

Continued Economic Benefit to the Author: Royalties in the Indian Film Industry – Historical Development, Current Status, and Practical Application

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Abstract

The chapter traces the stance that Indian copyright law has adopted on the issue of royalty payments to authors of literary and musical works, through the years. It delineates the court judgments that have exerted a significant impact on the subject, the development of the law, and the practical realities and application of the law. The first part of the chapter details the structuring of music production deals in India. The next section explores the relevant judicial precedents and the issues with the copyright societies in India. The third section traces the amendments introduced in 2012, thereby changing the royalties landscape, and the last part assesses the aftermath of these amendments.

The chapter is specific to the Indian law on the subject of royalties and the significance of royalties given the massive scale at which content, i.e., movies, television programs, and now web-based content, is produced and exploited in India. Music production has continued to play an important role in the realm of content production and distribution in India (“In its 103-year-old history, songs have been an integral part of Hindi movies ever since the first talkie, *Alam Ara*, released in 1931. Over the years, apart from their cultural and aesthetic significance, songs have added tremendous business value to films. The industry believes that songs become the identity of films in India, especially due to a marketing culture that relies on film stars and little else.” *Is Bollywood still wary of ‘song-less’ films?* Mint (April 21, 2016).), and music production, as detailed in the chapter, assumed immense significance in the context of the statutory royalties introduced vide the amendments to the Indian copyright law in 2012.

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Keywords

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1 Introduction

.... one of the plain objectives of the proposed legislation is to ensure that the authors of the works, in particular authors of songs included in cinematograph films or sound recordings, receive royalty for the commercial exploitation of such works.¹

The importance of music in cinematograph films created in India cannot be overstated. Many films produced in India are identified by the music. A lot of the music that is created in connection with cinematograph films in India is actually incorporated in the films, interspersed at regular intervals throughout the progression of the story. Hence, music holds a special significance in the context of content, in particular, Indian cinema.

Given the immense popularity of film music in India, it is unimaginable that the creation of music and accompanying lyrics would not constitute a lucrative business for the authors of these works. However, a close scrutiny of the status quo establishes that while the musical composition and the lyrics are the intellectual work of the respective authors, the substantial remuneration that accrues from the exploitation of the music actually flows to entities that may have procured the rights to it for a monetary consideration without any intimate involvement in the creative process.

This chapter explores the laws relating to equitable remuneration or “royalties” as the term is understood and used under the Indian copyright law. In particular, it explores the historical position on royalties, the current law on the subject, and the continuing complexities. At the outset, it is appropriate to clarify that the statutory concept of royalties was introduced in the Indian copyright law only in the year 2012. Hence, while prior to 2012, the payment of royalties was recognized as a requirement and an entitlement; there was no statutory mandate on it.

2 Music Deals: Indian Context

Each piece of music amalgamates several independent works. It includes the musical works composed by a music composer and the lyrics authored by a lyricist unless the music constitutes the background score for the particular cinematograph film. The musical work and literary work are fused together in a sound recording by the producer of the sound recording. This sound recording is usually incorporated in

¹Paragraph 10.20, Clause 7: Section 19: “Mode of Assignment,” Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, Rajya Sabha Secretariat.

the cinematograph film. The musical work, the literary work, the sound recording, and the cinematograph film each constitute a separate and independent class of work. The definition of a “work” as detailed in the Copyright Act, 1957 (“Act”), disambiguates this conceptual differentiation.²

While certainly not all, but a large part of the music in India is for incorporation in films or other forms of content such as television programs or web series. The structure of music deals in the Indian film industry³ usually involves the following processes:

1. The producer of the film “commissions” the music composer to create the musical composition and enters into a separate agreement for the lyrics, whereby the lyricist is similarly commissioned to author the lyrics.
2. The music composer and lyricist are required to assign all their rights in the musical compositions and lyrics to the producer.
3. The music composer is also delegated the responsibility of creating the sound recording for each song and delivering this to the producer. The rights in the sound recordings are assigned to the producer.
4. The music composer is also delegated the responsibility of procuring appropriate assignment of rights from the various singers, musicians, who render services in relation to a particular song.
5. The producer of the film assigns the rights in the songs to a music label that ultimately exploits the music rights in a film.

The spectrum of rights that is assigned to the producer of the film, and subsequently to the music label, usually assumes the format of an “all inclusive” assignment including all rights of exploitation and the entire copyright in the music. The music label is hence entitled to exploit the music through all modes and mediums of exploitation, including those that are only anticipated to be invented at a future date. The constant evolution and development of technology have expanded the scope of the modes through which music can be exploited. While earlier, the most commonly used medium for accessing and listening to music in India was the radio, cassettes, and later compact discs, in the present day the most ubiquitous medium is digital platforms. It is also important to bear in mind that digital platforms have supplemented, not supplanted radio and compact discs, which continue to be used by many people in India. Further, music companies also exploit the songs in audio-visual format, through authorizing various television and digital platforms to exhibit either the full-length songs or snippets from the songs.

²Section 2(y) of the Act provides that “work” means any of the following works, namely—(i) a literary, dramatic, musical, or artistic work; (ii) a cinematograph film; and (iii) a sound recording.

³While this chapter refers to the “Indian film industry,” it is important to note that there is no “a” Indian film industry. Bollywood is undoubtedly India’s most prominent and internationally recognized film industry. However, apart from Bollywood, there are several regional film industries in different parts of India.

The equal right to royalties⁴ accruing from exploitation of literary and musical works arose in the context of the rampant monetization of music by producers of films and music companies and the concomitant exclusion of music composers and lyricists, from a share in this commercialization. The amendments introduced in 2012 to the Act attempted to address three interrelated concerns of authors of literary and musical works incorporated in cinematograph films and sound recordings:

1. Authors would be entitled to receive an equal share of royalties each time the works are exploited as part of a cinematograph film, except in the case of distribution of the film in a cinema hall or in a sound recording not forming part of a cinematograph film. The royalties would be payable regardless of the medium of exploitation.
 2. The assignment of the copyright in the works cannot be construed to extinguish the author's right to receive royalties accruing from the exploitation of such works. While the copyright can be assigned, the right to receive royalties cannot be assigned by the author to any person other than to the author's heirs or a copyright society for collection and distribution of royalties.
 3. The proviso to Section 18 of the Act, introduced vide the 2012 amendments, sought to restrict an assignment of copyright in respect of unforeseen modes and mediums of exploitation⁵: "Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work." The intent behind the amendment was to ensure a guaranteed stream of royalties to authors upon the advent of new technological formats. "In short, the amendments in section 18 will protect interests of authors in the event of exploitation of their work by restricting assignments in unforeseen new mediums and henceforth author of works in films will have right to receive royalties from the utilization of such work in any other form except to the legal heirs or to a copyright society and any other contract to the contrary shall be void."⁶
- However, since the proviso referred to an "assignment," contracts have employed a "license" from the author to such future modes and mediums.

⁴Introduced vide the Proviso to Section 18 of the Copyright Act, 1957, through the amendments enacted in 2012. Please see *infra* Note 32.

⁵The historical precedent to the introduction of the proviso was the withholding of "ringtone" related royalties to authors of literary and musical works, a format of music exploitation that garnered immense popularity in India in the early 2000s; see Prashant Reddy T., *The Background Score to the Copyright (Amendment) Act, 2012*, 5 NUJS L. Rev. 469 (2012).

⁶Paragraph 9.18, Clause 6: *Section 18: Assignment of Copyright*, Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, Rajya Sabha Secretariat.

3 Historical Perspective

3.1 Judicial Backdrop to the Amendments

An oft-used argument by producers of cinematograph films to deny royalties to authors related to the commissioned status of the works created by such authors. A work is considered to be “commissioned” under the Act if it is created at the instance of another person. Section 17 of the Act encapsulates the principle of “commissioned” works. The relevant portion of the erstwhile provision as it read prior to the amendments in 2012 is reproduced below:

(b) subject to the provision of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.⁷

The provision operated to vest first ownership of the identified classes of works in the person who extended “valuable consideration” and at whose “instance” the cinematograph film was made.⁸ Since one of the enumerated classes of works was cinematograph films, producers of such works argued that the entire copyright in the underlying works, such as musical works and literary works, incorporated in a cinematograph film, was owned by the producer by virtue of the qualifying status of the film as a commissioned work. It is perhaps apposite to explain here that under the Indian copyright laws, authorship and ownership of a work are bifurcated. An author of a work may not be the first owner of the work in all instances. The general proposition is that the author is also the first owner of the work. However, this general principle is defeated in cases of a work created in the course of employment and in the cases of commissioned works.⁹ Producers of cinematograph films used the “commissioned” status of the films to argue that by implication, authors were also

⁷ Section 17(b) of the Act as last amended by Act No. 49 of 1999.

⁸ Section 17(b) of the Act as last amended by Act No. 49 of 1999.

⁹ See Section 17 of the Act (reproduced in part): “First owner of copyright.—Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Provided that—(a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work; (b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein; (c) in the case of a work made in the course of the author’s employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.”

divested of their right to receive royalties, in conjunction with the copyright in their works, to the producer of the film who would be deemed the first owner of the film including all works incorporated therein. The stance employed by the producers was bolstered by a decision of the Supreme Court of India in *Indian Performing Right Society Ltd. v. Eastern India Motion Pictures Association*.¹⁰ The Indian Performing Right Society (IPRS)¹¹ instituted an appeal against the order of the Calcutta High Court which held that the producer of a film could oust the first ownership of the literary or musical works incorporated in a cinematograph film, by the authors of such works, in cases where the film constituted a commissioned work under Section 17(b) of the Act:

In our opinion, therefore, when a composer of lyric or music composes for the first time for valuable consideration for purposes of a cinematograph film, the owner of the film at whose instance the composition is made, becomes the first owner of the copyright in the composition. The composer acquires no copyright at all either in respect of the film or its sound track which he is capable of assigning.¹²

The Supreme Court affirmed the decision of the Calcutta High Court. The Supreme Court held that when a literary or musical work is commissioned by a producer for incorporation in a cinematograph film, the copyright in the entire film, including the underlying literary and musical works, vests with the producer by virtue of Section 17 of the Act:

This takes us to the core of the question namely, whether the producer of a cinematograph film can defeat the right of the composer of music ... or lyricist by engaging him. The key to the solution of this question lies in provisos (b) and (c) to section 17 of the Act reproduced above which put the matter beyond doubt. According to the first of these provisos viz. proviso (b) when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric therefore i.e. the sounds for incorporation or absorption in the sound track associated with the film, which as already indicated, are included in a cinematograph film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other.... It is, therefore, crystal clear that the rights of a music composer or... lyricist can be defeated by the producer of a cinematograph film in the manner laid down in provisos (b) and (c) of section 17 of the Act.¹³

¹⁰ 1977 AIR 1443. "The Cinematograph Exhibitors Association of India also filed objections challenging the right of the IPRS to charge fees and royalties in respect of performance in public of the musical works incorporated in the sound track of the films. Besides raising contentions identical to those raised by various associations of producers they averred that copyright in a cinematograph film which vested in the producers meant copyright in the entirety of the film as an integrated unit including the musical work incorporated in the sound track of the film and the right to perform the work in public..."

¹¹ IPRS is the primary copyright society in India for literary and musical works. It issues licenses and collects and distributes royalties, in respect of literary and musical works.

¹² Paragraph 33, *Eastern India Motion Pictures Association v. Indian Performing Right Society Ltd.* AIR 1974 Cal 257.

¹³ *Indian Performing Right Society Ltd. v. Eastern India Motion Pictures Association* 1977 AIR 1443. Paragraph 18 of the decision as sourced from Manupatra.

The argument adopted by producers was clearly anomalous given that the “right to receive royalties” is not recognized by the Act as a right flowing from the copyright in a work. Section 14 of the Act¹⁴ details the rights that are construed to be included in the copyright in a work. The right to receive royalties is conspicuously absent from rights enumerated in Section 14. Hence, the right to receive royalties is deducible from the factum of authorship, i.e., it is attendant upon the authorship of a work and not the copyright in a work.

Further, the argument also overlooks the distinction created between the various classes of works in Section 13 of the Act. Section 13 clarifies that literary works, musical works, cinematograph films, and sound recordings are separate classes of works and copyright subsists in each work. The erstwhile Section 17(b) of the Act refers to the commissioning of a cinematograph film, not the independent works that are incorporated in it. The cinematograph film, as a whole, is owned by the person who commissioned it. Conceptually, the provision is inextricably linked to the distinction between the author and the first owner of a work under the Act. Section 2(d)¹⁵ of the Act states that the author of a cinematograph film is the producer of the film. However, by virtue of Section 17(b), the first owner of the cinematograph film could be a person other than the producer, i.e., the person at whose instance and consideration the film was made.

The bifurcation becomes clear when the definitions in the Act are viewed in the context of the reality of film production deals in India. Section 2(uu)¹⁶ of the Act defines a “producer” as a person who takes the initiative and responsibility for making the cinematograph film. The structure of film production deals in India involves multiple parties, frequently commencing at the instance of an entity that possesses the financial resources to commission the development of the film, and this entity usually delegates the responsibility of completing the film to a production house. Since the production house assumes the actual responsibility and initiative for making the film, the production house is recognized as the “producer” under Section 2(uu) of the Act. Conversely, given that the film is made at the instance of and with the aid of the consideration advanced by the financing entity, this entity is ultimately construed to be the “first owner” of the film under Section 17 of the Act.

¹⁴ Section 14(a) of the Act elucidates the various rights comprised in the copyright vesting in a literary or musical work, these include “(i) to reproduce the work in any material form including the storing of it in any medium by electronic means; (ii) to issue copies of the work to the public not being copies already in circulation; (iii) to perform the work in public, or communicate it to the public; (iv) to make any cinematograph film or sound recording in respect of the work; (v) to make any translation of the work; (vi) to make any adaptation of the work; (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);.

¹⁵ “author” means,—(i) in relation to a literary or dramatic work, the author of the work; (ii) in relation to a musical work, the composer; (iii) in relation to an artistic work other than a photograph, the artist; (iv) in relation to a photograph, the person taking the photograph; (v) in relation to a cinematograph film or sound recording, the producer; (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created” Section 2(d), *The Copyright Act, 1957*.

¹⁶ “‘producer’, in relation to a cinematograph film or sound recording, means a person who takes the initiative and responsibility for making the work” Section 2(uu), *The Copyright Act, 1957*.

While the law reflects the realities of film production in India through conferring appropriate legal status on the various parties involved, the argument advanced by producers and related entities conflates the cinematograph film with the literary and musical works incorporated in it. Ostensibly, the literary and musical works are created for incorporation in the film. However, as stated earlier, under Section 13 of the Act, each work constitutes a separate and independent work. Section 14 delineates the various rights associated with the copyright in each work. Hence, while the cinematograph film in totality is owned by the person that commissioned it, the various works comprised in it continue to retain their independent status and would continue to be owned by the author unless expressly assigned to the producer or the commissioning entity by the author. It is arguable to presuppose that to the extent that the literary and musical works are synchronized in the cinematograph film, they are owned by the commissioning entity to the extent of their synchronization, but to extend the argument to all other rights devolving from the copyright in a work would be counterintuitive to the independent status afforded to each class of work under the Act.¹⁷

A similar question was raised in Indian Performing Right Society Ltd. v. Aditya Pandey & Ors.,¹⁸ wherein the Delhi High Court considered whether the underlying literary and musical works are also performed each time that a sound recording is performed. The court concluded that when a sound recording is communicated to the public, there is no separate communication of the underlying literary and musical works, since the sound recording fuses the underlying works during the process of production of the eventual sound recording:

when a sound recording is communicated to the public by whatever means, it is the whole “work” i.e. the lyrics, the score, the collocation of sounds caused by the equipment and the capturing of the entire aural experience which is communicated. The musical or literary work, which is the subject matter of the copyright under Section 14(a) of the Act, per se is not communicated or broadcast; nor is there a method of separating that element, while communicating the entire work, i.e. the sound recording, to the public. The recognition afforded by the Parliament to the content of sound recording itself suggests that the content of a sound recording is perceived in law, as different from that of a musical or literary work, though there may be a coalescence of the two, but not necessarily so, all the time. It is, therefore, unjustified to say that when a sound recording is communicated to the public by way of a broadcast the musical and literary work is also communicated to the public, through the sound recording.

The Delhi High Court hence ruled that a separate license is not required to be procured each time that the sound recording is communicated to the public since there is no separate communication of the underlying literary and musical works.

¹⁷“It may not be out of place to mention here that Section 17 of the Act specifies the only instances where an author, although engaged under a ‘contract for services’, loses copyright. Those are the instances of taking photograph, drawing painting or portrait, engraving and making cinematograph film.” Gee Pee Films Pvt. Ltd. v. Pratik Chowdhary and Ors., 2002 (24) PTC 392. Paragraph 16 of the decision as sourced from <https://indiankanoon.org/doc/1245689/>

¹⁸CS (OS) 1185/2006 and I.A. Nos. 6486, 6487, 7027/2006 and CS (OS) 1996/2009 and I.A. No. 13692/2009. Paragraph 49 of the decision as sourced from Manupatra.

The court also discussed the counteractive provision contained in Section 13(4) of the Act, which essentially states that the copyright in a cinematograph film or a sound recording has no effect on the separate copyright comprised in the underlying works that form a part of the cinematograph film or sound recording.¹⁹ The court, however, dismissed the argument that the clarification enunciated in Section 13(4) could be interpreted to posit a requirement that a separate license from the authors of the underlying literary and musical works would have to be procured each time that a sound recording is communicated. The court's decision was reached based on the reasoning of the Supreme Court in Indian Performing Right Society Ltd. v. Eastern India Motion Pictures Association²⁰:

In other words, the author (composer) of a lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the sound track 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 sound track associated with the film by utilising such sound track or from communicating or authorising the communication of the film by radio-diffusion, as Section 14(1)(c) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things.

Recently, the Supreme Court affirmed the decision of the Delhi High Court in Indian Performing Right Society Ltd. v. Aditya Pandey & Ors., with an additional stipulation that subsequent to the enactment of the amendments to the Act in 2012, the authors of literary and musical works incorporated in sound recordings would remain entitled to receive an equal share of royalties accruing from the utilization of the sound recordings.²¹

3.2 The Problems with Copyright Societies in India

The amendments enacted in 2012 were also devised as reactionary measures to the denial of royalties and mismanagement of copyright societies in India by music labels. The parliamentary report on the Copyright (Amendment) Bill, 2010, noted the following in relation to the division of interests and inefficient functioning of copyright societies:

The Committees notes that there are inherent problems in the administration and functioning of copyright societies which have been continuing since long. Situation has deteriorated

¹⁹ Section 13(4) of the Act provides "The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made."

²⁰ 1977 AIR 1443. Paragraph 16 of the decision as sourced from Manupatra.

²¹ International Confederation of Societies of Authors and Composers v. Aditya Pandey & Ors., CIVIL APPEAL NOs. 9412-9413 OF 2016. Though the suit was decided post the 2012 amendments to the Act, the law was applied as it existed prior to the effective date of the amendments given that the suit was pending prior to the introduction of the amendments.

to such an extent that the owners of works/music companies are dominating these societies denying equity shares to the performers/authors. The basic reason for such a dismal scenario is obviously entirely different considerations and interests of the owners and authors.²²

The primary copyright societies in India are the IPRS, which grants licenses for and collects and distributes royalties in respect of literary and musical works, and the Phonographic Performance Limited (PPL), which deals with rights in sound recordings. There was, and continues to remain, a clear demarcation between the repertoire of works managed by both the societies. While the IPRS managed the literary and musical works underlying sound recordings, the PPL managed the sound recording itself. However, the music labels which controlled the PPL, as owners of sound recordings, succeeded in ousting the authors of literary and musical works from the governing body of the IPRS, leading to an establishment of control over both the IPRS and PPL by the music labels.²³

Following the exclusion of authors from the governing body of the IPRS, the payment of royalties to authors effectively ceased. A series of notices were addressed by the government to the IPRS demanding an explanation on the cessation of the payment of royalties to authors:

The undersigned is directed to forward a complaint dated 20.12.2010 and 26.12.2010 received by this Ministry from 28 authors and music composers regarding illegalities with respect to administration of Indian Performing Rights Society (IPRS) and non-disbursement of royalties due to them. It has been alleged in the above complaints by these authors and music composers that IPRS is illegally distributing the royalties due to them to its other members.²⁴

The emergence of new modes of exploitation of works exacerbated the issues of the authors. With the rise in popularity of ringtones, authors expected a concomitant increase in the royalties since each time that a ringtone was utilized, royalties were payable to the authors of the literary and musical works and to the owners of such works.²⁵ However, the IPRS claimed that it had assigned the right to grant rights with respect to the utilization of works for ringtones to the PPL, which was managed by music labels:

Sometime in 2004, IPRS inexplicably and certainly at the behest of its Music Company members decided to terminate existing mobile distribution agreements executed with third

²² Paragraph 16.11, Clause 22: Section 35: Control Over the Copyright Society by the Owner of Rights, Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, Rajya Sabha Secretariat.

²³ Supra Note 7, p. 502.

²⁴ Notice dated January 14, 2011, Complaints by some lyricists and composers regarding illegalities with respect to administration of Indian Performing Rights Society (IPRS), Copyright Division, Department of Higher Education, Ministry of Human Resource Development, Government of India, F. No: 10/2/2010/CRB.

²⁵ Authors were at the time entitled to 50% of the royalties, whereby 30% was paid to the music composer and 20% to the lyricist. The basis was the 1993 MOU between IPRS and authors. Letter dated December 26, 2010, addressed to Mr. G.R. Raghavendra, Registrar of Copyrights.

party aggregators. It was discovered much later that the said rights were in fact handed over completely without sanction of the author or composer members to the Phonographic Performance Limited or PPL as it is referred to normally and/or the Indian Music Industry or IMI which is the association of the Music Companies.²⁶

4 The New Royalties Regime

The 2012 amendments to the Act aimed to usher in a new regime of royalty collection and distribution and to ameliorate the existing condition of authors with respect to royalty payments. The most prominent contribution of the amendments was the introduction of an unwaivable right to receive royalties²⁷ by authors of literary and musical works forming part of cinematograph films and sound recordings.²⁸ The new royalties provision was modelled on the authors' remuneration provision contained in the EC Rental Rights Directive.²⁹ Article 4 of the aforesaid Directive encapsulates the following principles:

- (i) It assures authors of an equitable remuneration.
- (ii) The right to equitable remuneration cannot be waived by the authors.
- (iii) The administration of the right may only be entrusted to a collecting society.³⁰

²⁶ Letter dated December 26, 2010, addressed to Mr. G.R. Raghavendra, Registrar of Copyrights.

²⁷ It is important to note that there is no affirmative right to receive royalties in the Act. The right is only deducible from the restriction on authors from assigning or waiving their equal share of royalties, as incorporated in provisos to Section 18 of the Act vide the 2012 amendments.

²⁸ The right was in the form of an unwaivable entitlement to an equal share of royalties to authors of literary and musical works incorporated in a cinematograph film and to authors of literary and musical works incorporated in sound recordings to the extent that such sound recordings did not form part of or were exploited independent of a cinematograph film.

The provisions were incorporated in provisos to Section 18 of the Act and read as follows:

Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void:

Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.

²⁹ 92/100/EEC.

³⁰ The model was envisaged as a panacea to the unequal bargaining powers of authors in comparison with production houses and music labels. Silke von Lewinski, *Collectivism and its role in the frame of individual contracts*, Max Planck Institute for Intellectual Property and Competition Law, downloaded from Elgar Online, p. 117.

Under the 2012 amendments to the Act, royalties accrue and become payable only upon the utilization of the work. If the work is merely incorporated in a cinematograph film or a sound recording, no royalties become payable unless such work is also communicated to the public as part of the cinematograph film or sound recording. Further, royalties are not payable if the work is communicated as part of a cinematograph film in a cinema hall. It is interesting to note that when the Copyright (Amendment) Bill, 2010, was under deliberation, the proposed language omitted “in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall” which forms a part of the current language of the proviso to Section 18 of the Act. The draft amendment also excluded an obligation to pay royalties incumbent upon the exploitation of the works as part of sound recordings. The proposed language³¹ was amended to alleviate the concerns of the authors that excluding royalties arising on account of exploitation of works as part of cinematograph films and sound recordings would deprive the authors of an important source of revenue:

Another objection raised by authors pertained to the inclusion of words ‘other than as part of the cinematograph film’ in sections 18 and 19. Impact of such an amendment would be such that authors would be denied royalties arising out of television/cable broadcast of films and even the distribution/exhibition of films on mobile platforms through 3G technology. They would also be denied their share of the normal license royalty arising out of music used in advertisement films.³²

It is also interesting to note that the amendment introduces an unwaivable right to royalties to authors of all literary works forming part of a cinematograph film, which may include the script and the screenplay of the film as well, apart from the lyrics forming part of the songs of the film. However, the intention, as can be gathered from the parliamentary debates on the amendments, was to enact a statutory regime for royalties owed to authors of lyrics forming part of songs. Further, currently, royalties are paid only to lyricists and music composers, and no royalties are collected or distributed to scriptwriters.³³

³¹ “Provided also that the author of the literary or musical work, included in a cinematograph film or sound recording shall not assign the right to receive royalties from the utilization of such work in any form other than as part of the cinematograph film or sound recording except to the legal heirs or to a copyright society for collection and distribution and any agreement to the contrary shall be void.” Proviso to Section 18, The Copyright (Amendment) Bill, 2010, Bill No. XXIV of 2010.

³² Paragraph 10.10, Clause 7, Section 19: “Mode of Assignment,” Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, Rajya Sabha Secretariat.

³³ “When a song or music is incorporated in a film, it is relating to synchronization right of author and music composer which is assigned to the producer of the film as per section 17(b) or in the absence of agreement, film producer is the first owner. However, film producer is also getting other independent rights of author and music composer of their works envisaged in section 13 of the Act. As per section 17(b), he further assigns these rights to the music companies for upfront lump-sum amount. When the film songs are performed separately and independently through TV/Radio, restaurants, airlines, auditoriums or public functions etc. film producer becomes the first owner and authors/music composers lose economic benefits of exploitation of their works to music

As a response to the circuitous argument adopted by producers and music labels that the commissioning of a cinematograph film also signified the extinguishment of all copyright ownership of the authors of the underlying works, the amendments also introduced a reiteration of the principle that the incorporation of a work in a cinematograph film cannot be construed to affect the author's independent copyright in the work.³⁴ From a contractual perspective, this would mean that unless the author specifically assigns all rights to the work created by such author, the rights will continue to be owned by the author.³⁵ The commissioning of a work for inclusion in a cinematograph film will not affect the myriad of other rights that are encompassed in the copyright owned by the author as the first owner of the work. The clarification also serves to ensure that the author's right to receive royalties pursuant to the exploitation of the work is not impacted by the commissioning of the work for incorporation in a cinematograph film.

The amendments also sought to introduce greater clarity and transparency in the operations of copyright societies. Section 33A³⁶ introduced by the amendments mandates that every copyright society would be required to publish its tariff scheme in the prescribed manner and that a person aggrieved by the tariff scheme could appeal to the Appellate Board. Section 35(3) alludes to the exclusion of authors from the IPRS and enunciated that the governing body of every copyright society should have an equal number of authors and owners of works.³⁷ Section 33(3A) also, *inter alia*, requires all pre-existing copyright societies to register themselves

companies who become ultimate owners of these works." Clause 6: Section 18: Assignment of Copyright, Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, Rajya Sabha Secretariat.

The construct of the discussions was intended to secure royalty rights to lyricists and music composers. However, a consequence of the usage of "literary works" by default scriptwriters was also encompassed.

³⁴ Proviso to Section 17 of the Act provides "Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13."

³⁵ Reiterating the overarching principle encapsulated in Section 17 of the Act that subject to the provisions of the Act, the author will be recognized as the first owner of the work.

³⁶ Section 33A of the Act provides "Tariff Scheme by copyright societies.—(1) Every copyright society shall publish its tariff scheme in such manner as may be prescribed.

(2) Any person who is aggrieved by the tariff scheme may appeal to the Appellate Board and the Board may, if satisfied after holding such inquiry as it may consider necessary, make such orders as may be required to remove any unreasonable element, anomaly or inconsistency therein:

Provided that the aggrieved person shall pay to the copyright society any fee as may be prescribed that has fallen due before making an appeal to the Appellate Board and shall continue to pay such fee until the appeal is decided, and the Board shall not issue any order staying the collection of such fee pending disposal of the appeal: Provided further that the Appellate Board may after hearing the parties fix an interim tariff and direct the aggrieved parties to make the payment accordingly pending disposal of the appeal."

³⁷ Section 35(3) of the Act provides "Every copyright society shall have a governing body with such number of persons elected from among the members of the society consisting of equal number of authors and owners of work for the purpose of the administration of the society as may be specified."

with the central government within a period of 1 year from the date of commencement of the amendments.³⁸

5 The Aftermath of the Amendments

The copyright societies refused to comply with the dictates of the amendments.³⁹ Moreover, since the central government declined to re-register the IPRS and the PPL, as copyright societies, these societies utilized the denial of re-registration as a gambit to evade various investigations initiated by the government in relation to their operations and functionings.⁴⁰ An illustrative argument adopted by the IPRS is reproduced below:

To our utter shock and surprise we were informed by an email/letter dated 25th May 2014 from Office of Retd Justice Mukuk Mudgal that an “Inquiry Officer” has been appointed in exercise of powers under Section 33 of the Copyright Act, 1957 (Act) reas with Rule 50 of the Copyright Rules 2013 (Rules) under the impression that we are still a Copyright Society within the meaning of Section 2(ffd)/Chapter VII of the Act. IPRS is a company under the Company’s Act limited by Guarantee..... We have been directed to inform you by Governing Council (based on legal opinion), that we are not a Copyright Society within the meaning of Section 2(ffd) of the Act....we were to be registered on or before 21.6.2013. Since, the Central Government failed to register the Indian Performing Rights Society (IPRS) as a Copyright Society, the old Registration Certificate.... is deemed to have lapsed.⁴¹

³⁸ “The registration granted to a copyright society under sub-section (3) shall be for a period of 5 years and may be renewed from time to time before the end of every 5 years on a request in the prescribed form and the Central Government may renew the registration after considering the report of Registrar of Copyrights on the working of the copyright society under Section 36:

Provided that the renewal of the registration of a copyright society shall be subject to the continued collective control of the copyright society being shared with the authors of works in their capacity as owners of copyright or of the right to receive royalty: Provided further that every copyright society already registered before the coming into force of the Copyright (Amendment) Act, 2012 (27 of 2012) shall get itself registered under this Chapter within a period of 1 year from the date of commencement of the Copyright (Amendment) Act, 2012.” Section 33(3A), The Copyright Act, 1957.

³⁹ IPRS was also expelled from CISAC because of its failure to comply with CISAC’s professional rules. Achille Forler, My Songs, my royalties, available at <http://www.thehindu.com/todays-paper/tp-opinion/my-songs-my-royalties/article17692046.ece> (March 28, 2017).

⁴⁰ Shannad Basheer, The Day the Music Died: In the “Company” of Collusive Collecting Societies, available at <https://spicyip.com/2014/10/the-day-the-music-died-in-the-company-of-collusive-collecting-societies.html> (October 23, 2014).

⁴¹ Letter dated June 2, 2014, addressed to central government, Ministry of Human Resources Development, Department of Secondary & Higher Education.

Section 33(1) of the Act also mandates that the business of issuing and granting licenses can only be undertaken by a registered copyright society.⁴² As stated above, the IPRS and the PPL were denied re-registration as copyright societies. Further, entities such as Novex Communications Private Limited have been engaged in the business of granting and issuing licenses, in the capacity of private entities. Despite the lack of registration, these entities have claimed to possess the power to issue licenses in respect of the repertoire of works managed by them in their capacity as the owners of the works or the authorized agents⁴³ of the owners. The statutory authority for this stance has been Section 30 of the Act, which entitles the owner of the work to issue licenses in respect of the work or to designate an authorized agent to grant licenses.⁴⁴ The stance assumed by these entities was bolstered by various judgments of the courts in India, which attempted to harmonize the principles reflected in Section 30 and Section 33(1) of the Act. The Bombay High Court in *M/s. Leopold Café & Stores & Anr. v. Novex Communications Pvt. Ltd.*⁴⁵ ruled that that entities, not registered as “copyright societies,” could issue licenses for works as “authorized agents,” as long as they issued such licenses on behalf of the owner of the works:

⁴² Section 33(1) of the Act provides “No person or association of persons shall, after coming into force of the Copyright (Amendment) Act, 1994 (38 of 1994) commence or, carry on the business of issuing or granting licences in respect of any work in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3).”.

⁴³ Novex Communications Private Limited, for instance, states that it is the authorized agent of Yash Raj Films Pvt. Ltd. “Yash Raj Films Pvt. Ltd. (YRF) has appointed M/s Novex Communications Pvt. Ltd. (Novex) as its Authorised agent as per Section 30 of copyright Act as amended where Novex is allowed to enter into non-binding Deal Terms with Third Parties (as specified in Annexure 1) to enable YRF to issue licenses to such Third Parties who wish to use the Content (Sound Recordings)...” Authorization Letter from YRF, dated January 17, 2018, available at <http://www.novex.in/rights-of-novex/>. Further, it states that it is the assignee of “On Ground Performance Rights” in certain other sound recordings: “.... The Assignor, as beneficial owners, hereby agree to transfer and assign the On Ground Performance Rights in respect of Sound Recordings of the Songs....” Section 2.1 of agreement dated March 9, 2017, between Shemaroo Entertainment Ltd. and Novex Communications Pvt. Ltd., available at <http://www.novex.in/rights-of-novex/>. “‘On Ground Performance Rights’ are defined as the communication of the Sound Recordings to the public during on-ground live events or in commercial establishments including but not limited to communication of such Sound Recordings in clubs, hotels, restaurants, playing of such Sound Recordings by disc jockeys like in discotheques or during on ground live events or using the Sound Recordings as a background to any other performances like dance or other performances during any ground live events, parties etc....” Section 1(c) of agreement dated March 9, 2017, between Shemaroo Entertainment Ltd. and Novex Communications Pvt. Ltd., available at <http://www.novex.in/rights-of-novex/>, last visited on April 5, 2018.

⁴⁴ Section 30 of the Act provides “The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing by him or by his duly authorised agent:”.

⁴⁵ SUIIT (L) NO. 603 OF 2014. Paragraph 13 as sourced from <https://indiankanoon.org/doc/44713127/>

It is not, I believe, the mere “carrying on of business” that is interdicted by Section 33. It is the carrying on of the business of issuing or granting licenses in its own name, but in which others hold copyright. Every agent also “carries on business”, but that is the business of agency, with the functioning as such, i.e., clearly indicating that it is acting on behalf of another, one who holds the copyright. This is the only manner in which both Section 33 and Section 30 can be harmonized. An absolute bar even on agency, invoking Section 33, would undoubtedly run afoul of the plain language of Section 30 and render the words “or by his duly authorized agent” entirely otiose.

In a similar instance, the Bombay High Court ruled that the IPRS would not be precluded from granting licenses if such licenses are issued in the capacity of an owner or authorized agent of the owner of the works:

... This means that despite existence of a registered Copyright Society, an Author/Owner is free to be not part of it and can always license his own rights/works independently. Thus, there is no restriction on owner of copyrights in issuing or granting licenses in respect of such literary and musical rights.⁴⁶

Apart from the ability of unregistered entities to engage in the business of issuing licenses in respect of works, another concern has stemmed from the legal entitlement of such entities purporting to act as the authorized agents of the owners, to initiate infringement actions. Under Section 55 of the Act,⁴⁷ only an owner of the work or an “exclusive licensee” can undertake actions to curb infringement of works. An authorized agent is neither an owner nor an exclusive licensee of the work.⁴⁸ Recently, the Bombay High Court restrained Novex Communications Private Limited from undertaking any coercive action against a hotel chain.⁴⁹

⁴⁶ *Indian Performing Right Society Ltd. v. Harsh Vardhan Samor*, Suit (L) No. 1345 of 2015. Paragraph 7 of the decision as sourced from Manupatra.

⁴⁷ Section 55 of the Act provides “Civil remedies for infringement of copyright.—(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.” Section 54 of the Act provides: “Definition.—For the purposes of this Chapter, unless the context otherwise requires, the expression ‘owner of copyright’ shall include—(a) an exclusive licensee; (b) in the case of an anonymous or pseudonymous literary, dramatic, musical or artistic work, the publisher of the work, until the identity of the author or, in the case of an anonymous work of joint authorship, or a work of joint authorship published under names all of which are pseudonyms, the identity of any of the authors, is disclosed publicly by the author and the publisher or is otherwise established to the satisfaction of the Appellate Board by that author or his legal representatives.”

⁴⁸ Prashant Reddy, *Novex Muzzled by Bombay High Court in Recent Threats Action by Gulraj Hotels*, available at <https://spicyip.com/2018/02/novex-muzzled-by-bombay-high-court-in-a-recent-threats-action-by-gulraj-hotels.html>, (February 13, 2018).

⁴⁹ *Gulraj Hotels Pvt. Ltd. v. Novex Communications Pvt. Ltd.*, COMIP (L) NO. 166 OF 2018. It is pertinent to note that previously the Delhi High Court issued an order restraining the IPRS, PPL, and Novex Communications Pvt. Ltd. from issuing licenses in contravention of Section 33(1) of the Act, which requires the business of issuing and granting licenses in respect of works to be undertaken only by a registered copyright society. *M/s. Event and Entertainment Management Association v. Union of India & Ors.* W.P.(C) 12,076/2016.

Certain anomalies in the language of the amendments have also been exploited contractually by various parties:

1. The proviso to Section 18 does not specify which entity is responsible for the payment of the royalties to authors. The natural corollary would be that the entity utilizing the works should also assume the responsibility for payment of royalties, since the royalties become payable only upon utilization of the works. However, contractually, this lacuna has been utilized by assignees or licensees of the works to state that they are not responsible for the payment of statutory royalties. The author is, however, not asked to waive his/her right to receive royalties, since the same would violate the restriction embedded in the proviso to Section of the Act, resulting in the contract being declared void. However, simultaneously, the restriction in the proviso to Section 18 has not acted to preempt assignees or licensees from disclaiming the responsibility to pay the royalty. In many instances, the principle that has been emulated is to clarify in the contract that despite being the assignee or licensee of the works, royalties would be payable only by the entity that eventually utilizes the works.
2. When the amendments were enacted, several contracts between the assignees and authors required authors to agree that the royalties could only be collected through a registered copyright society of which the author was a member. As explained in the preceding sections, owing to the managerial control of copyright societies by the owners of the works, the societies were not distributing any royalties to authors. Further, several societies in India were not re-registered or registered at all as “copyright societies” in accordance with the requirements of the amendments. The contractual provision hence operated to practically forestall the payment of royalties to authors.
3. There is also some ambiguity surrounding what is intended by the “equal share” of royalties mandated by the proviso to Section 18. While ostensibly this would entail a one-third share to each author, i.e., the authors of the literary and musical works, forming part of the cinematograph film or sound recording, and the remaining one-third share to the assignee of the works, contractually the provision has been interpreted to mean the relegation of 50% of the share to the assignee of the works and the apportionment of the remaining 50% between the authors of the literary and musical works.

6 Conclusion: The Way Forward

The future of the royalties regime in India will be determined to a large extent by the manner in which the operations of copyright societies take shape. The IPRS recently re-registered as a copyright society.⁵⁰ The annual report of the society stated that the

⁵⁰ Prashant Reddy, *IPRS Gets Re-registered as a Copyright Society – Akhtar & Saregama Bury the Hatchet*, available at <https://spicyip.com/2017/12/iprs-gets-re-registered-as-a-copyright-society-akhtar-saregama-bury-the-hatchet.html> (December 21, 2017).

governing body now includes an equal number of authors and owners of works.⁵¹ However, the society's future course of conduct will determine its compliance with the requirements stipulated by the amendments. As a precursor to the streamlining of the collection and distribution of royalties in India, greater transparency is needed in the operations of copyright societies. Copyright societies are after all establishment for the collective management of rights, given the benefits of collective management. Further, certainty is also required in the interpretation of the several provisions introduced by the amendments to curtail the myriad explanations and applications of the provisions. The disambiguation of these provisions will undoubtedly introduce finality in an important area of copyright law in India.

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⁵¹ Section 1(b), The IPRS Articles of Association have been amended and the New Articles of Association has been adopted by the General Body of IPRS, Annual Report 2016–17, available at <http://iprs.org/pdf-files/IPRS%20Annual%20Report%202016-17.pdf>

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