

## ENTERTAINMENT: LIGHTS, CAMERA, CONTRACT!

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### Abstract

*Entertainment and Media Industry is one of the fastest growing sectors of the Indian economy. However, there is economic insecurity in the entertainment industry as consumers' taste in artistic products change quickly, driving certain artists to the heights of popularity and reducing others to obscurity. Entertainment law covers the legal issues faced in various fields like theatre, art, dance, opera, music, radio, television, film, etc. The entertainment industry relies on complex contracts because of this instability, which are usually drafted to protect entertainment companies against economic risk. For example, in the making of a film, the producer will enter into different contracts with the scriptwriter, actors, music director, etc. All of them will come under the scope of entertainment law as they are contracts entered into for the creation and distribution and broadcast of entertainment product. Thus, an entertainment contract can be defined as a contract entered into by the various players of the entertainment industry. This paper aims to highlight the importance of entertainment industry in India and how it has led to the establishment of legal relationship between various players of this industry through the means of contract. The paper also deals with various cases of copyright infringement and breach of contract in entertainment and media industry. It concludes by suggesting the pros and cons of exclusivity contract entered into by the actors.*

**Keywords:** Entertainment Industry, Entertainment contracts, Copyright Infringement

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*“And in my opinion, entertainment in its broadest sense has become a necessity rather than a luxury in the life...”*

**- Walt Disney**

‘Entertainment is the action of providing or being provided with amusement or enjoyment.’<sup>1</sup> ‘It is something that pleases, or diverts, especially a performance or show. The entertainment industry includes the fields of theatre, film, fine art, dance, opera, music, literary publishing, television, radio, live stage performances, etc. The common task of selling or otherwise profiting from creative works or services provided by writers, musicians and other artists is shared by these fields.’<sup>2</sup> Entertainment law covers all of the legal problems and issues generally faced by these industries. The areas of law most often associated with this field are intellectual property, agency, contracts, labour and employment. ‘The Indian Entertainment and Media (E&M) Industry is one of the fastest growing sectors in India and has out-performed the Indian economy.’<sup>3</sup> Even television witnessed its transformation from a single government owned channel to a medium telecasting more than 300 national and regional channels. At present Indian film industry or Bollywood is a perfect combination of entertainment and commercial sector, producing nearly thousand movies in a year in various Indian languages. ‘As per the recent report by Price waterhouse Coopers (PwC), Indians are expected to spend more on entertainment in the coming years with a steady growth in their disposable income. And as per the combined survey report by KMPG and FICCI, the entertainment industry in India is expected to expand by 12.5% every year.’<sup>4</sup> ‘The Indian Media and Entertainment (M&E) Industry is a sunrise sector for the economy and is making high growth strides. It is expected to reach US\$ 100 billion by 2025, from its estimated size of US\$ 17.85 billion in 2015, due to its large capacity to consume new products and businesses. Recently Reliance Entertainment (owned by Mr

<sup>1</sup> Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/entertainment>>, accessed 12 March 2016

<sup>2</sup> ‘Entertainment Law - Contracts, The Fiduciary Duty Of Entertainment Attorneys: Joel V. Grubman, Unique Aspects Of Entertainment Industry Contracts’ <<http://law.jrank.org/pages/6504/Entertainment-Law.html>> accessed 28 March 2016

<sup>3</sup> ‘The Indian Entertainment and Media Industry Unravelling the potential’ (FICCI-PWC, March 2006) <<https://www.pwc.in/assets/pdfs/ficci-pwc-indian-entertainment-and-media-industry.pdf>> accessed 28 March 2016

<sup>4</sup> ‘Entertainment Industry in India’ (Business maps of India, 10 June 2015) <<http://business.mapsofindia.com/entertainment-industry/>> accessed 27 March 2016

Anil Ambani) and DreamWorks (led by Mr Steven Spielberg), along with Participant Media (led by Mr Jeff Skoll) and Entertainment One (eOne) have formed a new film, television and digital content creation company called 'Amblin Partners', and have raised US\$ 500 million in debt to develop and produce films.'<sup>5</sup> There is economic insecurity in the entertainment industry as consumers' taste in artistic products change quickly, driving certain artists to the heights of popularity and reducing others to obscurity. The entertainment industry relies on complex contracts because of this instability, which are usually drafted to protect entertainment companies against economic risk. For example, in the making of a film, the producer will enter into different contracts with the scriptwriter, actors, music director, etc. All of them will come under the scope of entertainment law as they are contracts entered into for the creation and distribution and broadcast of entertainment product. Thus, an entertainment contract can be defined as a contract entered into by the various players of the entertainment industry. Though there are different types of contracts within the entertainment industry, many of them have certain clauses that are common among them and are unique to the entertainment field. Entertainment contracts will have clauses pertaining to intellectual property rights, restraint of trade and exclusivity, finances and payments, breach and dispute resolution. In India, there is no such one regulation of entertainment contracts. Apart from various Committee recommendations, the following are the most significant sources of entertainment law in India - Indian Contract Act, 1872, the Specific Relief Act, 1963, Indian Copyright Act, 1957, Telecom Regulatory Authority of India Act, 1997, Broadcasting Regulations under the TRAI Act. Several policy documents have also been issued by the Government of India to regulate various aspects of the films sector.

Though the growth of this industry has been astounding, it has seen a dash of litigations for reasons including infringement of Intellectual Property Rights and breach of contract. Sometimes, just before the release, these controversies seem to crop up deliberately. 'For instance, Bollywood production house BR Films had been sued by 20th Century Fox for allegedly copying the storyline and script of its comedy My Cousin Vinny in the movie Banda Yeh Bindaas Hai. Attempts were made to stall the releases of Jodha Akbar and Singh is King on religious grounds, while Ghajini was

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<sup>5</sup> 'Media and Entertainment Industry' (India Brand Equity Foundation, 16 February 2016) <<http://www.ibef.org/industry/media-entertainment-india.aspx>> accessed 26 March 2016

victimized by litigations over remake rights and copyright infringement just five days before its release.<sup>6</sup> Appropriate due diligence and negotiations at the documentation stage play a critical role in curbing unwarranted litigation. Prior to negotiations one must be aware of not only the commercial aspects but also legal issues such as intellectual property rights and enforceability of the contractual arrangements for ensuring that the contracts are reliable.

One of the early steps in making a film is script creation. It involves conceptualization of idea, creation of a concept note, followed by preparation of the storyboards and script. Theft of idea, story and script i.e. infringement of copyrights is one of the issues that may arise at this stage. Copyright law grants protection not to an idea but to its expression. Hence, there is no copyright protection available to an idea, unless given a tangible form with adequate details. With a single idea, multiple storylines can be developed, each capable of separate copyright protection. Hence, the only way the script writer may be able to protect the idea would be through non-disclosure agreements (NDAs). The courts have upheld protection of idea through such non-disclosure agreements or when the idea has been communicated in confidence. In the case of *Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.*<sup>7</sup>, Sundial developed the idea of a TV series called 'Krish Kanhaiyya' and approached the Managing Director of Zee and shared a concept note where the basic plot and the character sketches were outlined in confidence. Later, it was found that a TV series called 'Kanhaiyya' was broadcasted on Zee TV and this series was substantially similar in nature to the idea that Sundial had communicated to Zee. Sundial filed a suit against Zee and, inter-alia, sought for injunction. At the interim stage, a single Judge bench of Bombay High Court granted an injunction. In an appeal against this injunction by Zee, the Bombay High Court opined that an average person would definitely conclude that Zee's film was based on Sundial's script and hence upheld the injunction against Zee as Sundial's business prospect and goodwill would seriously suffer if the confidential information of this kind was allowed to be used. In another dispute, 'PepsiCo after learning about the movie being released under the title "YOUNGISTAAN" sought to restrain the producers, MSM Motion Pictures and Vashu Bhagnani from advertising, promoting

<sup>6</sup> Ranjana Adhikari, 'PROACTIVE APPROACH, PROMPT ACTION NEEDED TO BEAT BOLLYWOOD BLUES' (dna, 6 August 2009) <<http://www.dnaindia.com/money/comment-proactive-approach-prompt-action-needed-to-beat-bollywood-blues-1280014>> accessed 14 April 2016

<sup>7</sup> 2003 (5) BomCR 404

and releasing the film under the above mentioned title. The Delhi High Court in its order stated that the two parties agreed to settle the matter amicably with the defendants agreeing to give a disclaimer stating that the movie is not related or associated with Pepsi's Youngistaan Campaign and has no connection with Pepsi's registered trademark "Youngistaan."<sup>8</sup> Further, the writer would have to prove that he originated the idea and the date of origination. Concepts, scripts, screenplays are protected as literary works under the Copyright Act, 1957 (Copyright Act) and get protection if they are original. India is a member of the Berne Convention and the Universal Copyright Convention. The Government of India has passed the International Copyright Order, 1999 according to which any work first made or published in any country which is a member of any of the above mentioned Conventions is granted the same treatment as if it was first published in India. To create evidence of creation of the concept notes/script, some of the recommended steps are:

- to apply for the registration of the script with copyright offices,
- to register with the writer's association/s,
- to mail the script

The court will look at whether there has been any substantial copying of the key elements of the film in cases of copyright infringement. Very often, Bollywood filmmakers try to overcome any probable liability by adding elements to the story which are more similar to the Indian sensibilities. Therefore, it is recommended to acquire the adaptation or remake rights at the pre-production stage itself. The producers have preferred to procure a license from the owner instead of taking the matter all the way to court.

One of the key assets of the film is its title. Today, "Sholay" is not just a word for us; it is an event. HAHK or DDLJ are not four random letters but landmarks that defined a generation. Hence, the title of a film is the worst nightmare for its makers. If at times, it springs out from the story itself, at times it takes longer to get locked than the entire process of making the film.<sup>9</sup> A film is generally tentatively titled at the pre-production

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<sup>8</sup> Mathews P.George, '*Producers of 'Youngistan' accused of Infringement*' (Spicy IP Blog, 22 February 2014) <<http://spicyip.com/2014/02/producers-of-youngistan-accused-of-infringement.html>> accessed 22 March 2016

<sup>9</sup> Amey Nadkarni, '*Hindi Film Titles- The disputes, The arguments and The unfortunate mess*' <<http://shockaday.blogspot.in/2014/02/hindi-film-titles-disputes-arguments.html>> accessed 17 April 2016

stage and obtains a definite title at a later stage. It has been one of the most disputed aspects of a film in recent years. 'The practice of registering titles with societies or associations like Indian Motion Pictures Producers Association (IMPPA), the Film and Television Producers' Guild of India, the Association of Motion Pictures and Television Programme Producers (AMPTPP) and Western India Film Producers' Association has been developed by the Indian film industry.'<sup>10</sup> The film industry, as a general rule, has great respect for these associations and follows their rules and regulations. Associations allow suffixes and prefixes (including tag lines) to distinguish between the film titles. Around 2009, Anil Kapoor's project *Shortcut* ran into trouble when producer Bikramjeet Singh Bhullar raised objections that he had registered the title *Shortcut* with the film associations much before the former had even conceived of the project. Kapoor quickly remedied the situation and changed the title of his film to *Shortcut: The Con is On*. Titles are protected according to the fundamental tenets of trademark and unfair competition law. Film titles can be divided into two categories: the titles of a series of films and the title of a single film. Particular examples of well-known Indian film series titles are *Hera Pheri & Phir Hera Pheri*, *Dhoom & Dhoom II* and *Munna Bhai MBBS & Lage Raho Munna Bhai*. 'In case of single film titles, it must be proved that such a title has acquired a wide reputation among the public and the industry and has acquired a secondary meaning.'<sup>11</sup> Secondary meaning in layman's terms means that the average movie goer associates the title with a certain source, production house, etc. and there would be a possibility of confusion in the mind of such person if the title is used by another person for a different film. Even pre-release publicity of the title may cause the title to acquire sufficient recognition and association with its owners to give a secondary meaning to the title of the film. The courts look at the following factors for contribution towards creation of secondary meaning for the title- the duration and continuity of use; the extent of advertisement and promotion and the amount of money spent; the sales figures on purchase of tickets and the number of people who bought or viewed the owner's work; and closeness of the geographical and product markets of the plaintiff and defendant.

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<sup>10</sup> Shrishti Bansal, 'India: Movie Titles Entitled To IP Protection?' (Mondaq, 4 February 2016) <<http://www.mondaq.com/india/x/463448/Copyright/Movie+Titles+Entitled+To+IP+Protection>> accessed 23 March 2016

<sup>11</sup> Naik Naik & Company, 'The Role and Rule of Law' (Confederation of Indian Industry, 2014) <[https://issuu.com/naiknaikadvocate/docs/ebook\\_combined](https://issuu.com/naiknaikadvocate/docs/ebook_combined)> accessed 24 March 2016

Under the Indian Trademarks Act, 1999 (Trademarks Act), film titles qualify as ‘service marks’<sup>12</sup> rather than trademarks. They fall under Class 41 of the Fourth Schedule of the Trade Marks Rules, 2001. To ensure that one has the exclusive right to the title and that it is completely protected by law, it is prudent to register it as a service mark under the Trademarks Act. ‘The registration of a trademark constitutes prima facie validity of the same in legal proceedings.’<sup>13</sup>

A fine example of the benefits of the registration of title as a trademark is perhaps the Sholay case. ‘In 2007, Sascha Sippy, grandson of GP Sippy (producer of the 1975 blockbuster film), approached the Delhi High Court alleging Copyright and Trademark infringement by director Ram Gopal Varma. Varma had produced the film titled Ram Gopal Varma ke Sholay and also used the character names from the original film, Sholay. Sholay was one of the most popular movies in India during its time and has become a household name where the audience associates the title with the Sippys, thereby giving it a secondary meaning. They have not only obtained trademark registration for the title of the film Sholay but have also registered the character names ‘Gabbar’ and ‘Gabbar Singh’. After months of legal battle between the parties, Ram Gopal Varma finally accepted to change the title of his film to Ram Gopal Varma ke Aag. He also agreed to abstain from using any of the names of the characters from the original story.’<sup>14</sup>

The lyrics or the words in a song are protected as a piece of literary work. ‘The musical compositions including background scores are protected as musical works. It means works consisting of music including any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music, like lyrics of the songs.’<sup>15</sup> ‘Sound recordings are protected, regardless of the medium on which such recording is made or the method by which the sounds are produced.’<sup>16</sup> Performers Rights subsist in the performances rendered by the singers, musicians and other artistes while recording the songs (including audio-visual) and are protected under the Copyright Act. In the case of *Indian Performing Right Society Ltd.*

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<sup>12</sup> Section 2(1) (z) of the Trademarks Act, 1999.

<sup>13</sup> Section 31 of Trademarks Act, 1999

<sup>14</sup> ‘Trademarks: Case Study – Trademark for Film Titles’ (SINAPSE, 27 June 2014) < <http://www.sinapseblog.com/trademark-film-title/> > accessed 24 March 2016

<sup>15</sup> Sec 2 (p) of Copyright Act, 1957

<sup>16</sup> Sec 2 (xx) of Copyright Act, 1957



*v. Eastern Indian Motion Pictures Association and Ors.*<sup>17</sup>, the Supreme Court held that the producers of a cinematograph film who commission the works or create the works through composers or lyricists under a contract of employment, are the first owners of the copyright in musical and lyrical works forming a part of the cinematographic film. No copyright vests in the composer or lyricist unless there is a contract to the contrary between the composer/lyricist and producer of the cinematograph film. In *Anandji Virji Shah v. Ritesh Sidhwani*<sup>18</sup>, the plaintiff, who is one of the music composers of the songs Yeh Mera Dil and Khaike Paan Banaraswala in the 1978 film Don, initiated action against the producer of the 2006 remake with the same title, Don (defendant). The defendants had procured the rights from M/s Nariman Films, the producers of the original film, under a written contract and modified and incorporated the songs in the remake version. Relying on the Eastern Indian Motion Pictures Association case, the Bombay High Court held that the contract between the producers of the original film and the plaintiff (and Kalyanji) was a contract of service and thus the rights were vested with the producer and not the composers. Therefore, the producer had the legal and subsisting right to assign any part or whole of the rights in the songs to the defendants and thus, the contract between them was valid.

While negotiating the assignment agreement on behalf of the producer/sound recording house, it is important to procure adequate representations and warranties from the lyricists and musicians with respect to the originality of the music and lyrics in the assignment agreement. A corresponding indemnity provision should also be built in the agreement for any breach of these representations and in case of future third party disputes arising out of such breach. In India, the trend for the lyricists and the composers is to assign all the rights subsisting in their works to the producers for a fixed amount owing to the heavy bargaining power of the producers. There is a proposal to amend the Copyright Act to alter this position and to protect the interests of composers and lyricists. It says that an assignment of copyright in any work has no effect on the right of the author to claim royalties for exploitation of works other than as a part of cinematograph film for which it is made. If this amendment goes through, lyricists and composers will have greater bargaining power while negotiating their contracts and royalties.

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<sup>17</sup> AIR1977SC1443

<sup>18</sup> Suit (L) 2993 of 2006, Bombay High Court



Entertainment, the source of enjoyment, now involves multi-billion dollar industry. 'India is the fourteenth largest entertainment and media market in the world with industry revenues contributing about 1% of its GDP. However, industry stakeholders acknowledge the fact that India has the potential to achieve path-breaking growth over the next few years; possibly to reach a size of USD 100 billion.'<sup>19</sup> Entertainment includes various industries and under each industry there are number of contracts that are entered into. However, there is no standard agreement in the entertainment business. Oral contracts may be enforceable in certain circumstances, but it is not advisable to take a chance. Production time moves quickly, so it is best to have a formal contract executed before production begins. 'Recently, actress Shilpa Shinde has quit popular comedy show 'Bhabhi Ji Ghar Par Hai', alleging that the makers 'mentally tortured' her, which has prompted the production house, Edit II to send a legal notice accusing her of breach of contract. The actress, who played Angoori Bhabhi on the show, said the problem started when the makers asked her to sign a contract that would bar her from doing other shows.'<sup>20</sup> An exclusive agreement might look good on paper, but locking oneself into one always comes at a cost. After all, a better deal that one can't avail oneself of might come along next week, next month or next year, and the person won't be able to take advantage of it. The challenge lies not only in the successful negotiation of the contract but also in avoiding the legal complications that can arise. Hence, there is a dire need for drafting model agreements as per the acceptable standards of the industry. As rightly stated by Producer Robert Evans (*The Godfather, Chinatown*), "There are three sides to every story: yours...mine...and the truth. No one is lying. Memories shared serve each differently."<sup>21</sup> And to ensure that everyone has the same memory of the details it has to be made certain that the contract is put in writing.

**So remember-** lights, camera, *contract!*

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<sup>19</sup> Mudrika Mathur, 'Intellectual Property Rights Conundrums in Indian Film Industry: Need for a Clear Legislation' (Rostrum Law Academy, 25 March 2016) < <http://rostrumlegal.com/intellectual-property-rights-conundrums-in-indian-film-industry-need-for-a-clear-legislation/>> accessed 29 March 2016

<sup>20</sup> <<http://www.ibnlive.com/news/tv/shilpa-shinde-quits-bhabhiji-ghar-par-hai-makers-send-legal-notice-1216820.html>> accessed 19 March 2016

<sup>21</sup> Evans, *The Kid Stays in the Picture* (First New Millennium Press edition, 2002), Preface