</sup> Copyright Act 1957.

<sup>83</sup> Supra 36 Mannu Bhandari; Garapati Prasada Rao vs Parnandi Saroja And Others, AIR 1992 AP 230.

The Hon'ble Supreme Court while explaining the importance of paternity right said that *'the gain by way of reputation which a person would secure if his services are acknowledged in the title shots of the film is not one which can be adequately expressed in terms of money.'*<sup>84</sup>

In this background we would study the paternity right for the below mentioned questions.

### 3.1.1 Paternity right of a contributor: Focus on Chhappak movie case

Moral rights under the statute confers authors and performers with right to be credited for their work or performance. But the question arises what about a contributor in a cinematographic film that is someone who has provided his valuable inputs which helped in making of the film, does such person has right of paternity that is to recognised for such inputs in the films credits, when specifically the statute has not mentioned such person right of paternity?

This is a question which we would answer through the Chhappak movie case, that is **Fox Star Studios v. Aparna Bhat & Ors**<sup>85</sup>, the facts are, that this case is related to Chhappak movie which is based on true life story of an acid attack survivor. Here the respondent who is a lawyer who fought on behalf of the acid attack survivor on whose life story the movie is based, was approached by the director of the movie, Meghna Gulzar to get some authenticity in the movie on the promise that her contribution would be acknowledged. The respondent contended that she provided key inputs in the entire process of writing and shooting of the movie but she has not been given the due credits. The trial Court granted ad interim injunction to Aparna Bhatt who was the plaintiff here, by acknowledging the contribution of her in the movie. So Fox star studios appealed. To which the Hon'ble Court same as the trial Court, acknowledged Respondent's contribution in the making and directing of the film and held a person's right

cannot be prejudiced even if that person has contributed to only 'some part' in making a cinematographic film. So the respondent *has rights in the inputs that have been provided by her, including in the various scenes of the screenplay. Thus, she at the least has a right to be acknowledged and credited.* The right of paternity is an intrinsic component of the moral rights of a person who makes any contribution. The consideration for the respondent in rendering her services was not monetary but in the form of the recognition. It is also the well-settled position in law that in order for any person's paternity rights in any work to be recognised, a written contract is not required. So the respondent (Aparna Bhat) who gave inputs in the making of the film 'Chhappak' by providing details of the criminal trial and the proceedings there in, documents, and by helping in the script has maintained the integrity and the credibility of the film itself, in respect of the legal journey of the victim. The Producer has in fact acknowledged the same without any hesitation.<sup>86</sup> The said inputs could be considered to be those of a professional having expert knowledge, in the legal journey of the victim,<sup>87</sup> on whose acid- attack experience the movie was based.

All these information and help provided by the respondent in the making of 'Chhappak' movie would be considered her contribution in the film and so in this case right of paternity was given a new dimension by, recognizing the right of a contributor to be credited for her contribution to the work under paternity right and so the Delhi High Court restrained Fox Star Studios that is the appellants from releasing the film 'CHHAPPAK' on any electronic medium/s without acknowledging the name of the respondent/plaintiff that is Aparna Bhat.

This is the correct view of the Court as right to paternity entails right to be credited for your work, so when someone gives her inputs in a film making, she has a right to be

<sup>84</sup> Suresh Jindal v Rizoli Corriere Della Sera Prodzioni T.V. Spa and Others MANU/SC/0462/1991.

<sup>85</sup> 266(2020)DLT261.

<sup>86</sup> Ibid Para 37 Also Fox star studios do not dispute that aparna bhatt was approached by them, was consulted by them and that her help/assistance was taken.

<sup>87</sup> Ibid Para 34.

credited for giving such inputs and that is the correct application of right of paternity under moral rights.

### 3.1.2 3 Idiots' Credit Controversy and paternity right

Does the moral right of author is affected if the credit for using his work is not given in the opening credits of the movie? Also if the placing of credit also affect author moral right is analysed here.

#### Background and the Controversy

This controversy was around the movie 3 idiots which was based on Chetan Bhagat book "Five Point Someone". Issue was that Chetan Bhagat was credited in the end rolling credits of the film instead of the starting credits. He was not happy with this placement of credits and said '*That is it was not merely about the credits being there, but rather the placement and the prominence.*'<sup>88</sup> Also the credit is given in a one-liner.<sup>89</sup> So the point of the author of the book is that such placing of credit would not be seen by public<sup>90</sup> So according to the author this leads to not giving full credits to the author and thus violate his moral rights.<sup>91</sup>

Now seeing this controversy from lens of paternity Right, we see that the makers did not violated Chetan bhagat paternity right as they acknowledged that the movie 3 idiots was based on his book, so due credits are given to him. Further under section 57(1)(a) of copyright Act 1957 which talk about right of paternity, it does not mention that placing of the credits affect the moral right of the author. Further section 57 explanation says that moral rights of an author is not infringed if the work is not displayed to satisfaction of author. Applying this explanation to the controversy we can draw one inference that placing of credits not according to author would not infringe author

<sup>88</sup>N Sharma, Chetan Bhagat feeling cheated? Hindustan Times, (27 December 2009), <http://www.hindustantimes.com/Chetan-Bhagat-feeling-cheated/H1-Article1-491135.aspx>.

<sup>89</sup> Ibid.

<sup>90</sup> Chetan Bhagat 3 Idiots' Team In Story Credit Row, The Times of India, (2 January 2010), <http://timesofindia.indiatimes.com/india/Chetan-Bhagat-3-Idiots-team-in-story-credit-row/articleshow/5403167.cms>.

<sup>91</sup> Ibid.

moral rights, further as already said regarding placement of credits nothing given under paternity right provided by the statute. So author moral right of paternity is not violated here.

Now another way to view this controversy can be that since makers of 3 idiots gave credits at end of film to author, further in one line with small fonts, so even if credits given to author but if public could not see properly the credits, then right of paternity would not perform its function. So the film makers could have been told that they should make the fonts bigger and include the credits to author in opening credit of the movie. So if the controversy had went to Court, there were two possible decisions.

## 3.2 RIGHT OF INTEGRITY AND CINEMATOGRAPHIC FILM

### 3.2.1 Issue of right of integrity of authors when their work is showcased in cinematographic films: focus on Mirzapur web series controversy.

The second season of Mirzapur web series has a scene where a character is shown reading the book "Dhabba" authored by Surendra Pathak. The scene has a voice-over that reads out a sequence that appears to be an excerpt from the book, which according to Pathak, has no bearing with any part of the original text of 'Dhabba'. Pathak claimed that the voiceover is explicitly sexual and doesn't exist in the novel.



<sup>92</sup>

The author of the book has taken strong objection to the use of his book and its accompanying unrelated voiceover which he argues has "*mischievously misrepresented*" his

<sup>92</sup> A still from the show mirzapur where the book is shown; Divyanshi Sharma, [Mirzapur 2 team apologises to Surendra Mohan Pathak for Dhabba scene, India Today, \(30 October 2020\)](https://www.indiatoday.in/entertainment/story/mirzapur-2-team-apologises-to-surendra-mohan-pathak-for-dhabba-scene-2020-1777777.html), [Binge Watch News \(indiatoday.in\)](https://www.bingewatchnews.com/news/mirzapur-2-team-apologises-to-surendra-mohan-pathak-for-dhabba-scene-2020-1777777.html).



work. His letter is reported to have said, “*What is being read is sheer porno, the undersigned cannot even dream of writing, supposedly to titillate the viewers..*”

As a consequence, the show’s creators, Excel Entertainment have apologised to Pathak and assured him that they would blur the name of the book or change the scene.

Moral rights are typically justified by personhood theory that emphasise protection of the author’s deep connection with their work, which is regarded as an extension of their personality itself. The right to integrity protected under Section 57(1)(b) is material for this case at hand. Implicating sexual conduct in the voiceover which is shown to be related to author book, leads to distortion of the book as it suggests something which was never mentioned and intended by the author in his book and such portrayal affects the reputation of the author, as the author here in his book ‘Dhabba’ writes crime-fiction stories which can be read by general public but when sexual conduct is implicated in the book, it affects the reputation of the author as writer of crime-fiction stories. So moral right of integrity of the author of the book is affected here.

### **3.2.2 Analysing how much modification is permissible when a cinematographic film is based on a literary work.**

When a cinematographic film is based on a literary work say a novel, to what extent the film can make modifications in the story given in the novel and when such modifications would affect the right of integrity of the author of the novel would be seen.

Now to answer this question from one perspective, we use the term ‘a film being faithful to its source’. What does this mean? It means that the film captures the essence and theme of the original work.<sup>93</sup> So for example if a character in the novel is important for the story given in it, then the film based on that novel should not modify that character so much that it affects the story as presented by the author in the novel.

<sup>93</sup> James Harold, The Value of Fidelity in Adaptation, Volume 58, *The British Journal of Aesthetics*, pg 89 (2018).

Another perspective to this issue is that when there is adaptation of a literary work into a dramatic work, say a novel into a film, the film is made in such a way that in divulge from the novel in some ways so that it doesn’t appear that the film is a mere copy or reproduction of the novel.<sup>94</sup>

We see two divergent views here. Now let’s see India jurisprudential stand on this issue.

The landmark case Mannu Bhandari vs. Kala Vikas Pictures Pvt. Ltd. and Ors<sup>95</sup> dealt with a cinematographic film which was based on a novel and right of integrity of the author of the novel. Here a movie named ‘Samay Ki Dhara’ made which was based on a novel ‘Aap ka Bunty’ over which filming rights were assigned by the author of the novel to the producer. The complaint of author of the novel is of the mutilation and distortion of the novel in the film. It was held “*The modification should not be so serious that the modified form of the work look quite different work from the original*”. “*Modification*” can lead to, may amount to *distortion or mutilation.*” Modifications should not lead to something totally different from what is envisioned in the original work. <sup>96</sup> “*Some changes are inevitable when a novel is being converted into a motion picture. However, such changes should not mutilate or distort or completely modify the original theme and characters.*”<sup>97</sup> In this case a character portrayal was changed completely in the film in comparison to what is given in the novel, which the Court held would affect the author reputation and thus affect her right of integrity.<sup>98</sup> By modifying the creative input of the author which affects the author’s reputation, an action under infringement of moral rights arises.<sup>99</sup>

The above case, according to us gives a decision which combine the two divergent views that we mentioned above, so modifications can be done even in crucial respects but

<sup>94</sup> Livingston, ‘On the Appreciation of Cinematic Adaptations’, 4(2), Lingnan staff publications, 104,(2010).

<sup>95</sup> AIR1987Delhi13.

<sup>96</sup> Ibid Para 10.

<sup>97</sup> Ibid Para 18.

<sup>98</sup> Ibid Para 22.

<sup>99</sup> Supra I Amar Nath at Para 56.

such modifications should not affect the heart of the story which is given in the novel, like for example don't change the characters in the film which is based on the novel's characters/story, that the meaning which is attributed to each character changes like a simple housewife character in the novel is now shown as a vamp in the film which affects the heart of the story and thus the novel. This in turn leads to loss of reputation of the author of the novel. So in the cinematographic film which is based on a novel, it is better to maintain the novel's authors creative corpus in the film as in a literary work like a novel authors shows his personality through the story, so modifying it would also reflect on authors personality in front of the people who would see the cinematographic film based on the authors novel.

What we said above was also applied in *Phoolan Devi v Shekar Kapoor*<sup>100</sup>, the basis of the film 'Bandit Queen' was a novel dictated by the plaintiff herself and which was according to the Court had been grossly mutilated by the film producer. So when plaintiff who is also the author of her book is shown in bad light in the film, it affected plaintiff honour and reputation and thus affected her moral right of integrity.

Now in USA in "Monty Python" case,<sup>101</sup> it was said it is the right of the artist to have his work attributed to him in the form in which he created it, so unauthorized editing can be considered to alter the nature of the work.<sup>102</sup> So the author should be attributed for work which reflects his creative corpus that is his personality and if unauthorized editing is done on the work it would lead to infringement of moral rights.

### **ISSUES AND SUGGESTIONS**

<sup>100</sup> *Phoolan Devi v Shekar Kapoor* 57 (1995) DLT 154.

<sup>101</sup> *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (1976).

<sup>102</sup> *Ibid* at 20-21; *WGN Continental Broadcasting Co. v. United Video*, 693 F.2d 622 (1982) at 625.

1. In context of right of divulgation as a moral right, so if the producer of a movie decides that he does not want to showcase the movie, though it's a rarity but hypothetically if we think, then such right would affect the other stakeholders interested in the screening of the movie like director actors etc. So we think giving only right of attribution and integrity explicitly in the statute under moral rights is a good approach.
2. The way in USA they have made clear in Moral rights section that these rights are subject to fair use doctrine, Indian legislature could do the same and make it clear explicitly whether moral rights are subject to permitted acts or not.
3. USA has limited application of moral rights that is only to works of visual arts. This does not protect moral rights of authors of literary work like a book as books are specifically excluded from works of visual art definition in USA. So here USA can learn from India as India has not restricted moral rights to any particular type of work, further India has not only given moral rights to authors but also performers. The objective of providing moral rights is achieved when such wide application of these rights is done.
4. India can learn from USA moral rights section, the scope of right of attribution and integrity in the sense that an author can prevent wrong attribution to him for a work on which USA gives moral rights. This right is important as wrong attribution for a work which author has not created also affect reputation of author and hence moral right.
5. A line can be added in statute under moral rights section in light of 3 idiots film controversy, that the credits placing should be such that it is visible to general public, because if credits not visible to public, then aim of giving right to paternity prejudiced.

CONCLUSION

Moral rights are important to protect the creative endeavour. So when TRIPS does not treat Moral rights at par with economic rights, that is when member nations are not obligated to provide moral rights, this raises an important lacuna of the International framework for moral rights protection. Now another aspect we discussed was memes and moral rights. Memes majorly incorporate other's work, so memes raises question of moral rights which we analysed in context of USA and India. We also analysed two views with respect to violation of personality rights in memes and its connection to moral rights.

An interesting aspect is that though both USA and India provide moral rights but application and extent of this right vary in both jurisdictions. Indian moral rights jurisprudence is wide then USA like moral rights of contributor of a film is also recognised. In USA no moral rights on novels, so films based on novels are not affected by the moral rights clause in USA but they come under scrutiny in India when they affect the moral rights of the author of a novel and how they can avoid this is explained in this project.

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