

COPYRIGHT OWNERSHIP IN FILMS: AN ANALYSIS OF THE IPRS CASE AND THE COPYRIGHT (AMENDMENT) ACT, 2012

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The legal battle between musicians and lyricists has been a long drawn one. The fundamental aspect in question is the ownership of copyright that substantially affects the bread and butter of thousands of artists in India. The IPRS Case becomes important in this context and it was the first case to elaborately deal with this issue and find a viable solution for the same. However, the result was not on the expected lines of many, and this led to an ever greater discomfort amongst a section of the people associated with such artistic work. The Amendment Act of 2012 was therefore seen as a tool that would permanently curb this problem.

The present paper aims to do an in depth analysis of the IPRS case, thereby aiming to understand the stipulations and reasoning of the judgment. Further, a significant portion of this paper would be dedicated to the analysis of the Copyright (Amendment) Act. An overall assessment of the Act would be done to ascertain whether the Act has been designed in such a manner that the demands of the people could be satisfied adequately.

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INTRODUCTION

The issue of copyright in the works of musicians and lyricists has been a contentious one. Since a very long period of time, musicians, lyricists, composers etc. have had the complaint that they haven't been able to reap the benefits of the works that have been created by them. The situation becomes particularly interesting in the context of the Indian film industry, as making of a film entails corroborative efforts by people who are experts in different fields such as music, photography etc. It is in this light that the case of *Indian Performing Rights Society Limited (IPRS) v. Eastern Indian Motion Pictures Association*² becomes important. This case minutely analyzed the issue of copyright in the film industry, and tried to clear out the confusion regarding the ownership of such copyright.

However, post the judgment of the *IPRS case*, the discomfort of the musicians and allied professionals became more profound. Technological advancements and the emergence of new and varied avenues for commercial exploitation of their works contributed substantially to this discomfort. Emerging areas such as ringtone royalties and the 'trailer music market' are some of the aspects that fell within this domain. The consistent efforts of these people led to the passing of the Copyright (Amendment) Act, 2012 which made certain fundamental changes to the provisions of the Indian Copyright Act, 1957 with regards to the ownership of copyright in relation to literary, dramatic, musical and artistic work.³ Unlike the other legislations that the Government had come out with during the same period, the contents of this Bill were a closely guarded secret till the Bill was introduced in the Parliament.⁴

The present paper aims to do an in depth analysis of the *IPRS case*, thereby aiming to understand the stipulations and reasoning of the judgment. An attempt would be made to explore the flaws in the judgment, if any, and subsequently assess them in the light of the development in law that has taken place over the years. Another significant portion of this paper would be dedicated to the analysis of the Copyright (Amendment) Act, 2012 and the change that the Act has brought about to the law

² AIR 1977 SC 1443.

³ Prashant Reddy T., "The Background Score to the Copyright (Amendment) Act, 2012", 5 NUJS L. REV. (2012), p. 510.

⁴ *Ibid*

relating to copyright in films. An overall assessment of the Act would be done in light of the needs of the musicians and other creative people and whether the Act has been designed in such a manner that the demands of these people could be satisfied adequately.

THE IPRS CASE: A THUMBS UP TO THE PRODUCERS

The Reasoning and Judgment

The Supreme Court decision in the IPRS Case in 1977 is a landmark judgment on copyright in films. The case was initially decided by the Copyright Board before it was overturned by the High Court of Calcutta. The case finally came to the Supreme Court through an appeal by certificate granted under article 133(1) of the Constitution of India by the High Court.

The facts of the case relate back to the publishing of a tariff scheme laying down certain license fees in the Gazette of India and the Statesman by IPRS. IPRS was incorporated in 1969 and its members included composers of musical works, authors of literary works and dramatic work, along with artists.⁵ IPRS asserted the fact that it had the authority on behalf of its members to grant license for performance in public of all existing and future musical works of its members. They emphasized on the fact that this right would also extend to situations wherein their work has been incorporated in cinematograph films.⁶

The producers on the other hand had a totally different viewpoint of the entire situation. They emphasized on the fact that the musical works created by the lyricists and composers of music, once incorporated in the soundtrack of the film, becomes the property of the producer and the producer thereafter has full rights over the said musical works. Thus they claimed that they owned copyright in the above-mentioned works and thus licenses for the performance of the said musical works cannot be granted by IPRS.⁷

⁵ Supra note 1, MANU/SC/0220/1997 ¶ 2.

⁶ *Ibid*

⁷ *Ibid*

An interesting and important argument that was given by IPRS was that as per section 13(4) of the Copyright Act, 1957, the incorporation of literary or musical work in films would not affect the separate copyright of the author in that particular work.⁸ The said point was noted and greatly emphasized upon by Justice Jaswant Singh, and it formed the basis for his judgment. He focused on the fact that there was great confusion that existed between sections 13(4), section 14(1)(a)(iii) and section 14(1)(c). While section 13(4) has been elaborated by me above, the other two sections relate to the communication or performance of a work to or amongst public, which is of literary, dramatical, musical or artistic nature. The point of contention was whether there was any contradiction amongst these sections.

Justice Jaswant Singh stipulated that there was no contradiction, and the sections had to be read in a harmonious manner.⁹ It was emphasized that a combined reading would give us the plain and simple meaning that once the author has authorized a cinematograph film producer to use the author's lyric or musical work, then the permission extends to granting of rights over public display or such work, and subsequent appropriation of the profits as per 14(1)(c). With respect to section 13(4), it was stipulated that the author of the work would retain the right over the work subject to non-performance of his work as part of or in relation to the film.¹⁰

Justice Singh then went ahead to conclude the conundrum related to copyright in films by bringing in sections 17(b) and 17(c) of the Indian Copyright Act, 1957. It was stipulated that as per the reading of these sections, it was crystal clear that the rights of the composers or lyricists would be defeated in case of valuable consideration or contract of service from and with the producer, unless a contract to the contrary has been specifically made.¹¹ Therefore he concluded that in case of a film, the copyright would not remain with the musicians and other allied artists and the producer would be the first owner of the copyright.¹²

⁸ *Ibid* ¶ para 6.

⁹ *Supra* note 7.

¹⁰ *Ibid*

¹¹ *Supra* note 4 ¶ 18.

¹² *Ibid*

Justice V.R. Krishna Iyer's judgment also becomes important in terms of the way he approached the problem. The entitlement granted to the producer under section 14(1)(c) was emphasized upon by Justice Iyer. As per his reasoning, a film is representative of an artistic work created by the producer. Therefore all entitlement and benefits of such artistic work should go to the producer.¹³ However he emphasized on the fact that beyond the cinema show, the producer of the film would not have any rights over the song or the lyrics, and they would be the sole property of the original author.¹⁴

The Fault Lines

There have been considerable debates about this judgment that have related to the fact that certain major judicial anomalies can be found in the judgment, which if corrected, could have led to an entirely different conclusion.

One major criticism of the judgment has been the expansive interpretation of 'cinematograph film', as has been given in section 17(b).¹⁵ If one looks at the provision and goes by the rule of strict literal interpretation, then one could assert that the provision appears to speak about the ownership rights of only certain specified works such as films, and not the literary, musical and sound recordings that are incorporated in those works.¹⁶ The Supreme Court based its decision on section 2(f) of the Indian Copyright Act, 1957, wherein 'cinematograph work' was defined. As per the said definition, a cinematograph work would include 'soundtrack if any'.¹⁷ However there was a major flaw that was made by the Supreme Court while interpreting the sections. Although the term soundtrack was undefined in the legislation, the Supreme Court assumed that soundtrack included music as well as lyrics.¹⁸ Making of such an assumption was highly irrelevant and a major defect in the judgment of the Supreme Court.

¹³ Supra note 4 ¶ 22.

¹⁴ *Ibid*

¹⁵ Supra note 2, p. 482.

¹⁶ *Ibid*.

¹⁷ Section 2(f), The Indian Copyright Act, 1957.

¹⁸ NanditaSaikia, "The Bollywood Amendments: Film, Music and Indian Copyright Law", SSRN (2010), p.18, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566350

Hence when one looks at the interpretation done by the Supreme Court, it is amply clear that the golden rule of statutory interpretation which requires a court to give the black letter of law its most literal interpretation was not followed.¹⁹ The possible reasoning of the Supreme Court, wherein ‘cinematograph work’ could have been taken independent of any work incorporated within it, could have been easily backed by section 13(4) of the Indian Copyright Act, 1957, which talks about the authors retaining their rights even after the incorporation of the work in a film.²⁰ This reasoning would have also been supported by the strand of reasoning taken by Justice Iyer, where he has emphasized on the functions of 13(4)²¹, and stipulated that the copyright of the works incorporated would remain separate from that of the film.

Another problematic stance taken by the court is the acceptance of the contention of the producers that all the musical and literary work involved in the case had been made during the course of employment with the producer.²² It is well known fact that most of the authors in the film industry compose music and lyrics for a large number of producers. Thus they are not working for one single producer in the legal sense of the term.²³ Hence the Supreme Court faulted in including all kinds of contracts under the ambit of employment contracts. A distinction should have been made by them as to which one’s would constitute employment contracts, thereby specifying how classification is to be done.²⁴ The approach of the courts of the United States of America (U.S.A) could be helpful in this context. A similar situation in their jurisdiction fell within the ambit of ‘work for hire’ doctrine. The stipulations or criteria of this doctrine have been aptly culled out in cases such as *Community of Creative Non-Violence v. Reid*²⁵ to include ‘mode of payment’, ‘tax treatment’ etc.

Therefore on an analysis of the judgment, it becomes clear that the judgment did create great hardships for the musicians and other authors of creative works. To the core of this problem lies the weak negotiating power of the authors. Although a clause is present in sections 17(b) and 17(c) that talk about a contract between the author and

¹⁹ See *Illachi Devi v. Jain Society, Protection of Orphans India*, AIR 2003 SC 3397 ¶ 35.

²⁰ Supra note 14.

²¹ Supra note 13.

²² Supra note 11.

²³ Supra note 15, p. 484.

²⁴ *Ibid*

²⁵ 490 U.S. 730 (1989)

the producer through which the author could retain his rights, there were hardly any such contracts that were negotiated between the parties.²⁶ This is in complete contrast to the situation in U.K and U.S.A, where authors are collectively organized, thereby having stronger bargaining powers.²⁷ Strikes by scriptwriters and their colleagues are common features in Hollywood.²⁸ However, authors in Bollywood have not been able to form strong collectives, let alone call strikes.²⁹

There are very few composers who could actually make use of the provision regarding contracts that has been given in sections 17(b) and 17(c). A.R. Rahman would probably be one of them. However, even Rahman's negotiating power has had limits, which was evident when he had to drop out of the movie 'Om Shanti Om' because T-Series was not ready to enter into a royalty sharing agreement with him.³⁰ Hence this shows the kind of problem that the artists face, and how the judgment totally ignored this aspect.

COPYRIGHT (AMENDMENT) ACT, 2012: A FRESH CHANGE WITH PRECARIOUS HOPE

The Copyright (Amendment) Act, 2012 came about as a result of consistent efforts made over a long period of time by artists of the film industry. The Act came out with certain important changes in sections 17, 18 and 19.

When it comes to section 17, the Amendment Act adds another proviso, through which it mandates that nothing contained in clauses (b) and (c) of section 17 of the Act should affect the rights of the authors of original literary, dramatic, musical and artistic work, when such work is incorporated in cinematograph movies.³¹ This is basically meant to ensure that the rights of the authors remain with them even after

²⁶KirtiDahiya, "Cinematographic Lyricists Right to Royalty: Myth or Reality", 16 JIPR (2011), p.338.

²⁷ ASCAP, "We Create Music", available at <http://www.ascap.com/legislation/>, See also "The Authors Guild", available at <https://www.authorsguild.org/where-we-stand/>

²⁸ BBC News, "Hollywood Writers' Strike", available at <http://news.bbc.co.uk/2/hi/entertainment/7092571.stm>

²⁹ Supra note 2, p. 485.

³⁰Subhash K. Jha, "Rahman Fights for Copyright of his Music", The Times of India, October 12, 2006, available at <http://timesofindia.indiatimes.com/articleshow/2161297.cms>

³¹Point 7, "Amendment of section 17", The Copyright (Amendment) Act, 2012.

their work has been incorporated in films, thereby ensuring accrual of monetary incentives for their work.

Coming to section 18, there are three new provisions that have been added. The first one prohibits assignment of rights to exploit through modes or means that are not yet developed or in commercial use.³² A limitation in this regard is that if the contract of assignment specifically refers to such assignment in future technology, then such an assignment would be valid.³³ This provision becomes excessively important as it acts as a safeguard against disentanglement from the commercial benefits that might arise as a result of the technological advancements that might take place in the future.³⁴ Aspects such as ringtone royalties, which are new technological developments, are sought to be covered by this particular provision.

The second provision seeks to guarantee royalty to the author of literary or musical work included in a film, for any and all exploitation of that work.³⁵ The section prohibits the assignment of rights to receive royalties to be shared on an equal basis with the assignee. Therefore only assignment of royalties upto 50 % is permissible.³⁶ The rationale for such a restraint can be found in the standing committee report of the Rajya Sabha of the 2010 and the parliamentary debates. This provision was a policy decision of the legislature, which was aimed to protect the artists from exploitation, by preventing them from assigning their rights completely.³⁷ Hence this provision was aimed to attack the unequal bargaining power that has traditionally existed between the producer and the musician.

The third provision contains a restriction on the authors of literary and musical works, that are included in sound recordings but do not form a part of films.³⁸ This provision

³²Point 8, "Amendment of section 17", The Copyright (Amendment) Act, 2012.

³³ *Ibid*

³⁴ Adarsh Ramanujan and S.B. Mallik, "Rights over Sound Recordings: Indian Court gets criticized for getting the law right?", p. 4, available at

<http://www.lakshmisri.com/Uploads/MediaTypes/Documents/Rights-over-sound-recordings.pdf>

³⁵ *Supra* note 31.

³⁶ *Ibid*

³⁷ Speech of Jawed Akhtar, Uncorrected Parliamentary Debates, Rajya Sabha (2012), See also 227th Report on Copyright (Amendment) Bill, 2010, p. 24, Rajya Sabha.

³⁸ *Supra* note 31.

is analogous to the above-mentioned provision, except for the exception of ‘display of work in cinema hall’.³⁹

There have been certain additions that have been made to section 19 as well. Section 19 of the Indian Copyright Act, 1957 talks about valid assignments and stipulates the requirements of a valid assignment. The Amendment Act adds 2 new subsections to section 19 of the Indian Copyright Act, 1957. These two subsections, i.e. 19(9) and 19(10), deal with royalties for work incorporated in films and sound recordings, and are analogous to the provisions added in 18(1). Hence they operate in the same domain and further strengthen the royalty provisions for the artists.

Fault Lines

Since the Copyright (Amendment) Act, 2012 has been the result of long battle, the artists were hopeful that the act would be free from any lacunae and would help to adequately ensure them their rights. However, a deep analysis of the Act reveals that there are indeed certain faults lines that could alter the interpretation substantially.

If one looks at section 17, one would notice that the word ‘right’ has been used, instead of mentioning a specific right. Hence the provision does not explicitly state as to which right of the author it seeks to protect.⁴⁰ The lack of any clarity with respect to the right could give rise to three possible interpretations, i.e. right to royalty, right to copyright and a rather far fetched idea of moral right. However deductive analysis could come to our aid in figuring out as to which right the provision actually refers to. While royalty isn’t a right under the Indian Copyright Act, 1957 but a legal consequence of the same, the Amendment Act could not have envisaged moral rights as a reading of section 57 of the Indian Copyright Act would make it clear that independent of the authors’ copyright or any assignment, the moral rights of the work would remain with the author, thereby strongly favoring the assumption that the legislators would not have wanted to add a right which already exists.⁴¹ Hence the

³⁹ *Ibid*

⁴⁰ Udit Sood, “The Touch of ‘Jadoo’ in the Copyright (Amendment) Act, 2012: Assessment of the Amendments to sections 17,18 and 19, 5 NUJS. L. REV (2012), p. 532.

⁴¹ *Ibid*

logical conclusion would be that the work refers to copyrights. However more clarity regarding the same and better drafting could have helped to a large extent.

Section 18 also poses its own set of problems. When one looks at the provision relating to new technology, it would appear that the provision is too broadly worded as it is not limited to literary or musical works.⁴² Hence the impact of this provision would be felt in numerous other fields, apart from the film and entertainment industry. A good example could be the mobile industry, where there would a problem in utilizing the source code for every new invention.⁴³ Further the overall process would become highly tedious as for every new development in technology, the permission of the original author would have to be taken.⁴⁴

When one goes on to the second addition to section 18, related to royalty for inclusion of work in a film, the first question that would come to the mind would be regarding the restraint that has been put on the author to privately contract as per his/her whim. Therefore the maximum cap of 50% share is royalty does in a way interfere with the freedom of the person to contract.⁴⁵ Another unclear aspect is the non-envisaging of a situation of composite license that may arise.⁴⁶ The problem would arise in a situation wherein the rights to broadcast the film as well the music is given out in one license. How this particular provision would work in those situations has not been made clear through the act, thereby leaving a broad area wide open.

Another problematic area is the application of the provision to only literary and musical works.⁴⁷ There is no specific reason that has been given for excluding the other types of works that can be included in a film. This proposition becomes even more interesting in light of the decision of the Supreme Court in the case of *Academy of General Education, Manipal v. B. MaliniMallya*⁴⁸. It was held in that case that even a scriptwriter who creates a dramatic work with 'literary value' would be protected.⁴⁹

⁴² Supra note 34.

⁴³ Supra note 39, p. 539.

⁴⁴ *Ibid*

⁴⁵ Supra note 26.

⁴⁶ Jessica D. Litman, "Copyright Compromise and Legislative History", 72 Cornell L. Rev. (1987), p. 857.

⁴⁷ Supra note 39, p. 543.

⁴⁸ 2009 (4) SCC 256.

⁴⁹ *Ibid*

Hence the provision should have been broader to even cover artists like choreographer and designers working on the film set.

One would also notice certain anomaly when we compare the stipulations of section 18 and section 19(9). While the second provision of section 18 deals with literary and musical work incorporated in a film, section 19(9) includes ‘any work’ incorporated in a film, thereby being more expansive in scope.⁵⁰ This is a bit anomalous, as both the provisions deal with the same aspect of copyright law, and seek to correct the position as regards to the same aspect.

Hence on a deep analysis of the Amendment Act, there appears to be certain fault lines that clearly emerge. The legislators should have been more careful while drafting this legislation, especially in light of its importance to the artists. The courts would therefore have to play a great role in the interpretation of these provisions, if cases involving them come to the court, so as to clarify the position of law w.r.t these provisions.

THE ROAD AHEAD: LAW IN THE FUTURE

Noting the irregularities that the amendment poses and also to safeguard their own rights, three writ petitions challenging the constitutionality of the amendments were filed before Delhi High Court.⁵¹ The petitions were filed by Super Cassettes, Bharat Anand and Venus Entertainment. The core constitutional challenge against this provision, by the film producers, is that such provisions create special rights for only lyricists and composers and unreasonably discriminates against other classes of authors⁵². The petition also emphasized on the fact that the amendments are in violation of the fundamental right to trade and carry out profession, as given in article 19 of the Constitution of India.

⁵⁰Points 8 and 9, “Amendment of section 17”, The Copyright (Amendment) Act, 2012.

⁵¹Prashant Reddy, “ Delhi High Court scheduled to hear three petitions challenging copyright amendments”, Spicy IP, April 12, 2013, available at <http://spicyip.com/2013/04/delhi-high-court-scheduled-to-hear-3.html>

⁵²Prashant Reddy, The constitutional challenge by film producers to the Copyright (Amendment) Act, 2012, Spicy IP, May 3, 2012, available at <http://spicyip.com/2013/05/the-constitutional-challenge-by-film.html>

The order of the Delhi High Court given on 07.08.2015 becomes important in this context. The order relates to applications for withdrawing of the petitions, as appended to the case of *Super Cassettes Industries Ltd v. Union of India*.⁵³ The petitioners had come to know that a petition titled *Eskay Video Private Ltd. &Anr. Vs. Union of India &Ors.* was already filed in High Court of Calcutta. Therefore the petitioners were seeking to withdraw the applications from the High Court of Delhi so that they could become a party in Calcutta. The application was allowed by the Delhi High Court. Therefore, the *proceedings* of titled *Eskay Video Private Ltd. &Anr. Vs. Union of India &Ors* would be of prime importance from now on, and its decision is keenly awaited.

At the outset the constitutional challenge of the producers appears weak. This is because even if the court decides that the amendment goes against the concept of intelligible differentia, instead of negating the provision, it is quite possible that the court would give an expansive interpretation of the provision to deal with the mischief. This would have the effect of bringing designers and other artists also within the scope of copyright protections, as provided by the addition of the provision to section 17. However one can never be sure with the decisions of courts. One would hope that the decision clarifies the position adequately and puts a stop to the long drawn battle between producers and artists working on the movie.

⁵³ W.P. (C) No. 2316/2013.