EXCLUSIVE RIGHTS OF CINEMATOGRAPHY OWNERS IN FILM INDUSTRY

by

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ABSTRACT

Cinematography finds uses in many fields of science and business as well as for entertainment purposes and mass communication. Cinematographic films' visual images and accompanying sounds are protected under copyright. Cinematographic films also include feature films, TV programs, documentaries, short films, home videos, animated films, and cartoons, television commercials, video podcasts and computer games. Films are protected regardless of their format (16mm, film, video, DVD, or digital formats). Such cinema has a special feature of copyright in the entire film which may cover portions of the film in the sense that the owner of the copyright in the film will be entitled to the right in portions of the film; but this idea or concept cannot be extended that there would be one owner of the cinematograph film and different owners of portions thereof in the sense of performers who have collectively played roles in the motion picture.

INTRODUCTION

Cinematography also called (Direction of Photography) is the science or art of motion-picture photography by recording light or other electromagnetic radiation, either electronically by means of an image sensor, or chemically by means of a light-sensitive material such as film stock. Cinematographers use a lens to focus reflected light from objects into a real image that is transferred to some image sensor or light-sensitive material inside a movie camera. These exposures are created sequentially and preserved for later processing and viewing as a motion picture. Images captured with an electronic image-sensor, produce an electrical charge for each pixel in the image, which is electronically processed and stored in a video file for subsequent processing or display. Images captured with photographic emulsion result in a series of invisible latent images on the film stock, which are chemically "developed" into a visible image. The images on the film stock are projected for viewing the motion picture. The word "cinematography" was coined on the basis of the Greek words, meaning "movement, motion" and meaning "to record", together meaning "recording motion". The word used to refer to the art, process, or job of filming movies, but later its meaning became restricted to "motion picture photography".

FILM CINEMATOGRAPHY

Surviving Motion Picture Film - The experimental film Roundhay Garden Scene, filmed by Louis Le Prince on 14 October 1888, in Roundhay, Leeds, England, is the earliest surviving motion picture. This movie was shot on paper film. This camera took a series of instantaneous photographs on standard Eastman Kodak photographic emulsion coated onto a transparent celluloid strip 35 mm wide. Contained within a large box, only one person at a time looking into it through a peephole could view the movie.

(i) In 1896, movie theaters were open in France

(ii) Italy (Rome, Milan, Naples, Genoa, Venice, Bologna, Forlì), Brussels & London.

(iii) In 1896, Edison showed his improved Vitascope projector, the first commercially successful projector in the U.S.

(iv) Cooper Hewitt invented mercury lamps which made it practical to shoot films indoors without sunlight in 1905.

(v) The first animated cartoon was produced in 1906.

(vi) Credits began to appear at the beginning of motion pictures in 1911.

(vii) The Bell and Howell 2709 movie camera invented in 1915 allowed directors to make close-ups without physically moving the camera.

(viii) By the late 1920s, most of the movies produced were sound films.

(ix) Wide screen formats were first experimented with in the 1950s.

(x) By the 1970s, most movies were color films. IMAX and other 70mm formats gained popularity. Wide distribution of films became commonplace, setting the ground for "blockbusters."

(xi) From its birth in the 1880s, movies were predominantly monochrome. Contrary to popular belief, monochrome doesn't always mean black and white; it means a movie shot in a single tone or color.

(xii) Film cinematography dominated the motion picture industry from its inception until the 2010s when digital cinematography became dominant.

(xiii) In late 2013, Paramount became the first major studio to distribute movies to theaters in digital format, eliminating 35mm film entirely. Since then the demand for movies to be developed into digital format rather than 35mm has increased drastically.

REGISTRATION OF A WORK – GUIDELINES

Chapter VI of the Copyright Rules, 1956, as amended, sets out the procedure for the registration of a work. Copies of the Act and Rules can be obtained from the Manager of Publications, Publication Branch, Civil Lines, Delhi, or his authorized dealers on payment. The procedure for registration is as follows:

(i) Application for registration is to be made on Form IV (Including Statement of Particulars and Statement of Further Particulars) as prescribed in the first schedule to the Rules

(ii) Separate applications should be made for registration of each work

(iii) Each application should be accompanied by the requisite fee prescribed in the second schedule to the Rules

(iv) The applications should be signed by the applicant or the advocate in whose favour a Vakalatnama or Power of Attorney has been executed. The Power of Attorney signed by the party and accepted by the advocate should also be enclosed.

Both published and unpublished works can be registered. Copyright in works published before 21st January 1958, i.e., before the Copyright Act, 1957 came in force, can also be registered, provided the works still enjoy copyright. Three copies of published work may be sent along with the application. If the work to be registered is unpublished, a copy of the manuscript has to be sent along with the application for affixing the stamp of the Copyright Office in proof of the work having been registered. When a work has been registered as unpublished and subsequently it is published, the applicant may apply for changes in particulars entered in the Register of Copyright in Form V with prescribed fee.

COPYRIGHT IN CINEMATOGRAPH FILM UNDER S. 14(D) WITH EXCLUSIVE RIGHTS

Copyright protection is available only to the cinematograph film including the soundtrack. The cine artists who act in the film are not protected by copyright law for their acting. The actors or performers in the film are conferred certain special rights called Performer's Rights. Since a film includes performances by various actors, dancers, and so on, their permission is required to film their performances. This is usually done by separate contracts with the performers.

To communicate the film to the public means making the film available for being seen or heard or otherwise enjoyed by the public directly or by any means of diffusion regardless of whether any member or public actually sees, hears or otherwise enjoys the film so made available. Communication includes communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel. Communication to a private audience is not included. What is prohibited is the commercial exploitation of the film without the consent of the owner or without the license of the owner of the copyright.

Effects of Censorship on Copyright - Where the owner of a cinematograph film has committed an offence under the law relating to film censorship and is liable to prosecution for that offence, the question arises whether it would affect his right to copyright in the film. Since the subsistence of copyright depends only on the provisions of the Copyright Act it would appear that the fact that the owner has not complied with the film censorship requirements will not affect the subsistence of copyright in the film or the enforcement of remedies against infringement.

The **performance of an actor is not a work** and so not protected by the Copyright Act. Thus the performance of cine artists is not protected by copyright law. However, the Copyright (Amendment) Act 1994 has provided certain special rights to performers called "Performer's Rights" as mentioned in section 38 of the act.

COPYRIGHT IN LYRIC AND MUSIC AND OWNER OF CINEMATOGRAPH FILMS

Once the author of a lyric or a musical work parts with a portion of his copyright by authorizing a film producer to make a cinematograph film in respect of his work and thereby to have his work incorporated or recorded on the soundtrack of a cinematograph film, the latter acquires by virtue of section 14(d) of the Copyright Act on completion of the cinematograph film a copyright which gives him the exclusive right inter alia of performing the work in public for example to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyric or a musical work for the performance of the work in public. In other words, a distinct copyright in the aforesaid circumstances comes to vest in the cinematograph film as a whole which in the words of the British Copyright Committee set up in 1951 relates both to copying the film and to its performance in public.

The author (composer) of a lyric or musical work who has authorized a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the soundtrack of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the soundtrack associated with the film by utilizing such soundtrack or from communicating or authorizing the communication of the film by radio-diffusion, as s. 14(1)(c) now replaced by the new S. 14 (d) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things. In such cases, the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work.

MOTION PICTURE WHETHER A PIECE FOR RECITATION OR A CHOREGRAPHIC WORK ENTERTAINMENT IN DUMB SHOW

From the definition of "dramatic work" a motion picture cannot be regarded as a piece for recitation or a choreographic work or entertainment in dumb show. Under S. 2 (h), these three types are specified only for the scenic arrangement or acting form of which (in the three types) is fixed in writing or otherwise. When this requirement is satisfied then the work under consideration will amount to a "dramatic work" which will be protected. The words "or otherwise" found in the definition of "dramatic work" seem, only to provide for the modern means of recording such as a tape-recorder or a Dictaphone and similar instruments. The concluding portion of the definition of "dramatic work" in the sub-section, excludes a choreographic film.

Thus the dramatic performance of a cine artiste which is fixed or recorded in the film negative will not be "dramatic work" within the meaning of this definition and therefore protected by the Copyright Act. Although the definition is an inclusive definition, it would not be permissible to extend it to cover all cases where the work can be popularly described as exertions or efforts of a dramatic nature. The words "fixed in writing or otherwise" would seem to suggest a point of time prior to the acting of scenic arrangement, which requirement would be required to be satisfied before the work can qualify to be a "dramatic work" and secure protection. It is debatable whether the record of the acting or scenic arrangement made on a film after the scene is arranged or acting done or contemporaneous therewith, would be covered by the definition

Whether film is a Recording of 'work or Dramatic Work' - A film could be both a recording of a dramatic work and a dramatic work in itself, or alternatively, a recording of something-which was not a dramatic work, or a dramatic work in itself but not a recording of a dramatic work. There is no Copyright in mere style or technique. In order to interpret the 1988 Act consistently with. the Berne Convention, the cinematographic works referred to in the convention have all to be included within the Acts category of dramatic works, even in cases, where the natural meaning of 'dramatic work' did not or might not embrace the particular film in question.

Norowzian v Arks Ltd[1] In this case the question as to whether a short film called "joy" consisting of a man dancing to music was infringed by another film called 'Anticipation'. In both films the visual impact was produced by an editing technique known as 'jump cutting'. Both were

[1] 1 [2000] FSR 363 (CA).

advertising films. It was held by the court of appeal that (i) Since 'joy' was a work of action capable of being performed before an audience it was a dramatic work (ii) 'Joy' was not a recording of a dramatic work; (iii) 'Anticipation' was not a copy of a substantial part of 'joy'.

Sound Recording- Copyright exist in a sound recording Sound recording means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are reproduced. Copyright will subsist in a sound recording only if it is made as per the Act. Copyright will not subsist in any sound recording made in respect of literary, dramatic, or musical work, if in exist in the making the sound recording, or that copyright in such work has been violated or infringed. The right of sound recording is different from the subject matter recorded as they are the subject of independent copyrights. The author of a sound recording is the producer.

Details to be Included in sound recording and video films Under S. 52A introduced by the Copyright (Amendment) Act 1984, the following particulars should be displayed on sound recording or video films or video cassettes, as the case may be, or any container thereof namely: (i) The name and address of the person who has made the sound recording (ii) The name and address of the owner of the copyright in such work (iii) The year of its first publication.

Recording Music - Musical works and sound recording embodying the music are considered separate subject matters for copyright. Thus copyright in the recording of music is separate from the copyright in the music. Copyright in the music vests in the composer and the copyright in the music recorded vests in the producer of the sound recording. Where the song has not been written down and the composer who is also the performer records the song two copyrights come into existence at the same time, one for the music and one for the sound recording.

COPYRIGHT INFRINGEMENT IN INDIAN CINEMA

The Copyright Act 1957 governs the subject of copyright laws in India. Copyright is a bundle of rights given by the law to the creators of literary, dramatic, musical, and artistic works and the producers of cinematograph films, and sound recordings. The rights provided under Copyright law include the rights of reproduction of the work, communication of the work to the public, adaptation and translation of the work. India is a member of most of the important international conventions governing the area of copyright law, including the Berne Convention of 1886 (as

modified at Paris in 1971), the Universal Copyright Convention of 1951, the Rome Convention of 1961, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The duration of the copyright protection for literary, dramatic, musical, and artistic work is till the lifetime of the author or until 60 years from the beginning of the calendar years next following the year in which the work is first published. Section 19 of the Copyright Act 1957 lays down the modes of assignment of copyright in India. Assignment can only be in writing and must specify the work, the period of assignment and the territory for which assignment is made If the period of assignment is not specified in the agreement, it shall be deemed to be 5 years and if the territorial extent of assignment is not specified, it shall be presumed to be limited to the territories of India.

In a recent judgment (**Pine Labs Private Limited v. Gemalto Terminals India Limited**), a division bench of the Delhi High Court confirmed this position and held that in cases wherein the duration of assignment is not specified, the duration shall be deemed to be five years and the copyright shall revert to the author after five years. Copyright infringement is the use of works protected by copyright law without permission, infringing certain exclusive rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works.

The copyright holder is typically the work's creator, or a publisher or other business to whom copyright has been assigned. Copyright holders routinely invoke legal and technological measures to prevent and penalize copyright infringement. Bollywood has been waking up to copyright infringement cases because of the recent trend of remaking films based on south Indian films and taking inspiration from Hollywood films has shifted the focus to the cause of protection of intellectual property rights in entertainment industry. For a long time, filmmakers in Hollywood were largely unaware of their films being copied in India. The unlicensed copying of movies, changing a few sequences in the film and conveniently passing them off as "inspirations" to avoid giving credit to the original filmmakers is an all too familiar practice here. But the scenario is slowly changing now, with Hollywood on the defensive for protecting their work by setting up offices in India to monitor any unlicensed copying of American movies.

In 2010, for the first time, a successful suit was filed by Twentieth Century against Sohail Maklai Entertainment for the unlawful remake of Twentieth Century's 2002 thriller Phone Booth, into

Knock Out. It was for the first time when an Indian court ruled that Bollywood infringed a Hollywood copyright. The Bombay High Court awarded Twentieth Century injunctive relief until Sohail Maklai Entertainment paid $340,000 in damages. The Indian film industry has had a long history of ripping-off Hollywood and other foreign language films and the audience is used to this trend. But I am appalled that in this day and age Bollywood filmmakers are still resorting to the easy way out – plagiarizing Hollywood and other foreign language movies at a time when Indian films are trying very hard to become global. But this trend has made the Indian film industry pay hefty prices as damages and compensation to other foreign movie makers and producers.

As these two words, plagiarism and copyright infringement may sound similar but these two are different in many ways. Copyright infringement is a very broad term, rooted in the law that covers a wide range of unlawful activities that violate the rights of copyright holders. Copyright infringement is a construct of the law; plagiarism is a construct of ethics. Anything that is seen as an unethical and unattributed use of another's original creation can be defined as plagiarism.

The key difference between plagiarism and copyright infringement is that not all plagiarisms are infringements and not all infringements are plagiarisms. For one, a person can plagiarize almost anything, including works that are not protected by copyright. If you were to claim to have written "Hamlet", for example, it would be plagiarism but not a copyright infringement because the play is in the public domain and is not protected by copyright.

JUDICIAL PRONOUNCEMENTS ON OWNERSHIP

In Garcia v. Google,[2] The Ninth Circuit Court of Appeals came to its senses and held that an actress did not own any separate copyright interest in her performance that was embodied in a film, so she could not use the copyright laws to block the release of the film. The court's rationale was twofold - one pragmatic and one legal: The pragmatic reason was that permitting all actors to claim a copyright interest in their performances would make film making next to impossible, as everyone involved with a film could claim some piece of copyright ownership. The legal reason was that the actress was not the "author" of the film, since she was not the person that recorded it in a tangible medium. In a remarkable dissent that should alone disqualify

[2] Inc., No. 12-57302 (9th Cir. 2014).

him from future consideration for appointment to the Supreme Court, Judge Kozinski stood his ground as the author of the original reversed opinion, and his dissent was as passionate as it was blatantly wrong, just reiterating his prior goofy reasoning.

But more importantly, and only one month later, the influential Second Circuit Court of Appeals went further in 16 Casa Duse LLC v. Merkin,[3] and held that unless joint authorship was actually intended by two or more parties, the copyright to a film could only be owned by one person or entity, identified as the person that is the "dominant author" of the film. In most cases (as was held in that case), the "dominant author" is the production company making the film. Importantly, this case dealt with a director that had declined to ever sign a work made for hire agreement, despite repeated requests. The court held that even though the director added his own creative skills and actually recorded the film on a tangible medium, he was not an "author" of the film and had no copyright claim to the film. This holding means that at least in the Second Circuit, it is no longer necessary to get any written agreements with the various contributors to a film, whether directors, actors, or whoever, in order for the production company to be secure that it owns the entire copyright to the film. Up until that case, most lawyers assumed that at least the director had a claim of copyright authorship to a film, so it was believed necessary to obtain a written agreement from the director confirming that the filming was done as a work made for hire for the production company.

Under the logic of 16 Casa Duse LLC v. Merkin[4], ancillary creative contributions that might independently qualify for copyright become subsumed within the copyright to the film itself. It is not quite clear just how far this logic will be applied. To pick just one extreme example, what if the director had independently written the screenplay on spec? It is hard to imagine that the director would not have a copyright claim against the film as being a derivative work based on the screenplay, but under the logic of the case the production company should own the copyright to the film outright, as the "dominant author" of the film. Or what about all the cases that involve some underlying copyrighted work (such as a quilt or artwork) that is incorporated into a film? Certainly, those claims will survive. 16 Casa Duse LLC v. Merkin might have been on firmer ground if it had held, as other cases have, that when one person requests another to work on a

[3] No. 13-3865 (2d Cir. 2015).
[4] No. 13-3865 (2d Cir. 2015).

specific copyrighted work, that the person performing the work (in this case, the director) is deemed to be an "employee" of the person requesting the work for copyright purposes, so the contributions become part of the copyright owned by the person requesting the work, even in the absence of any written agreement. One might guess that 16 Casa Duse LLC v. Merkin will later be distinguished on that basis.

In all events, the two recent cases go far in clarifying just who can (or more accurately, who can't) make a claim to copyright ownership in a film, and they are both certainly welcome news to all film production companies.

CONCLUSION

The owners of films hold the right to perform or screen, reproduce or communicate the film. Indian cinema has been indulging in copyright infringement and Hollywood has good knowledge about it, but Hollywood producers fear the slow and tedious Indian judicial process which keeps aggrieved Hollywood producers from seeking redressal in cases of plagiarism. Moreover, ingenious producers suitably change plots and storylines which makes it very difficult to prove in the court of law that a theme has been plagiarized. The second reason why Hollywood doesn't seem to care is most movies with "inspired" plots hit the Indian screen at least two years after the original is released even in India, by which time the potential of the Hollywood version is exhausted. Copyright infringement is downright immoral, unethical and due credit should be given to the original author of the work and his ideas. Tickets Film studios in Chennai are bound by legislation, such as the Cinematography Film Rules of 1948, the Cinematography Act of 1952 and the Copyright Act of 1957. In Tamil Nadu, cinema ticket prices are regulated by the government. Single screen theatres may charge a maximum of Rs.50, while theatres with more than three screens may charge a maximum of Rs.120 per ticket.[5]

[5] S.R. Ashok Kumar, *Cinema ticket rate revision reflects a balancing act* (2 January 2007).