

# MUCH DO ABOUT NOTHING? A *DE MINIMIS* APPROACH TO SAAHO'S INSPIRATION FROM PULSE AND BLOOM

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## Abstract

*The Indian Copyright Act is a robust legislation which acts as a sentinel to protect the invaluable rights of authors. As times and technology have changed since its enactment, we are beginning to see diverse instances of infringement which were previously unheard of. One particularly noticeable area where the infringements are proliferating is "Cinema", where ideas and expressions are "borrowed" unhesitatingly. This article examines the far-reaching effects of the use of protected works in "Cinemas", and more precisely, it investigates the recent controversy of the use of an art-work titled "Pulse and Bloom" in the big-budget Indian cinematographic work titled "Saaho." The authors delineate the working of the Indian Copyright Law and the significant role played by the courts in interpreting and curbing the menace of unauthorized use. They further explicate the application of laws to the present controversy by comparing and contrasting and by using a logical-analytical approach. They also examine what demarcates fair use from infringement. The article also delves into the foreign jurisprudence to discover how the foreign courts construe indiscriminate use of a work in broadcasts. The authors finally conclude by determining a possible outcome to the controversy in question and present "a way forward" idea which could safeguard the rights of those aggrieved.*

## Introduction

Cinema, cricket and politics are the *trikota* of entertainment in India. Karl Marx might have said that religion is the opium of the masses, but in India, the film industry unites people beyond barriers of religion, language, or for that matter any other demographic. KPMG's India's Media and Entertainment report of 2019 pegs the media and entertainment industry at INR 1631 billion<sup>1</sup> out of which, films contributed to INR 183 billion.<sup>2</sup> The film industry is expected to grow to INR 260 billion in the next five years.<sup>3</sup> Given the high stakes involved, it is no surprise that there is cut-throat competition at the top. Big-budget films try to out-do their competitors by investing heavily in the big-name performers, extravagant sets, and over-the-top promotions. However, given the high-risk nature of the industry, being creative can also be a double-edged sword. Consequently, creators sometime look towards already successful ideas for taking inspiration. The artistic industries no doubt, thrive upon inspiration and subsequent interpretations. The problem that arises is that the line between inspiration and plagiarism is blurred. Protection of their original works and the monopoly to exploit the same is one of the most important incentives for an original creator. Intellectual property laws operate to strike a balance between the rights of creators and the rights of the society in the creative works. For the film industry, copyright laws are the one of the most important tools for protection of their creations. But the copyright laws are inherently grey themselves. There is very less objectivity, and disputes are mostly settled by application of 'tests' by judges. What also complicates the fact is that copyright laws are born inherently from original work, independent of any registration formalities, which are rarely, if ever, compulsory. This article looks at one such recent controversy in which the movie, *Saaho*, appeared to have taken "inspiration" for a marketing poster and a song from an earlier artwork 'Pulse and Bloom' by the artist Ms. Shilo Shiv Suleman.

## Issue in Controversy

Ms. Shilo Shiv Suleman presented her artwork, titled '*Pulse and Bloom*' at the Burning Man Festival in 2014 in Nevada's Black Rock Desert. By its own admission, the Burning Man Project seeks to "bring experiences to people in grand, awe-inspiring and joyful ways that lift the human spirit, address social problems, and inspire a sense of culture, community, and civic

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<sup>1</sup>INDIA'S DIGITAL FUTURE - MASS OF NICHES, <https://assets.kpmg/content/dam/kpmg/in/pdf/2019/08/india-media-entertainment-report-2019.pdf>, (last visited Oct. 27, 2019)

<sup>2</sup>*Id.* at 13.

<sup>3</sup>*Id.* at 14.

engagement.”<sup>4</sup>As far as the artistic work itself is concerned, the artist describes *Pulse and Bloom* as “an interactive and social art installation that visualizes participants’ heartbeats and invites people to share and sync their human heartbeats in a rhythmic pattern. Pulse and Bloom is one of the largest biofeedback installations of its kind, allowing 40 people to visualize their heartbeats simultaneously.”<sup>5</sup>In essence, the structure consists of a circular matrix of 10-14 feet high lotuses which have LEDs in their stems and flowers. When two participants interact with the flowers, we “begin to see the effects of each person’s heartbeat on the other and the effect of meditative synchronicity unfold.”<sup>6</sup>The artwork was well received and has been featured by various media outlets such as BBC News<sup>7</sup>, MSNBC,<sup>8</sup> The Guardian,<sup>9</sup> and the Atlantic,<sup>10</sup> to name a few. The work in controversy is a cinematographic film, *Saaho*, released in 2019. Directed by Sujeeth, it features film industry A-listers in the lead roles in Prabhas, of *Baahubali* fame, and Shraddha Kapoor, most famously known for her roles in *Aashiqui 2* and *Haider*. The film was shot in Hindi, Telugu and Tamil. The issue came to light when a poster of the film was released wherein the lead pair can be shown holding hands and walking in a desert in front of mammoth sized flowers.<sup>11</sup> Industry observers were quick to point out that the background installation looked eerily similar to ‘Pulse and Bloom.’ The copying was further confirmed when the full-length video of the song titled *Baby Won’t You Tell Me* was uploaded on YouTube by the producers T-Series. The song appears to be shot at various exotic locations throughout the world. Interestingly, during the song at 1:25 mark, a man appears to give two tickets of ‘Burning Man’ to the pair. Soon after, at the 1:29 mark, the couple appears to visit an art festival with various installations in the background. They appear to be surrounded by artists of various kinds all dressed up for their performances including gymnastics, pyrotechnics etc. At 1:46, we see the first instance of the artwork that looks substantially similar to *Pulse and Bloom*. Various people can be seen admiring the artwork in the background while the two leads dance around the installation in typical, *Bollywood-esque*, romantic manner. This

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<sup>4</sup> BURNING MAN, <https://burningman.org/network/about-us/> (last visited Oct. 27, 2019).

<sup>5</sup> PULSE AND BLOOM, <https://www.pulsebloom.com/about> (last visited Oct. 27, 2019)

<sup>6</sup>*Id.*

<sup>7</sup> BBC NEWS, <https://www.bbc.com/news/in-pictures-29059374>, (last visited Oct. 27, 2019)

<sup>8</sup> Burning Man festival draws thousands, MSNBC (2014), <http://www.msnbc.com/msnbc/burning-man-2014-draws-thousands#slide1> (last visited Oct. 27, 2019).

<sup>9</sup> THE 20 PHOTOGRAPHS OF THE WEEK THE GUARDIAN, <https://www.theguardian.com/artanddesign/gallery/2014/sep/06/photography-new-york-fashion-gaza-islamic-state> (last visited Oct 27, 2019)

<sup>10</sup> BURNING MAN 2014 THE ATLANTIC, <https://www.theatlantic.com/photo/2014/09/burning-man-2014/100802/> (last visited Oct. 27, 2019)

<sup>11</sup> *Bengaluru Artist Claims Saaho Poster Copied From Her Burning Man Art Installation*, NEWS18 (Oct. 27, 2019) <https://www.news18.com/news/movies/bengaluru-artist-claims-saaho-poster-copied-from-her-burning-man-art-installation-2290783.html>.

instance lasts for nearly 15 seconds before the background changes. At 2:27, there is a clear shot to a city that looks exactly like the layout of the burning man festival. Pursuant to the controversy coming to light, Shilo took to Instagram to share pictures of her artwork. A cursory look at Shilo's Instagram shows that she has shared her artwork there previously as well in 2014, 2016 2017, 2018. On being asked her view on the copying, she did not mince any words and straight away called it "thievery." She is not amused when suggested that her work has got more visibility due to this incident as she does not "condone the narrative in mainstream Bollywood cinema" and her work is about her own interpretation of "the female body, desire, sensuality, gender and consent." Personally, she finds "the mainstream's portrayal problematic" and is also "critical of the aggression."<sup>12</sup>

### **Experiences from USA**

The Courts in the United States of America, in several cases, ruminated whether the display and broadcast of "artwork" in movies and television shows would amount to an infringement of the copyrighted work. The courts, as dissected hereinafter, have profusely examined the application of the fair use defence and the *de minimis* defence while deciding such cases. Although, it may seem that courts generally grant such defences, it is worthwhile to note that there is no straightjacket formula to determine what constitutes fair use. Therefore, the meticulous scrutiny of facts is of utmost importance in deciding the availability of such defences.

#### ***Mura v. CBS*<sup>13</sup>**

The earliest of cases which dealt with the broadcast of a "work of art" in television programs was *Mura*.<sup>14</sup> The plaintiff in *Mura*<sup>15</sup> created puppets which were broadcasted in defendant's television program and the puppets were shown for approximately 35 seconds in the defendant's television program. The pertinent question was whether the broadcast of the plaintiff's copyrighted puppets constituted copying for the purposes of the copyright act. The Court held that the broadcasting of copyrighted work would not be construed as copying. The

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<sup>12</sup> Artist Shilo Shiv Suleman On The 'Saaho' Plagiarism Row And Her Installation Pulse And Bloom, SILVERSCREEN.IN (Oct 28, 2019), <https://silverscreen.in/news/exclusive-artist-shilo-shiv-suleman-on-the-saaho-plagiarism-row-and-her-installation-pulse-and-bloom/>

<sup>13</sup>*Mura v. Columbia Broadcasting System, Inc.*, 245 F. Supp. 587.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

court then went on to hold that even if the defendant infringed the plaintiff's work, they would be safeguarded by fair use. The court's *raison d'être* in reaching the conclusion that the broadcast was not copy was that "the evanescent reproduction of a hand puppet on a television screen... is so different in nature from the copyrighted hand puppet."<sup>16</sup> The Court then opined that the defendant had made fair use of the work. The effect on the potential market was considered, by the court, as the factor which could tilt the case significantly in a fair use defence with respect to the fact of the present case. It was held that "the exhibition on television would stimulate sales of the hand puppets rather than prejudice them."<sup>17</sup> Further, it was concluded that these puppets were not the "principal attraction"<sup>18</sup> and that the copies could not possibly act as a "substitute"<sup>19</sup> for the original work.

### ***Amsinck v. Columbia Pictures Indus***<sup>20</sup>

The Plaintiff, Carol Amsinck, was a graphic artist who created "Baby Bears Artwork" containing pastel-coloured teddy bears. The impugned work was a baby mobile which contained the copyrighted "Baby Bears design." The District Court for the Southern District of New York held that the usage of the Plaintiff's work "Baby Bears Musical Mobile" in a movie was not copying and thereby granted summary judgment in the favour of the defendant. The Plaintiff had to establish two ingredients, i.e., (a) ownership of a valid copyright; and (b) copying of the protected work by the alleged infringer.<sup>21</sup> Plaintiff was able to satisfy the first element. The issue arose with the second factor as the Court was unable to accept the plaintiff's contention that using plaintiff's work resulted in "copying" for the purposes of infringement under the Copyright Act. The traditional interpretation of the term "copying" under the Copyright law would be the reproduction of the work itself. But, as technology and times changed, the courts have adopted an intelligent interpretation of the term "copying" on the basis of the facts and circumstances before them.<sup>22</sup> The Court reasoned in *Amsinck*<sup>23</sup> that "defendant's display of the Mobile bearing Amsinck's work is different in nature from her copyrighted design."<sup>24</sup> The Court also stated that mere display of the copyrighted work for few

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<sup>16</sup>*Id.* at 590.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044 (S.D.N.Y. 1994).

<sup>21</sup> *See*, e.g., 2 H.B. Abrams, *The Law of Copyright*, § 14.01 [A]; *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986); *Eckes v. Card Prices Update*, 736 F.2d 859, 861 (2d Cir. 1984)

<sup>22</sup> *See Mura v. Columbia Broadcasting System, Inc.*, 245 F. Supp. 587, 590 (S.D.N.Y. 1965)

<sup>23</sup> *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044 (S.D.N.Y. 1994)

<sup>24</sup> *Id.*

seconds, along with the fact that the defendant has not attempted to create a profit from the work or substitute plaintiff's work was, in the mind of the court, not "copying."<sup>25</sup> The defendant contented that it was protected by fair use, which was sustained by the court. The first factor favoured the defendant as they did not use the plaintiff's work to advertise or in any manner use the work as a means to produce profits. Further, the work was not featured in any of the defendant's promotional materials, such as advertisements.<sup>26</sup> The second factor was interpreted by the Court differently. The Court opined that although the plaintiff's work was highly creative in nature, and it probably weighed against the finding of fair use, it did not serve as a substitute to the original and thus rendering this factor to not lean in the favour of the plaintiff.<sup>27</sup> The third factor was interpreted in a manner that included both a qualitative and a quantitative measure and it was concluded that the work was displayed only for a "short-term"<sup>28</sup> and hence granted the defendant's a fair use defence. The fourth factor also favoured the defendant as the defendant's portrayal of the plaintiff's work "did not prejudice sales of her design or of the Mobile bearing the design."<sup>29</sup> "

***Ringgold v. Black Entertainment TV, Inc***<sup>30</sup>

This case is comparable to *Amsinck*.<sup>31</sup> The plaintiff, Ringgold, created a painted story quilt which was titled "Church Picnic". A non-exclusive license was given to a museum to transform the work into a poster while preserving the art. This poster had been monetized and was being sold since 1988. The defendant, Black Entertainment TV (BET), aired a show on cable television which contained the usage of the plaintiff's artwork. "The Poster appears in nine shots that range in duration from 1.86 to 4.16 seconds and can be seen for a total of 26.75 seconds."<sup>32</sup> The plaintiff initiated, *inter alia*, an action for infringement of his copyright. The trial court decided the case in defendant's favour. The District Court's opinion was reversed by the Court of Appeals. The Court of Appeals extensively considered the *de minimis* doctrine and held that the *de minimis* limit was crossed by the plaintiff. The court considered three relevant aspects of the *de minimis* doctrine. First, the triviality of the use of the work,<sup>33</sup> second the triviality being below the conceived limits of substantial similarity, <sup>34</sup> third, in relation to

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<sup>25</sup>*Id.* at 1049

<sup>26</sup>*Ibid.*

<sup>27</sup>*Id.* at 1050

<sup>28</sup>*Id.* at 1050

<sup>29</sup>*Id.* at 1049

<sup>30</sup>*Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70 (2d Cir. 1997)

<sup>31</sup>*Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044

<sup>32</sup>*Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70, 73 (2d Cir. 1997)

<sup>33</sup>*Id.* at 74.

<sup>34</sup> *Ibid.*

one of the prongs of fair use,<sup>35</sup> i.e., the quantity and substantiality of the usage when compared with the totality of the copyrighted work. The court, unlike the *Amsnick* court, did not scrutinize whether the plaintiff's work was copied. If the Court had pronounced that the work was not infringing at all, as the *Amsnick* Court did, it would have resulted in a great deal of clarity and consistency. Instead, the court proceeded to examine the four-factor affirmative fair use defence. Post thorough consideration, the court opined that the use by the defendant was not *de minimis*. It was concluded that the "four to five second"<sup>36</sup> display of plaintiff's work, where the work was "clearly visible"<sup>37</sup> and "re-enforced by the briefer segments, totalling to 26-27 seconds,"<sup>38</sup> was quantitatively, not a *de minimis* usage. The first of the four-factors was adjudged to favour the plaintiff by the court of appeals. The court opined that, firstly, defendant's work will not supplant the views desire to see the poster again and again, should not be interpreted as the factor leaning in favour of the defendant.<sup>39</sup> Secondly, one of the reasons art is created is to make it a decorative piece, this would mean that usage of art as a decorative piece would not result in finding of fair use.<sup>40</sup> Thirdly, the usage of posters as merely 'incidental' would mean that anyone can make "wholesale appropriation"<sup>41</sup> of the artwork under the guise of fair use. The reasoning's of the Court of appeals take a slight deviation from the prior cases, but provides a robust test for the protection of artists which ought to be highly welcomed. The Court decided that the second factor favoured the plaintiff, as the work was highly creative in nature. The Court felt that the third factor leaned in the favour of the defendant, but were reluctant to give it significance as they believed that this factor could be used to "easily to tip the aggregate fair use assessment in favour of those whom the other three factors do not favour."<sup>42</sup> The Court also stated, the market for licensing would be impaired, simply by claiming minimal infringement. The Court was vociferously attempting to protect the artists, and rightly so. The Ringgold Court opined that the fourth factor inclined towards the plaintiff. One of the important averment made by the plaintiff regarding loss of marketability was that it was not a mere loss in revenue earned from copying but the exploitation of the work without paying the price which was customary.<sup>43</sup> This sound argument was taken into serious consideration by the Court. The court stated that the fourth factor can favour the plaintiff, if she can show "traditional,

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<sup>35</sup>*Id.* at 74.

<sup>36</sup>*Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70 (2d Cir. 1997)

<sup>37</sup>*Id.* at 79

<sup>38</sup>*Id.* at 77

<sup>39</sup>*Id.* at 79

<sup>40</sup>*Ibid.*

<sup>41</sup>*Id.* at 80

<sup>42</sup>*Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70 (2d Cir. 1997).

<sup>43</sup>*Id.* at 81.

reasonable, or likely to be developed" market for licensing her work as set decoration.<sup>44</sup> The Court was ready to scrutinize the plaintiff's readiness to prove serious factors which could tilt the fourth factor towards her. It was rightly concluded that the inadequacy of records for the fourth factor clearly does not warrant a grant of summary judgment to the defendants.

***Jackson v. Warner Bros***<sup>45</sup>

*Jackson*<sup>46</sup> involved the use of plaintiff's artwork in the movie produced by the defendant. The artwork titled "Following the Path" and "A Place of Crossing" was used in the movie for nearly 60 seconds. The Court in *Jackson* interestingly stated that there was no dispute that the artwork was copied. The stand taken by the Court is diametrically opposite to the stand taken in *Amsinck*.<sup>47</sup> Therefore, the Court limited itself to the examination of the applicability of the four prong fair use defence. The first prong of fair use was resolved in favour of the plaintiff. The Court referred to the *Amsinck*<sup>48</sup> and *Ringgold*<sup>49</sup> and held that Plaintiff's works were neither used in the promotion of the movie nor used "as a catalyst to increase sales for the movie."<sup>50</sup> The court rightly held that the Defendant never stood to profit from the use of the plaintiff's work. The Court came to the conclusion that the second prong of fair use supports the plaintiff as the works were highly imaginative, creative and original. This reasoning is also a sharp deviation from the *Amsinck* court as the *Amsinck* court did not consider the second factor to be clearly in favour of the plaintiff. The third prong, amount and substantiality, was also resolved in favour of the defendant as the court believed that display of the plaintiff's work for less than 60 seconds in the defendant's movie did not create "demonstrable harm to the plaintiff".<sup>51</sup> The fourth prong of fair use was also decided in favour of the defendant. The defendant argued, with regards to the fourth prong, that the display of the plaintiff's work has not resulted in jeopardizing the licensing or sales of the work. The defendant went on to argue that such display would only result in an increase in sales. The court referred to *Campbell*<sup>52</sup> and stated that "The boon to the song does not make the film's simple copying fair." The Court then turned to *Amsinck*<sup>53</sup> and concluded that the artwork was merely used as props, the potential

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<sup>44</sup>*Id.* at 81.

<sup>45</sup>*Jackson v. Warner Bros.*, 993 F. Supp. 585.

<sup>46</sup>*Id.*

<sup>47</sup>*Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044 (S.D.N.Y. 1994).

<sup>48</sup>*Id.*

<sup>49</sup>*Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70.

<sup>50</sup>*Jackson v. Warner Bros.*, 993 F. Supp. 585, 589.

<sup>51</sup>*Jackson v. Warner Bros.*, 993 F. Supp. 585, 586. ; *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044 (S.D.N.Y. 1994).

<sup>52</sup>*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569.

<sup>53</sup>*Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044.



market for the plaintiff's work is not jeopardized, the display of artwork did not result in substitution, and hence there was no demonstrable harm caused to the plaintiff.

***Sandoval v. New Line Cinema Cop***<sup>54</sup>

The work infringed, in this case, was “a series of ten photographs” of the plaintiff which “depicts his body or face in a variety of unusual poses.”<sup>55</sup> The defendants were producers of a movie titled “Seven”. In one of the scenes in the movie, it could be seen that “a series of black and white translucent forms, including certain of Sandoval's Photographs” hanging. This scene was approximately 90 seconds in length and the plaintiff's photograph was only faintly visible, that too, it was recognized only after repeated viewings. The defendants conceded that the work used was that of the plaintiff, argued that the use of the impugned work was insignificant and that they had made fair use of the work.<sup>56</sup> The Court of Appeals opined that the examination of two elements of a copyright claim was not necessitated as the defendants successfully invoked the fair use defence.<sup>57</sup> The Court of Appeals was of the opinion that the first factor was favouring the defendant. It sustained the view of the District Court that the plaintiff's work was neither used to promote the movie nor to exploit any potential market for the work. Furthermore, the Court of appeals also affirmed the District Court's opinion that the work was “transformative”<sup>58</sup> and created a “distinct visual aesthetic and overall mood for the moviegoer watching the scene.”<sup>59</sup> The second factor, since the work was highly creative, favoured the plaintiff as per the Court. The third factor was considered meticulously by the court and it came to the conclusion that *de minimis* use would not preclude the finding of fair use, albeit the court found this factor favouring the plaintiff. For the fourth factor, the court concluded that a “fleeting, obscured and out-of-focus” display of work would not jeopardize the potential market or substitute the original work. In toto, the court found that the infringement is insignificant and “de minimis” and also stated that the infringement came under the ambit of fair use.<sup>60</sup>

***Gordon v. Nextel Communs***<sup>61</sup>

In this case, the work involved was a series of Dentist-patient illustrations created by a self-employed medical artist.<sup>62</sup> The Defendants used plaintiff's illustrations without his consent

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<sup>54</sup> Sandoval v. New Line Cinema Corp., 147 F.3d 215.

<sup>55</sup> *Id.* at 216.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Sandoval v. New Line Cinema Corp., 973 F. Supp. 409, 413.

<sup>59</sup> *Id.* at 413.

<sup>60</sup> Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218.

<sup>61</sup> Gordon v. Nextel Communs., 345 F.3d 922.

<sup>62</sup> *Id.* at 923.

in their advertisement, resulting in the alleged infringement. To determine whether fair use was made, the Court examined the four factors of fair use. The first factor was resolved in favour of the defendant. The court opined that although the advertisement is commercial in nature, the work was “fleeting”<sup>63</sup> used and the work was not the focus of the defendant’s advertisement. The Court of appeals decided affirmed the District Court’s view that the second factor is in the defendant’s favour as the work of the defendant was “more functional than creative.”<sup>64</sup> The third factor was also decided in the favour of the defendant. The court stated that the “Plaintiff’s illustrations appear for fleeting seconds during the 30-second commercial, and the bridge illustration is never seen in focus or as a close-up.”<sup>65</sup> Further, the court held that the work was never the “heart” of the advertisement. It was decided that the fourth factor also leaned in the favour of the defendant as the use of the work was “*de minimis*,”<sup>66</sup> as the work was out-of-focus and was only shown briefly.

#### ***Gayle v. Home Box Office, Inc***<sup>67</sup>

The plaintiff, the creator of graffiti, claimed that the defendants used the graffiti in a movie without his authority. He claimed infringement of copyright in the artwork, inter alia. After due consideration of the contentions of the plaintiff and defendants, the court opined that the graffiti was shown fleetingly and could be seen only for 2-3 seconds.<sup>68</sup> It also stated that the graffiti was not “pictured “by itself or in a close-up,” and it plays absolutely no “role in the plot.” Therefore, this use, as determined by the court, is only “*de minimis*.”<sup>69</sup> The court in this case did not consider the availability of the affirmative fair use defence to the defendant. Instead, it examined the ‘*de minimis*’ doctrine and concluded that the use was ‘*de minimis*’, and thus would not result in an actionable claim.<sup>70</sup>

#### **Yashraj Films Case and *De Minimis* Copyright Infringement in India**

*India TV Independent News*<sup>71</sup> is landmarks decision with regards the concept of *de minimis* copying in the entertainment industry. In that case, an advertisement had used one line of a hit song ‘Kajra Re’ whose rights were held by Yashraj films. Further, during a chat show, the interviewee had sung some stanzas of songs rights of which were owned by Yashraj films. There was also an ancillary issue that associated cinematographic clips were also shown in the

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<sup>63</sup>*Id.* at 925.

<sup>64</sup>Gordon v. Nextel Communs., 345 F.3d 922.

<sup>65</sup> *Ibid.*

<sup>66</sup>*Id.* at 923.

<sup>67</sup>Gayle v. HBO, Inc., No. 17-CV-5867 (JMF), 2018 U.S. Dist. LEXIS 73254 (S.D.N.Y. May 1, 2018).

<sup>68</sup>*Id.* at 7

<sup>69</sup>*See Id.* at 8

<sup>70</sup>*See Id.*

<sup>71</sup>India TV Independent News v. Yashraj Films, 2012 SCC OnLine Del 4298

background during such performance, however, the same point was conceded during the proceedings. The lower Court had held that apart from taking permission of a copyright owner, the only exception to using a copyrighted work without authorization flows from §52 of the Copyright Act, 1957.<sup>72</sup> It further held that consequently, “a derivative copyrightable work such as a sound recording cannot be appropriated, even in the minute part, by any person for whatsoever purpose it might be.”<sup>73</sup> The appellate Court noted that even though the lower court had discussed the issue of fair use and used the four factor test, it did not apply *de minimis* test.<sup>74</sup> The appellate court herein then proceeded to discuss the facts of the case and the context in which the advertisement had used the line from the copyrighted work.<sup>75</sup> The Court started its analysis by observing that by its very nature, copyright law is violated in a minor way daily by someone or the other everywhere in the world.<sup>76</sup> It further noted that it wasn’t the case earlier; however, trivial instances of copyright infringement were being litigated more frequently now.<sup>77</sup> The Court observed that judicially, there are three broad ways of applying *de minimis*.<sup>78</sup>

- i. **Substantial similarity analysis** – usually used in case of fragmented literal similarity i.e. either the copying has been substantially similar, or the copying has been *de minimis*.<sup>79</sup> The court noted that this is fraught with uncertainty as different courts have reached contradictory decisions on similar facts.<sup>80</sup>
- ii. **Fair use analysis** – applying the test in the fourth factor. The court was cognizant of the fact that there was no discernible trend as to whether or not copying would be *de minimis* as there was a difference of application by various judges.<sup>81</sup>
- iii. **Simple application** – the court opined that this was perhaps the most effective test to apply, especially given the nature of copyright law wherein copyright arose irrespective of registration in any work by a creator which involved a modicum of creativity.<sup>82</sup> Given that cost of adjudication is higher than what would be usually awarded as relief in such disputes, and also the fact that the promoting creativity is an important objective

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<sup>72</sup>*Id.* at 4

<sup>73</sup>*Id.* at 4

<sup>74</sup>*Id.* at 8

<sup>75</sup>*Id.* at 7

<sup>76</sup>*Id.* at 5

<sup>77</sup>*Id.* at 8

<sup>78</sup>*Id.* at 8

<sup>79</sup>*Id.* at 9

<sup>80</sup>*Id.* at 9

<sup>81</sup>*Id.* at 11

<sup>82</sup>*Id.* at 12

of copyright law, this method has the most advantages.<sup>83</sup> The court also noted that given fair use test is not really suited for trivial violations, applying the *de minimis* standard would be best suited for dispute resolution.<sup>84</sup>

The Court finally went on to list the five factors to be considered, namely:<sup>85</sup>

- Size and type of harm
- Cost of adjudication
- Purpose of the violated legal obligation
- Effect on legal rights of third parties
- Intent of wrongdoer

After applying these factors to the issue before the Court reached the conclusion that the violation was insignificant and *de minimis* was a successful defence.<sup>86</sup> The Court finally concluded by hoping that future disputes would preferably follow the *de minimis* standard effectively for dealing with trivial copying.<sup>87</sup>

### **Application of the said Standards to Current Controversy**

There are two different issues that arise herein- first, the use of the artwork in the movie poster prior to its release, second, the use of the artwork as set design in *Baby Won't You Tell Me*, a song from the movie. In India, the Copyright Act, 1957 governs the law of copyrights of various works. Section 14 (c) of the act provides the bundle of rights available to the authors of artistic works, including the right to reproduction in any material form.<sup>88</sup> A copyright in such a work is deemed to be infringed when some other person, without due authorization, carries out something the exclusive right of which expressly resides with the author of the work in question.<sup>89</sup> The statute also enumerates an exhaustive list of actions that do not come under the ambit of infringement.<sup>90</sup> Indian courts have also actively used the four factor test laid down in Section 107 of Title 17 which is the federal law governing copyrights in the United States.<sup>91</sup> The High Court of Delhi has held that the four-factor test should be used when courts ought to determine whether or not there has been transformational use of a particular work because if

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<sup>83</sup>*Ibid*

<sup>84</sup>*Ibid*

<sup>85</sup>*Ibid*

<sup>86</sup>*Id.* at 13

<sup>87</sup>*Id.* at 14.

<sup>88</sup>The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §14 (c).

<sup>89</sup>The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §51.

<sup>90</sup>The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §52.

<sup>91</sup>U.S. Copyright Act, 17 U.S.C. §107 (1976)

there has been transformational use, it is irrelevant if there is substantial similarity.<sup>92</sup> Therefore, the first question that arises in here is whether there exists a copyright in the work '*Pulse and Bloom*'. By virtue of a joint reading of Section 2, 14 and 17 of the Copyright Act, it *prima facie* appears that there indeed exists a valid copyright in the artistic work irrespective of registration. Interestingly, the Indian courts have never come across a similar situation. Nevertheless, the five factors from *Yashraj Films Case* (Supra) can be considered herein to see whether or not the current copying can be called *de minimis*. As far as the size of the work is concerned, the artwork has been copied in its near entirety. In the poster, the work can be seen clearly in the background. In the foreground, the poster shows Prabhas leading Shraddha Kapoor by hand who is looking intently at him. There is also a part of the space dedicated to the details of the movie like the name of the song, the name of the movie, the persons involved in production and direction, and the title of the movie itself. The poster's background exclusively consists of the artwork. A possible argument that the design of the set is a not a replica but merely an inspired recreation of '*Pulse and Bloom*' may sound like a good contention, but it is likely to fail. It is true that copyrights cannot exist in an idea. However, once the idea has been expressed in a material forms such *Pulse and Bloom*, it I entitled to protection. In the present matter, the set design did not just the idea, but they had copied the manner of expression, which amounts to a "copy" under the Indian Copyright Act. A defence that there are some differences between *Pulse and Bloom* and the set design is highly unlikely to be tenable at law. The producers can perhaps argue that the background is used only for fifteen seconds, which might seem too short a period of time in Indian cinema where movies easily run into a couple of hours on a n average. However, as we saw in *Ringgold*, that itself cannot be determinative enough to hold that the copying was *de minimis*.

A question such as this can only be properly judged by a fact-finding court, however if other factors are being fulfilled, the overall value of such a determination in favour of the defendants might not count towards much. Further, in such cases, a substantial amount of cost will be involved in the litigation process given how costly it is to hire expert senior advocates and how long disputes take to get adjudicated. What compounds this fact further is that it is likely going to be a classic David versus Goliath battle as the resources at disposal for a big banner such as the producers of the current movie are going to significantly outmatch those available to an individual artist. Given that the Indian legal system has only recently started

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<sup>92</sup>The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors., 2008 (38) PTC 385 (Del).

picking up on the process of awarding significant damages and legal fee to the winning party, and these instances are far too rare, a long drawn out litigation is unlikely to yield expected results. The most difficult part of any infringement transaction is to be able to discern the purpose and motive behind it. There are certain cases wherein it is clear that the wrongdoer is trying to ride on the goodwill established by a creator or trying to cause misrepresentation. However, in scenarios such as the current one, one can only conjecture such purpose. As far as the poster is concerned, it definitely works to generate interest among the people and makes them want to go and watch the movie. The very purpose of posters is to advertise and market the product. Therefore, there was clear intention on part of the producers to use the artwork as a tool to attract audience. It is, however, uncertain why the particular artwork was selected for the song. Perhaps as the usual prevalent practice in the industry, the only goal was to make the background look exotic and appealing. This would certainly explain why the artwork formed a part of the song, so as to attract the audience and give them a sense of awe. Therefore, there was a clear intent by the makers to display the artwork prominently. Furthermore, in the song-video, there is also a glimpse of tickets to the Burning Man Festival. Therefore, it is evident that the makers were aware and intended to copy the artwork. Clearly, it is not a situation where in the creator saw the artwork sometime and then subconsciously copied it like George Harrison did with the Chiffon's. This at least shows clear intention on part of the creators to imitate the artwork. In case where existed any *bona-fides*, the producers could have reached out to the artist for a license for the work. The circumstances lead us to believe that either the producers anticipated that they would be denied licensing or they would get away with the copying. Irrespective of the same, the artist would probably feel hard done by. This is even more pertinent in light of the artist's statements that she does not agree with such use not only owing to the commercial factor but also because she is not a fan of the manner in which contemporary cinema depicts issues such as women and sexuality. The Indian copyright law recognizes special rights for the authors, even though it is not of great relevance in the instant factual matrix.<sup>93</sup>

The statute provides for moral rights of the author wherein even after sale or licensing of a work, authors can restrain the use of a work in case the use is done in a manner which is prejudicial to his reputation or honour. Admittedly, this is not very relevant in the current situation as it is inapplicable if there is a failure to display the work in a manner deemed satisfactory by the author. Another factor that can be considered is the monetary value of

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<sup>93</sup>The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §57.

copying. The makers of *Saaho* are likely to believe that they have not caused any loss to the artist. Their use of the artwork in no way offered a substitute for the work and in anyway the artist looks to be unwilling to license the product. Therefore, we find ourselves in a typical copyright grey area. On the one hand, we have an artist whose work was completely copied. On the other hand, it is unclear the overall impact of the use of the work. *Prima-facie*, it does appear that there was infringement as far as use of the artwork in the poster is concerned. However, things get murky when we consider the use of the work in the song. It looks like a good academic example of where the *de minimis* standards can be applied. At the same time, there is no real clarity as to the effect of the copying as there is no real way to determine if there was any effect of using the artwork at all. We would be wading into domain of Law of Tort if we were to suggest that this is a case of *damnum sine injuria* fit for nominal damages. The higher judiciary can only lay down the standards, however, the onus lies on the lower courts to actually implement and uphold the *dictum* higher courts. Unfortunately, property issues are rarely adjudicated to an end in India. Mostly, they reach settlements. Even though that might seem like a favourable outcome as far as a clogged judicial system is concerned, it certainly seems like a missed opportunity as far as testing the contours of law are concerned. There is also the underlying issue that seldom would an individual artist be able to match the might of big budget infringers. One remedy to correct that would be to have a pro-active copyright society for artists of such works which can collectively stand up to infringing bullies as well as provide smooth mechanisms for licensing of artworks.

## Conclusion

It is clear from the analysis made, that there is no straightjacket formula to determine whether an infringement is actionable or not. Nevertheless, it is suggested that the courts can resort to the following two-fold approach while encountering such situations. Firstly, an examination must be done if the use falls under *de minimis*. The *de minimis* standard must pertain to both the qualitative and quantitative use. If it is found it is *de minimis*, the court must stop at that point without analysing other defences such as “fair use.” Secondly, the Court, if it finds that the *de minimis* defence is unavailable, must proceed with whether fair use has been made of the work. The Indian Copyright Act has a list of “fair dealing” instances but no explicit mention of “fair use”. But the Indian judiciary has taken precedence “fair use” from the American jurisprudence to determine if the defendant can be exonerated even upon infringement. This “fair use” test is broad to be applicable in any situation, and hence, it must be taken as the guiding principle by the courts in the time to come. It is important, finally, that

the courts must be amenable to changing circumstance. As a great jurist once said “The life of the law has not been logic: it has been experience.”<sup>94</sup> The Courts must not insist upon narrowed down construction of law but must adapt to the prevailing circumstances to ensure that justice is done. The “Saaho” controversy is just an instance from the innumerable infringements that frequently occur in the entertainment industry. On a cursory reading of copyright law, a court is likely to consider the copying *de minimis* and not really meeting the standards for infringement. However, at the end of the day we must not insist on following the letter of law so blindly that we miss the spirit of law. The law of copyright balances the rights of authors on the one hand and that of the society on the other. In the matter at hand, the artist would probably feel hard done by for absolutely no fault of hers, if the current standards of law were to be applied strictly. We must ask ourselves, is there a point in granting a copyright to an author if she would control of her hard work and not even have a say in it. Granted that there are practical reasons for a *de minimis* approach but cases such as these merely illustrate that above all, law must be based upon justice, equity and good conscience.

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<sup>94</sup> HOLMES, O. & NOVICK, S, THE COMMON LAW (Dover Publications 1991).