

# ● INDIAN APPROACH ON COPYRIGHT PROTECTION FOR CINEMATOGRAPH FILMS



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## **Abstract**

*"Cinematograph film" is any work of visual recording and includes a sound recording accompanying such visual recording including any work which is the result of any similar process of recording and also a video film. The confusion as regards protection of cinematograph film under copyright law emerges from the possible understandings prevailing about the subject. One is that only medium and not the content belongs to the producers of cinema and thus narrow protection is required. On the other hand, the recent trend in various decisions of courts favour content bases approach according to which a film is considered to be copied if there is substantial similarity between the defendant's film and the plaintiff's film, to be judged according to look and feel test. The current state of protection of cinematograph films is in favour of producers of films because the remakes of an original film cannot be made without the authorization of its producer. Although no part of the recording is copied in making remakes. It is in this background that the present paper examines the various decisions to evaluate the merit in the two approaches. The judicial flip-flop and the resulting uncertainty in the position of law on copyright protection for cinematograph films has been highlighted.*

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## **Key words**

*Copyright, Cinematograph film, Medium based approach, Content based approach, Film copyright, Producer of cinematograph film.*

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## **I. INTRODUCTION**

The protection for cinema and the issue of cinema piracy came to fore mainly in the post TRIPs Agreement era. Liberalization of economy coupled with the advent of WTO led countries including India to make important changes in the intellectual property laws including addressing the issue of cinema piracy.<sup>1</sup> There has been a very significant growth in the entertainment sector in India in recent past particularly the film industry. The industry has kept growing despite the periods of economic slowdown.<sup>2</sup> According to Shubha Gupta in the early years of films the laws of censorship and finance were considered more important, however, later the issues of intellectual property generally

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<sup>1</sup>Shubha Ghosh, "A Roadmap for TRIPs: Copyright and Film in Colonial and Independent India", 1(2) *Queen Mary Journal of Intellectual Property*, 2011, pp.146-162, at 157.

<sup>2</sup>The worth of Entertainment Industry of India in 2010 was about US\$ 14.4 billion. It registered a growth of 11% over 2009. It was expected to grow at 14% in subsequent years.

and copyright law particularly came to become more important legislations.<sup>3</sup> It is relevant to note that now a days almost all film production companies are bound to handle intellectual property issue as a major concern in the process of film production.<sup>4</sup>

"Cinematograph film" is any work of visual recording and includes a sound recording accompanying such visual recording including any work which is the result of any similar process of recording and also a video film.<sup>5</sup> "Visual recording" includes any recordings from which moving images may be obtained, it also includes storing the recording in any electronic medium.<sup>6</sup> Therefore, the recorded work with moving visuals/images is considered as a cinematograph film.<sup>7</sup> It is relevant to note that traditionally it is the recording which is thought to be included in the definition as the content belongs to the content creators.

Cinema or the work of audio visual fixation present the most difficult and complicated questions for municipal laws of various countries. Under the laws of the common law countries, employers enjoy the copyright of "cinematographic work". In the copyright legislation of the civil law system, "co-authors" enjoy the copyright of cinematographic works. According to paragraph 3 of Article 89 and paragraph 1 of Article 93 in the *Copyright Law of Germany*, the content of the cinema which include the story, music etc are not considered part of the audiovisual work. According to Article 16 of the *Copyright Law of Japan*, "the authorship of a cinematographic work excludes authors of novels, scenarios, music or other works." According to Article L. 113-7 of the *French Intellectual Property Code*, "the original work constitutes an audiovisual work and authorship of an audiovisual work belongs to persons who have carried out the intellectual creation of the work." According to Article 15 of the *Copyright Law of China*, "the scriptwriter, director, cinematographer, lyric writer, composer of the work shall enjoy the right of authorship."<sup>8</sup> Although in France courts were initially reluctant to protect cinematographic productions as works, in 1905 it was held that a cinematograph film was worthy of protection as a series of photographs. In the U.K., although the first case to classify a cinematograph film as a series of photographs was decided in 1912, it was widely

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Available at:

<http://www.indiaainbusiness.nic.in/industryinfrastructure/service-sectors/media-entertainment.htm>, cited from "Indian Film Industry September: Tackling Litigations" 2013, at 1, available at:

[http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Indian%20Film%20Industry.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Indian%20Film%20Industry.pdf) (last visited on 9-10-2020)

<sup>3</sup>Shubha Ghosh, supra n. 1, at 149.

<sup>4</sup>Helena Axelsson and Andreas Knutsson, "New Challenges for IP in the Film Industry: A Study on how the Swedish Film Industry manages Copyrights", at 11, available at:

<https://pdfs.semanticscholar.org/d425/89a1b03c64875a348e5d98c8c12fc0589293.pdf> (last visited on 9-10-2020)

<sup>5</sup>The Copyright Act, 1957, Section 2(f).

<sup>6</sup>Id., Section 2(xxa).

<sup>7</sup>Available at:[http://copyright.gov.in/Documents/Manuals/CINEMATOGRAPH\\_MANUAL.pdf](http://copyright.gov.in/Documents/Manuals/CINEMATOGRAPH_MANUAL.pdf) last visited on 9-10-2020

<sup>8</sup>Li Weimin, "Study on the Relationship between the Original and the New Cinematographic Works", 6 *China Legal Sci.*, 2018, at 58.



acknowledged before the Copyright Act of 1911 that this should be the case.<sup>9</sup> Under the 1908 Act of the Berne Convention a dual system for the protection of cinematographic productions existed: original cinematographic works were protected as an independent subject matter and unoriginal cinematographic productions as a series of photographs.<sup>10</sup> It is believed that the judicial opinion in India has been in favour of allowing the cinema which is only inspired from other protected works to be non-infringing, such cinema are held to be non-infringing of any copyright. The law of infringement of copyright revolves around the concept of substantial taking/copying. Thus, if the defendant can prove that the copying is not substantial and his treatment of the work is different from the way plaintiff has treated the work no case of infringement is proved.<sup>12</sup> The present paper examines the shift in the approach of Indian courts on the issue of copyright protection for cinematograph films from medium based protection to content based protection and also examines the basis for the shift. The possible missing links have also been identified.

## II. THE MEDIUM BASED APPROACH

The issue of film copyright came in discussion when Bombay High Court decided the case of *Star India Private Limited v. Leo Burnett (India) Pvt. Ltd.*<sup>13</sup> The court proceeded on the understanding that cinema is the visual recording of the content and therefore it is only the recording which belongs to the producer and not the content. The content is generated by the content creators and thus in favour of the producer the protection only extends to medium i.e. the fact of recording. A similar logic applies to phonograms also. It is relevant to note that in case of both cinematograph film and sound recording the approach was to protect only the fact of recording and not the content in favour of the producer. While explaining the position of law on protection of cinema, the court established the distinction between clauses (d) and (e) of section 14 one hand and clauses (a), (b) and (c) of the section on the other hand. In the case of literary, artistic, dramatic and musical works provided under clauses (a), (b) and (c) the right holder has a clear reproduction right i.e. the right to reproduce the work. This right is not mentioned in clauses (d) and (e) which provide for rights in cases of cinema and phonograms. The right to make copies of the cinema and phonogram means that the owner of rights can stop others from copying the recording and nothing more. Therefore, making of a cinema by any person, other than the producer of original cinema, which is same in content does not mean violation of copyright in original cinema. Infringement takes place only when it is actually copied by the process of duplication or when the fact of recording is copied. The making of another film by independently shooting the film does not violate the right to make copies as provided in clause (i) of section 14(d) even if the film resembles the first

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<sup>9</sup>Pascal Kamina, "Film Copyright in the European Union 19, 2002" at 12 cited from Makeen F. Makeen, "The Protection of Cinematographic Works under the Copyright Laws of Egypt and Lebanon", 55 *J. Copyright Soc'y U.S.A.*, 2008, at 228.

<sup>10</sup>*Id.*, at 229. Makeen F. Makeen

<sup>11</sup>Rachana Desai, "Copyright Infringement in the Indian Film Industry", *Vanderbilt Journal of Entertainment Law & Practice*, 2005, at 269.

<sup>12</sup>*Ibid.*

<sup>13</sup>(2003) 27 PTC 81 (Bom).

film. Thus the protection for the owner of right in cinema and phonogram exists only on the surface *i.e* the fact of recording. The position for other works *viz*, literary, artistic, dramatic and musical works is different in the sense that deeper protection on the content is also provided. Court identified the reason for the narrow protection for film and phonogram to be the absence of the requirement of originality for protection. Stronger protection is given to those subject matter which pass stringent test of copyrightability.

Again in the case of *Zee Entertainment Enterprises Ltd v. Gajendra Singh and Others*<sup>14</sup> the Bombay High Court observed on similar lines. Court contrasted clauses (d) and (e) from clause (a), (b) and (c) and held that in case of works other than film and phonogram the right holder can stop others from reproducing the work in any material form. However, this aspect is not mentioned for cinema producers and phonogram producers. The exclusive right for cinema lies only in the recording and therefore producer of cinema cannot stop others from making a cinema having the same content. He can stop others only from making actual copy by the process of duplication. The same justification for such an interpretation as given in *Star India Private Limited* was reiterated.

It is apparent that an audiovisual work gets protection against unauthorized copying only by the process of duplication which is a mechanical process. The theme, plot, format, relation between different aspects of the film etc. are not protected. In the light of above opinions one may conclude that the skill part of the film which included camera techniques and editing etc. which may transform a mediocre work into a classic piece are not covered by protection under the law.<sup>15</sup>

### III. BEGINNING OF THE CONTENT BASED APPROACH

In *Shree Venkatesh Film v. Vipul Amritlal Shah*,<sup>16</sup> the court observed that copyright in cinema is infringed by making remakes provided the condition of substantial similarity between the works is established. The position is true even if the law defines cinema to be recording of content created by others. The requirement of similarity here means similarity in scenes. It means that even if the film is not a carbon copy it may still be a case of infringement. The Court also explained the meaning of "carbon copied" and observed that in case of films apart from the type of copying as implied in section 14(d) *i.e.* where the physical form of the film is duplicated or carbon copied, there are other forms of copying of film other than carbon copy which is possible under the provision. The Court gave the word 'copy' a broad meaning, which according to court is in line with the scheme of the Indian law. Thus, the court held that a film will be called as a copied work if considered as a unit the film is substantially similar to some other film which can be judged by applying the test of 'a person of ordinary prudence' which means by applying look and feel test.

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<sup>14</sup>2007 (6) Bom CR 700.

<sup>15</sup>Chintan Chandrachud, "A Dual System of Copyright Protection for Films: Should India Go the *Norowzian* Way? 5(3) *Journal of Intellectual Property Law & Practice*, 2010, at 164.

<sup>16</sup>Civil Suit No. 219/2009, Calcutta High Court, 1 September 2009.



In England, the carbon-copy aspect was applied in the first *Norowzian v. Arks*<sup>17</sup> but it was not approved by the Court in the second *Norowzian v. Arks*<sup>18</sup> when it was observed that an audiovisual work will get film copyright as well as protection as dramatic work.<sup>19</sup> In the first case the issue was whether the story line of film Joy is also under protection under the definition of dramatic work and if it is protected can it be said that the dramatic work has been copied. The court held that the film itself has not been copied thus it is not a case of violation of copyright in film. On the issue of story behind the film and the question whether it is protected by copyright as a dramatic work, the court found against the claimant.<sup>20</sup> The court held that a film is different from a dramatic work it can incorporate the dramatic work but cannot be a dramatic work itself. The Court of Appeal, however, reversed the opinion. According to Lord Justice Nourse, for the purpose of the English law of 1988 a film can be considered as a dramatic work. The ordinary meaning of a dramatic work is that it is a work of action which is capable of performance in the sense that it can be performed. This according to him is the meaning according to section 1(1)(a) of the Act. Applying the definition to a cinema the Judge observed that a cinema, in most case, is a work of action and it can be performed thus it can validly fall within the definition of a dramatic work. Thus he disapproved the opinion expressed in first *Norowzian v. Arks* in which cinema was excluded from the definition of dramatic work.

It is clear from the foregoing that as a result of the decision of court in the *Norowzian* case in England films get stronger protection against unauthorized duplication which includes protection as film as well as protection as dramatic work.<sup>21</sup> On the other hand it is also relevant to note that *Norowzian* presents the possibility in favour of directors of cinema who employ creativity and related skills in various dimensions of the cinema including synchronizing the sequence and editing etc. to claim copyright on the subject in the dramatic work category. It may be mentioned here that such a possibility exists only in relation to cinema which may be considered creative. Thus routine videos will not qualify for the protection.

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<sup>17</sup>The factual matrix of the case was that a film was shot using simple steps by a stationary camera was transformed by employing some editing technique into a film which was significantly different from the film which was actually shot. This film of plaintiff inspired the defendant and he also created a film using the same technique and the result was that the final film contained performance by actor which is humanly not possible and was against the law of nature. [1998] EWHC 315 (Ch).

<sup>18</sup>1999 FSR 79.

<sup>19</sup>The English law on protection of cinema has altogether different elements than other European Union countries. Where other countries protected cinema as work of authorship so as to comply with the requirements of Berne Convention, the English law protected it as a subject matter of neighbouring rights or related rights but at the same time it had to treat cinema as authorial work for the purpose of Berne requirements. The decision in second *Norowzian* presents the justification on the basis of which compliance of English law with Berne requirements can be established which is to treat the creative aspects of film to be part of the definition of dramatic work. Available at:

<https://www.pbookshop.com/media/filetype/s/p/1366698014.pdf> (last visited on 10-10-2020)

<sup>20</sup>*Norowzian v. Arks Ltd & Anor* (No. 2) [1999] EWCA Civ 3014, available at:

<http://nipclaw.blogspot.com/2008/09/copyright-norowzian-v-arks-ltd-anor-no.html>. (last visited on 8-10-2020)

<sup>21</sup>P. Kamina, *Film Copyright in the European Union* (Cambridge University Press, 2002) at 37 cited from Chintan Chandrachud, *supra* n. 15, at 166.

The views of the English court does not seem to apply in India because the definition of dramatic work under section 2(h) of the Copyright Act, 1957 expressly exclude cinematograph film from its scope.<sup>22</sup> The Calcutta High Court in *Shree Venkatesh Film* has held films to be authorial works, but the judgement nowhere recognizes the film to be a dramatic work. The opinion seems to be in accordance with the Berne Convention on the ground that the Convention obliges the members to protect cinema as a work of authorship.<sup>23</sup> Thus, the two clear outcomes of the Calcutta High Court decision are *firstly*, cinematograph film deserves the same level of protection which any other work of authorship gets, however, the observation is not supported by any clear statutory scheme. The *Norowzian* view of considering cinema as a dramatic work could provide the necessary justification or else the court could have found the requirement of originality in cinematograph films within the framework of the Copyright Act. *Secondly*, no observation as regards requirement of originality for protection of films was made which means it is not a requirement for protection. Thus, a new interpretation primarily on the basis of expansion in the meaning of 'copy' has been provided by the court.

A 'cinematograph film' is mentioned under Section 13(1) of the Act, 1957 as a work in which copyright subsists. Further, Section 13(4) of the Act, 1957 stipulates that there is separate copyright in the underline content of the film and it is independent of the copyright in the film. It is pertinent to mention that the Copyright Bill, 1955 was referred to a Joint Committee. In its report, the Committee specifically stated that a cinematograph film is an independent work which will enjoy copyright apart from its component parts. The Statement of Objects and Reasons of the Copyright Act, 1957 specifically states that a cinematograph film will have a separate copyright apart from its various components namely, story, music *etc.*

#### **IV. THE CONTENT BASED APPROACH: FILM IS ORIGINAL WORK OF AUTHORSHIP**

The law on protection and the extent of protection of cinematograph film remained out of discussion for many years after the Calcutta High Court decision till very recently when two decisions over the issue came to fore. As pointed above the law on the point of film copyright evolved from purely medium based approach to contentbased approach, although the theoretical justifications were missing. In *MRF limited v. Metro Tyres Limited*<sup>24</sup> the court observed that despite the fact that the word "original" is not expressly mentioned before the word cinematograph film in Section 13(1)(b) of the Indian Act it is still a requirement by virtue of sub-section (3)(a). It becomes more clear when section 13 of the Act is read in the light of the definitions of 'cinematograph film' and 'author' under clauses (f) and (d) of section 2 of the Copyright Act respectively. Explaining the phrase "to make a copy of the film" in Section 14(d)(i), the court observed that the expression does

<sup>22</sup>According to Section 2(h) of The Copyright Act, 1957, the definition of 'dramatic work' has an inclusive part which includes any piece of recitation, choreographic work or entertainment in dumb show, and it has an exclusive part which provides that dramatic work does not include a cinematograph film.

<sup>23</sup>Arpan Banerjee, "Film Copyright Infringement: Bypassing the 'Carbon Copy' Handicap", 5(1) *Journal of Intellectual Property Law & Practice*, 2010, at 17.

<sup>24</sup>*MRF limited v. Metro Tyres Limited*, CS(COMM) 753/2017, 1st July, 2019.



not only mean to make a physical copy of the film by duplication. Further, the court held that in case of cinema also the test of *R.G. Anand's case*<sup>25</sup> would apply as the scope of protection for cinema is same as that for any other original work. Accordingly, the court proposed to compare the substance of the two works to decide whether it is a case of copying or not. The court was of the view that the decision of Bombay High Court in *Star India Private Limited v. Leo Burnet (India) Pvt. Ltd.* recognized a narrow scope of the rights of the producer who owns the copyright in a cinema, further, it is not in accordance with the Berne Convention because the decision has the effect of not treating cinematograph work as original work.

The above opinion is further substantiated by the Delhi High Court in the decision of *Yash Raj films Pvt Ltd v. Sri Sai Ganesh Productions & Ors*<sup>26</sup>. The case relates to a cinema called "Band Baja Barat". In this case the plaintiff contended that the story, the plot of the film, and the way in which the theme has been presented in the original film had been completely copied. It was contended that the theme, concept, plot, character sketches, story, script, form and expression etc have been copied and the similarities between the works is substantial. Such an act of blatant copying amounts to copyright infringement. It was argued by Plaintiff that those who have seen both the cinema will form an unmistakable impression that the defendant's work is copy of the plaintiff's work. Thus the requirements of test of *R.G. Anand* is fulfilled to decide infringement. The Delhi High Court was of the view that the defendants have infringed plaintiff's copyright in the film.

The decision re-affirms the decision of the case of *MRF limited* presenting a new interpretation different from the earlier Bombay High Court decisions. The approach has shifted from medium based protection to content based protection for cinematograph films. The foregoing indicates that the current state of protection of cinematograph films is in favour of producers of films because even remakes of films (provided such film is original) cannot be made without the authorization of its producer. Although no part of the recording is copied in making remakes. It is not out of context to mention that in the case of *Gramophone Co. of India v. Super Cassettes Industries Ltd.*<sup>27</sup> the Delhi High Court, in relation to cover versions of published sound recordings, has observed that remixes which may also be called as cover version is recording of any existing song which is already published. The version is made by employing different voice and new musicians. Therefore, cover version is not considered as reproduction of the original recording<sup>28</sup>. Going by the above observation and deriving analogy from the same one may argue that remakes of films must also be allowed as neither copying nor infringement.

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<sup>25</sup>The Supreme Court in *R.G. Anand v. M/s. Delux Films*, AIR 1978 SC 1513, laid down the safest test to determine infringement of copyright. It is called the look and feel test. The test can also be called as a prudent person's test in which a person who has seen or read both the works will be asked if he form an impression that the defendant's work appears to be a copy of the plaintiff's work. It is also true in cases of infringement of copyright by changing the form of the work.

<sup>26</sup>CS(COMM) 1329/2016, 8 July, 2019.

<sup>27</sup>2010 (44) PTC 541 (Del).

## V. CONCLUSION

The above discussion on film copyright indicates the shift in approach of the courts in India in protecting a cinematograph film, however, it is relevant to note that the content base approach goes beyond protecting the recording in favour of producers of cinema to include even the content of the film which is essentially not owned by the producer of the film in the way it is understood in the copyright law. It is also evident from the provision of the Act which distinguishes the copyright in film from the copyright in the underlying content. The recent high court decisions have laid down the criteria of originality for protection of films which means that non-original films (e.g. film on wild life, non-creative interviews shot in routine manner) will not get protection. This does not seem to be a good proposition because as such films also deserve protection at least on the basis of medium based approach. Further, if at all protection for films has to be expanded a dual protection regime including protection of cinema under dramatic work category on the line of English law may be explored. This must be done keeping the larger aspect of the fundamental difference between entrepreneurial works like cinema and phonogram on one hand and other works on the other hand.