Royalty From Underlying Works in a Cinematography Film

Copyright Amendment Act, 2012 Came Out Short?

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5 September 2023

Introduction

The battle for royalties in the entertainment industry goes a long way back into history. The infamous Supreme Court Order *Indian Performing Right Society v. Eastern Indian Motion Pictures Association* ("**EIMPA**") facilitated the same, vesting all the rights with the Producers of a cinematography film. Jumping several years forward, Mr. Javed Akhtar stepped forth and put the artists' issues in the forefront, wanting legislative action to redress them. Consequently, the Copyright (Amendment) Act, 2012 ("**Amendment Act**"), was passed, evolving the Right to Royalty for the authors of underlying works. In light of the same, this piece attempts to delineate the current position concerning copyrights in underlying works and the Right to royalty juxtaposed with the Amendment Act. Lastly, it tries to shed some light on persisting issues and provide feasible solutions for remedying them.

Status of Copyrights in Underlying Works

Copyrights in underlying works have been vastly debated across scholarships owing to the hardships emanating from the Supreme Court order in EIMPA. Disappointingly, the Apex Court ruled unfavorably for the authors of underlying works, highlighting the loss of rights once the works become a part of the cinematograph film. Even though Section 13(4) of the Indian Copyright Act, 1957 ("**Copyright Act**") provides for the separate existence of copyright, the Bombay High Court in 2011 specifically mentioned that once a cinematography film subsumes the underlying work, the independent existence of copyright in underlying works gets extinguished. Consequently, the producers tamed the authors for long because of overarching assignment contracts. However, the Law makers recognized the authors' plight in the Copyright (Amendment) Bill 2010, later passed as the Amendment Act. The Amendment Act empowered the authors of underlying works by granting them a non-waivable "Right to Royalty" despite the assignment of copyright.

Interestingly, the Amendment Act implies retaining ownership of authors of underlying works. To further the argument, the Amendment Act acknowledged the seminal footnote of Justice V.R. Krishna Iyer in the EIMPA judgement. Herein, it is pertinent to highlight that Justice Krishna Iyer underlined the possibility of harmonious coexistence of producers' investment and the intellectual creation of underlying works' authors. The Statement of Reasons and Objectives of the Copyright Amendment Bill, 2010, reflected the same.

Sketching Right to Royalty with the Amendment Act

Section 2(f) of the Copyright Act defines a cinematography film. Essentially, a cinematography film is a mix of artistic, dramatic, and literary works, to name a few. Of these, sound recordings sit atop

the underlying works rankings. The Indian Music Industry relies heavily on the film industry for functioning. Hence, under this section, underlying works must be assumed synonymous with sound recordings unless specified otherwise. The changes in the current paradigm have significant parallels in other countries. For instance, Article 4 of the EU Rental Directive 1992 accords the author with the Right to "equitable remuneration" given the transfer of rental rights to the producer.

Nonetheless, by the wording of Section 19(9) of the Copyright Act, the usage of "share" expresses the nature of the obligation. Instead of "pay," share contemplates the duty to be mandatory—elimination of "if any" from the Copyright Act post amendment further clarifies the nature.

Intriguingly, the 'right' in discussion has been provided distinctly from those granted under Section 14 of the Copyright Act. To elaborate, Section 14 of the Copyright Act elucidates various rights while defining copyright. However, the "Right to Royalty" has been expressly excluded from the previous section. Besides, royalty is an incidental outcome of commercial exploitation of copyright, which Section 14 "authorizes." Such conspicuous exclusion is sufficient to conclude that the 'right' is contractual in lieu of statutory Right.

Royalty Distribution: An Enigma

Various issues and uncertainty about royalty distribution have surfaced throughout the Acts implementation. Varied views in reference to the scope of applicability of the amendment provisions have arisen. For starters, it is unclear if the provisions would operate retrospectively or not. The Supreme Court clarified by stating that the effect of the provisions would not be extended to agreements entered into before the incorporation of amendments. Thus, ruling out all the underlying works created prior to 21st June 2012 from the scope of the provisions. In furtherance of the same, the usage of "shall" in Sections 17, 18, and 19 of the Copyright Act determines the prospective application of the amendments.

On the contrary, the Parliamentary Debates pose differing views. The discussions framed an illustration to posit that the underlying works would not accrue royalty until passing the Amendment Act 2012. But the same work will bear royalty for the authors with the incorporation of the Amendment Act, thus indicating its retroactive application.

Another grey area can be attributed to the constrained purview of the underlying works. A cinematography film is a complex mix of varied elements, of which the Amendment Act recognizes only a few. One of the significant snubs is the scriptwriters. Sections 18 and 19(9) and (10) missed the mark in including dramatic works. Thereby, the Amendment Act barred a vital slice of contributors to the film.

Adding to these problems, the Courts have adopted vastly different views on the issue of royalty. The Delhi High Court, in a clubbed Order, categorically denied royalty for underlying works, characterizing the amendments as clarificatory rather than substantive. The judgement has been appealed before the Division Bench of the High Court. Contrastingly, the Bombay High Court, in its interim injunction order, identified the Right of sharing of royalty with the authors of the underlying work concerning the communication of sound recordings to the public through radio stations. Along the same lines, it mentioned that most sound recordings are a part of the cinematography film. Hence, it imputed the Right to share royalty for the underlying work of the cinematography film.

On top of all, another challenge pertains to the ascertainment of royalty rates. There is ostensibly no statutory guidance vis-à-vis fixation of rates, apart from the recent Intellectual Property Appellate Board's ("**IPAB**") order acknowledging the 'needle per hour' method. Unsurprisingly, the same has been challenged. While at the same time, considerable ambiguity exists surrounding the interpretation of "equal share" as stated in the provision. Further, the Amendment Act stands silent on whose responsibility it would be to share the royalty with the author; it becomes all the more convoluted owing to the presence of multiple parties like the Copyright Societies, Assignee, and the Broadcaster. Bear in

mind that Section 19 of the Copyright Act does not elucidate the aspect of continuing royalty, whose non-payment has been characterized as grave as a criminal offence under Section 63 of the Copyright Act. Lastly, it must be mentioned that the Amendment Act overlooked redressing unfair bargaining arrangements.

Plausible Solutions

Articles 18-22 of the Digital Single Market Direction of the European Union presuppose adequate protections for the authors. For instance, Article 20 establishes a contract adjusting mechanism while Article 18(1) ensures 'appropriate and proportionate' remuneration for authors. Moreover, Article 46 of the Italian Law for Protection of Copyright and Neighbouring Rights gives the authors of musical work utilized in the film, separate remuneration collectable from the entities making the communication. In the same Act, Article L.132-28 mandates the producer to annually furnish revenue records to the author vis-à-vis exploitation of the sound recording. Overlooking the validity of the IPAB Order for a moment, the Legislature must take the initiative to build up on the groundwork established by the Order and foreground royalty rates in statutory regulations. If not, the minimum expected is to clarify the context of "equal share" used in the Sections.

Conclusion

The efforts of the Legislature are nothing short of commendable in ensuring the Authors acquire royalty. Against the backdrop of the historical exploitation and instances highlighted of long-drawn battles for ownership and royalty, the Amendment Act was undoubtedly a step in the right direction. However, unintendedly so, the Amendment Act cuts both ways. To address the negative consequences, the Legislature must quickly step down the same pathway and plug the legal and ancillary shortcomings.

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Music Broadcast Private Limited v. Indian Performing Right Society Limited Suit no. 2401 of 2006

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Cite as (OSCOLA, 5th ed.): Shubhankar Sharan, 'Royalty From Underlying Works in a Cinematography Film: Copyright Amendment Act, 2012 Came Out Short?' (*The Innovation Brief*, 5 September 2023) <https://innovationbrief.nludelhi.ac.in/essays/royalty-from-underlying-works-in-a-cinematography-film> accessed 18 November 2026.

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Published by the Centre for Innovation, Intellectual Property and Competition, National Law University Delhi. Read online at https://innovationbrief.nludelhi.ac.in/essays/royalty-from-underlying-works-in-a-cinematography-film.