EFFECTIVENESS OF CONTRACTING MECHANISMS IN THE INDIAN FILM INDUSTRY TO PROTECT DIRECTORS' INTELLECTUAL LABOR

Dr. Kavitha Chalakkal, Asst. Prof. IUCIPRS, CUSAT

Muthumani Somasundaran, Research Scholar, IUCIPRS, CUSAT

ABSTRACT

The Indian film industry is one of its kind in the international entertainment spectrum. The industry can boast of creating commercially successful films, critically acclaimed films, and a maximum number of films on a yearly basis for a considerably long time. Though the industry is one of the key player in the international scenario, the provisions pertaining to protection of the intellectual labour of the director involved in the creation of a film is questionable. There is no statutory protection of the intellectual labour of the director of a film, it is left to be governed by the terms of contract between the producer and director. This article aims to understand how far the contracting mechanism is effective in protecting and rewarding the intellectual labour of the director. The article further aims to unfold and understanding which is the best approach to protect and reward the intellectual labour of a director of a film, the contractual mechanism, or statutory inclusion of the rights of the directors of the film, more particularly by incorporating the same in the Copyright Act of 1957 (India).

Introduction

The Indian Film industry is distinctive in itself from its inception till date. Indian film industry is the largest film industry in terms of number of films produced per year and has a unique positioning because of its artistic edge and market command. Yet the copyright provisions pertaining to the protection of the intellectual labour of the director of a film is left un-addressed by our copyright statute. The director is the visionary and interpreter who interprets a script for the viewer, the director envisions what needs to be seen on the screen through his intellectual labour. Though the contribution of a director in the creation of a film is indispensable and film is essentially the creation of the director, the legal framework frequently positions the producer as the primary author and owner. Solely crediting the producer as the author of the film exacerbated the power imbalance, diminishing the director's rights and restricting their access to royalties.

The intricate nature of filmmaking, involving multiple creative contributors and substantial financial investment, complicated the notion of film authorship from the inception years of film in common law nations.[1] In the case of film authorship often the statutes embraced entrepreneurial authorship[2] as against creative authorship. This disparity arouse from various factors: the collaborative nature of filmmaking, where numerous individuals contribute creative elements; the significant capital infusion required for production of a film and the common practice of considering directors as employees and deeming film as a work done in the course of employment to name a few. However, there was a change in approach in the second half of twentieth century, in recognising and rewarding the intellectual labour of the director in different jurisdictions across the globe. Some of the nations safeguarded the interest of the director through regulatory framework[3] and some of the nations had contractual mechanism[4] in place to safeguard the interest of the director. While contracting mechanisms offer a potential solution to safeguard these rights, their effectiveness is influenced by various factors, including power equation between the producer and director, industry practices, enforcement mechanism etc.

[1] Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press, Cambridge (2002)
[2] For instance Copyright Act of 1956 (UK), Copyright, Designs and Patents Act, 1988 (UK) prior to amendment, The Copyright Act of 1976 (US), The Copyright Act of 1957 (India)
[3] As in UK and EU member nations
[4] As in USA, through collective bargaining of the guilds.

Statutory protection *vis a vis* Contractual Arrangement

The CDPA, 1988 was amended in 1996 to identify film as a work of joint authorship[5] and recognised director also as an author[6] of film along with the producer. This is a classic example of safeguarding and recognising the intellectual labour of the director of a film through statutory provision. As per the statute, work of joint authorship means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors. Film is recognised as work of authorship and both the producer and director shall be identified as the authors of work unless the producer and the principal director are the same person. Identification of producer and principal director as the author of film is balancing the creative investment undertaken by the producer and the financial investment under taken by the producer. The approach taken by the CDPA, 1988 clearly sets out economic as well as moral rights entitled by the directors of a film. This statutory inclusion is providing a framework for protection of intellectual labour of the director of a film.

In US there is no direct statutory provision to recognise and reward the intellectual labour of a film maker. Filmmaking's collaborative nature and the intellectual labour involved in the making of a film is undermined by the Act of 1976 by placing it under work for hire.[7] The statute identifies film as a class of work falling under work for hire. By virtue of work for hire principle[8] a work created by an employee in the course of employment belongs to the employer including the authorship and ownership over the work. The statute states that film shall be a work for hire, by virtue of which the producer shall be author as well as the owner of the film unless there is a contract to the contrary. This approach has left the directors at the mercy of the terms of contracts to protect and safeguard their intellectual labour in the creation of the film. The Unions and Guilds used collective bargaining as a tool to incorporate what the law failed to recognise. By means of collective bargaining, the rights and recognition due to the director was made a part of contract and thus surpassed the conundrum created by the work for hire practice[9].

[5] S.10(1), CDPA 1988
[6] S.9(2)(b) of CDPA,1988
[7] 101 of the Copyright Act of 1976
[8] Anne Marie Hill,*Work for Hire Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works* , 74 Cornell L. Rev. 559 (1989)
[9] Michael Carter Smith, Work for Hire: Revision on the Horizon, 30 IDEA 21 (1989)

Collective bargaining is a practice wherein the representatives of a group of employees or union negotiate with their employer for and on behalf of the employees. The primary aim of collective bargaining is to derive at a mutually beneficial and agreeable terms and conditions of employment, such as wages, hours, benefits, and working conditions. The same was followed by the unions and guilds of the American film industry to have better working conditions.[10] The Minimum Basic Agreement (MBA) for the directors of film in US is collectively bargained by the Directors' Guild of America this agreement sets the minimum terms for securing and protecting the labour of the director community. The Agreement is intended to protect both economic as well as moral rights of the directors, along with many other aspects relating to working conditions, social security, remuneration etc. Collective bargaining has played a fundamental role in shaping the current contractual landscape of the US film industry, particularly with regard to the rights of directors. Though there is no explicit recognition on the statutory front for the protection of the actual creator of film to be identified as the author of film, the collective bargaining mechanism prevalent in the industry set the course in favor of the directors to negotiate terms[11] to safeguard their intellectual contribution.

Indian Scenario

The Indian copyright law was enacted in 1957, the statute is heavily inspired by the UK Copyright Act of 1956. The Act of 1956 focused on identifying a right owning entity as the author of film than the actual intellectual contributor behind the work. This UK copyright practice had direct influence on the Indian copyright Act of 1957. The directors were kept away from the authorship status due to lack of identifiable and quantifiable contribution, but this presumption was later on rejected by most of the nations, even UK.[12] The Copyright Act of 1957 identified the producer as the author[13] as well as the owner[14] of film. In India rather than extending statutory protection to safeguard and reward the intellectual contribution of the director of the film, has is left to the contractual arrangement between the producer and the director. By 2010 major film industries across the world started recognising the film directors as a co-author /joint author of film, the efforts of principal director were recognised and rewarded. The Copyright Act of 1957 identifies Producer as the Author and Owner of Films.

[10] Collective bargaining in the Motion Picture Industry -A struggle for stability , by Institute of industrial Relations University of California Berkeley, Hugh Lovell & Tasile Carter (edited), 1955
[11] Hillary Bibicoff, Net Profit Participations in the Motion Picture Industry, 11 Loy. Ent. L.J. 23 (1991)
[12] Amendment of CDPA, 1988 in 1996
[13] S.2(d)(v), Copyright Act of 1957 (India)
[14] S.17, Copyright Act of 1957 (India)

This provision was delinking the principal directors from their legitimate claim over their intellectual contribution in the creation of film. Subject experts of India also attempted to bring in the change approach in recognising and rewarding the intellectual labor of the director of film our country. This was clearly reflected in the proposed Copyright (Amendment) Bill of 2010.[15] The Copyright (Amendment) Bill, 2010[16] redefined the author of film and recommended to make Principal Directors as Joint authors of film along with the producers. For recognising and rewarding the intellectual labour of the principal director of film The Copyright (Amendment) Bill, 2010 proposed to amend s. 2(d)(v)[17] and s. 2(z)[18].

The Copyright (Amendment) Bill, 2010 provided that S. 2(d)(v) of the Copyright Act of 1957 shall amended to make the principal director also author of film along with producer.[19] The reason behind the proposal for recognising principal director as a joint author could have been the change of Global scenario in recognising the principal directors of films. The language used in the Copyright (Amendment) Bill, 2010 is similar to that of the language used in the Copyright Designs and Patents Act 1988 of UK. One of the limitations of the proposed amendment was that it did not interpret the term 'principal director'. The term 'producer' is captured u/s. 2 (uu), however the term principal director was left undefined. the Bill of 2010 also recommended introduction of joint authorship provision with regard to film. S. 2(z)[20] of the Copyright Act of 1957 deals with 'Joint Authorship'. In The Copyright (Amendment) Bill, 2010, an explanation to S.2(z)[21] was provided and the explanation stated that 'a cinematograph film shall be deemed as a work of joint authorship except in cases where the producer and the principal director is the same person'.

[15] The Full text of the Copyright (Amendment) Bill of 2010 accessed from https://prsindia.org/billtrack/the-copyright-amendment-bill-2010

[16] Bill No. XXIV of 2010 introduced in Rajya Sabha, India

[17] S.2 (d)(v) of the Copyright Act of 1957

[18] S.2 (z) the Copyright Act of 1957

[19]The Copyright (Amendment) Bill, 2010,

2. In section 2 of the Copyright Act, 1957 (hereinafter referred to as the principal Act),—

(*i*) in clause *(d),*—

(*a*) in sub-clause (*v),* for the words "cinematograph film or sound recording, the producer; and", the words "cinematograph film, the producer and the principal director;" shall be substituted

[20] S.2 (z) of the Copyright Act of 1957 "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;

[21] The Copyright (Amendment) Bill, 2010

S.2(z) *"Explanation*.—For the purposes of this clause, a cinematograph film shall be deemed as a work of joint authorship except in cases where the producer and the principal director is the same person;".

Though there was recommendation in 2010, the same was summarily rejected when the amendment was passed in 2012. Amongst the many reasons quoted for rejection, one of the cardinal reasons was that there needn't be a statutory recognition for director as the author of film, if at all they wants any right or royalty, it shall be managed by contractual arrangements between the Director and producer as done in US.[22] In reality Indian film industry is unprepared when it comes to contractual arrangements and distribution of intellectual property through contracts. Even established and legendary directors are having a tough time in negotiating for their rights and protection of their intellectual labour.

Limitations of contracting mechanism

In US, contract is an effective tool to safeguard the interest of the director of a film because of efficient collective bargaining mechanism existing in US film industry. However in India, there is no practice of collective bargaining in film industry, more particularly amongst the directors. The contracting mechanism is largely ineffective and they cannot be used as a tool to safeguard the intellectual labour of the director. There is no standard format of contract, and often the contracts are drafted by the producer, as a consequence of which they usually will be favouring the interests of the producer alone. There are no guidelines as to the terms of contracts that is to be entered into between the director and the producer, as a result of which, the scope of such negotiations is highly limited, and often these agreements will be taking away all possible rights of the director over their creative work (Film)[23]. A director can demand royalty only if they are having an industry buy in, bargaining power and a status to demand the same. Few exceptions barred, in film projects the producers/production houses are often bigger companies/entities with higher bargaining power, and the bargaining often ends up with highly one sided contracts. Dealing with the rights by way of contracts needs a lot of effort.

Negotiations and writing of agreements often happen during the shooting of the film, and this leaves the director in a weaker bargaining position. Director will be more keen on the creative aspects and the fulfilment of his creative work, rather than contracts and its nitty-gritties. The terms of contracts are directly related to the bargaining power and the brand value of the

[22] 227th Report On The Copyright (Amendment) Bill, 2010 By The *Department-Related Parliamentary Standing Committee On Human Resource Development*, (2010), (Presented To The Rajya Sabha On 23rd November, 2010) (Laid On The Table Of Lok Sabha On 23rd November, 2010), Rajya Sabha Secretariat, New Delhi, full copy of the report available At http://www.prsindia.org , P.114

[23] Anand Nair Royalties And Rights Sharing In Film Industry In India Post Copyright Amendment Act 2012 – *Impact On Contractual Freedom: A Comparative Study With The Us And The Uk Copyright Regimes p.1*

director. A newbie director or director with no bargaining power or a director of medium repute, is never protected by the terms of contracts, due to their poor bargaining capacity?. What we could gather from the industry practice of drafting of contracts and their enforcement is that, it is no way beneficial to the directors, who are weaker in terms of bargaining capacity. The directors would not have had faced this plight, had their rights been recognised and ensured by way of statute.

A director has to completely rely on the contractual arrangement with the producer without any recourse under the Copyright Act. Such a contract in reality is a general service agreement of commercial nature. However, this is off late being treated as stepping stone to establish a work for hire like arrangement between the producer and the director. Contract between the producer and director is undoubtedly important for the smooth functioning of the work in an arranged manner and pre-empting the potential conflicts of interests between the parties, but giving excessive importance to the contractual arrangement, in the absence of any statutory protection to one of the parties, ie the director, makes it a mismatched bargaining power among parties.

A thorough perusal of the terms of the contracts[24] shows that the terms of the contracts are often one sided, especially when it comes to the contractual relation between a non-established director and a producer. Directors with a track record may have a better say over the contractual terms, but not all directors may have it. There is no standard format on Minimum Basic terms as in US. Generally, the first party of the contract will be the Producer and the second party will be the director. The wordings in the contract are used in such a way that the initiative and effort of the Producer is very much emphasised, and presented in such a way as to establish that his effors alone has resulted in the making of the film. For example, the language used generally, in contracts, is "Whereas the 1st party had sought the willingness of the parties of the 2nd party and whereas the parties of the 2nd party? have expressed their desire to participate in the filming process as Director". This need not be the actual scenario as in most of the cases the project might have been initiated and conceived by the director. Irrespective of who initiated the project, the opening clause of contract states that the producer approached the director even in cases where it is initiated by the director.

The duties of the director are clearly enlisted in the subsequent clauses, which includes, the total responsibility of directing the entire film, including pre shooting, shooting, and post

[24] On the basis of some sample contracts analaysed

production marketing, release etc. in other words, the Director is fully responsible and authorized for the entire shooting related arrangements, such as deciding locations, artists, shooting units, and other technicians to complete the project in scheduled time in a cost effective manner. Failure of which makes him responsible for removal from the role of director or payment of compensation to the producer. There is no mention as to the role and responsibility of the producer. The contracts explicitly surrenders any existing or future intellectual property rights a director could claim. The agreements even make the director surrender their moral rights such as the right to be known as the creator of work[25] as well as final cut of the film[26]

The director is bound to make themselves "exclusively available for the works relating to Direction of the movie from Pre shooting period till the release of the said picture in theatres" even if it goes beyond the schedule for no fault of the director. This restricts the directors are from taking up any other assignment during the currency of the agreement, except with the written permission of the producer, which seldom the producer approve off. Evenwhen the director is casted with a sever restriction like this, the producer is at the liberty to produce more than one film at a time.

Another major one-sided clause usually seen in the contract is the one which deals with potential exclusion of director from the process of filming. The film is the artistic creation of the director and this clause is making it clear that the producer may even remove the director from their role. This is an unjustifiable and unfair clause. On such removal from the role of director, the director will have the right only to claim the remuneration for the work already done, and services already rendered, till he /she is dropped form the project. Once the director is so removed, the producer is free to substitute him with anybody else, and this cannot be challenged by the director. Thus the producer will be free to continue with the project thereafter, as he wants. The implication of this clause is that the producer can alienate a director from his creation (film), without even settling the full remuneration. The producer can reap benefit of the work of the director by alienating them by way of this clause. In US, there collectively bargained contracts have clear set of guidelines for replacement of a director, and the same are grounded on the principle of equity and justice.

[25] Right to paternity
[26] Right to integrity

In most of the contracts there used to be a clause, which will clearly state that directors shall not be entitled for anything other than remuneration already fixed, and the director shall not ask for any other benefit or privileges other than those agreed upon, in any form whatsoever. This clause excludes the directors from claiming any share on the revenue received on account of remake rights, dubbing rights, satellite rights, audio rights, video rights etc. In brief, basically the Producer-Director agreement used to casting all responsibilities and duties upon the director and all the benefits upon the Producer.

Contracts could play an effective role only if concerned authorities can come up with a minimum standard agreement that protects the intellectual labour of the director of a film. This can include clauses pertaining equitable remuneration, right to receive royalty from the revenue generated beyond the communication to public through cinema halls. As per the proviso to s.18, after the 2012 amendment, the authors of work incorporated in the film are entitled receive royalty for revenue generated beyond cinema halls, going by the same logic, a clause can be included in the directors contract as well. there shall be clauses which clearly protect the moral rights of the director. Moral right is essentially granted to a human being, but because of the current statutory framework the moral rights associated with film vests solely with the producer, which could even be a non-human entity. Since the statute is not recognising the director as the author of the film, there are instance wherein the court could grant the plea of a director to have his name in the credits of the film as the director of the film.[27]

Conclusion

Statutory recognition of director as a co-author of film along with the producer would be more permanent and legally grounded solution to the complex issue of film authorship. By establishing directors as authors with specific rights and protections, statutory recognition could help to level the playing field between directors and producers, irrespective of the power dynamics. The current statutory framework reiterates the privileged position of the producer and underprivileged position of the directors. This approach is not providing an effective mechanism for the directors to safeguard their intellectual labour involved in the making of a film. By addressing the challenges and implementing best practices, the Indian film industry can create a more equitable and sustainable environment for filmmakers. Even after timely amendments of the Act of 1957, the principal directors are not counted worthy of copyright

[27] *Sartaj Singh Pannu* v. *Gurbani Media Pvt Ltd &Anr* 2015 (4) ARBLR 176 (Delhi)

protection. The conventional way of approaching film authorship alienates the principal director from the copyright protection she/he is entitled to. Directors' world over, are being recognised as authors of films, though India, as a nation, is lagging behind in conferring the status of author to principal directors.