India

Welcoming in the new royalty regime

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On June 21 2012 the Copyright Amendment Act 2012 came into force, making the most significant changes to Indian copyright law since the introduction of the Copyright Act 1957. Although the law has been amended since 1957 (most notably in 1994), the new act constitutes a fundamental shift in copyright legislation.

The amendments have affected many of the act's provisions, with the most publicised and debated changes relating to the creation of mandatory royalty-sharing provisions. They further seek to introduce greater revenue/payment entitlements for creators such as lyricists, screenplay writers, composers and actors in terms of royalty sharing, irrespective of any assignment of their copyrights. The amendments have been heralded by the Indian film and sound recording industries, particularly creative artists in Bollywood.

This chapter examines the effect of the new mandatory royalty-sharing provisions in the Copyright Act, with a particular focus on the ambiguities and challenges that the amendments have created for the cinema industry with respect to the assignment and sharing of revenue in film copyrights.

Amendments

First-ownership provision

Previously, under Section 17(c) of the Copyright Act, when a work (eg, a screenplay, musical score, special effect or animation) was made in the course of employment, the employer was considered to be the first owner of the copyright therein, rather than the employee who created the work. The new act has inserted the following proviso into Section 17: "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."

The effect of this proviso is that where an individual employee creates any underlying work which is to be included in a film, he or she is considered to be not only the author, but also the first owner of the copyright in the underlying work (which includes all copyrightable works incorporated into a film). Therefore, the film production company now holds a copyright in the final film only, as this is recognised as a copyright, separate from the underlying work, of which the producer is the author and first owner. According to the amended act, a producer or production company now requires an assignment for each of the underlying works to be used in the film from each respective employee. This means that the ability to consolidate proprietorship of the copyrightable works used in a film has become far more difficult than previously. In effect, the authors and creative artists who produce works such as scripts, screenplays or musical scores are now placed in a much stronger bargaining position, with an increased capability to acquire a larger stake in the revenue generated by a commercially released film through a royalty-sharing agreement as part of the assignment to the producer.

For example, a scriptwriter employed by a production company was previously considered the author but not the first owner of the copyright in any script written in the course of his or her employment. In such case the scriptwriter could exercise his or her moral rights (eg, the rights to claim authorship of the work and to prevent distortion of the work), but not the copyrights (eg, the rights to reproduce, issue copies or perform the work in public) that flow from ownership of the work.

The amendments have reversed this position, making the scriptwriter both the author and first owner of a script written for a film. As a result, the producer or production company will now have to take an assignment from the scriptwriter and any other creative artist employed for the purpose of creating copyrightable works that are to be incorporated in a film. Without such assignment, the employee could seek legal relief against the producer or production company for unauthorised or infringing use of his or her underlying work.

Perhaps the most telling effect of this change can be seen in other sectors such as advertising or media production, where films are made by agencies on commission of a client. A situation could arise where the employees of an advertising agency find themselves in a strong bargaining position compared to their employers, who will be forced to take individual assignments from all of the employees involved in the creation of a film.

Further, there could be an effect on training films commissioned by corporate bodies – the proprietorship of a film produced on commission by a media production company will now be a complicated affair involving a new set of assignments first from the individual employees to the production company, and then to the body which commissioned the film. The position is even more complicated for documentary or educational films created on a non-profit basis, as another amendment prevents the assignor of a copyright from waiving or assigning his or her right to receive a royalty where the works are to be incorporated into a film. Table 1 illustrates the new set of assignments that are likely to be required in order for a film producer to aggregate and collect ownership of all the underlying copyrights in a film.

Assignment provisions

Previously, the copyright in a film could be assigned wholly from the first owner of the work to any other person. Under the amended act, a work classified as a cinematograph film can no longer be wholly and completely assigned by the owner to any other person – the amendments added the following proviso to Section 18 of the act: "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 a royalty to be shared on an equal basis with the assignee of copyright for the utilisation 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."

Essentially, this proviso states that the author of a literary or musical work included in a cinematograph film shall not assign or waive the right to receive a royalty, except:

- where the literary or musical works are communicated to the public and such

Table 1

Work to be assigned	**Assignor** (employed by the producer)
Script/screenplay/song lyrics (literary works)	Scriptwriter/lyricist
Musical score (musical work)	Musical composer
Storyboard (artistic work)	Artist
Animation (cinematograph film)	Animation artist
Special effects (artistic work/cinematograph film)	Special effects designer/artist
Soundtrack (sound recording)	Sound recording or music producer
Choreography (dramatic works)	Choreographer

Figure 1

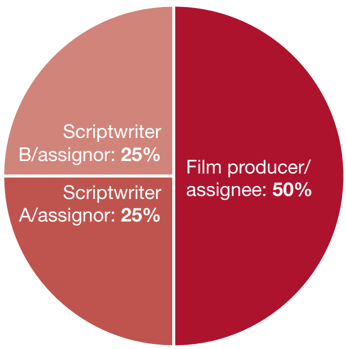
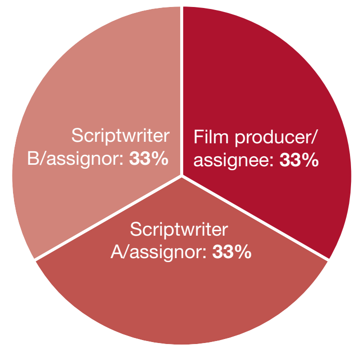


Figure 2



communication is part of a cinematograph film screened in a cinema; or
- where the musical or literary work is assigned to a legal heir or collecting society.

This means that the authors of a literary or musical work included in a cinematograph film must receive any royalty that accrues to the assignee on an equal basis with the assignee, except as stated above.

The implications of this new proviso are by far the most far-reaching and controversial of all the new amendments. The main ramifications are as follows:
- When their works are incorporated in a film, the authors of musical or literary works now enjoy a right to collect a royalty irrespective of the terms of their assignment.
- Musical and literary authors are unable to assign their works wholly for a one-off payment.

The proviso does not make clear what is meant by sharing the right to receive a royalty on an equal basis.

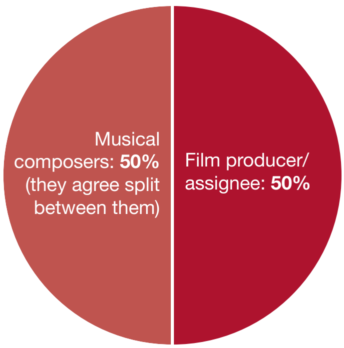
The new right to receive a royalty could give considerable financial protection to a class of musical composers and scriptwriters who previously felt that they were being cut out of their fair share of the revenue collected through royalties by film producers – especially in India's lucrative commercial film industry.

Authors of musical and literary works incorporated into a film must now receive royalty payments and cannot assign their works in return for a one-off payment. This will have considerable implications, as it opens up the possibility for producers to ask lyricists and musical composers to share in the commercial risks of producing a film. Previously, lyricists and musical composers could protect themselves from the financial risk of contributing to a loss-making film by taking a one-off payment. The amendment now requires them to take an equal share of the royalty collected by the producer, thus restricting the quantum of the one-off payment that they are likely to be offered by an assignee for the assignment of their works.

The lack of clarity over the idea of sharing the right to receive a royalty is likely to be the subject of considerable and costly litigation as assignors and assignees of musical or literary works incorporated into a film seek to clarify what percentage of royalty they are entitled to receive. Confusion over distribution of the royalty between the assignor and the assignee on an equal basis is likely to arise when there are more than two assignors or assignees. For example, if there are two scriptwriters and one producer, the new proviso could be interpreted to give either of the distribution models shown in Figure 1 or 2.

Further complications are likely to arise in situations where there are two assignors whose contributions to the works being assigned vary greatly. Because the success of so many commercial Indian films is rooted in their soundtracks and musical scores, this problem is most likely to arise when two musical composers contribute an unequal number of

Figure 3



songs to the soundtrack of the same film. In such case it is unclear whether the new proviso suggests the sharing of royalty in terms of Figures 1 and 2, or allows a separate arrangement to be worked out as per Figure 3.

New right of authors and creative artists to collect a royalty

The amendments to Section 19 of the act have inserted provisions which grant the authors of any works incorporated into a film the right to collect royalties on an equal basis. Specifically, new Section 19(9) states that no assignment of a copyright in a work that is used to make a film shall affect the right of the author of the underlying work to claim an equal share of royalties and consideration payable for the use of such work in any form other than when it is screened as part of the film in a cinema.

The effect of this new provision is to extend the right to collect royalties to authors of all kinds of work (not just musical and literary works) that are used to make a film (see Table 1). However, the new provision does not expressly restrain the author from assigning or waiving his or her right to collect royalties, as Section 18 does. It remains to be seen whether the Indian courts will interpret this provision to mean that although all authors of works used to make a film have a right to collect royalties, only the authors of musical or literary works are barred from assigning or waiving their right to collect royalties to the producer of the film.

Further, new Section 19(10 grants the authors of underlying works used in the creation of a sound recording (which is not incorporated as part of a film) the same right to collect an equal share of royalties for the use of the underlying work in any form. This provision raises questions similar to those raised above with respect to authors of underlying works used in a film. Again, it remains to be seen how the courts will interpret this provision and whether the right to collect royalties, although recognised, can be waived in the absence of a bar on such waiver as laid out in the proviso to Section 18 (discussed above).

Performers' right to collect a royalty

New Section 38A has created a bundle of performers' rights which are broadly akin to the copyrights enjoyed by authors of literary, dramatic, musical and artistic works. However, if the performer has given written consent to the incorporation of his or her performance in a film, he or she cannot object to the producer's enjoyment of the same rights. The proviso to this new section states that "the performer shall be entitled to royalties in case of making of the performances for commercial use".

Once again, the exact implications of this provision are unclear. It is not yet known whether an actor performing in a film will now be considered to have the same rights as authors of musical, literary, artistic and dramatic works involved in the making of a film. The provision does not state whether the royalty to which a performer is entitled is to be shared on an equal basis, or whether this entitlement can be assigned or waived. Further, it is uncertain whether the performer has a right to collect a royalty as a part of the entire royalty collected from the commercialisation of a film, or whether he or she will receive only the royalty received by the film producer after the producer has shared the royalty on an equal basis with the authors of the other works incorporated in the film (see above). What is clear is that the provision will undoubtedly strengthen the bargaining position of actors and other performers in the commercial film industry, allowing them to negotiate for a larger proportion of the revenue earned from a film, whether by collecting a higher royalty or otherwise.

Comment

It is obvious that the amendments to the Copyright Act have brought about a shift in the relationship between authors, creative artists and performers and producers and rights holders in the Indian film industry. The amendments seek to create a new system of royalty sharing which empowers authors and performers in a way that was previously unimaginable. There is no doubt that until now, such artists have received a relatively small section of the revenue generated from the film and the associated sound recording industry. However, it remains to be seen whether this new royalty-sharing system will be the answer to all their grievances, or will merely lead to a new set of ambiguities requiring costly legal adjudication. *iam*

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