

The Tussle Between Artistic Creativity and Commerce in the Realm of Copyright Law; Exploring Copyright Existing in the Work of Director of a Film

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DOI: <https://doi.org/10.52403/ijrr.20230945>

ABSTRACT

The Indian film industry, renowned for its diversity and prolificacy, stands as a testament to the creative process of its directors. This paper delves into the intricate realm of copyright law as it pertains to the director's work in Indian cinema. In a country where filmmaking is both an art form and a thriving industry, the protection and regulation of the director's creative contributions are of paramount importance. This analysis examines the legal framework governing copyright in directorial works, encompassing elements such as screenplay, cinematography, choreography, and overall visual aesthetics. It sheds light on the Indian Copyright Act of 1957 and its subsequent amendments, elucidating the rights granted to directors and the duration of their protection. Furthermore, the abstract explores notable cases and legal precedents, showcasing the evolving nature of copyright jurisprudence in India. It also discusses the challenges faced by directors in asserting their rights, including issues related to authorship, moral rights, and disputes with producers and studios. The comparative study of the UK Copyright Law provides number of new jurisprudence which can find a place in Indian ecosystem. By navigating the intricate legal landscape and addressing emerging challenges, this paper aims to present a more comprehensive understanding of the evolving copyright paradigm in India's dynamic film industry.

Keywords: Copyright, Economic Interest, Joint Authorship, Director, UK CR Law.

INTRODUCTION

The journey of the Intellectual Property Rights has been very interesting. Intellectual Property has been treated as property for nearly three centuries. It is intangible in nature thus

cannot be seen or touched. It is completely devoid of physical element i.e. *corpus* of the jurisprudence of property. It only and only possesses the mental element i.e. *animus*. The explanation of this sole animus form of property can be found in theories of John Locke, and Hegel.¹ Copyright is among the first Intellectual Properties to develop. The primary idea behind Copyright protection is to encourage creativity and provide impetus to people for bringing creativity and increase artistic contribution.

The concept of Intellectual Property was initially a private affair. The Intellectual Property owner gets the monopoly in return for making the new knowledge available to the public at large. He is given such a monopoly to recover the amount he incurred in bringing such creativity or to substantiate his intellectual efforts in monetary terms. But with time, the intellectual property became very prominent and an area indispensable in every sector when it started to affect and contribute to GDP of countries and worldwide.

Scope of intellectual property is increasing. Starting from the private monopoly of a person, intellectual property has extended its scope to business legal profession and economic and cultural importance. It is even been politicised by various countries.² Now at this juncture the intellectual property even contributes to the GDP of few countries. Owing to this importance of intellectual property, every country is now very keen on providing an efficient and better intellectual property. In this modern time the intellectual property makes the most important asset of any company or business or even countries. Similar trends have been seen in Copyright Law. The copyright law which was supposed to promote creativity has been defeated by the economic factor attached by it. The commerce involved in the copyright work is heavily defeating the creativity of the copyright.

The research project is focusing upon the essentials of the copyright law and how it is being compromised by the current copyright law regimes. The project analyses the current Indian Copyright Law with respect to the creative input of the Director of the Cinematograph Film and how his right is being protected. The denial of the copyright to the Director of the film seemingly defeats the very basic tenant of the copyright law. This project also analysis the power dynamics and domination the certain people or group of people in Indian Film Industries.

Copyright Existing in Cinematograph Film

² Saule Tlevlessova, Intellectual property is becoming politicised, Euronews, 3rd March, 2020. (last accessed at 05 February, 2023), available at <https://www.euronews.com/2020/03/02/intellectual-property-is-becoming-politicised-that-s-why-i-am-a-candidate-to-run-wipo-view>.

A cinematograph film is defined as “the work of visual recording and includes a sound recording accompanying such visual recording” and “cinematograph” shall be “construed as including any work produced by any process analogous to cinematography including video films.”³ In general terms it may be called as the combination of the artistic work⁴, dramatic work⁵, literary work⁶, musical work⁷, and sound recording⁸. Each of these copyright works has their separate author being the Author, Composer, Artist, Producer, etc.⁹ After combination of all these separate works, the resultant work is cinematograph film whose authorship rests with the producer of the film.

The Copyright Act takes proper care to protect the individual copyright of the work providing that the copyright in cinematograph film shall not affect the separate copyright in any work in respect of which or substantial part of which becomes part of the film¹⁰. This protects the individual right of the holder of the work, but surprisingly forgets to recognise the contribution of the director in the film. Moreover the act provides for the first ownership of any work and clearly establishes that in the case of cinematograph films, the producer shall enjoy complete ownership and exclusiveness in copyright subsisting in the work. Subject to any contract to the contrary, employer (which Producer of the Cinematograph film is) shall be the first owner in any work done by means of work for hire or contract of service or apprenticeship¹¹.

Director of Cinematograph Film and Artistic Creativity

To analyse the artistic creativity or contribution of the Director in any cinematograph films, it is very important to understand who the Director is? Whether Director has any copyright subsisting in him? Whether Director can be the joint author of the cinematograph film? If not any Copyright, is he entitled to any Moral Rights?

Indeed, there have been remarkable film directors whose work transcends the category of 'direction'. These are the genre of Directors who are renowned 'film makers'. Illustratively, Satyajit Ray, Akira Kurosawa, Ingmar Bergman, Alfred Hitchcock are legendary figures who

³ Section 2(f) The Copyright Act, 1957.

⁴ Section 2(c) The Copyright Act, 1957.

⁵ Section 2(h) The Copyright Act, 1957.

⁶ Section 2(o) The Copyright Act, 1957.

⁷ Section 2(p) The Copyright Act, 1957.

⁸ Section 2(xx) The Copyright Act, 1957.

⁹ Section 2(d) The Copyright Act, 1957.

¹⁰ Section 13(4) The Copyright Act, 1957.

¹¹ *Id.*

belong to the genre of 'film makers'. They are known to have been intimately involved not just in directing the film but in every aspect of its making from its conception to the final product exhibited on the screen. Indeed, it is not unusual that a director will typically be involved in all or many of the stages of film making - the development of the story line, the casting of actors, the lyrics, the musical score, the dialogues, and during the actual filming, the position or angle of the camera, the lights, the layout of the scene, ensuring continuity and so on. Everything that happens in a film usually passes through the Director.¹² The extent of involvement of the Director in departments other than direction will obviously vary from case to case. A 'film maker' Director brings to the film a characteristic style.

These are some very important questions that the current Copyright regime needs to answer. Going by the basic tenant of the Copyright law and looking at the contribution and the impact of the Director in any film including television series, the director qualifies to be an author and owner of the film. He very easily qualifies the test of “*skill, labour and judgment*”. The immense artistic contribution of the Director brings life to the scene and film. He is the one deciding all the setups, expression, scene setting and make and portrays the reality out of it. In fact, he can be performing all the function of the artist, who through his creativity brings out liveliness out of anything.

Interestingly copyright recognises very limited type of work in which copyright subsists. They include Artistic work, literary work, dramatic work, musical work, cinematograph films and sound recording. Upon plain reading of the following, the creative contribution doesn't falls in any categories except one i.e. artistic work. It is argued that director fulfils the requirement of the *artistic craftsmanship* as provided under artistic work. Since the director brings life to the film, his artistic contribution cannot be ignored and shall be recognised as the author and owner of the film.¹³ When it comes to directing or making a film, the 'directorial touches' that a Director imparts to the film cannot be confined to any particular oeuvre. The expression 'artistic craftsmanship' is wide enough to accommodate the effort of a film maker director who brings to the final product a distinctive style, an 'artistic touch' so as to qualify for acknowledgment as an 'artist' in relation to an 'artistic work'.¹⁴

Countering the above arguments, it is generally argued that the expression 'artistic craftsmanship' in Section 2(c) (iii) of the CR Act had to reflect the production of durable

¹² Sartaj Singh Pannu v. Gurbani Media Pvt. Ltd., MANU/DE/1629/2015.

¹³ *id.*

¹⁴ *Supra at 12.*

handmade objects in a skilful way. It was never meant to and could not be interpreted to include the contribution by a director to the making of a cinematograph film. Likewise he could not be an author, much less a joint author in relation to a literary or dramatic work or a musical work. Moreover, section 16 of the CR Act makes it explicit that there shall be no person entitled to copyright "otherwise than under and in accordance with the provisions of this Act".¹⁵ As regards a cinematograph film and its sound recording, Section 2(d) (v) acknowledges only the producer of the film as the author. It does seem anomalous that a Director of a film, who is usually the moving force behind the creative work that goes into its making, would not be statutorily acknowledged as an author or even as joint author.

But such narrow interpretation of the artistic craftsmanship is refused and settled in the landmark case of *GEORGE HENSHER LTD V RESTAWILE UPHOLSTERY (LANCS) LTD* in following terms:

“If it is asked whether works which possess distinctive features of design and skill in workmanship or works which possessed distinctive characteristics of shape, form and finish or qualify to be called artistic, I would say that the word ‘artistic’ calls for something additional and different. If it is asked whether there is artistry if there is an appeal to the eye, I would say that something more is needed. In any event, and apart from this, such questions would tend to suggest or to impose a clamp of rigidity and restriction in definition where none is needed. In deciding whether a work is one of artistic craftsmanship, I consider that the work must be viewed and judged in an attached and objective way. The aim and purpose of its author may provide a pointer, but the thing produced must itself be assessed without giving decisive weight to the author’s scheme of things...The conscious intention of the craftsman will be the primary test of whether his product is artistic or not; the fact that many of us like looking at a piece of honest work, especially in the traditional trades, is not enough to make it a work of art...”¹⁶

Interestingly, the Moral element too becomes relevant in the case of Director. The Berne Convention recognises four types of moral rights and director if qualifies to be an author, will be entitled to moral rights. This interesting conjecture becomes very relevant with respect to the rights of the Author. The basic understanding of moral right is that it precedes the existence of copyright in a work. The films are being marketed under the name of Director,

¹⁵ Section 16 The Copyright Act, 1957.

¹⁶ *GEORGE HENSHER LTD V RESTAWILE UPHOLSTERY (LANCS) LIMITED*, [1976] AC 64, [1975] RPC 31.

thus they deserve to be identified among the public, which is essentially attributing them with moral right. But the point of contention at this stage is that to claim even moral rights,¹⁷ you have to be author of the work. Thus, without being author of the work, director is not even entitled for the moral rights, which is against public policy. Reference shall be made to *Amar Nath Sehgal v. Union of India*¹⁸ (*moral right is soul of any author and its essence is his creativity*) and *Sanjeev Pillai v Venu Kunnappalli and another*¹⁹ (*authorship cannot be relinquished*).

Position in United Kingdom

UK law has gone under amendment in 1995 and now recognises principal director of the film as joint author of the film. Under Section 10(1A) of the Copyright, Designs and Patent Act, 1988 in the UK²⁰, a film is treated as a work of "joint authorship unless the producer and the principal director are the same person". Also, under Section 9(1)²¹ an 'author' in relation to a work is "the person who creates it". Further, section 9(2) (a b) states that both the producer and the principal director are the 'author' of a film. Section 77 (6)²² of the UK Act states: "*The director of a film has the right to be identified whenever the film is shown in public or communicated to the public or copies of the film are issued to the public*".

Copyright Amendment Bill, 2010

An attempt was made in 2010 to fill this lacuna. An amendment was moved in the Indian Parliament by the Minister of Information & Broadcasting but the entire discussion appeared to centre around on the rights of a director to royalties. The proposed amendment sought to introduce in Section 2(d) (v) the 'principal Director' also as an author of a cinematograph film. That would have also taken care of Section 57 of the Act which recognizes the moral rights of authors. The Minister, who tabled the amendments, was unable to convince the Standing Committee which turned down the amendments. The Minister spoke eloquently when he stated:

¹⁷ Section 57 The Copyright Act, 1957.

¹⁸ AMAR NATH SEHGAL V. UNION OF INDIA, 117 (2005) DLT 717; 2005 (30) PTC 253 Del.

¹⁹ SAJEEV PILLAI VS. VENU KUNNAPALLI AND ORS., MANU/KE/5406/2019.

²⁰ Section 10 A Copyright, Designs and Patent Act, 1988.

²¹ Section 9 Copyright, Designs and Patent Act, 1988.

²² Section 77(6) Copyright, Designs and Patent Act, 1988.

"All over the world, there is equitable distribution of royalties. But unfortunately, this is not what has been happening in India. Actually, I wanted to give this right to the principal director of films as well. Ultimately, in a film, who are the real artists? They are those who sing songs, those who perform, and those who direct the film. Now a director is kept out of any profits of the film. He is the one who actually creates the architecture of the film. But unfortunately, he does not share any part of the royalty because there is no risk capital involved. It is the producer who risks his capital. Though I made this recommendation to the Standing Committee that the principal director should also partake of the profit, the Standing Committee had thought in its wisdom that the time has not come for the principal director to be included and he too share in the profit of the business. So, I have, in fact, dropped those amendments and I have not pressed on them".

But the present copyright amendment bill was rejected by the Standing Committee of the Parliament. It was reasoned that the producer bears all the risk thus must exclusively exploit the work. But this report seems to overlook the creative element of the copyright act. The report seems to completely ignore the essential of the copyright and focus essentially on economic right of the producer.

Analysis Of Sartaj Singh Pannu V Gurbani Media PVT LTD & Others

The judgement delivered by Delhi High Court is a classic judgement which recognises the relation between the copyright existing in favour of producers and directors if any. In Indian copyright act the copyright in cinematograph film subsist in the producer. Despite the fact that a film is the result of the combined efforts of many persons who can have their own personal copyright, the resultant copyright in the film is attributed to the producer of the film. To end any such controversy with respect to the copyright existing with the producer or the director of the film, the contract of service or work made for hire clearly favours the producer of the film and has all exclusive rights over the film. But the amendment proposed in the copyright act in 2010, in line of UK Copyright Act, to make principal director the Co-Author of the cinematograph film along with the producer. Although the standing committee of the parliament rejected the bill, this judgement briefly discusses all important consideration with that regards. But the judgment leaves various important points to talk upon:

- It has been a settled principle that moral rights cannot be waived or assigned as provided under section 57 of the Copyright Act which includes right to authorship or identity, but the judgment mentions that if a director of the film doesn't want to be known as the director of the film, he can do so by relinquishing through a valid voluntary contract and

it would not be against the public policy. But this observation by the court is disputing very settled principle of the copyright law. Also, in situation like in Indian Film Industry where power dynamics is such, the abuse of this observation can be seen in many ways.

- It has been very common that while arriving at any jurisprudence, Indian Courts often look at different jurisdiction of the court, while the circumstances and law in countries are not the same. For example, the US Copyright Act doesn't provide for moral rights, and UK and Indian Does. Thus looking at UK jurisdiction where directors are provided with joint authorship with producers, it is very unfair to look at different jurisprudence and provide remedy in Indian circumstances.
- The case falls within the same category of the cases where the ART loses to Commerce. The creative contribution of the Director in the film is immense and thus must be accorded with copyright protection. The films are being advertised by the name of the Director, thus using the credibility of the one and not giving him due credit seems to be very unfair. The Indian Copyright law needs such amendment as proposed in 2010 in Copyright Amendment Bill. The crux of the Copyright is not the commerce always but the creativity as well.
- The present case taken no notice of the agreements concluded between the parties. On the apparent face of the records, the agreement seems to be void. Thus the court shall have taken note of the same and be held that these types of agreements be not signed.

Thus, this case brings lot of unexplored area which must be carefully examined and redresses.

Other References

Ingmar Bergman is known to have adopted certain techniques different from his contemporaries. *"I say my films are good craftsmanship. I am diligent, conscientious and extremely careful. I make my work for daily use and not for eternity. My pride is that of a craftsman."*²³

Another reference may be given of the **Brazilian film "Sam Laury"**. The film was produced by Arnon Milchan's company Embassy International Pictures and directed by **Terry Gilliam**. The film was conceived by the director and he crafted a dark ending to the film. US distribution was handled by Universal, whose executives felt the ending tested poorly. Universal chairman Sid Sheinberg insisted on a dramatic re-edit of the film to give it a happy

²³ BIRGITTA STEENE, *INGMAR BERGMAN: A REFERENCE GUIDE*, pp. 139 (Amsterdam University Press, 2005).

ending. He suggested testing both versions to see which scored higher. At one point, there were two editing teams working on the film, one without Gilliam's knowledge. A version of Brazil was created by the studio with a more consumer-friendly ending. There was a lengthy delay with no sign of the film being released.

Gilliam took out a full-page ad in the trade magazine Variety urging Sheinberg to release Brazil in its intended version. Sheinberg spoke publicly of his dispute with Gilliam in interviews and ran his own advertisement in Daily Variety offering to sell the film. Gilliam conducted private screenings of Brazil (without the studio's approval) for film schools and local critics. On the same night Universal's award contender Out of Africa premiered in New York, Brazil was awarded the Los Angeles Film Critics Association award for "Best Picture". This prompted Universal to finally agree to release a modified 132-minute version supervised by Gilliam, in 1985.

Although Gilliam won the nettle, but he won it out of public support and even the producer saw the huge commercial potential of the film, otherwise the film has been re-made and ending was changed. Here *the artistic contribution seems to have no legal remedy and stands all alone at mercy of the commerce.*

CONCLUSION/SUGGESTION

The copyright act is seeing transition all over the world. It is one of the most subjective areas of Intellectual Property Rights. Any law, with advancement of technology and change in social dynamics has to undergo changes and amendments. Indian Copyright law has also been evolving and underwent significant changes in 2012, but with more change in social dynamics, it needs and relook and need some changes. Following are the conclusion and suggestion, the researcher finds in his research:

1. The Director of the movie qualifies to be an artist (and an author) which brings out the life in a film. His artistic contribution is very significant and his creative is the soul of the film. He is the one who decides the setup during shooting, theme and instils the basic theme in the film. The broad interpretation of the 'artistic craftsmanship' seemingly involves the work of director. Thus he qualifies to be labelled as artist and be put under category of Author.
2. The director owing to his immense contribution is entitled to be known to the public. Any such omission would be against public policy. Now day's films are being advertised by the name of the directors and thus it adds to the credibility of the film.

Owing to such importance and significant contribution of the Director must be attributed with moral rights i.e., right to identity.

The argument that only Authors can claim moral right seems to very out dated and vague and is fallacy upon the essence of the copyright act. If that is the case, it is undue exploitation of the creativity of a person, which purports to be unjustified. Statutory lacuna cannot be made to deny any person his rights.

3. Recognising the risk factors involve in the film and is all borne by the producer of the film, so he shall exclusively economically exploit the film. But this does not give any valid justification for denial of the rights of the Director. The argument in tariff scheme of the copyright societies, the producers are provided with 50% of the royalty in cases of musical recording is unjustified because he doesn't make any contribution to the creation of the recording rather than making financial investment in the project, seems to be justified here as well. Apart from making financial investment, the producer doesn't make any such significant contribution in creation of the film. All such contribution is being done by the Director of the film.
4. The researcher is surprised to note that issue of grant of Copyright to Director is revolving around the economic reasoning. The refusal by the Standing Committee of the Parliament seems to not focus upon the creativity or the contribution of the Director in creation of the film, rather just deliberated upon the economic interest of the producers. There should be clear rational behind the discussion and in law and it must be immune from the economic factor. The commerce seems to dominate the artistic factor and defeating the purpose of copyright films.
5. The Cinematograph film rights shall be divided under two heads: Economic rights and Copyrights rights associated with the work. The economic rights shall vest in Producer of the film but the copyright shall vest in authors who tender creative contribution. Just for the sake of economic exploitation, the economic and commercial rights shall not be misunderstood. The essence of copyright be protected and must never be suppressed by economic rights

The year 2012 can be termed as the year in which copyright law was reborn in India. The statutory protection was extended to marginalised performers; similarly, there is need for another revolution for granting protection to the creativity. The director shall be given copyright protection and the UK model of copyright protection can be referred as an example but industrial factors of India must be given due credit while incorporating any right. The

fight between creativity and commerce seems to be so unjustified and law seems to heavily protect the commerce. We must be borne in mind that the essence of copyright law lies in creativity, skill, labour and thus must be given emphasis and shall be protected and shall be protected any power dynamics and economic suppression.

How to cite this article: Shambhu Nath Mishra. The Tussle Between Artistic Creativity and Commerce in the Realm of Copyright Law; Exploring Copyright Existing in The Work of Director of a Film. *International Journal of Research and Review*. 2023; 10(9): 439-449. DOI: <https://doi.org/10.52403/ijrr.20230945>
