

Possession and Transfer of Copyrights of a Cinematograph Film

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The attempt through this paper is to analyze the provisions relating to the ownership and assignment of copyright regarding a cinematograph film and in the context of changing mode of communication technologies how it tackled the problems emerged in ownership, assignment and license of copyright, the adequacy of these provisions in effectively protecting the rights of the author and performer & tries to balance the rights of the owner of copyright *vis-à-vis* public interest and also the role of judiciary in effectively protecting their rights. The fundamental problem with the Indian Copyright Law is not so much of it being flawed but the fact that it is not always followed as such. That the 2012 Act is well-intentioned is not debatable. It covers a range of issues relating to the film and music industry, and clearly intends to alleviate the condition of “non-powerful” individuals working in the industry by strengthening their position. Whether it will achieve this aim without their first being a deluge of litigation to interpret the provisions of the 2012 Act is an open question.

Keywords: Cinematograph film, Indian Copyright Law, Bern Convention, Copyright Board, Copyright Society, assignment of copyright, copyright license

The Protection of Copyright is given for a work which has originality, i.e. there should be an author of the work and certain amount of creativity should be involved. The author is the real creator of the work and hence, he is the one who has the first right over the copyright. Even Indian law establishes that first owner of the copyright is the author. The definition of the term “ownership” is inclusive where it can even include assignee and a legal entity, irrespective of it being defined under law. Whereas, in Bern Convention, there is no specific definition of the term “Author”, instead it implies that it is not necessary that the person who creates the work should always be the owner. However, the term “Author” is defined under Indian Copyright Act with respect to different works but it has lot of ambiguities.¹

This area of law becomes really complicated in the context of improving technologies in the area of recording and broadcasting, especially when the work is done in the course of employment of the author.

When new technologies emerge, different mode of communication simultaneously arise and the exploitation of the copyright by way of assignment & licensing will add economic benefits to the copyright owner and the provisions of assignment and licensing becomes crucial. By amendments Indian Copyright

Act has taken care of such provisions, but still leaving lacunae & the role of judiciary becomes crucial in interpreting such provisions for effectively protecting the rights of the authors.²

The attempt through this paper is to analyze the provisions relating to the ownership and assignment of copyright regarding a Cinematograph Film and in the context of changing mode of communication technologies how it tackled the problems emerged in ownership, assignment and license of copyright, the adequacy of these provisions in effectively protecting the rights of the author and performer and tries to balance the rights of the owner of copyright *vis-à-vis* public interest and also the role of judiciary in effectively protecting their rights. The hypothesis of this paper is that having certain changes in law through amendment (Copyright Amendment Act, 2012) will not lead to anything unless implementation is improved through mechanisms and for the same Judiciary will have to play an important role.

Assignment of copyright and copyright license is two forms of contract involved in the exploitation of copyright work by a third party. A license is an authorization of an act without which authorization would be an infringement. Licensing usually involves licensing of some of the rights and not the whole. Licenses can be exclusive or non exclusive. An assignment involves the disposal of the copyright.³

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The author (assigner) assigns the copyright to another person (assignee) or transfer of ownership of the copyright. In the case of license only specified interest in Intellectual Property (hereafter "IP") is transferred not the ownership is transferred to the licensee. A license normally does not confer any right to licensee against licensor or third party but exclusive licensee has substantial rights against the licensor, even to sue the licensor. And by Section 30 if the licensee in the case of future work dies before the work comes in to existence his legal representatives shall be entitled to such works, in the absence of any provision to the contrary.⁴

Unless he joints the owner of copyrights as a party to the infringement action, he cannot take an action for infringement against third party but a purchaser in good faith and for value of the proprietors interest without notice of previous licensee is unaffected by it. The licensee can however, sue the assignor for damages for breach of contract if the latter does not protect his interest. A licensee has a right to make alterations except in so far as his license expressly or impliedly restricts the right. A failure to pay royalties enables the licensor to revoke the license. But in the case of assignment it is not possible. But if there is any harsh terms which affect the author can lead to revocation if a complaint is made to the Copyright Board. Both assignee and assignor will be treated as owners of the copyright once the rights are assigned with respect to their own separate rights which are assigned and which are kept by assignor with himself.⁵

The term "assignee" includes legal representatives of the assignee with respect to assignment of copyright in future work in case assignee dies before the completion of the work. The owner of the copyright has the power to assign his entire rights or assign only some of the rights. In case the rights are split up there is only partial assignment. Assignee will be the owner of the copyright as regard rights so assigned, the owner will be the owner of the copyright of remaining rights. The assignment could be for whole duration of the copyright or for a short duration.⁶

Mode of Assignment

No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent. It shall identify such work; specify the rights assigned, duration, territorial extent of such assignment, amount of royalty payable

to the author. If the period is not stated it shall be deemed to be five years and territorial extent shall be presumed to extend within India. If the assignee does not exercise such rights within one year from the date of such assignment it shall be deemed to have lapsed unless otherwise specified in the assignment.⁷

Assignment of Future Rights

The copyright in any work can be transferred either wholly or partially or with certain limitations by the owner of the copyright in any existing work or the owner of copyright in any future work.⁸ Whereas, if it's the issue of assignment of copyright in a work which has yet to come into existence then it can be effective only when the work comes into existence. When new rights are granted by the legislature on existing works due to the technological development, problem arises as to the ownership of the new rights, whether the assignor who assigned already all the existing rights on the work or the assignee is the owner of the future rights.⁹

Assignment and Licensing of Rights of a Cinematograph Film

Generally, the "the first owner" of the copyright is the "author" of the work with respect to his creation.¹⁰ However, there are certain circumstances in the Copyright Act where it is said otherwise.¹¹ In 2012 Amendment Act, the definition of the author especially of the producer of the cinematograph film was kept unchanged.¹²

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.¹³ 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)¹⁴. In the aforementioned matter, the Copyright Board initially held that composers¹⁵ 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.

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. Once the author of a lyrical or musical work transfers his rights in the work to a producer for the Cinematograph film then later he cannot claim the infringement of his rights. 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.¹⁶

The Calcutta High Court in case of *Eastern Motion Pictures v Performing Rights Society*¹⁷ decided that a producer of a cinematograph film will be considered as the first owner of the work created by a composer of music or a lyricist, if there was certain consideration or reward given by the producer to such creator. By incorporating certain changes through Clause (2) (d) of the 2012 Amendment Act, economic interests of the creators of such works have been tried to be protected. Other provisions to protect the economic interests of the author of the work are sub-section (8), sub-sections (9)¹⁸ and (10)¹⁹ of Section 19.

These new provisions protect the economic rights of the authors of the work irrespective of the fact whether they are paid consideration by the producer for producing that work. The proviso inserted to sub-section (1) of Section 18 protects those authors who are in vulnerable position so that they cannot assign or waive the right to receive royalties for his creation in any form other than when it is communicated to the public with a cinematograph film in a cinema hall.²⁰

In addition, if the work of an author of literary or musical work is used for the sound recording but is not included in the cinematograph film, then these authors of the work are protected by provisions in the Copyright Act which prohibits them from assigning or waiving their right to receive the royalty for their work (Section 34 and 35 of the Copyright Act, 1957).²⁰

In India, the Copyright Act, 1957 protects an author of the copyright work by giving them right of protection against all kinds of unauthorized infringement. These rights extend to economic and moral rights of an author under copyright law. The rapid change in the technology has undermined the economic rights of an author as there are increasing incidents of piracy of the copyright work. It is becoming necessary that the protection should not be

only within certain jurisdiction but it should be extended to foreign jurisdictions also.²¹

Copyright law not only protects the economic rights of an author but it extends to even protecting the reputation and personality of an author against all kinds of mutilations, modifications or distortions of their work. Judiciary has played an important role in interpreting these rights so that the implementation can be proper in its real sense. In spite of providing so many rights on the paper, there is a long way to go to protect these authors against the unauthorized infringement of their work available on the internet.²²

Present Position after The 2012 Amendments

While the 2012 amendments to the Act extended the rights of the performers and broadcasting organisations, the major thrust of amendments was on eliminating unequal treatment meted out to lyricists and music composers of copyrighted works incorporated in cinematograph film owing to the contractual practice in Indian entertainment industry.²³ Under industry practice, lyricists and music composers were assigning all rights in the work to the producer of the film for a one time lump-sum payment.²³ This entailed that lyricists and music composers had no further right to any royalty accruing from their work even if the work was being utilized in mediums other than the cinematograph film.²⁴

As expected, amendments have not gone down too well with the producers of the cinematograph film and major music companies of the country who buy the music rights of the film²⁵, and a number of writ petitions²⁶ challenging the constitutional validity of the amendments have been filed before the Delhi High Court.²⁷

Surprisingly, a category of song writers and composers (in whose favour amendments are claimed to be), are also not very pleased with the amendments and have challenged their constitutionality.²⁸ These song writers and composers belonging to a regional language fraternity have challenged the second proviso to Section 33(1) which compulsorily requires them to transact licensing business through a copyright society, on the ground that it restricts their right to license their work and forces them to join a copyright society which in view of the limited popularity of that regional language music harms their commercial interests as they would have to say no in determining the distribution scheme of the royalties collected by the Copyright Society.²⁹ While these

writs are yet to be decided it has been widely reported that producers of the cinematograph film are already devising ingenious ways to create instruments preserving their broad interests.³⁰ The Government had assured that it would set up a permanent Copyright Board and also a Copyright Enforcement Agency Council to ensure compliance with the provisions of the Amendment Act; some concrete steps towards this goal are yet to be taken.³¹

Parliamentary Standing Committee on Copyright Amendment Bill, 2010

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, Paragraph 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.³²

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 Paragraph 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.³³ 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. 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.³³

Conclusion

There is little doubt that the 2010 Bill intended to implement extensive structural changes in Indian copyright law, and that this intention remained in the 2012 Act. However, the amendments contained in the

2012 Act are themselves at times unclear, while at other times, it is the rationale underlying them which is unclear. And at virtually all times, the likely effect of the amendments is open to debate.

If at all, the copyright statute was to be used to regulate copyright contracts and *inter se* relations in the film and music industry, such regulation should ideally have been made in a manner which was not quite as susceptible to (mis) interpretation as appears to be the case. Instead of creating (relatively) clear-cut provisions which would benefit the authors of underlying works, the 2012 Act appears, in places, to create an extremely confused and confusing situation which is most likely to benefit those who focus on interpreting the law, and not those to whom the law would apply.

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.

The fundamental problem with the Indian Copyright Law is not so much of it being flawed but the fact that it is not always followed as such. That the 2012 Act is well-intentioned is not debatable. It covers a range of issues relating to the film and music industry, and clearly intends to alleviate the condition of “non-powerful” individuals working in the industry by strengthening their position. Whether it will achieve this aim without there first being a deluge of litigation to interpret the provisions of the 2012 Act is an open question.

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