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Cinematography and Copyright: Exclusive Rights of The Producer v. Recognition for Key Artists

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INTRODUCTION: MEANING & HISTORICAL DISCOURSE

The world is busy acquiring power and money. Each of us is mechanised to aspire for top positions for which we work in tight schedules day and night; work pressure, job deadlines, greed to earn more, the exponentially hiking competitive environment and such things tend to consume our mental balances to extreme extents. However, leisure and entertainment keeps us going, freshens us up to deal with the ever-growing pressures of life. So no doubt that the entertainment industry is flourishing in today's time and has certainly become a need for all of us.

A very dominant sector of the entertainment industry is the Film Industry. The superlative combination of various creative elements like literature, art and drama are blended with the appropriate audio, visual and motion effects. A film has the ability to attract and captivate larger audience than any other form of art.

The earliest form of motion pictures was based on the phenomena of the persistence of vision wherein a series of still pictures were set into motion and created an illusion of movement.[1] Thereafter, certain instrument like 'Mutoscopes' (A 19th Century instrument which displayed images by flipping a row of cards in front of a peephole) and 'Zoetropes' (A device which used strip of printed images and was then rotated in a drum to achieve an effect of motion), which involved a simple process of rotating still images against the light to achieve the effect of motion were developed. This was just the beginning of the complex film-making process that we witness in today's world. It has come a long way since then and presents itself as a highly complex and specialised art involving sophisticated technologies,

highly specialised professionals and numerous workers. But with developments and increasing complexity of the process comes the complicated legal implications attached to it. One of such legal aspects attached with the process of film-making is the involvement of copyright law. Films come under the category of derivative works[2] under the copyright law as in most of the cases these are based on or encompass within them several literary, dramatic, artistic or musical works.[3] The fact that numerous persons are involved in the process of film-making makes it imperative to ascertain the rights of each of such persons.

As a matter of general rule of copyright, the author is the person who creates the work in question and this author is the first owner of the work. However, while determining authorship of copyright in a film, this straightforward logic stands diluted since a person other than the one who creates the work was regarded as the author of the work (i.e. the producer under most jurisdictions).

But before any further discussion could be made on the authorship of cinematographic work, an understanding of the terms 'film' and 'cinematographic work' is needed as either of these terms are used by various jurisdiction while

protecting the said subject matter.

> ***"Cinematography**, the art and technology of motion - picture photography. It involves such techniques as the general composition of a scene; the lighting of the set or location; the choice of cameras, lenses, filters, and film stock; the camera angle and movements; and the integration of any special effects. All these concerns may involve a sizable crew on a feature film, headed by a person variously known as the cinematographer, first cameraman, lighting cameraman, or director of photography, whose responsibility is to achieve the photographic images and effects desired by the director."*[4]

A close scrutiny of the above meaning of cinematography highlights a special kind of process associated with it, meaning thereby that a cinematographic work has to be produced in line with this special process. Simply put, a work, to qualify as a cinematographic work, inevitably goes through the aforementioned lengthy process. Later in this chapter, one may observe that the Berne Convention strictly follows this school of thought. Most countries use the term cinematographic work for the purpose of copyright protection.

However, some countries are still stuck with the traditional concept of providing copyright protection to a 'film.' An example of it would be U.K. law. Films are defined in Sec. 5B (1) as meaning "*a recording on any medium from which a moving image may by any means be produced.*"[5] Noticing the width of definition by its utilisation of words- 'any medium' and 'by any means',[6] a conclusion follows that a 'film' would be a more generalised and wider concept than a cinematographic work and need not go through any special process to qualify for protection.

Given the distinction between a cinematographic work and a film, one can make out that more or fewer legislations are trying to protect the same subject matter under the ambit of the words, the difference is only in regards to the scope of the subject matter protected.

So the next and a more relevant issue for the purpose of this paper is to determine the person with whom the authorship/ownership of copyright in a cinematographic work lies. On the inception of this right, most of the jurisdictions vested this right with the producer of the film. However, this meant ignoring other key artists' creative inputs involved in the making of the film.

Filmmaking is a complex, collaborative endeavour that gives rise to many different layers of rights that relate to different elements of a production, such as a screenplay, the music, the direction and the performances.[7]

This paper seeks to determine the rights of a producer in a cinematographic work vis-à-vis the rights of various other key artists involved in the making of such a work. This study tries to evaluate the creative input by such artists and assesses whether the law disproportionately favours the producer over the other artists. The scope of the study, however, has been curtailed to discussing the rights of director, scriptwriter, cinematographer and editor in a cinematographic work. This discussion starts with first analysing the scope of international copyright law in relation to films which would be covered in the immediate section.

HISTORICAL DISCOURSE IN INTERNATIONAL ENVIRONMENT

Before the Berne Convention, which became the first and the most important multilateral Treaty on the protection of copyright, many bilateral

treaties were concluded. There were some important characteristics which these treaties had in common and which are regarded as foundation stones of the Berne Convention; for example, National Treatment, the most favoured clause etc.

However, the bilateral treaties could not serve to provide uniformity and universality in protection as the level and scope of protection differed largely from country to country. So finally, the Berne Convention for Protection of Literary and Artistic Works, signed in Berne, Switzerland in 1886, was the first multilateral treaty with universal effect to govern the provisions of copyright. However, the Convention has been amended several times to meet the demands of the time, the latest version being agreed at Paris in 1971.

This section would analyse the provisions of Berne Convention as well as various other international instruments that concern cinematographic work and rights related to it.

THE BERNE CONVENTION FOR PROTECTION OF LITERARY AND ARTISTIC WORKS (1886)

Art. 2(1) of the Convention provides for the subject matter which is protected and elaborates what the expression, "*literary and artistic work*" includes. It lists, inter alia, - "*cinematographic works to which are assimilated works expressed by a process analogous to cinematography*"[8] as a protected copyright work. It may be observed that it is the use of a cinematographic process which converts a work into a 'cinematographic work', while no requirement of images, sounds or motions is found.[9] Further, the works expressed by a process analogous to cinematography are also protected, but the interpretation as to which processes are 'analogous to cinematographic' is left for the members to decide, as, in the light of rapid technological improvement in the film sectors, it would be very difficult and limiting to define its scope.[10]

However, it is pertinent to note that the initial draft of the convention never provided for an exclusive protection of cinematographic films, and it was the Brussels revision of the Act in 1948 that cinematographic works were included as a subject of protection.[11] It took a few more years to solve the issue of ownership of rights in a cinematographic work until, in 1967,

Stockholm revision of the Convention was done wherein the rules governing films had been elaborately added.[12] This revision settled the issue by the introduction of a new 'article 14 bis', which established that "*cinematographic work should be protected as original work*."[13] Further, it gave the owner of the copyright of a cinematographic work all rights to the likes of an author of an original work.[14] But a very important issue regarding who shall be an owner of the copyright in a cinematographic work is left unresolved; rather the Convention leaves it to the domestic legislations of a country to determine the owners.[15] It is at this point that this project report would be developed in the upcoming chapters. The point being whether member countries may or may not include key artists involved in the process of filmmaking under the ambit of authors along with the producer.

Art. 14 bis (2)(b) stipulates that the authors who have contributed to the making of a cinematographic work are presumed to be allowed the reproduction, distribution and other like usage of the work.[16] But this shall apply only to those countries which "*include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work.*"[17] Art. 14 bis (3), however, bars the inclusion of authors of scenarios, dialogues, musical works and even the director while applying Art. 14 bis (2)(b) unless the national law otherwise suggests.

WIPO provided the following justification for this provision:

> "*The purpose behind Article 14 bis (2)(b) is clear enough: to facilitate the exploitation of the cinematographic work as a whole, and to ensure that this is not restricted or inhibited by objections from co-authors whose contributions to the overall work may be regarded as comparatively minor.*"[18]

Art. 15 provides for person(s) who have the right to enforce protected rights and makes an attempt at hinting who could be an author of a cinematographic work and provides that "*the person or body corporate whose*

name appears on a cinematographic work in the usual manner shall, in the absence of proof to contrary, be presumed to be maker of a said work."[19]

The Berne Convention sets the minimum term of protection for a cinematographic work as fifty years after the work has been made available to the public with the consent of the author and in case the work is not made available to the public within fifty years, the protection expires after fifty years.[20]

UNIVERSAL COPYRIGHT CONVENTION (1952)

The UCC is largely attributed to UNESCO's effort in harmonising the laws on copyright and include under its scope of protection cinematographic work. UCC's mainly differs from Berne Convention so much so that it provides for a minimum term of protection as only twenty-five years after the death of the author.[21] It contains no provision for moral rights of the author. It is likely to show no development in the future due to the advent of modern WIPO Treaties and TRIPS which deal with modern technological aspects affecting copyright protection.

TRIPS AGREEMENT (1994)

TRIPS as such does not elaborate upon cinematographic works, however, it mandates the compliance of Art. 1 through 21 of the Berne Convention by the members.[22] Also, rental rights in relation to cinematographic works have been incorporated in Art. 11[23] of the agreement.

WIPO COPYRIGHT TREATY (1996)

WCT is a special agreement under the under Art. 20 of the Berne Convention which guarantees some more rights in addition to rights of authors of digital works under the Berne Convention. In relation to cinematographic works, it provides for an additional "*exclusive right of authorising commercial rental to the public of the originals or copies of their works*" under Art. 7 to the author of the work. Howsoever, this right can only be enjoyed by the author if "*such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.*"[24]

A look at the aforementioned international instruments brings us to the conclusion that though films/cinematographic works have clearly been included under the ambit of copyright protection and rights in relation to such works have been provided, however, less has been elaborated upon the authorship aspects of such works. In such a scenario, it is left to the national legislations as to whom they would want to be designated as the author of a cinematographic work. Therefore, the next chapter would discuss the domestic approaches of the U.K., U.S. and India in this respect.

OWNERSHIP OF COPYRIGHT IN CINEMATOGRAPHIC WORKS: AN ANALYSIS OF THE SITUATION IN U.S.A, U.K. AND INDIA

As observed in the previous chapter, it is entirely left to the nations to decide to whom they want to be treated as an author of a cinematographic work, this chapter seeks to clarify the law regarding the authorship of a film by analysing the legal regimes in U.K., U.S.A. and India. Since Indian law mostly follows U.K. legal development, it becomes imperative to study U.K. law in this regard. Also, development in the U.S. law can't be ignored, it is the world dominating power.

THE U.K. LAW

The nineteenth century marks the beginning of film production with the introduction of moving pictures and initially legal protection accorded to film in The UK was indirect, either as a series of photographs or as dramatic works.[25]

In The U.K., it was under the Copyright Act of 1956 that for the first time cinematograph films were accorded copyright protection under S. 13 of the Act. Further improvement of the Act led to the adoption of the Copyright, Designs and Patents Act, 1988 (CDPA). The Act, however, protects 'films' as a subject matter of copyright. The law in U.K. does not require the film to pass the threshold of originality.[26] The accepted status now is that a film has to be a 'cinematographic work' under the Berne Convention and a 'dramatic work' under the U.K. Copyright Law as well.[27]

Further the act under S. 9(2)(ab) says that the producer and the principal director are the 'author'[28] of a film. However, the principal director was included as an author only in 1994 in compliance with the EU Duration

Directive.[29] Before the 1994 amendment, the author of a film was "*the person by whom the arrangements necessary for the making of the recording or film are undertaken.*"[30] This obviously points out to the producer is the sole author of a film as in most cases these 'necessary arrangements' are made by the producer only. A producer is a person who exercises some degree of direct (organisational) control over the process of production.[31] After the amendment, it is pretty much clear that a film is a work of joint authorship of the producer and the principal director, as also mentioned in S. 10(1A) for the Act. The U.K. Act nowhere defines who this director ought to be.

Also, S. 9B stipulates that "*the sound track accompanying a film shall be treated as part of the film for the purposes of this Part*",[32] however, this should not affect "*copyright subsisting in a film soundtrack as a sound recording.*"[33]

Interestingly, when given a closer look at the aforementioned; Arts. 2(1); and 3(3), one can figure out that it was not meant to make the producer and the principal author as the co-authors of a film. Art. 2.1 mentions that, "*The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. The Member States shall be free to designate any co-authors.*" In contrast,

Art. 3 says, "*The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made.*" This implies that the clear intention was to mark a distinction between the producer and the director of the film by granting authorship in the cinematographic to the director, whereas the producer should be the author of the fixation aspect of a film. The CDPA seems to have completely ignored this distinction.[34] Further, the Directive 2006/115/EC and Directive 2001/29/EC reaffirms the rights to producers of the first fixation ("master copy") of a film under EU law.

However, interestingly, the term of protection of a film is not only dependent on the life of the producer and the principal director but it is a 'life plus seventy formula' wherein 'life' of either of the following, whoever lives the most is taken:

"*(a) the principal director*,

(b) the author of the screenplay,

(c) the author of the dialogue, or

(d) the composer of music specially created for and used in the film"[35]

This provision seems to be unwisely adopted by the British Act from the Duration Directive[36] and shows the haste of illogically extending the protection period. What may seem strange is, if all these above persons are not even credited as authors of a film, why is their life span taken into account. This is in clear contrast to life plus formula used in copyright which implies a life of the 'author' plus some more years. Does this not show the importance of the work of these people in a film? But on the other hand, the transfer of copyright is usually governed on a contractual basis wherein the parties have full freedom to determine the terms and conditions suitable to them.

U.S.A. LAW

In the U.S., the first Copyright Act came up in 1790,[37] however, the categories of work like literary, dramatic, musical works etc. were later included in the Act by way of revisions in the years 1802, 1831, 1856, 1865, 1870, when prints, musical compositions (but not public performance rights), dramatic compositions including public performance rights, photographs and painting were provided protection respectively. The modern legislation on copyright came into being in 1976 in the U.S. and was in consonance with the international developments brought about due to the Berne Convention in 1886 and Universal Copyright Convention of 1952-1971.

It is to be noted that initially, U.S. was quite reluctant to ratify Berne Convention because this would have required major changes to be made in its domestic copyright law specifically in relation to moral rights, removal of the general requirement for registration of copyright works and elimination of mandatory copyright notice.[38] Surprisingly, in approximately two years' time, Visual Artist's Rights Act[39] was enacted which included moral rights in the U.S. copyright legislation, however, it expressly exempted motion pictures from its ambit. Though the Director's Guild of America (DGA) had been arguing that films are a work of art and producers or

the owner should have no right to alter them, they were being opposed by Hollywood Studios contending that "*moral rights impeded the efficient exploitation of works of*

authorship and that this would discourage the investment in creation"; and ultimately the legislation favoured them.[40]

Finally, it implemented the necessary changes and ratified the Convention in 1989.[41] US Copyright law has been dynamic in keeping up with the changing environment at the international front and had seen constant revisions and amendments.

As far as The 1909 Act is concerned, '*motion picture*' wasn't defined, however, post 1912 amendment, it did contain motion picture photoplays and motion pictures other than photoplays as a copyright registerable category.[42] The US Copyright Act, 1976[43] defines 'motion pictures' as "*audiovisual works consisting of series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.*" For any work to qualify for copyright protection in the U.S., S. 102 lays down two mandatory requirements: (a) originality and (b) fixation.

However, no explicit mention of who is the author of a motion picture is found in the US copyright legislation. In such a case, theoretically, motion pictures can be regarded as 'joint work' of the producer, the principal director, the scriptwriter etc.[44] but the practical situation is not so. For identifying the author of a motion picture one has to figure out whether a motion picture is registered as a 'work for heir' or as a 'work of heir'? Most commercial motion pictures are registered as works made for an heir and therefore the employers become the author of such work.[45]

In the States, most of the creative contribution made by key artists involved in the art of filmmaking are categorised as '*work made for hire*'.[46] Therefore the Act seems to imply that, for motion pictures, the authorship and first owner of copyright lie with the person responsible for hiring the other, who, in most cases is the *producer or sponsor* of the motion picture.[47] In the U.S. motion pictures are usually owned by Hollywood studios.

INDIAN LAW

The legislation for independent India, which deals with the provisions of copyright is the Indian Copyright Act, 1957. Thereafter, it has been amended five times i.e. in 1983, 1984, 1992, 1994 and 2012.[48] The latest and the most important amendment being the 2012 amendment, which was largely brought about to bring the act in consonance with various copyright treaties like WCT and WPPT to protect the copyrights in music and film industry is one of the few aims of the amendment.[49] As far as the position of rights of various artists is concerned, the legal atmosphere in Indian could be studied in two phases namely:

a. Pre (2012) Amendment

b. Post (2012) Amendment

This section would briefly highlight the situation in both these phases and thereby analyse if 2012 Amendment has brought about any major change in the real working of the film industry.

Pre 2012 Amendment

After the amendment of 1994, the "cinematograph film" is under the Act is defined in Sec. 2(f), which means "*any work of visual recording on any medium produced through a process from which a moving image may be produced by any means 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."[50]

Under the Act, copyright subsists in cinematographic films.[51] It is pertinent to note that no requirement of originality is required for a cinematographic film to qualify for copyright protection. But, no copyright subsists in a cinematograph film "*if a substantial part of the film is an infringement of the copyright in any other work."*[52]

Further Sec. 2(d) of the Act states that 'author' in relation to cinematographic film would be its "Producer"[53]. The Calcutta High Court in relation to the responsibility of the producer held in one of the cases that:

> *"the word "responsibility" appearing in Sec. 2(uu) does not refer to financial responsibility but means "consequential legal responsibility" for such recording. The producer is the one who takes initiative as well as the responsibility of the recording. Mere payment of expenses of the recording including hire charges of studio and remuneration of the musicians does not result in taking "responsibility for making the work."*[54]

These provisions were influenced by their British counterparts and recognised producers as the 'author' of a cinematographic film. Even the judicial pronouncements confirmed the position wherein the Supreme Court in reference to Provisos (b)[55] and (c)[56] of S. 17 of the Act concluded that the producer of a cinematographic work was the first owner of the copyright and no copyright subsists for the lyricists or the composer unless there is a contract to the contrary.[57] Even Bombay High Court in *Ramesh Sippy* v. *Shaan Ranjeet Uttamsingh*[58] held that "*if a person who finances and takes risk of making the work and directs others to do work for valuable consideration, such person is the owner within the meaning of the Copyright Act."*[59]

Authors of the work were only given initial commission and they used to assign their work to the producer in the sense that now even they themselves couldn't commercially exploit their work. This stand was reaffirmed by the Supreme Court in the judgment of *Indian Performing Right Society Ltd.* v. *Eastern Indian Motion Pictures Assn.*[60] which clearly stated that Sec. 17(b) and (c) vest ownership of any work incorporated in a cinematographic film with the producer and not with the creator of such work.

One of the scholar comments was that there has been a legislative mix-up while laying down the provisions in the Act.[61] According to him, once the author of a cinematographic film was defined to be the producer under S. 2(d)(v), and S. 17 makes the author of a work as the first owner of the

copyrighted work, there is no need of an overlapping proviso (b) to S. 17.[62] Madras High Court tries to explain this ambiguity in the case of

> *"In respect of all works of art or music other than cinematographic film, the first ownership vests in the creator. But when they are created by the author while under a contract of employment with someone else, the first ownership vests in such person who happens to be the employer. In order to make this shift in*

ownership (from the author to the employer) very clear, the provisos under section 17 are inserted. But in the case of a cinematographic film, the ownership does not shift in the first instance at all, in view of the fact that the producer himself is recognised as the author. In fact, Section 2(uu) of the Act, defines the term "Producer" in relation to a cinematograph film, to mean a person who takes the initiative and responsibility for making the work. Such a person, despite not being the creator, is already recognised by Section 2(d)(v) to be its author. Omitting to take note of this, proviso (b) under Section 17 creates confusion in so far as the cinematographic film is concerned, providing a hunting ground for legal pundits."[63]

However, Sec. 13(4) established that a separate copyright will continue to exist in the work which has been incorporated in the cinematographic film.[64]

Hence, the position was quite clear, legally recognised individual copyrights even though the works were incorporated in a cinematographic film though the artists were not entitled to joint ownership in the film itself.

Post-2012 Amendment

The Copyright (Amendment) Act, 2012[65] majorly changed the position from what previously existed. One of the focused areas of this amendment was eliminating the prejudice caused against the lyricists and composers whose work is incorporated in a cinematographic film. In fact, the statement of the objective of the amendment stated explicitly that the purpose of the amendment is to "*ensure that the authors of the works, in particular, [the]*

author of the songs included in the cinematograph films or sound recordings, receive a royalty for the commercial exploitation of such works."[66]

First, the definition of 'cinematographic film' was simplified[67] and the words "*on any medium produced through a process from which a moving image may be produced by any means*" were omitted thereby reducing the definition to "*any work of visual recording and includes a sound recording accompanying such visual recording…."* Visual Recording has been further explained and Sec. 2(xxa) has been inserted for the same purpose.

Sec. 17 is indicative of the fact that as a general rule, the author of a work is the first owner of the copyright. With certain existing provisos, which mark an exception to this general rule, the 2012 amendment act added an exception to these exceptions[68] in the form of a proviso stating that if any work (if it is an original literary, dramatic or musical work)[69] is incorporated in a cinematograph work, in such a scenario, the rights (of the author) vested over such work should not be affected. However, it is not clarified as to what 'rights' does the section refer to, whether it's copyright or right to royalty?

The producer is still acknowledged as the author of a cinematographic film.[70] It is pertinent to note that the initial draft of the Amendment Bill, 2010 included 'principal director' to be added as joint-author with the producer.[71] This faced huge opposition from Film and Television Producers Guilds of India backed by many other producers' association because they argued that the financial risks were borne by only the producer and not the director while making the film.[72] So, this was dropped out in the later 2011 drafts.

However, second proviso added to Section 18(1) (dealing with assignment of copyright) after the amendment of 2012 clearly establishes that author of a literary or musical work whose work has been incorporated in a cinematographic film does not

have the right to assign his work or waive the right to receive royalties, which are to be shared on an equal basis with the assignee

of the work. That means any assignment of less than equal basis (i.e. up to 50%) is permissible. This excludes the circumstances where the work is exhibited in a cinema hall as part of such film. It is important to note that the limitation is not on the assignment of copyright but on assignment or waiver to receive royalties, but the dichotomy is that the copyright has not yet anywhere recognised the right to receive royalties.[73] The intent of this provision as Shri Javed Akhtar pointed out in one of his speeches in Rajya Sabha was to remedy the unequal bargaining power between the musicians and the producers.[74]

A complementary section, S. 19(9) has also been inserted which mandates that the author's right to "*claim an equal share of royalties and consideration payable*" shall remain unaffected, notwithstanding any "assignment of copyright in any work to make a cinematograph film." This shall not apply to "communication to the public of the work, along with the cinematograph film in a cinema hall". This provision is applicable for licences as well. This provision is broader in scope than the proviso to S. 18 as it is applicable to 'any work.'

This 2012 amendment seems to have a strong impact as far as monetary rights of the authors whose work has been incorporated in a cinematographic film are concerned.[75] It is a check to suppress exploitation of the key artists involved in the process of filmmaking.[76] The language of the added provision may be interpreted to include scriptwriters also.

Another important change brought about is the addition of the second proviso to S. 33(1) which provides that now it could be only through a copyright society that the issuance or grant of any license of literary, dramatic, musical and artistic work incorporated in a cinematographic film be done. However, a challenge had been made in the Supreme Court alleging this provision to be violative of Art. 19(1)(c) of the Constitution of India,[77] but the case was subsequently withdrawn in August 2015, leaving the matter open for discussion.

THE KEY ARTISTS INVOLVED IN THE PROCESS OF FILMMAKING

The Process of Filmmaking

For a layman it is a matter of hundred rupees which he has to spare to watch a film, however, little one realises the amount of effort that goes into the making of a film. The actors we see on screen are enacting minds of those hundreds of people who are inseparably connected with various phases of filmmaking. What we see summed up in some three hours with some five-six people acting might have taken a time span ranging from a few months to several years and involved hundreds of people. The creative intellect involved of each of these persons cannot be, rather should not be ignored.

Broadly, the film-making process can be divided into five phases and each such phase is so dependent on the others that the success of filmmaking cannot be

attributed to the excellence of just one phase; rather it is the result of the wholesome process which determines the fate of a film. The five main steps are:

i. Development
ii. Pre-production
iii. Production
iv. Post-production
v. Distribution[78]

Copinger, however, compresses it into three stages namely development, production and distribution.[79] His discussion highlights the fact that it is the sum total of activities done by the producer himself or done for him that a film is produced.[80] But during all this discussion he does recognise the key role played by screenplay writer, singers, costume designer, choreographer etc. without whose input, the film can never be completed.

KEY ARTISTS INVOLVED IN A CINEMATOGRAPHIC WORK

The producer becomes the central person who raises funds and makes all arrangements for a film to start; still, it's obviously not practical for one person to be versatile enough to play all roles in the film-making process. The skill and creative requirement of each phase are so different and unique that the producer has to arrange for different creative inputs for each of such stage. Some key artists involved in the process of filmmaking could be listed as follows:

i. Scriptwriter(s)
ii. Cinematographer(s)
iii. Director(s)
iv. Producer(s)
v. Editor(s)
vi. Performer(s)

However, this can't be regarded as an exhaustive list. The scope of this write-up is limited to discussing - who among the producer, director, editor and the scriptwriter may qualify as an author of the work

The Issue Under Various Jurisdictions: Exclusive Rights of the Producer v. *Recognition of Key Artists*

A peculiar thing about motion pictures/cinematographic films is that several artists' labour gets combined into an inseparable, unitary work.[81] This highly collaborative work is said to be owned by the producer of the film while other key participants, without whose contribution, the work would not have even made sense, are not deemed as co-authors of the work.

Financial backing and management are undoubtedly important to a film but, what would a film look like without a script, without music, etc? All these creative inputs though form an integral part of a film, share an uncertain legal relationship with it.

The earliest movements which propagated an agenda to secure some kind of recognition for artists involved in the art of film-making were in 1950's, when French journal *Cahiers du Cinema*[82] formulated the *politique des auteurs* whereby, for the first time, attention was focused on the director as the author of a film which was said to reflect the personality, the 'genius' of the director[83]. Thereafter, the courts have been approached under various jurisdictions for getting this issue resolved. One of the earliest cases is *Edison* v. *Lubin*[84], wherein the court stated that, "*a film embodies artistic conception and expression, and to obtain it, it requires a study of lights, shadows, general surroundings, and a vantage point adapted to securing the entire effect*," thereby, providing recognition to the work of a cinematographer and the cameraman for the purpose of copyright in a film.

This was followed by recognition by the court of the creative input of the crew responsible for preparation of cameras, rehearsal of actors, tweaks with a camera and the film, and editing of the film, in *American Mutoscope & Biograph Co.* v. *Edison Mfg. Co.*[85]

Recently, a very crucial case came up i.e. *Aalmuhammed* v. *Lee*[86] wherein the main issue was to determine the authorship of the film named and based on a real-life personality-Malcolm X. A brief of facts is that the director Spike Lee engaged Jefri Aalmuhammed, who was a leading expert on Islam to serve as an advisor on the film.[87] Aalmuhammed worked on the dialogues, the actors and performers etc and was given a monetary compensation for the same but there was no written contract. The producer of the film was Warner Bros.

Aalmuhammed wanted to be credited as a co-writer in the film but was accorded credit as an "*Islamic Technical Consultant*" in the end titles for the film.[88] Once the film was released, he claimed to be a co-creator, co-writer, co-director, filed for copyright registration for the film, and at the same time filed a complaint seeking accounting with a declaratory judgment that he was a co-author of the film.

The Ninth Circuit Court of Appeal invoked theories of film authorship by Sergei Eisenstein, auteur critics etc.[89] and also reviewed the definition

of authorship in the *Sarony case*.[90] It was noted that vision of a writer as a desk conjured by the word author was insufficient when considering the question of film authorship, also, the fact that Spike Lee has signed a contract of work-for-heir with Warner Bros which made Warner Bros the legal author of the film.

The court concluded giving the judgment in favour of defendants which stated that "*making a valuable and copyrightable contribution is not enough to constitute authorship when it comes to joint authorship in motion pictures.*"[91] This judgment marks a significant departure from the jurisprudence of judicial precedents of over hundred years which sums up that, to qualify as an author one's contribution must only be *original and include some minimal human creative expression*. Also, the court held that for a person to be a joint author, he should have exercised some control over the making of work. In the present case it was held that though the director, Spike Lee had the right to accept Aalmuhammed's contributions or not, but Aalmuhammed, "*lacked control over the work, which according to this approach shows a lack of co-authorship*."[92] Finally, the Court decided Lee be the sole author of the film.

So based on this above reasoning a script writer would fail to be regarded as an owner of the film as he does not exercise control over the making of the film.

However, this test might be easier to apply in the case of a cinematographer. In the

U.S., cases suggest that authorship in cinematography draws from determinations of authorship to a photograph, which includes, "*posing the subject and evoking the desired expression; selecting and arranging costumes, props and other accessories; arranging light and shade*"[93], "*selecting the type of camera and lenses; selecting the time and position of the camera for taking the photograph*"[94] and "*selecting the camera angles and exposure and deciding what events to photograph and the duration of the filming*"[95]. Therefore, the person responsible for and who exercises control over all the above-mentioned activities is deemed to be the author of cinematography in a film. But it is pertinent to note that his work is inseparable from the whole film.

Next, is the work of an editor. A film in its raw form might not be fascinating, it is the editor who works under the supervision of the director

for selection and arrangement of different scenes of a film while applying his own intellect in synchronising transitions of various shots in a film. But how actively does he participate in the editing process? He might be regarded as an author of the editing while the extension of his authorship to the whole film may not a good idea as neither does he exercise control over the whole film nor does he put in any intellect in making the film other than that put in editing.

The case of the director is a dicey one as different jurisdictions have varied opinions on it. As we have already seen that U.K. law included principal director as an author of a film. In *Casa Duse LLC* v. *Merkin*[96], the Second Circuit Court of Appeals discussed the matter as to who is an author in case of a motion picture. The case particularly regarded as important because it governs the State of New York which where most of the entertainment industries are established.[97] The judgment expressly denied that the Director is not an author of a film because he does not create any copyrightable material which constitutes a part of a film.

ANALYSIS & CONCLUSION: EFFECTIVENESS OF THE PREVAILING LEGAL PROTECTION FOR KEY ARTISTS

Depending upon the legal traditions of a country, two approaches to ownership of copyright in a cinematographic work are generally seen:

a. Civil Law countries regard it as a contributory work of various persons. A film in these countries may be considered as a joint or composite work. The producer enters into a separate contract with each of such recognised owners before commercially exploiting the work.[98]
b. Common Law countries, however, generally regard the producer as the sole owner of the copyright in a cinematographic work based on the reasoning that this facilitates avoidance of unnecessary negotiations with contributors.[99]

An author is someone who contributes at least with the minimum level of creativity to a work. Determination of author of a work becomes an integral

question in law because it is the author who is the first owner of a work and it is with him that copyrights will rest. He will have all the economic and moral rights over the work e.g. Right to reproduce, right to distribute, right to public performance etc.

In the case of original works made by one or more authors, determination of

authorship is not a problem. However, determination of authorship requires serious considerations in cases of derivative works such as cinematographic films which are based on several other works or are a collaboration of works which are individually copyrightable. A cinematographic work, as we have already seen is not a one-man-job. Each area of creative input in a film is so specific and needs such a versatile level of skill that for almost each of the stages/part a different specialist is needed. For example, a scriptwriter's work cannot be done by any random person; only a director would know how and where to give appropriate directions for a film to be made, only a professional actor could perform/act etc. Hence, it is indisputable that without any one of these niche, highly-trained professionals, a cinematographic work wouldn't be possible. This shows how important each of these artists is in a cinematographic film. However, the laws at international and national levels hardly recognised these key artists as authors of copyright in a film.

When it comes to the question of authorship in a film, it seems as if the party with more bargain power tends to shift the balance of convenience in its favour and mould the domestic law in its favour. As far as international regimes are concerned, none provides for a clear-cut authority to determine the authorship in a film, rather the Berne Convention leaves it to the nations to decide who they want to include under the definition of the author of a cinematographic work. The UCC (1952), TRIPS (1994) and WCT (1996) are post-Berne but even these instruments did not define author of cinematographic work.

It is pertinent to note that domestic laws not only vary in deciding who could be an author of a cinematographic work but also have been unable to accept a uniform terminology in relation to such works. For example, U.K. copyright law (CDPA, 1988) provides protection to 'films', for U.S. its 'motion pictures' and India calls it 'cinematographic films.'

Domestic approaches would depend upon the foundations on which the laws of a country are based, whether it is the economic foundation wherein the laws will favour the money investing entity (producer) or whether it is based on protecting the intellectual interest of the artists and creators. S. 9(2)(ab) of the CDPA, 1988 clearly provides that it is the producer and the principal director who are 'authors' of a film. Principal Director was included as an author to bring the law in line with the Directive 98/93EEC.

However, a reading of Arts. 2(1) and 3(3) of the Directive suggests that it aimed at making the Director as the author of the film and for the fixation aspect of the film was the author should be the producer. The U.K. law features an ill-founded interpretation. The directive never aimed at making a film as a joint-work of producer and the principal director.

Another strange provision found under the U.K. law is the dependence of copyright term on the life of not only the authors (producer or principal director) but also on the life of the key artists such as script writer, dialogue writer and music composer. This provision is so ill-fitted as far as the general formula of 'life of the author plus some years' of copyright jurisprudence is concerned. Such a provision points out at the haste the lawmakers have shown in extending the copyright term unreasonably.

Next, the U.S. laws havenowhere clarified as to who could be an author of a motion picture. Motion pictures in the U.S. have generally registered as a 'work for heir' wherein the studios own the copyrights in the motion pictures and all other artists are

simply employees.

As far as India is concerned, before 2012 producer was regarded as an author of a cinematographic film, copyright of individual works was still recognised though artists were not made joint authors of the work. Though even post 2012 amendment, it was only the producer which is regarded as an author of the work, but the bargaining power of the key artists have been substantially enhanced by proving certain provisions where in the laws now provides for a check and balance system while assignment and license of literary and musical works being incorporated in cinematographic works. The authors of such original works may still claim royalties, even once they assign their work. The important sections where changes have largely strengthened the economic rights of key artists involved in the process of filmmaking are S. 17, the proviso to S. 18 and S. 19(9). Another limitation brought about is that the licensing of original works, to be incorporated in a cinematographic film, can only be done through a registered copyright society. This provision has faced a mixed reaction. It has been accused to be against the spirit of A. 19(1)(c) of the Constitution and is felt to be an unnecessary limitation on the exercise of licensing rights by the authors.

The question after analysing the domestic laws still stands-whether script writer, director, editor and cinematographer can be considered as joint-authors of a film? For this reliance is usually placed on the judgment of *Aalmuhammed* wherein the court said that to qualify as an author, the contribution made should be "*original and include some minimal human creative expression*" and also such a person could exercise "*control over the work.*" Using this test, the script writer could not be regarded as an author of the work as he does not exercise sufficient control over his script

while the film is in making. Next, the cinematographer might qualify as an author but the fact that even he is working under the directions of the Director can't be negated. An editor may be an author of the editing done by him but clearly hasn't played a role, sufficient to qualify as a joint author in a film.

The central issue is the director and the producer. The justification given for treating producer as an author is that it is him who undertakes all financial risks in making of the film and all the arrangements for a film are done by him. Whereas the Director is actually the person whose envisions the script into a workable expression, the whole crew of the film works under his directions. It is his mind who is actually visualising what the future work i.e. the film here would look like. The word 'Director' itself emphasises upon his managerial and authoritative position he holds while the process of filmmaking is going on. From start to end it is he under whose direction a film is made. It would not be incorrect to say that actually, it is the Director's intellectual contribution which ripens into the final fruit of film. And undoubtedly, he exercises real control over all intellectual contribution made to a film.

Then why is it so that a Director is not made an author or even a joint-author in most jurisdictions? Specifically, when we have a look at the legislative history of the Amendment of 2012, the proposal of making principal director as a join-author of a cinematographic film was out rightly rejected. Reading the standing committee's report on the point, one could realise that this has been done due to excessive lobbying by the producers' guilds and societies, A clear case of money influencing implementation of the law.

My submission in this regard is that the role of director is so crucial to the process

of filmmaking that excluding it from being designated as an author of a film would mean underestimating or not recognising his creative efforts. As far as the adoption of an effective and correct approach is concerned, I find the approach adopted by the EU Directive as most appropriate wherein, the principal director who is the main creative mind in making of a film is regarded as author of the film and since the director has only backed the making of the film financially, he may be regarded as the author of just the fixation aspect of a film. This would protect the intellectual contribution of the director on one hand while the producer being the author and owner of the fixation of the film would be able to derive his monetary benefits from the film. However, the approach followed by U.K. seems to be most practical, wherein the producer and the principal director are made the 'authors', which tends to solve the problem of any kind of overlap of rights of both the producer and the principal director.

This study, therefore, seeks to establish that the role of director in making of a film is of vital importance and he should be duly recognised for his part of work. Though the 2012 Amendment of the Indian Copyright Act has brought about significant changes as far as recognition of copyright of many key artists in their portion incorporated in such film is concerned, but, the issue of recognition of the director, who is the real captain of a film has not been tackled. The law needs serious consideration in this regard and the contributions of the principal director cannot be ignored for any reason. Indian law can borrow ideas from the jurisprudence that has been developed in EU and UK so far to include both, the principal director and the producer to enjoy the fruits of their contribution made to a film.

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