

Cinematographic Lyricists Right to Royalty: Myth or Reality?

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This paper deals with the issue of a cinematographic lyricist's right to copyright royalty after the producer of a film has been assigned the right. The position of law in India is not in favour of writers, who are often marginalized and cut-out from a share in the profits by generally exploitative and unfavourable terms of a contract. In the light of the same, the author's view is that an amendment to the Copyright Act was long overdue and the Copyright (Amendment) Bill, 2010 is an affirmative step by the government to correct inequitable balance of interests that has plagued the Indian film industry. In order to arrive at a deeper understanding of the matter, reliance needs to be placed on the stand taken by the Indian judiciary with respect to the right of authors over lyrics used in songs in cinematographic vehicles. Recourse will also be taken to considerations on the basis of which the Bill is being pushed. An analysis of the lacunae that may exist even if the reforms are brought to fruition is concluded with certain suggestions to overcome them.

Keywords: Intellectual property rights, copyright law, assignment of copyright, right to royalty

The issue of the amendments being introduced in the Indian Copyright Act, 1957 (ref. 1) by virtue of the Copyright Amendment Bill² has been consistently raising eyebrows. The Bill proposes to restrict the right of lyricists and music composers to assign copyright of their works included in films and sound recordings for use in media (other than as part of films or music recordings) to anyone other than their legal heirs or copyright societies. The debate reached a new level of fervour following the imposition of a ban on noted lyricist Javed Akhtar by the Film Federation of India in late December 2010 (ref. 3). The Federation believed that the veteran writer failed to understand the 'legitimate' concerns and problems of the producers before going up in arms against them. The primary contention here being that since the producers bear the entire risk, if lyricists are to get a share in the profits then they need to share the burden of losses as well, which at the moment falls squarely on the shoulders of the producers.

This seems to be a spurious argument as the writers merely want a percentage in total earnings, irrespective of whether the song fails to rake in big numbers or becomes a sensation. The reforms, which are a first of a kind as far as copyright law in India is concerned, are not being brought about with an intention to harry the producers but as merely a means

to ensure just and fair distribution of revenue earned because of the collective efforts of the writer, composer and the singer.⁴ The general industry practice so far has been that writers assign their copyright over the lyrics, albeit reluctantly, in exchange for a one-time payment.⁵ This results in an unfair arrangement with the first owner of the copyright having to give up all rights to the fruits of his labour and ultimately watching from the side-lines while the producers draw in the big money.

Comparative Position of Law

As per Section 17 of the Indian Copyright Act, the author of a work shall be the first owner of the copyright therein, which in relation to a literary work means the writer. However, Clause (c) of the above section states that in the case of a work made in the course of the author's employment under a contract for service, the employer shall, in the absence of an agreement to the contrary, be the first owner of the copyright therein. It is this provision, when read with Section 18 that provides for exploitative contracts by means of which the author, who owns the copyright over the lyrics he has penned, assigns the same to the producers of a cinematographic film. A typical clause in such a contract reads as follows:

The lyricist hereby agrees that the lyrics shall constitute a work specially ordered by the producer and accordingly the lyricist expressly

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acknowledges and agrees that the producer shall be considered the first author and owner of the lyrics for all purposes and the owner of all lyrics rights, without condition, restriction or limitation of any kind, and free and clear of all claims to royalties or other compensation, except as specifically set forth herein. The lyricist irrevocably and unconditionally waives all rights in respect of the lyrics to which he is now or in the future be entitled to under the Copyright Act, 1957 (ref. 6).

Thus, the terms of the contract involving the underlying work clearly call for the payment of a low sum of money upfront owing to an unequal bargaining power, following which the author loses the right to demand compensation for any subsequent use of the lyrics in a sound recording or its distribution in any form.

US Copyright Law

The copyright law in India is *prima facie* in consonance with that in the United States as per which copyright protection subsists in original works of authorship fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated and is inclusive of literary works (17 USC § 201). Section 201 (a) of US Copyright Act puts forth that copyright in a work protected under this title vests initially in the author or authors of the work unless it is the case of a 'work made for hire' wherein the person for whom the work is prepared is considered the author [17 USC 201 (b)].

Additionally, copyright in each separate contribution to a collective work is considered to be distinct from the copyright in the collective work as a whole and vests in the author of the contribution [17 USC 201(c)]. Consequently, it was held in *ABKCO Music Inc v Stellar Records Inc* that lyrics in a sound recording are subject to an independent copyright as a literary work.⁷ The ownership of such a copyright may be transferred to any person in whole or in part by means of conveyance or by operation of law⁸ or by an agreement.⁹

In practice, typically, the writer and the composer grant a music publisher rights over the work, either by transfer or contracting as a work for hire, in return for which the publisher provides a cash advance and specified on-going royalties. Section 1006, specifically, Clause (a) when read with Clause (c) of the copyright law explicitly states that royalty

payments deposited by any person engaged in the digital audio recording, analog musical recordings or dissemination to the public by transmissions of the song recording or musical work pursuant to Section 1005, shall be distributed to interested copyright parties. Clause (b) calls for the royalty payments to be divided between two groups, namely the Song Recordings Fund and the Musical Works Fund. Clause (b)(2)(B) of the provision under consideration explicitly states that half of the 33 1/3 percent of the royalty payments allocated to the Musical Works Fund shall accrue to the writer who is the lyricist of the work and the rest shall remain with the music publisher.¹⁰

UK Copyright Law

In the United Kingdom, the Copyright, Designs and Patents Act¹¹ is the primary piece of legislation dealing with copyrights and their assignment. Copyright protection subsists in original literary works [as defined in Section 1(1)(a)] and vests in the person who creates it unless the same is made by a person in the course of his employment [Section 11(2)]. Such a copyright, by virtue of Section 90, is transmissible by assignment, by testamentary disposition or by operation of law. In cases where an agreement concerning the production of a film is entered into between the author and a producer, there is a presumption of transfer of any rental right in relation to the film by virtue of inclusion of a copy of the author's work in the film (Section 93A). However, the right to equitable remuneration for rental continues even after the author has transferred his rental right to the film producer and the same cannot be assigned by the author except to a collecting society. Such a right is only transmissible by testamentary disposition or by the operation of law.

Thus, in both UK and US, synchronization royalties, which are royalties accruing by utilization of a copyrighted work in a film, are the legitimate right of the composer or song-writer, although there are differences in the manner in which they are distributed to the author. In connection with the same, the concept of 'needle drop' is used i.e. synch royalty becomes payable every time the needle drops 'on the record player' in a public performance.¹²

French Copyright Law

Similarly, French copyright law also provides the requisite amount of protection to an author at the time of assignment of copyright. Such an assignment needs

to be in writing and should necessarily state the copyrights assigned and their intended use.¹³ Most importantly, royalties of the author have to be in proportion to the revenue arising out of the exploitation of the copyright so assigned. This is made clear by means of Article L.132-25 of the copyright code as per which, where the public pays a price to receive an individually identifiable audiovisual work, remuneration proportional to the price is to be paid to the authors by the producer.¹⁴

German Copyright Law

German law, on the other hand does not contain a specific provision to this effect. It differs from most countries of continental Europe in that it follows a 'monist' approach to author's rights. Under this approach, the author's economic and moral rights are considered to be so thoroughly intertwined that the economic aspect of the right cannot be dissociated from the personality aspect of the right.¹⁵ The ownership of the authors' economic rights may therefore not be transferred, except by way of testamentary disposition. Article 89 of the Copyright Act specifies that any person who undertakes to participate in the production of a film, should he acquire a copyright, shall be deemed to have granted to the producer of the film an exclusive right to utilize the cinematographic work in any known manner.¹⁶ This presumption of transfer of an exclusive right to exploit is in line with the European Union Directive on Rental and Lending Rights. Nevertheless, as per Article 4 of the Directive, even after the rental and lending right is transferred, the author retains the right to equitable remuneration and such a right cannot be waived.¹⁷

Indian Copyright Law

This is in stark contrast to the contractual practice in India as per which the writer or the lyricist of a work has no right to royalties which may accrue owing to the subsequent use of a sound recording or a musical work with all profits being accepted by the producers once a contract of assignment has been entered into.¹⁸ This practice is based on the decision given in the landmark case of the *Indian Performing Rights Society Ltd v Eastern India Motion Pictures Association* (IPRS case).¹⁹ In the aforementioned matter, the Copyright Board initially held that composers of lyrics and music retained copyright in their musical works incorporated in sound tracks of cinematograph films and could collect fees, royalties and charges in respect of those films. An appeal was preferred to the High Court which set aside the decision of the Board.

It was contended by the appellants, before the Apex Court, that if a person desires to exhibit in public a cinematograph film containing a musical work, he has to take the permission not only of the owner of the copyright in the cinematograph film but also the permission of the owner of the copyright in the literary or musical work which is incorporated in the cinematograph film, as according to Section 13(4) of the Act, the copyright in a cinematograph film or a record does not affect separate copyright in any work in respect of which or a substantial part of which the film or as the case may be, the record is made.

The respondents on the contrary submitted that the contention that the composer of the lyric or music is entitled to royalty is unfounded, as unlike the law in England, in India unless a music is notationally written, printed or graphically reproduced, it is not musical work within the meaning of the Copyright Act. It was also submitted that there exists no separate copyright in songs as a cinematographic film within the meaning of Section 2(f) of the Act is inclusive of the soundtrack.

The Court, in its decision interpreted Section 17(b) and (c) in relation to Section 13(4) of the Act to mean that the rights of a music composer or lyricist can be defeated by the producer of a cinematographic film as a film producer becomes the first owner of the copyright and no copyright subsists in the composer or lyricist, unless there is a contract to the contrary. If the author of a lyric or musical work authorizes a film producer to make a cinematographic film on his composition, he cannot later claim copyright infringement. Moreover, the owner of the cinematographic film, namely, the producer cannot be wrongfully said to appropriate anything which belongs to the composer of the lyric or musical work.

Reliance was also placed on the case of *Wallerstein v Herbert*,²⁰ wherein it was held that 'the music composed for reward by the plaintiff was merely an accessory to and a part and parcel of the drama and the plaintiff did not have any right in the music'. Thus, the Supreme Court held that once an assignment is made by the lyricist to the producer, it is only the producer who has the right to all profits accruing from the work of the former.

The Copyright (Amendment) Bill, 2010: Proposed Changes

The Copyright Amendment Bill, 2010, is a well-meaning legislation seeking to regulate the exploitation of composers who have to consent to unfavourable

contractual terms if their work is to be utilized in a cinematographic film.

The relevant amendment to Section 18 of the Copyright Act prohibits the author of the literary or musical work included in a film or sound recording from assigning the right to receive royalties from the utilization of such work in any form other than as a part of the said film, except to the legal heirs or to a copyright society for collection and distribution (Clause 6 of the Copyright Bill). Any agreement to the contrary shall be deemed to be void and unenforceable. Additionally, the proposed provision i.e. Section 19(9) clarifies that no assignment of the copyright in any work shall affect the right of the author of the work to claim royalties in case of the utilization of the work in any form (Clause 7 of the Copyright Bill).

The 227th Report of the Parliamentary Standing Committee (the Report)²¹ is indicative of the numerous objections that have been raised against the amendments, a majority of which were considered by the Committee prior to proposing the said changes. The primary contention of those opposed to the amendments was that they would take away the scope for private negotiation in respect of assignment of rights of exploitation which was in violation of the fundamental right to business under Article 19(1)(g) of the Constitution (para 9.3 of the Report). It was also contended that the proposed amendments would have a nullifying effect on all existing contracts apart from the fact that the owners would have to trace thousands of authors and enter into fresh agreements (para 9.4). Another concern voiced was in relation to broadcasters and media organizations who even after the payment of exorbitant amounts to the producers, would not be able to exploit the rights so obtained (para 9.7).

Those supporting the changes welcomed the amendments with the only issue raised pertaining to the effect of the language 'other than as part of the cinematographic film' in Sections 18 and 19. It was put forth that this would lead to a situation where television broadcast of films would ultimately result in the denial of royalties to authors (para 9.11).

The Committee decided in favour of the amendments and further endorsed their strengthening after taking note of the established fact that separate and independent rights of authors of literary and musical works in cinematographic films were being wrongfully exploited by producers on account of the decision given by the Supreme Court over three

decades ago (para 9.14). The Committee was of the opinion that the amendments would collectively benefit composers and authors who individually cannot claim royalties (para 9.19) and as such are merely a reiteration of what is already provided in Section 13 of the Act (para 9.18). In furtherance of its intent, sweeping changes were suggested over and above those proposed in the Bill with the second proviso to Section 18 being modified to state:

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 author's legal heirs or to a copyright society for collection and distribution and any agreement to contrary shall be void (para 10.20).

Such a modification was suggested with the aim of bringing about greater clarity with respect to issues such as royalty sharing, with the Ministry of Human Resource Development clarifying that sharing of royalties by authors and music composers equally with music publishers is an international non-legislative practice (para 10.18). Revisions were also suggested in the proposed Section 19(9) of the Bill to 'protect the interests of authors in the event of exploitation of their work by restricting assignments in unforeseen new mediums (para 9.18). These read as follows:

No assignment of copyright in any work to make a cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilization of the work in any form other than for the communication to the public of the work, along with the cinematograph film in a cinema hall (para 10.20).

However, the basis on which the Committee advanced the aforementioned suggestions is fundamentally flawed as it solely relied on the *obiter* in the IPRS case which stated:

The authors and music composers who are left in the cold in the penumbral area of policy should be given justice by recognizing their rights when their works are used commercially separately from cinematographic film and the legislature must do something to help them.

The Committee entirely failed to consider the 1994 amendment to the Copyright Act by means of which the very definition of a 'cinematographic film' was amended so as to include sound recordings but exclude the associated soundtrack. Thus, music and lyrics could no longer be treated as an undifferentiated part of the film itself and were distinct works owned by the composers and lyricists. So long as the decision in the IPRS case is not revisited, it shall continue to stand and be misinterpreted to the advantage of producers.

The deliberations of the Committee thus, more or less addressed the concerns of those pushing for the amendments, although it fell short in effectively dealing with the issues raised by the producers with respect to their retrospective operation (para 9.16).

Conclusion

The Bill, which has received widespread support from the International Confederation of Authors and Composers Societies,²² fails to be entirely successful as far as the protection of the independent rights of the composers is concerned. The amendment to Section 18, although on the lines of international practice, especially England, still provides for the assignment of the copyright over a literary work. It is most essential in the interest of social justice to restrict the assignment or transfer of such rights in their entirety. The same cannot be considered to be in violation of the freedom to contract granted as an extension to the right to trade under Article 19(1)(g) of the Constitution of India; the proposed changes would function as a reasonable restriction imposed similar to social justice legislations such as the Minimum Wages Act, 1948.²³

The purpose behind providing the assignment of rights to copyright societies is also flawed. The Parliamentary Standing Committee perceived that such a restriction on assignment of rights would ensure that the administration of copyright societies was not taken over by film producers and control of such societies was retained with the authors (the Report, para 10.3). However, unless there is greater participation of the authors in the administration of the copyright societies so as to record a significant increase in their collective bargaining power, the amendment shall be in vain with producers continuing to strong-arm the terms and conditions of the licensing agreement.

As put forth in the Report, 'the system of institutionalized societies needs to be strengthened as

everybody may not be in a position to negotiate contracts with equity' (the para 9.20). The absence of any collective bargaining power, unlike the presence of strong unions in other nations, will have a substantial effect on the enforcement of royalty rights. This necessitates the formation of functional groups similar to the Writer's Guild of America which was extremely successful in securing substantial benefits for film, television and radio writers following their strike in 2007-08 (ref. 24).

Moreover, the proposed amendments are seemingly directed towards servicing the interests of the composers and lyricists alone as the protection offered is only in relation to underlying works other than in conjunction with the cinematographic film, thereby conveniently ignoring the concerns of other contributors such as scriptwriters.²⁵

Furthermore, no effective remedy has been advanced to tackle the problems arising out of the retrospective operation of the amendments and the copyrights already assigned to producers. It is logistically difficult to alter all payments already made based on existing agreements. There also exists ambiguity with respect to the recipient of payments to be made by third parties such as music companies and whether such payment is to be made directly to authors or will be taken care of by the producers.

In spite of its drawbacks, the Copyright (Amendment) Bill strives to fulfil the purposes for which it was established and with improvements, will hopefully reduce the current inequitable balance of interests hounding the largest film industry in the world.

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