

NOTES AND COMMENTS

CONFLICT OF COPYRIGHT IN CINEMATOGRAPH FILMS: THE INDIAN SCENARIO

Abstract

Cinematograph film is one of the subject matters recognised and protected under the Indian Copyright Act, 1957. What makes Cinematograph films unique is that it is a derivative work, which means that it is based on an already existing work. A film is a work of collaboration wherein several persons like scriptwriter, music composer, director, actors *etc.* contribute to create the work. However, under the copyright law, it is only the producer who is considered the sole author as well as the owner of the film. In recent times, this biasness towards producers under the copyright regime has been questioned. Conflicts between producers and other contributors, *viz.*, scriptwriters, musical composers have surfaced, contesting the copyright of scripts and music included in the film. This paper is an attempt to understand the current Indian legal position on conflict of such copyright, address the loopholes in the law and suggest ways to amend them.

I Introduction

THE INDIAN Copyright Act, 1957 (hereinafter the copyright Act) recognises two categories of work, the first category comprises of literary, dramatic, musical and artistic works which requires originality as a pre-requisite condition to be granted protection. The second category consists of cinematograph films and sound recordings which do not require originality as a criterion as it is a derivative work. A derivative work is one which is based on an existing work. Common derivative works include translations, musical arrangements, plays, art reproductions, abridgments *etc.*

Authorship and ownership of cinematograph films

Under the copyright Act, there are two kinds of recognition granted in context to the copyrighted works, one is authorship and the other is ownership of the work. Usually, the author is considered to be the first owner of the copyright except under specific conditions when the author may not be considered to be the first owner of copyright.¹ A cinematograph film is a result of amalgamation of the efforts put in by different persons, such as scriptwriter, music composer, director, actors *etc.* However, when it comes to conferring rights, it is the producer of the film who is considered to be the sole author and owner of the cinematograph films under the copyright Act.

1 The Copyright Act, 1957, s. 17.

Conflicts of copyright in cinematograph films

Many of the works included in the film have their own separate copyright, for example, a script is a literary work and has its own separate copyright. A separate copyright is given in the form of musical works. Off late, many cases have surfaced highlighting the conflicts between the producer of a film and scriptwriter about rights relating to re-making of the film, dubbing rights *etc.*, or between producer of film and musical composer on re-using the music included in the film. Another controversy is that the current copyright regime completely ignores the director of the film with many arguing that the director should also be given co-authorship of the film along with the producer. The Copyright (Amendment) Act, 2012 retained the earlier position that the producer shall be the author whereas the Copyright (Amendment) Bill, 2010 included the principal director as the co-author of the film.

Purpose of the study

As seen above, the process of filmmaking encompasses the creativities of a very large number of people and the copyright Act seems apparently biased towards the producer of the cinematograph films. Hence, it is important to analyse if the copyright Act acts as a hindrance in the exploitation of the rights of these creators and if yes, what measures should be taken to protect their rights.

II Reasons for existence of rights in the form of copyright

There are many justifications of intellectual property rights including copyright: the first justification is that if someone has put his or her labour and has created something new, the right should be given to that person. For instance, a group of twenty students attended a special creative writing class and one out of them after a year completes writing a book. The justification for providing her copyright is that all the twenty students attended the same course, was provided the same raw materials, were trained by the same set of persons and one out of them, went ahead, worked hard and wrote a book. The argument is that it is entirely justified that she gets the monopoly rights and exploits it the way she wants to.

Another justification theory states that if a creator of a work is not incentivised, that person might not be encouraged to create more work in the future. Taking the aforementioned example again, let us try to think of a hypothetical situation where copyright has not been granted to the author for her book. She showed her manuscript to her friend who was also her previous classmate for a review. The father of the friend happened to own a publishing house. They, without her permission took the manuscript and published it in the publishing house's name and it became a bestseller. They earned a lot of money from the book. However, the author was not able to do anything about it. Would she be encouraged to write another book? Probably not. The act of unfair exploitation would be a huge disappointment to her which might discourage her to write or create anything new in the future.

History of rights under copyright: Publisher versus author

Although the rationale behind other intellectual property rights has been to give recognition to the contribution of the creator and give rights of economic exploitation to the creator, the history of the first copyright is somewhat different. The first copyright law can be traced to England. In the beginning, there was hardly any mechanism for copying, and, even if there was, the process of copying books was so tedious that few copies were ever made. Hence, there was no reason to have something like a copyright law, but the invention of printing press worried the publishers of duplication of their books, which, eventually in England led to the Stationer's Company² to appeal to the Monarch to give them a right that prohibited other publishers (who were not part of the Stationer's company) to commercially sell the books they published. The right was granted henceforth to such publisher. Interestingly, the reason the monarch agreed to give the right was because it saw it as an opportunity to control the importation and circulation of books to the public. So, the first ever copyright granted was not for author but for the publisher.

However, in the coming years, lot of protest against copyright to publishers started, eventually leading to the Statute of Anne,³ which broke the monopoly of the stationer's company. The statute had its own limitations, but, it for the first time gave rights to the authors. The tilt of balance was however, in favour of publishers because the publishers got copyright as the assignees from the author. However, the law limited the rights of the publishers in restricting their perpetual printing rights to fourteen years which could be extended to another fourteen years on renewal. The work came to public domain after a maximum period of twenty-eight years.

Difference between author's right system *versus* copyright system

Most of the countries under European Union barring Ireland and United Kingdom (Continental Europe) follows the author's right system. These countries do not recognize the *work-for-hire*⁴ doctrine as United States (US) copyright law does, and thus limit the rights of commissioning parties to those specified in the contract of hire; all other rights belong to the author.⁵ The rationale behind the author's right system is that only a natural person can be an author, since only a natural person has the mind and capacity of intellectual creation, whereas, in a copyright system followed in common law

2 The Stationer's company was established by a group of printers who agreed amongst themselves that they would not print books which another was already printing.

3 It is considered to be the first ever legislation on copyright law wherein firstly authors were recognised as the first beneficiaries of copyright law and secondly, the duration of copyright law was limited.

4 17 US Code, s. 101 includes both, one, work prepared by an employee within the scope of his or her employment and two, a work specially ordered or commissioned for use.

countries they believe that work is the result of investment and labour and whoever does that should be granted rights. So, not just natural persons but legal persons can have copyright. Originality as per author's right system is the result of author's personality and investment of his creativity, hence 'employee' will always be the initial owner of copyright. Under the common law system, 'employer' can be the initial owner of the copyright.

The concept of moral rights is present in civil law countries and not in the common law countries. The concept of moral rights was introduced in France in the 19th Century. Moral rights in a limited way is now recognised in common law countries but are frowned upon because it hinders freely negotiated assignment of economic rights. USA, which has a strong copyright system for a very long time (more than a century) did not join the Berne Convention. Even when it did, only visual art works were granted moral rights under the Visual Artists Rights Act (VARA).⁶ The Act grants authorship rights and right against distortion, mutilation to creators of visual arts. This legislation does not deal with literary works (books and pamphlets) as they are not visual works. Right against distortion, mutilation is given very limited understanding. For example, changes in how a work is displayed will not constitute a distortion or mutilation for the purpose of US copyright law.⁷

Copyright of cinematograph films and works included in cinematograph films: A comparative analysis

European Union (EU)

EU's member states are also members of the Berne Convention; hence it is not necessary that audio-visual or other copyrighted works be registered in order to be protected by the copyright law. Works generally fit into two groups, the first group includes books, pamphlets, dramatic and musical works, choreographic and musical compositions with or without words, cinematographic works, painting, sculpture, and architectural works. These works form the majority of protected works and are unconditionally protected under the Berne Convention. The second group includes official texts of a legislative, administrative, and legal nature, and official translations of such texts, political speeches, and the like. Protection for all these works is determined by the domestic legislation of

5 With respect to cinematographic works, the countries that protect the author rather than the author's employer include Belgium, Denmark, Germany, France, and Italy. Refer, Anne Moebes, "Copyright Protection of Audio-Visual Works in the European Community" 15(2) *Hastings Communication and Entertainment Law Journal* 399-415 (1992).

6 *Supra* note 4 at s. 106A.

7 Marley C. Nelson, "Moral Rights in the United States", *available at*: <https://library.osu.edu/site/copyright/2017/07/21/moral-rights-in-the-united-states/> (last visited on 18 May, 2020).

member countries. Pursuant to the national treatment clause of article 5,⁸ persons entitled to Convention protection have, with respect to their works in all member countries, “the rights which their respective laws do grant or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.” Thus, if the Berne Convention does not specify other rules, the laws of the country where protection is sought are applied. The problem raised by this national treatment clause is that one member-nation may not provide as high a degree of protection to its own nationals, and hence to the nationals of other member countries, as other members provide. Therefore, even under the Convention, protection between members can be uneven in scope.

It is then apparent that copyright laws may vary greatly among the EU member states. So, a copyright owner has to accept different levels of protection which is granted by the member states. The Berne Convention however provides some minimum protection.

With respect to cinematographic works, among EU countries, the countries that protect the author rather than the author’s employer include Belgium, Denmark, Germany, France, and Italy. The Copyright law in Denmark does not provide specific provisions regarding the ownership of motion pictures, but it can be inferred from several sections that only authors making creative contributions to a film are entitled to copyright protection. In contrast, the producers of the film are granted copyright in countries like United Kingdom, Ireland, and Luxembourg.

United Kingdom (UK)

The Copyright law in UK defines films as recording on any medium from which a moving image may be produced.⁹ There is no copyright in film that is a copy. The author of the films is considered to be the person who undertakes arrangements that are necessary for making the film (the producer) and since 1994, the principal director is also considered to be the joint author of the work. The author is considered to be the first owner of copyright. However strangely, when it comes to duration of copyright, it is stated in the Act that copyright expires at the end of the period of 70 years from the end of the calendar year in which the death occurs of the last to die of the following persons, the principal director, the author of the screenplay, the author of the dialogue, or the composer of music specially created for and used in the film.¹⁰ What makes the

8 Berne Convention, 1887, art. 5 states that protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors

9 Copyright, Designs and Patents Act 1988, s. 5B(1).

10 *Id.*, s 13B.

provision bizarre is that except the principal director, none of the others are given copyright in the film.¹¹

Production of audio-visual work may happen on an employer-employee contract or of commissioned contract. Accordingly, the employer will be the copyright owner in both the cases. The copyright in films post June 30, 1994 will belong to the producer and principal director jointly, unless the latter is in employment.¹² The producer has to thus take the necessary assignment on such terms as may be bargained. Since bargaining is crucial for the rights of the other creators, the collective bodies or organisations are extremely important. In case of Screenwriters in UK, the Writers' Guild of Great Britain is the important representative body. It has negotiated many collective agreements with the producers in UK. The contracts may vary but it covers much of the common ground such as structure of payment at different stages (preliminary, outline, first draft, second draft, principal photography script *etc.*). For each stage, a minimum fee is payable. After completion of the film, rights must accordingly be separately acquired and the agreement specifies minimum amounts payable for a considerable range of additional uses.¹³

France

Under French law, an audio-visual work is considered as a work of collaboration, *i.e.*, a work that several authors have contributed towards to create. Natural persons who have created the work as joint authors are recognized as authors: script, dialog, adaptation, soundtrack, adaptation of a pre-existing work and film direction.¹⁴

Under French law on literary and artistic property, there are two major categories of authors' rights: moral rights and economic rights. This law also governs the relations between the author and producer which must be formalized in a written agreement whereby the author assigns his or her economic rights to the producer. Under French law, authors should mandatorily receive remuneration proportional to the proceeds of the work's use in exchange for assigning the associated rights to the producer. Collective

11 W. Cornish, D. Llewelyn and T. Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 471 (Sweet and Maxwell, London, 2010).

12 *Id.*, 552.

13 *Id.*, 553.

14 Intellectual Property Code, art. L113-7. Authorship of an audiovisual work shall belong to the natural person or persons who have carried out the intellectual creation of the work. Unless proved otherwise, the following are presumed to be the joint authors of an audiovisual work made in collaboration: 1°.the author of the script; 2°.the author of the adaptation; 3°.the author of the dialogue; 4°.the author of the musical compositions, with or without words, specially composed for the work; 5°.the director. If an audiovisual work is adapted from a preexisting work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work. Refer for the English version, *available at*: <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf> (last visited on May 2, 2020).

authors' rights management societies have therefore negotiated master contracts with users whereby a proportional fee is paid back to authors.¹⁵

United States of America (US)

In USA, audio-visual works are considered as “works made for hire” (*e.g.* part of a contract for hiring works or services), which is similar to commissioned work. The work's author is therefore the producer, whether a natural or legal person (production company). In the United States, the relations between creators (natural persons) and production companies are often governed (not necessarily always) by the Code of Labor.¹⁶ In the case of *16 Casa Duse LLC v. Merkin*,¹⁷ the bone of contention was with regard to the copyright ownership of the film *Heads Up*. The producer of the film, Casa Duse, purchased the screenplay and asked Alex Merkin to direct the film. The sum informally agreed was 1500 dollars. With the rest of the cast and crew, there was a work for hire agreement signed except the director, who kept on delaying the signing of the contract. The movie was made and then when it came to media rights, Merkin, the director was given the right to edit but not to license, sell or copy the film footage without the producer's permission. The ownership was still negotiated and when nothing was agreed upon, Merkin, the director went ahead to register the copyright of the film. The producer started an action for declaration that Merkin had no copyright in the film. The Court agreed with the decision of *Garcia v. Google*,¹⁸ that “a copyright system that allowed each producer, director, screenwriter, actor, designer, cinematographer and camera operator to claim an individual copyright in a small piece in a collaborative work “would result in a legal morass.” While originality and fixation are necessary prerequisites to obtaining copyright protection, they are not alone sufficient. Authors are not entitled to copyright protection except for the ‘works of authorship’ they create and fix. The court held that only dominant author could be the copyright owner. The court stated that the ownership and authorship can be decided by factors such as the decision making, written agreement with third parties, the way in which parties bill and credit. Looking into these factors, the court said it was Casa Duse which retained such powers and hence Casa Duse was the dominant player. Hence, the court held that Merkin was not the copyright owner of the film as a director. The court further stated that directors could never be copyright owners, they might at times be considered a joint director if the authors of the work intended for a joint authorship. Since this was not the case, the director did not have copyright in the film.

15 *‘Authors’ rights v. Copyright*, available at: <https://www.sacd.fr/en/authors-rights-vs-copyright> (last visited on 2 May, 2020).

16 *Ibid.*

17 No. 13-3865 (2d Cir. 2015).

18 It was an *en blanc* decision where it was decided that an actor had no copyright interest in his performance in a motion picture.

The position in America can be better appreciated by acknowledging the fact that in the United States, unions representing script writers (WGA, Writers Guild of America) and directors (DGA, Directors Guild of America) have negotiated collective-bargaining agreements, or so-called Minimum Basic Agreements, with American producers.¹⁹ The agreements include setting minimum remuneration thresholds (according to the length of the film, its budget, *etc.*) to scriptwriters, directors.²⁰ Additional fees designed to compensate authors for any secondary use of their works (sales to a TV network, sales abroad, video, *etc.*) in the United States and overseas are also covered.²¹ Residuals are collected from the producers by the guilds (WGA, DGA). Unlike economic rights to which authors are entitled under French law, residuals result from contractual negotiations and are thus a matter of the bargaining power of the respective parties.²² Working conditions, payment for overtime, rest days *etc.* are also properly negotiated, acknowledgment of the contribution of the authors in the work and its mention in the credits mentions appearing in the credits in terms of position, size, sequence, *etc.*²³ Even the contract includes provisions such as producer's contribution to the pension funds and social security schemes, in addition to the residuals paid out to the script writers and directors.²⁴ The idea behind these guild-negotiated agreements is that the author should be given a share of the profit and success of his/her work. Residuals can thus be considered as the proportional remuneration of authors.²⁵

Contrary to what is widely believed, the copyright law in USA is not based on fixed remuneration to authors. The scriptwriters and directors have formed strong associations and organisations so that they could negotiate the working condition, remuneration and other benefits of their members. This kind of solidarity has been the key to successful negotiations with producers.²⁶

The copyright system in India

India follows the common law system of copyright. India, however, gives two moral rights protection as author's special rights under section 52 of the copyright Act. In context to cinematograph films, the producer is considered to be the author of the work.

In context to works which are included in films, such as, script, music and such other works, one of the relevant provision is section 17(b) which states that in the case of a

19 'Authors' rights v. Copyright', *supra* note 15.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein. It means that if an underlying work is a commissioned work, the producer and not the author will be considered to be the first owner of copyright. This provision faced a lot of criticism specially from music composers, scriptwriters *etc.* eventually leading to an amendment in section 17 and section 18 of the copyright Act in 2012. In section 17, a new proviso was added that stated that “provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b)²⁷ and (c)²⁸ shall affect the right of the author in the work referred to in clause section 13(1)(a).²⁹ Another relevant provision is section 18 which deals with assignment of copyright. The 2012 amendment inserted a proviso to section 18 which states that “the author of a literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void”.

Now, the Indian position is that even if an underlying work (script, music) is a commissioned work, still the copyright under section 13(1)(a) will be granted to them. It means they will still have the right to exploit the work (remaining rights other than the ones assigned). Under section 18, they or their heirs will continue to collect royalties for any other use of their work other than for the communication to the public of the work along with the cinematograph film in a cinema hall. For any other use they can claim royalty.

27 *Supra* note 1 at s. 17 (b) states that subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

28 *Id.*, s. 17 (c) states that in the case of a work made in the course of the author’s employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein

29 *Id.*, s. 13 states works in which copyright subsists (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,—

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

III Conflict of producers of cinematograph films with other stakeholders in India

In 1977, in the case of *Indian Performing Right Society v. Eastern India Motion Pictures Association* ('IPRS case'), IPRS³⁰ published their tariff scheme which laid down their license fees for public performance of musical works and lyrics which were part of their repertoire in the *Gazette of India* and the *Statesman*. Such musical works and lyrics were owned by Indian composers, lyricists who composed primarily for Bollywood movies or other regional cinema. There were many works of foreign music and lyrics which were owned by foreigners too. On getting the news, the producers of films filed an objection before the Copyright Board stating that they were the owner of such work and the lyricists and composers does not have any copyright and the public performance right, of the music and the lyrics included in the cinematographic films. Their main contention was that they commissioned such works for their movies and hence the resulting work was owned by them. The authors of such work on the other hand argued that while the producers would own the synchronization rights of the music with the movie, the remaining rights, including the public performance rights, independent of its performance with the movie, would remain with the authors. The Copyright Board gave the decision in favour of authors, which was subsequently overturned by the high court and on further appeal, the Supreme Court agreed with the decision of the high court thereby protecting the rights of the producers.

The Supreme Court in its judgment held that as per section 17, provisos (b) and (c) of the copyright Act, producers of films had the rights in the underlying works which they commissioned to the authors such as music and lyrics. According to the Supreme Court, as per section 17, proviso (b) "when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric therefore, *i.e.*, the sounds for incorporation or absorption in the sound track associated with the film, which was already indicated, are included in a cinematograph film, he becomes the first owner of the copyright therein 'and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other'". The Supreme Court further states that same result follows in case

30 IPRS is copyright collective society in India. It is stated that 'IPRS is to legitimize use of copyrighted Music by Music users by issuing them Licences and collect Royalties from Music Users, for and on behalf of IPRS members *i.e.*, Authors, Composers and Publishers of Music. Royalty thus collected is distributed amongst members after deducting IPRS's administrative costs. Composers are those who are better known as Music Directors, Authors are better known as Lyricists, Publishers of Music are the Music Companies, or those who hold Publishing Rights of the Musical & Literary Works. Authors and Composers are sometimes referred to as Writers which can mean any or both of them', available at: <https://www.iprs.org/about-iprs/> (last visited on May 19, 2020).

of proviso (c), that is, if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work. The court further held that it is clear that the rights of a music composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in section 17, provisos (b) and (c) of the copyright Act.

Criticism of the IPRS judgment

There had been severe criticism of the Supreme Court's judgment. Critics stated that the aforementioned proviso (b) in the copyright Act has been given a very expansive interpretation by the court. All that proviso (b) stated was that subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein. Critics stated that a literal interpretation of the provision would mean that the provision extended only to cinematograph films and not the music and lyrics created separately from the film, which were subsequently incorporated into the film. The criticism stated that the judge committed the error of including music and lyrics composed for a cinematograph film, within the proviso (b).

It is noteworthy to mention that the original 1957 Act included 'soundtrack' within the definition of cinematograph films. Critics argued that Supreme Court committed the error of including music and lyrics under soundtrack, in effect, it should have been only confined to synchronisation rights of the soundtrack with the movie.³¹ It would have then meant that the music and lyric's owner would have owned all the remaining rights to the music, when it would have been used independently of the film. Thus, public performance of music, such as live shows etc. would have remained with the author of the work.³²

The Supreme Court in fact accepted the contention of the producers which stated that all the works involved in this case were made under contract of employment,³³ which at least in the Indian scenario may not appear to be right. The composers and lyricist work with different production house and are not employed by one single of them. On the other hand, if it is a commissioned work under proviso (b) to section 17 or not had to be done on a case to case basis. The Supreme Court could have at least in the judgment laid down criteria as to which categories of contracts would qualify as 'employment contracts' as opposed to 'independent contracts.' Unfortunately, the Supreme Court's judgment came to this conclusion without any such analysis. The US

31 Prashant Reddy T., "The Background Score of Copyright (Amendment) Act, 2012" 5 *NUJS Law Review* 483 (2012), available at: https://nujlawreview.org/wp-content/uploads/2016/12/01_prashant.pdf (last visited on 25 April, 2020).

32 *Ibid.*

33 *Supra* note 1 at proviso to s 17.

courts³⁴ on the other hand laid down in many cases that certain criteria, such as mode of payment, tax treatment and other factual grounds, will determine the nature of contract and whether the person in question was an employee or an independent contractor.³⁵

Post the 2012 amendments to the copyright Act, the situation of the authors of underlying works *vis-à-vis* producers were made comparatively better, but still there were certain loopholes and uncertainty about the law. Some of the main issues are discussed henceforth.

Ignorance of right of directors under the Act

According to some intellectual property rights experts, the final 2012 amendments to the copyright Act seemed like a missed opportunity specially because section 17(f) and section 17(g) of the draft copyright (Amendment) Bill, 2010 were not included in the final Act. Those provisions in the draft bill recognised the rights of the director.³⁶ The standing committee was of the opinion that this provision will affect the interests of the film industry adversely.³⁷ The committee stated that if the rights of the lyricists and composers were not recognised, it will not nourish the industry, but, when it came to directors, it felt the rights could affect the industry adversely. It was a blatant discrimination against directors and the fact that the reasons were not mentioned properly made it more apparent. The role of a director is vital in the film. The audience sees the film with the director as the storyteller. The vision of the film is developed by the director. The producer takes responsibility for the film, both legal as well as financial. That is the reason perhaps why producer is given the authorship although he is not the

34 *Community for Creative Non-Violence v. Reed*, 490 U.S. 730 (1989).

35 “Works made for Hire” available at: <https://www.copyright.gov/circs/circ09.pdf> (last visited on 5 May, 2020).

36 The Copyright (Amendment) Bill 2010, s. 17 First owner of copyright
(f) in the case of a cinematograph film produced on or after the commencement of the Copyright (Amendment) Act, 2010, the producer and the principal director shall be treated jointly as the first owner of copyright;
(g) in the case of a cinematograph film produced before the commencement of the Copyright (Amendment) Act, 2010, the principal director shall enjoy the copyright for a period of ten years after the expiry of the duration of copyright in the cinematograph film subject to the principal director entering into a written agreement with the owner of the copyright in the film during the subsistence of copyright: Provided that an agreement referred to in this clause shall not be necessary in case where the owner and principal director are the same person: Provided further that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.

37 See, N.S. Gopalakrishnan, ‘Social, Economic and Political Dimensions of Copyright (Amendment) Act 2012’ (NUJS-CUSAT Conference Copyright Amendments, 2012: A Fair Balance?, NUJS, Kolkata, Nov 27-28 2012).

actually creator of the work. The role of the director, one of the main creator should not be side-lined. So, definitely the copyright Act is biased so far as the right of the director is not given recognition.

Conflict between producers and scriptwriters

Infringement of Copyright in Films and Physical Copy Doctrine

When the story of a film has been copied in another film, whose copyright has been infringed, is it the producer's or is it the scriptwriter's? For this, it is of utmost importance to understand what constitutes infringement of a film. Certain case laws shed light to this issue. As per the decision in *Star India v. Leo Burnett*,³⁸ the *Zee Entertainment v. Gajendra*,³⁹ etc., only when the 'physical copy' of the film is reproduced it constitutes infringement, that is, if a copy of the recording of the film over a physical medium is made, it will be considered to be an infringement of copyright. The court while deciding this considered the precedent in another leading case *Norowzian v. Arks*,⁴⁰ where it was held that "for the second film to infringe the copyright in the first film, it had to be an actual copy of the first film, that in respect of a cinematographic film, it is the recording that is protected from copying and nothing else, that even if the defendants' film exactly resembles the plaintiffs' film but does not copy the plaintiffs' film, that is, it is not reproduced from the recorded medium of the plaintiffs' film, the defendants' film does not and cannot infringe the plaintiffs' copyright in the plaintiffs' film." However, in another case decided by the High Court of Calcutta, the court reached a complete different conclusion. In the case of *Shree Venkatesh v. Vipul Amrullal Shah*,⁴¹ the court said that a film is more than sum of its parts and that the purpose of the copyright Act will be defeated if copying the content of the film is not held to be infringement. It is extremely important to mention here that a film will not be accorded copyright protection if a substantial part of the film is an infringement of the copyright in any other work.⁴²

In another case of *Yash Raj Films v. Sri Ganesha Productions*⁴³ case, the plaintiff contended that the defendants were remaking the film *Band Bajaa Baraat* without authorisation of the plaintiff. The plaintiff prayed for permanently restraining the defendants from dubbing and releasing the movie *Jabardasth* in any language and restrain from commercially exploiting the same in any format. The court gave the decision in favour of the plaintiff and said that copyright is a separate work and separate copyright vest in it; a film is more than sum of its parts and that a copy of film does not mean

38 2003 (27) PTC 81 Bom.

39 2008 (36) PTC 53 Bom

40 [1998] EWHC 315 (Ch).

41 C.S. No. 219 of 2009.

42 *Supra* note 1 at s. 13(3).

43 CS(COMM) 1329/2016.

physical copy. Several criticisms of this decision has come up, primarily that remaking a film cannot be called a 'copy' of the film. The judge did not consider two important provision, one is section 51 and the other is section 2(m) which defines an "infringing copy" as a copy of "the film" on "any medium". Further, section 14(1)(d) states that it is the exclusive right of the copyright owner of film to make a copy of the film which includes the right to make a photograph of an image forming a part of the film and to store a copy of the film on any medium. These are the only two provisions in the copyright Act which talks of making a copy of the film and remaking doesn't fall under either of them.⁴⁴

Remaking and Dubbing Rights

Coming to scriptwriters, there has been some litigations wherein there has been major conflicts between scriptwriters and producers of a movie. In the case of *Thiagarajan Kumararaja v. Capital Film Works*,⁴⁵ the appellant *Thiagarajan Kumararaja* (TK), was the script-writer and the director of the Tamil film 'Aaranyakaandam'. The producer of the film, S.P. Charan (through Capital Film Works, his production company), wanted to dub the film to the Telugu language and also wanted to remake the film. The appellant did not assign his copyright on the scripts to the producer and claimed that the producer did not have the right to remake or dub the film without his consent. The scriptwriter, in this case did not assign the rights in the script to the producer ever and the producer, therefore, has no right to remake or dub the film without his consent. The High Court of Madras considered the following issues to (i) Accepting that there was no assignment of the copyright in the script of the film, did the producer have the right to dub the film in another language? (ii) Assuming that the producer has such a right, can they still be enjoined from dubbing the film by the author of the underlying work? and (iii) Further, did the producers have a right to remake the film entirely?⁴⁶

The appellant in this case contended that dubbing a film to another language amounted to remaking the film. It was stated that it would be a new adaptation of the script (literary work) and it will infringe the film making rights of the scriptwriter. The appellant further said that dubbing the dialogue of a film entails translation of the script, the right of which is with the author of the work, the appellant in the case in hand. The respondents contended that remaking and dubbing is not translation of literary work, and it can be included in the 'communication to the public' right, which is granted to the producer who is owner of copyright in the film.

44 Swarup Mamidipudi, "Creating More Copyright in Cinema: But What of the Actual Creators?" available at: <https://spicyip.com/2019/07/creating-more-copyright-in-cinema-but-what-of-the-actual-creators.html> (last visited on 20 May, 2020).

45 C.S. No. 93 of 2012. Judgment delivered on Nov. 20, 2017, available at: <https://indiankanoon.org/doc/68611937/> (last visited on 1 May, 2020).

46 *Ibid.*

The court in its decision held that remaking and dubbing are two different things, in case of remaking the film, the producer did not have a right. The right to communicate a film to the public does not include the right to remake the film entirely, as this would entail making changes to the underlying script, without the author's consent. With regard to dubbing, the court held that dubbing entails replacing the sound recording of the original film with a different language. The court while allowing it reasoned that the sound recording is a part of the film, and the exclusive rights over the same is with the producer of the film.

In another case of *Salim Khan v. Sumeet Prakash Mehra*,⁴⁷ the plaintiffs Salim Khan and Javed Akhtar, famous scriptwriters of Bollywood sought for a permanent injunction to restrain the defendants from exhibiting, releasing, displaying, communicating to the public anywhere in the world the remake of the film "Zanjeer" in Hindi, Telugu languages or in any other language. The plaintiffs contended that when Prakash Mehra, the producer of the first movie approached them, they had already written the story, script and screenplay (literary work) and hence it was not a commissioned work as per section 17, proviso (b) of the copyright Act. The producer, Prakash Mehra was granted a one-time permission to make the said film of the literary work which was exercised when they made the film in 1973. The other rights relating to the literary work were still with the Plaintiffs. The defendant argued that in fact their father, Prakash Mehra gave a token when the appellants narrated their story and that it amounted to commissioned work. A lot of facts and witnesses were presented by both sides, one side to argue that it was not a commissioned work and the other side to argue that in fact it was a commissioned work. The court in this case gave the decision in favour of the defendant. The court held that as per proviso (b) to section 17,⁴⁸ once a literary and/or musical work was incorporated in a film, the producer of the film becomes the first owner of the copyright in such literary and/or musical works, unless there is a contract to the contrary between the authors of such works and the producer of the film. This goes according to section 17 of the copyright Act, whereby the producer of the work is the first owner of the copyright in the underlying work and not the author of the underlying work. The court determined that Prakash Mehra had in fact commissioned the work from the Plaintiffs for a consideration of Rs. 55,000 each and was therefore the first owner of the underlying works of the film, which included the literary work. Consequently, this meant that the Plaintiffs were not entitled to any relief. With regard to the amendment of the copyright Act and insertion of the new proviso to section 17,⁴⁹ the court said that clearly the 2012 amendment will operate

47 NMSL 768 OF 2013.

48 *Supra* note 1 at proviso to s. 17.

49 Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-s. (1) of s. 13.

prospectively and cannot operate to resurrect rights of ownership/copyright that had been extinguished prior to June 21, 2012, the date on which the proviso was added. The court held that although the case was filed in February 2013 but the court denied the plaintiff the right under section 18 of the amended act⁵⁰ as they said the cause of action started in November 2011 when announcement of remake made and since the plaintiffs intentionally delayed filing of the case, it will be retrospective application of the amendment which will not be right.

A joint reading of *Thiagarajan Kumararaja* case and that of *Salim Khan* made it amply clear that the right of producer did not include making a remake of the movie until and unless anything contrary in the agreement. The Kumaraja's decision on dubbing rights seemed erroneous as dubbing definitely entailed translation of the script from one language to another language. The court held that dubbing entailed only replacing the sound recording of the original film with a different language and since the sound recording was a part of the film, and the exclusive rights over the same was with the producer of the film, the producer had the right to dub the movie. The line of reasoning in *Salim Khan's* case was faulty so far as the court held that once a literary and/or musical work was incorporated in a film, the producer of the film becomes the first owner of the copyright in such literary and/or musical works, unless there was a contract to the contrary between the authors of such works and the producer of the film. It was further stated that it went in accordance with section 17⁵¹ of the copyright Act, whereby the producer of the work was the first owner of the copyright in the underlying work and not the author of the underlying work. Section 17 was applicable only in case of commissioned work, *i.e.*, the work was created at the behest of the contract, however, if the work was created independent to the contract, the right should lie with the author. Still, what still remained controversial was whether it was a commissioned work at all. Some scholars cited that the court could have used this opportunity to lay down criteria which could determine the nature of the contract to determine if it was commissioned work or not. The law already seemed to be biased towards producers and the court's decision that it would be deemed to be a commissioned work unless the contract said otherwise would be more unfair towards other creators involved in film making process. Would not it have been better to say instead that it had to be a

50 Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void

51 Subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

specific agreement to be a commissioned work? Moreover, in the *Salim Khan* case, the court took account of all the defendant's witnesses but felt the plaintiff's witnesses were not reliable. This case was decided in September 2013 and the case filed in February 2013 but the court denied the plaintiff the right under section 18 of the amended act as they said the cause of action started in November 2011 when announcement of remake was made and since the plaintiffs intentionally delayed filing of the case, retrospective application of the amendment would not be the right course of action.

Conflict between music composers and producers

In the case of *Ilayaraja v. Agi Music*,⁵² the world renowned composer Ilayaraja held complete and absolute right over his musical works, but due to paucity of time executed an Assignment Agreement assigning his wife, Jeevaraja, all and complete rights in his musical works/compositions. She in turn, licensed the right of exploitation to a company named Agi Music Sdn Bhd, through a Sound Recording Licensing Agreement ('SRLA') upon condition that royalties are to be paid to Ilayaraja. A Sub-Publishing Agreement (SPA) was also entered into by and between Raja Music Universals (which was represented by Jeevaraja, wife of Ilayaraja as its owner) and Agi Music, as sub-publisher, to the effect that the latter was granted world rights to print, publish and vend the compositions listed for a period of 10 years upon payment of royalty. However, the wife died before the aforementioned 10 years and Ilayaraja said that the duration was not specified in the assignment of term between him and his wife and as per section 19(5) of the copyright Act, if the term is not specified, it will be deemed to be five years. Hence, the SPA and SLRA will be effective for only five years. Another party against whom the case was filed was a recording company called Echo who was in the business of purchasing 'sound recordings' from various producers of films and used the same for manufacturing cassettes and compact discs for sale.

Echo contended that it procured the sound recordings from the producers of the film who according to it was the copyright owner of the film. According to Echo, Ilayaraja was engaged by various producers to compose music for the films they produce and was an employee of the producers. He further contended that the musical work was commissioned for the purpose of a particular film. Once the composer received his remuneration, there was no right vested with them. There were evidences to establish that Ilayaraja received adequate remuneration for all his compositions including royalty.

On behalf of Ilayaraja, it was contended that he being the author of musical works had a lot of rights with regard to his work. He said that section 13(4) of the copyright Act stated that there would be a separate copyright in respect of any work or part of the work that had been utilized as part of a cinematograph film. Thus, the copyright

52 C.S.No.308 of 2013 and C.S.No.625 of 2014, available at: <http://164.100.79.153/judis/chennai/index.php/casestatus/viewpdf/467302> (last visited on 2 May, 2020).

held by a creator of a part of a film, would not be affected by the ownership of the copyright in the entirety of the film, even if the latter was held by the producer. He said that section 17(b) and (c) were not applicable in this case and he was the author as well as the first owner of copyright reading section 17 with section 2(d)(ii) of the copyright Act. The producer thus, could not have transferred non-existing rights to Echo and the agreements were vitiated on these grounds.

Ilayaraja further contended that the rights he gave away was reproduction of the sound recording as part of the film itself which meant only the broadcast/telecast/exhibition of the sound recording along with the visual effects that accompany it in the original film was a permissible use of his work. Any use of the sound recording without the visuals that accompany the 'sound recording' in the cinematograph films constituted a clear infringement. For example, live performance or any other exploitation of the work.

The court held that it is the producer of the cinematograph films who held the copyright, by default, in respect of the 'sound recordings' that the film contained and only if the author of the 'musical work' could produce evidence of reservation of his right to such 'sound recording', would such rights be with the composer. The court also clarified that Ilayaraja held complete special and moral rights in regard to the 'musical' works under section 57 of the copyright Act. The court held that Echo was the legal owner of the 'sound recording' in this case and the assignment between Ilayaraja and his wife had no statutory sanction. The party who could have if at all filed an infringement case was Echo but Echo did not raise any complaint knowing that there was exploitation of the 'sound recording' by Agi Music between 2007 and 2012. Thus, Echo, acquiesced the assignment of the sound recording right to Mrs. Jeevaraja and the subsequent exclusive assignment of the right to Agi Music. Establishing that the assignment existed as Echo acquiesced it, the court further went on to decide about the tenure of the assignment. In this case, the SRLA and the SPA were effective for a period of ten years, but the assignment agreement did not say anything about the duration. Rejecting Agi Music's contention the court held that section 19 was sacrosanct and was important to protect the interest of the assignor. Thus the assignment would be considered for a period of five years.

Coming to the strengthening of the author's right (the composer in this case), by the 2012 copyright amendment, Ilayaraja contended that it is the composer who has the full ownership and right of exploitation of his 'musical works' including that of a 'sound recording' based on his musical work. However, the court held that the Copyright Amendment of 2012 nowhere talked of retention of ownership rights to the composer. The rights of the producer had not been changed by the amendment. There were three provisos inserted in section 18 of the copyright Act, and in section 19(3). These new provisions only ensured payment of royalty to the authors of musical work and

their heirs and nowhere did they mention about shifting the basis of ownership of copyright as it existed presently.

This judgment was hailed by many scholars stating that it was a victory of the authors but in fact the court in this case had actually strengthened the case of the producer. Specially, the judgment was detrimental to the interest of the authors of musical work as it subsumed “musical works” into “sound recordings”. The judgment stated that if “musical works” found *expression* as “sound recordings” in a film, further “sound recordings” could not be made based on the same. This was a huge setback for the composers. The producer’s right was restrained to the extent that he could not express the musical work as a sound recording with different lyrics in another movie or as a standalone piece. All other rights were with the producer.

It was also deeply disturbing that in all the cases, the court had said that all works included in a film would be considered to be a commissioned work. Only if the authors were able to bring an evidence on the contrary, it would not be considered to be a commissioned work. Section 17(b) had been interpreted in the aforementioned way to tilt the balance in favour of the producer which was problematic. It should be considered to be a commissioned work only when there was an agreement which stated so or on a case to case basis. Commissioned work could not be presumed in such a case. Also, section 18 could not be read in isolation. It should be read along with section 13(4) and the newly added proviso to section 17. These provisions talked of separate copyright in work which was substantial part of which the film was made or a sound recording was made. It could not be restricted just to the extent of collecting royalty as was suggested in the decision.

IV Conclusion and recommendations

To conclude, it is important to highlight that in the current copyright regime in India, the tilt seems to be on the side of the producer as against the right of the director, scriptwriter, composer *etc.* The argument that it is the producer who takes the risk of the film and hence should be given the right over it fails when compared to other subject matter of copyright. For example, a book publisher also takes similar risk but the law does not give copyright authorship and ownership to such publisher. So, this apparent biasness only to film producers becomes questionable. On the other hand, the creators of the underlying work who are instrumental in making the movie gets a backseat. The case of principal director, who does not get a recognition under the law is one of the strong proofs of the same. Leading scholars in India have cited the 2012 amendments as a lost opportunity.⁵³ In spite of the fact that most provisions of our law are borrowed from the UK Copyright Act, 1988⁵⁴ but when it came to adopting

53 NUJS proceeding, *supra* note 31.

54 UK included principal director as a joint author/ joint owner in 1994 by amending its law.

principal director, the standing committee felt that provisions in favour of directors would affect the industry adversely, so it decided to not give rights to principal directors. The committees's remark that granting such rights to directors will affect the industry leaves us in a confused state of mind. If in the other countries, the film industry is not adversely affected by giving due rights to the directors, why will it adversely affect the film industry in India? This position needs to change and the courts have to limit the rights of the producers.

Coming to conflict between producers and other contributors, *viz.*, scriptwriters' and composers', it is very important to note that the contract and the terms of the contract plays a very important part. It is also important to note that the stature and the bargaining power of the scriptwriter and composer is vital in shaping the contract. For example, A. R. Rahman is heard to retain his copyright. So, also, Ilayaraja but that is not the case of all composers. To protect the right of the composers and scriptwriters who are not frontliners, it is important to interpret the provisions of the law liberally.

Recently, a very interesting case came up in which an FIR was filed against Yash Raj Films (YRF),⁵⁵ a big production house in Mumbai under section 409 and section 34 of the Indian Penal Code, 1860 as well as section 63 of the copyright Act, alleging that YRF has committed a criminal breach of trust (CBT) and violated the copyright Act by appropriating one 100 crores of royalties that belong to IPRS' members. According to the reports, the FIR accused YRF of using their superior bargaining power to force artists into contracts that prevented them from collecting royalties which belonged to them.⁵⁶ This means that even after the copyright amendments in 2012, this kind of malpractice may still continue. YRF allegedly responded by arguing that the revenue it collects is in the capacity of copyright owners, rather than an agent or assignee. Probably YRF wants to convey that the proviso to section 18(1) applies only if the authors still own the copyright over their work.⁵⁷ Once that has been assigned to a third party, their right to receive royalty, like other rights under section 14, is extinguished. But the argument in that case will be wrong. While it is true that the proviso to section 18(1) does not prohibit the assignment of copyright itself, it envisages a distinct right to receive royalty on an equal basis, which is assignable *only* to legal heirs and collecting societies. As per section 18(1), this right to receive royalty belongs to the author, and not the owner of the copyright. The distinction between author and owner is crucial here: the owner of a work may change through the assignment of the copyright, but the author always remains the same and is not included within the meaning 'owner' of

55 Rishabh Mohnot, 'IPRS take on Yash Raj Films over misappropriated royalties' *available at*: <https://spicyip.com/2020/02/iprs-take-on-yash-raj-films-over-misappropriated-royalties.html> (last visited on 10 April, 2020).

56 *Ibid.*

57 *Ibid.*

the work. Thus, even if YRF successfully establish themselves as the owner of the works for which they receive royalties, they do not possess the author's right to receive royalty on an equal basis. Otherwise, the purpose of the amendment fails.

In the case of composers' rights in India, two observations by the court in the *Ilayaraja v. Agi Music* case,⁵⁸ severely restricted the rights of the composers, firstly, it said that the amendments brought in 2012 nowhere talks of retention of ownership rights of the composers. It only ensures payment of royalties to the authors of musical work and their heirs. Secondly, it states that musical works find expression as sound recording in a film, further sound recording cannot be made based on the same. This interpretation further narrows down the rights of the composer in an already biased film industry. The court it seemed only emphasised on the amendment of section 18 of the copyright Act which provided for royalty rights to the creators of work, and, completely ignored the newly added proviso to section 17 of the copyright Act read with section 13(4) which mentioned that just because a work is included in a film, the author of the work will not lose their original copyright guaranteed under section 13 of the copyright Act.

With regard to scriptwriters' rights *vis-à-vis* producers, though it is stated in the *Thiagarajan Kumaraja's* case that in case of remaking of films, the scriptwriter will still retain the rights (though in that case it was controversially held that dubbing is not remaking), but the *Salim Khan* case still does not guarantee the rights to the scriptwriters. In the *Salim Khan* case, the court accepted the evidences offered by the producers and not by the scriptwriters and declared that the script of 'Zanjeer' was a commissioned work. The court did not mention anything about the proviso to section 17 which mentioned that any work incorporated in a film, nothing shall affect the rights of the author under section 13(4) of the copyright Act. It will be interesting to observe how in future this provision will be interpreted by the courts, will it declare that remaking rights even of commissioned work will lie with the scriptwriters (rightly so) or whether it will declare that the amendments only give them rights to royalty (like in the case of *Ilayaraja* in context to composer's rights).

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58 *Supra* note 51.

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