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# **DIRECTOR – THE UNRECOGNISED AUTHOR: A CRITICAL ANALYSIS OF THE NEED FOR REDEFINING THE AUTHORSHIP OF FILM IN INDIA**

AUTHORED BY - MUTHUMANI SOMASUNDARAN<sup>1</sup>

## **Abstract**

A work is an expression of its creator. Film is the creative expression of the Director of the film. In India, the entrepreneurial author, i.e., is the Producer is deemed as the Author of the film and creative author, i.e., the Director is not recognised. One of the main objectives of Amendment of 2012 was to update the Copyright Act of 1957 to 'Protect Creative authors in films and music industry'. There was proposal in the Copyright (Amendment) Bill, 2010<sup>2</sup> to incorporate Principal Director<sup>3</sup> as the Author of film along with the Producer and to redefine Joint authorship clause<sup>4</sup>, this was summarily rejected while the Act was amended in 2012. This article is an attempt to discuss the need for redefining the film authorship in India. It is analysing the reasons given by the Parliamentary Standing Committee in rejecting the proposal to redefine Authorship of film in the light of industry practices, international practices in recognising directors, and the actual position of the director of Indian film without statutory recognition.

## **Introduction**

Motion Pictures, Cinemas, Cinematographic works, Movies etc are interchangeably used as per convenience to address the art form popularly known as 'Films'. It is one unique art form with unprecedented growth trajectory. Film is an artform, which is a creative expression of the creator(s) involved in its making. Authorship of film is a complex affair because of the

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<sup>2</sup> Bill No. XXIV of 2010 introduced in Rajya Sabha, India

<sup>3</sup> 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

<sup>4</sup> 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;"

collaborative nature of film as a class of work. A film is a collaborative work, wherein individual works worthy of copyright protection, like the script, scenic arrangements, music components etc are being put into use to create a totally new class of work. Because of this collaborative nature there are multiple creative contributors and stakeholders in a film. The director, screenwriters, producers, performers etc are involved in the making of film and they all are direct stakeholders of film.<sup>5</sup> Though there are multiple contributors in the making of film, a film is essentially the artistic signature of the director.<sup>6</sup> Films are the expression of artistic personalities of the Director.<sup>7</sup> It is the creativity of the Director that is transformed and fixed into a film. As legendary filmmaker Satyajit Ray once said, *the director is the only person who knows what the movie is all about*<sup>8</sup>. In view of Alexandre Astruc<sup>9</sup> films are written by a director using a *caméra-stylo* or "camera-pen". The Director's creativity is the ink for writing a work, known as cinema. No cinema can survive without the creative input of the Director<sup>10</sup>. A Director is the one who creates a film by investing his creativity and intellectual labour. Producer on the other hand is the one who makes the necessary arrangements for the execution of film. The director is the creative force in the making of film and producer is the entrepreneurial force behind the making of film.

## History of Film Authorship

Copyright is a legal concept created for protecting the interests of the creators of original copyrightable works.<sup>11</sup> Authorship plays a central role in copyright law.<sup>12</sup> Authors are the heart of copyright and they are the intellectual contributors behind a work worthy of copyright protection. An author is an artist who confronts and adapts the external elements to their work and expresses it with their interpretation to the audience. In the case of films this task is undertaken by the director. All authors leave an inscription of their creativity and personality in their work and they should be recognised and rewarded for the same.

Determining authorship is easy in most of the works, because the general rule is that "author of a

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<sup>5</sup> C Paul Sellors, *Collective Authorship in Film*, 65 J.A.A.C. 263, 265 (2007).

<sup>6</sup> Steven Ascher and Edward Pincus, *The Filmmaker's Handbook: A Comprehensive Guide for the Digital Age*, Penguin, USA (4<sup>th</sup> edn., 2012)

<sup>7</sup> Going by the Hegelian Personhood theory a work is an extension of the personality of its creator.

<sup>8</sup> "Remembering Satyajit Ray", Indian Express, May 2, 2016, available at

Indianexpress.com/article/trending/trending-in-india/satyajit-ray-quotes( accessed on 4/10/2021)

<sup>9</sup> World renowned French Film Director and Film critic (13 July 1923 – 19 May 2016).

<sup>10</sup> Alexandre Astruc, "The Birth of a New Avant-Garde: La CaméraStylo", originally printed in 'L'Écran française' 30 March 1948 as "Du Stylo à la caméra et de la caméra au stylo", (Apr, 4 2020), <http://www.newwavefilm.com>

<sup>11</sup> WIPO "Understanding copyrights and related Rights" pp 6-7

<sup>12</sup> Ryan Vacca, Work Made for Hire - Analyzing the Multifactor Balancing Test, 42 Fla. St. U. L. Rev. 197 (2014)

work is the one who actually creates the work, that is, the one who translates an idea into a fixed, tangible expression".<sup>13</sup> However, determination of authorship was a complicated affair in the case of films and an exception to this general rule. The uniqueness of the medium and the functioning style of the people involved in the same created a conundrum in identifying the Author of the film. Film as a class of work, worthy of copyright protection, is different from rest of the copyrightable works. Film making is a highly collaborative process with contributions of multiple authors.

During the inception days of films, determining the authorship of films and granting of corresponding rights to film was a major problem faced by the copyright system. There were no model provisions or international agreements on how to handle this issue, and hence nations came up with legal mechanism which is best suited to their copyright approach and industry practices. Each of the Nation had its own way of recognising the authorship and ownership of film. The nations chose their approach based on their social construct, cultural exposure and economic stability, philosophical orientation and copyright approach. Often these mechanisms failed in recognising the basic principles of copyrights. The determination of Authorship was largely done on the basis of convenience rather than the actual creative input involved in the making of film. Traditionally, the maker of the film was deemed as the Author of the film, i.e., the Producer of the film<sup>14</sup>, and this approach was ignoring the contribution of the actual creators- like the Directors. This global practice of non recognition of directors as author of film went until the last lap of 20<sup>th</sup> century. However, Towards the end of 20<sup>th</sup> century there were clarity as to the fact that the author of film shall not be the producer alone. The director is also entitled to be the author of the film and their creativity is to rewarded and recognised. European countries statutorily recognised the directors as the author of film along with the producer<sup>15</sup>. US rewarded the director by protecting their economic and moral rights through Union contracts<sup>16</sup> and collective bargaining.<sup>17</sup>

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<sup>13</sup> *Community for Non-Violence v. Reid*, 490 U.S. 730 (1989)

<sup>14</sup> An exception to this practice was the French, they recognised the distinctive role of the creator and recognised the rights of the directors and writers.

<sup>15</sup> In UK, by way of amendment of S.9 of The Copyright, Designs and Patent's Act, 1988. Other European nations, like the France and Germany were recognising the directors as author of the film as an when their current copyright statutes came into force.

<sup>16</sup> Directors Guild of America, SUMMARY OF DIRECTORS' CREATIVE RIGHTS UNDER THE DIRECTORS GUILD OF AMERICA BASIC AGREEMENT OF 2020 – <https://www.dga.org/Contracts.aspx> .This Agreement Acts As The Minimum Basic Agreement For Protecting The Interests Of The Directors. This Agreement Practically Covers Both Economic And Moral Rights.

<sup>17</sup> 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

## Authorship of film in India

Indian copyright system is heavily influenced the British system of Copyrights from its inception. The intellectual efforts of the Director was left unrecognised, and they weren't recognised as the author from the very inception of the Copyright Act of 1957. Copyright Act of 1956 of UK is not recognising the director as the author of film and the same approach was followed by the law makers while making the Copyright Act of 1957. Absence of recognition of Directors in UK law was one of the cardinal reasons for non-recognition of rights of Directors of films in Indian Copyright Act ,1957.<sup>18</sup>

Prior to the amendment of the Act in the year 1994, the Owner of film at the time of completion of the film was deemed as the Author of the film, which effectively made the Producer, the Owner as well as the Authors of Film. This was an antithesis to the general rule that 'authorship' decided 'ownership'. In the case of films in India 'Ownership' decided the 'authorship' of film until 1994. 'Owner' of the film when it is under production on or before its completion is not regarded as the author of the cinematographic film. This definition of producer was creating confusion in determining who is the actual producer of the movie that shall be deemed as the author of film , as per the law. For determining the 'author' in relation to a film the court will have to find out the time when film was completed and the person who was the owner of the film at the time of the completion. Hence by means of 1994 amendment, 'Author<sup>19</sup>' of cinematographic film and 'Producer<sup>20</sup>' of cinematographic film was amended. This was a right opportunity for the law makers to redefine authorship of film by taking into account the international practices and there by recognising Directors as co-authors of films along with the producers and thereby recognising both the 'maker<sup>21</sup>' and 'creator<sup>22</sup>' of film. However, the 1994 amendment did not recognise authorship status of Directors, instead it redefined the producer as a person who takes the initiative and responsibility for making the work. The harm in this definition is that one who takes the initiative and responsibility for making of film is regarded as the author of a work, which means there is no need of any creative contribution for one to achieve author status. This approach is not addressing any aspect of 'creativity and its protection' which is one of the cornerstones of

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<sup>18</sup> S.13- Copyright in Cinematograph Films, The Copyright Act 1956, (4 & 5 ELIZ. 2 CH. 74) (United Kingdom).

<sup>19</sup> S.2(d)(v), The Copyright Act of 1957 (Act No.14 of 1957).

<sup>20</sup> S.2(uu), The Copyright Act of 1957 (Act No.14 of 1957).

<sup>21</sup> 'Maker' of a film is the 'Producer' of the film, means the person by whom the arrangements necessary for the making of the film.

<sup>22</sup> 'Creator' of a film is the 'Director' of the film, means the person whose intellectual contribution and creativity is being transferred to create a film.

copyright mechanism. Even when most of the Common law countries started recognising joint authorships in the case of films, we are considering producer as the sole author of films totally ignoring the creative contribution of the Director. There is hardly any difference between the concept of Authorship and Ownership when it came to films in India, the statute is recognising producer as the author, and author becomes the first owner of the work.

In *Thiagarajan Kumararaja v. M/S. Capital Film Works (India) Pvt. Ltd & Anr.* the High Court of Tamil Nadu<sup>23</sup> ordered in favour of the producer, wherein the Plaintiff (writer cum Director of the movie) approached the court alleging violation of copyright over the script of the film. In the instant case the producer had sold the dubbing rights and remake rights without the knowledge of the plaintiff and hence the plaintiff alleged that it violated his Copyright over script. The Court concluded that by entering into the contract (for direction of movie) it shall be presumed that all rights are assigned to the defendant by the plaintiff and hence the plaintiff cannot allege copyright violation. If the 1994 amendment while, amending 'author' and 'producer' of cinematograph, have had recognised Directors as co-author of cinema, the Director would not have missed out the benefit of his creative labour.

Amendment of the Copyright Act in 2012 was a golden opportunity to recognise Directors as authors/co-authors of Cinematographic film, for the fact that one of the objectives of 2012 amendment was to 'Protect Creative authors in films and music industry'.<sup>24</sup> The Amendment of 2012 improved the position of the writers, music composers, lyricists and singers of by incorporating appropriate provisions in the Act. On one hand the 2012 amendment is a triumphant success, but it miserably failed in redefining authorship of film and extending copyright protection to the prime creative person behind the making of film- The Directors. Even after recognising and protecting the rights of scriptwriters, lyricists, music composers and performers no recognition were given to principal directors

## **Attempt to redefine film authorship in India**

Film authorship in India was delinking the principal directors from their legitimate claim over the film. By 2010 major industries across the world started recognising the film directors as a co-

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<sup>23</sup> C.S. No. 93 Of 2012, Madras High Court, decided on Sep., 09 2016, full text access from <https://indiankanoon.org/doc/45684202/>

<sup>24</sup> "The Copyright Amendment Bill 2009", Press Information Bureau of the Indian Government, in 2009, available at <http://pib.nic.in/release/release.asp?relid=56444&kwid>

author /joint author of film, the efforts of principal director were recognised and rewarded<sup>25</sup>. Subject experts of India also attempted to bring in this change in our country. This was clearly reflected in the proposed Copyright (Amendment) Bill of 2010<sup>26</sup>. For recognising and rewarding the intellectual labour of the principal director of film The Copyright (Amendment) Bill, 2010<sup>27</sup> proposed to amend s. 2(d)(v)<sup>28</sup> and s. 2(z)<sup>29</sup> of the Copyright Act of 1957, the former redefining author of film and the later adding proviso to the joint authorship clause.

The Copyright (Amendment) Bill, 2010 redefined the author of film and recommended to make Principal Directors as Joint authors of film along with the producers<sup>30</sup>. This proposal was striking a right balance between the creative investment made by the Director and entrepreneurial investment made by the Producer. The proposed definition was crafted in a way to protect both the creative labour of the director and the financial risk undertaken by the Producer.

The Bill of 2010 further recommended to treat Film as a work of Joint Authorship. An explanation to S.2(z)<sup>31</sup> was provided for the same. 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’. This recommendation is upholding the collaborative nature of film. No film can be made by the director alone or the producer alone. Both the producer and the director make indispensable contribution to the making of film.

The proposal to redefine the Authorship of film and to include principal director as an author of cinematograph film was vehemently opposed by the representatives of the Film and Television

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<sup>25</sup> In US the director is recognised through Contractual Arrangements, in UK through S.9 of Copyright Designs Patents Act 1988 S. 9: Authorship of work

(1) In this Part "author", in relation to a work, means the person who creates it.

(2) That person shall be taken to be –

(ab) in the case of a film, the producer and the principal director;

<sup>26</sup> The Full text of the Copyright (Amendment) Bill of 2010 accessed from <https://prsindia.org/billtrack/the-copyright-amendment-bill-2010> on 30 December 2019

<sup>27</sup> Bill No. XXIV of 2010 introduced in Rajya Sabha, India

<sup>28</sup> S.2 (d)(v) of the Indian Copyright Act of 1957

<sup>29</sup> S.2 (z) of the Indian Copyright Act of 1957

<sup>30</sup>The Copyright (Amendment) Bill, 2010,

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

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<sup>31</sup> 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;”.

Producers Guild of India<sup>32</sup>, Indian Motion Picture Producers Association<sup>33</sup>, South Indian Film Chamber of Commerce<sup>34</sup> etc. All these associations projected the financial risk undertaken by the producers in the making of film. They stated that the producer is the one who takes the financial risk of the cinematograph film and the principal director does not share the potential risk. Since there is no sharing of risk by the principal directors they need not be considered as the author of the film. They anchored the concept of authorship of film solely on the financial aspect of the film. They were of the opinion that the one who takes the financial risk is to be rewarded. They argued that joint authorship provision is absolutely unfair and unjustified as it was the producer who faced the potential risk of loss<sup>35</sup>. The director is only responsible for direction and hence making him a co-author is unjustifiable. By focusing more on the financial risk element, they diluted the role played by the principal director in the making of film and negated their intellectual contribution in the making of a film.

The Copyright (Amendment) Bill, 2010 was introduced in the Parliament in April 2010<sup>36</sup>. However, the recommendation to redefine film authorship in India, by making Director a co-author along with the producer was summarily rejected by the Parliamentary Standing Committee through its 'Two Hundred and Twenty-seventh Report of the Committee on the Copyright (Amendment) Bill, 2010'.

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<sup>32</sup> The Film & Television Producers Guild Of India Ltd. is a Public incorporated on 26 February 1954. It is classified as Non-govt company and is registered at Registrar of Companies. It is involved in Motion picture, radio, television and other entertainment activities.

<sup>33</sup> The Indian Motion Picture Producers' Association was formed in the year 1937. It is popularly known as IMPPA. It is the first and the only internationally recognized oldest association of the Indian Film production sector.

<sup>34</sup> The South Indian Film Chamber of Commerce represents the conglomeration of the Kerala, Tamil Nadu, Andhra Pradesh and Karnataka Film Chambers of Commerce.

<sup>35</sup> 227<sup>th</sup> 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

<sup>36</sup> The Parliamentary Standing Committee called for representation from public (this included memoranda as well as oral evidence from stake holders) before finalising the provisions of 2010 bill. 68 memoranda were received from the stakeholders. The Committee interacted with a number of organizations/associations from the film, music and publishing industry, Authors' organizations, lyricists/music composers, Artists organizations, Copyright Board and other organizations and departments, especially that of the Secretary, Department of Higher Education who was entrusted to study the Bill in detail. On 26 May, 2010

## Reasons given by the Parliamentary Standing Committee for omitting the Joint Authorship Clause and Redefinition of Film Authorship

The Parliamentary Standing Committee has acknowledged the fact that director's creativity has not yet been recognised in spite of his intellectual contribution in the creation of the film. However, the committee refused to approve the recommendation to amend the law to make Principal directors as a joint author of cinematograph film along with the producer.

Primary reason quoted by the Parliamentary standing committee for rejection was that no major jurisdiction has a statutory provision in recognising the authorial status of director of film, especially in US. Parliamentary Standing Committee pointed out that in the US industry the issue of Authorship of film and incentivizing the creative contributors was addressed through 'union contracts', same shall be followed in India also. In US the Union contracts acted as a tool to achieve what was left unaddressed by law. The union contracts became an effective tool because of the structured Union functioning and Collective bargaining. In Indian film industry there is no structured union mechanism like in the US. Since there no effective Union mechanism, there is no collective bargaining to claim economic and moral rights for the directors like in the US. Furthermore, the creative labour and intellectual efforts of a creator are to be governed by Copyright laws, not by Trade Union arrangements and contracts. The approach taken by the Parliamentary Standing Committee is undermining the creativity and intellectual labor of film directors. By stating that no major jurisdiction has statutory recognition for the authorial rights of directors, the Committee side-lined the fact that the European Directives<sup>37</sup> implemented by 27 European States<sup>38</sup> introduced 'work of joint authorship' in cinematograph films in last decade of 20<sup>th</sup> century. These 27 European states are not only include major jurisdiction but also some of the best film industries across the globe like the French film industry, German Film industry etc. Both the creative author as well as the entrepreneurial author is identified as the author of film in UK through S.9<sup>39</sup> Copyright, Designs and Patents Act, 1988. There is no justification in denying

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<sup>37</sup> EC-directive 92/100/EC (Renting and lending); EC- Directive 93/83/EEC (Satellite and Cable Transmission), EC- Directive. 93/98/EEC (Harmonizing the Term of Copyright and Certain Related Rights)

<sup>38</sup> Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden

<sup>39</sup> The Copyright, Designs and Patent's Act, 1988- S. 9: Authorship of work

(1) In this Part "author", in relation to a work, means the person who creates it.

(2) That person shall be taken to be –

recognition to the directors of Indian film on account that there is no similar statutory recognition in other jurisdictions.

While rejecting the recommendation to make director a co-author the Parliamentary Standing Committee suggested that a well-designed contractual agreement between the producer and the principal director, clearly stipulating the nature and content of the enjoyment of rights, would be sufficient to protect the interest of the director. This reason given by the Parliamentary Standing Committee and its possibility of realisation is far from reality in the Indian film industry. There was a contention that a contract negotiated freely between the producer and the director which may include percentage of profit would take full care of the rights of director. In most of the situations the directors are ignorant or incompetent to negotiate their contracts. In the power structure the directors are placed way below the Producers and never in a co-equal status to demand their terms.

The Parliamentary Standing Committee stated that the producer is the kingpin and the one who makes the film. The producer invests money, utilizes persons, and chooses the director on certain offer; hence the producer shall be deemed as the author of film. This approach of giving weightage only to the monetary and entrepreneurial aspects in deciding the authorship of a work and totally ignoring creative and intellectual labour by the director. One factually erroneous reasoning provided by the Parliamentary Standing Committee is that ‘ it is the producer’s role which is central to the creation of the film’. This is a reason beyond any logical reasoning and lack of awareness of the actual functioning of film industry. Film is a collaborative art form and no single person/entity alone shall be its author. There is a blend of capital investment from the side of the producer and creative investment/intellectual labour from the side of the director. Both the producer and director are indispensable for the realisation of a film. By making the producer the kingpin the role and positioning of the director is side-lined. The role of a director in the creation of film is cardinal and director is the one who conceives, conceptualise and create a film, the film is essentially the director’s creative labour and effort, it is unjustifiable to state that the producer is central to the creation of film. One cannot deny the role played by the producer in realisation of film. Film is an art form that demands huge capital investment, and that is realised by the producer, but no film can be made with Capital investment alone, it needs intellectual and creative investment as well, and that portion is realised by the director, hence both the director

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(ab) in the case of a film, the producer and the principal director;

and as well as the producer are critical to the completion of a film.

In the Copyright (Amendment) Bill, 2010, the term used to address the director of film is 'principal director', this was quoted as a reason for rejecting redefinition of film authorship. Parliamentary Standing committee stated that 'Principal Director' is not a term commonly used in the industry'. The term 'principal director' had not been defined either in the Copyright (Amendment) Bill, 2010 or Berne Convention, whereas S.2(uu)<sup>40</sup> of the Copyright Act of 1957 is defining 'Producer'. The fact that term 'Principal Director' is neither defined in law nor used in industry is not a valid reason to remove Joint authorship provision in the case of cinematographic films. If Parliamentary Standing Committee found that the term 'Principal Director' is not defined, they should have ideally sought the drafting body to provide clarification on the usage. The term Principal Directors was incorporated by the drafting body to avoid any confusion when it comes to identifying the author and assigning the right. By principal directors, the drafters intended to address the actual film directors of the film and to eliminate other directors like director of cinematography, director of photography, directors of choreography, Associate director, Assistant Director, Chief Associate directors etc. The usage 'principal director' is actually providing a clarity, but Parliamentary Standing committee failed to recognise it.

Another reason for rejection was 'directors are well-paid and are not marginalized', this is again a factually erroneous statement. Amongst the 1500 odd film produced a year nationwide, only a handful of directors are well paid. Very rarely do a director directs movie year on year, in such a situation the lump sum received as remuneration by the director in two year or even higher span is not doing justice to creative labour the director is taking. So, while discussing this aspect we should get hold of the actual facts and figures of the industry. And in most of the cases the directors are unaware of their monetary worth, and the rights due to them. Barring a few established directors, directors as a class is still subservient to producers when it comes to remuneration, negotiation, bargaining etc.

Another reason provided by the PSC was that 'if the proposed provision were to become law, it could encourage producers not to engage directors and to do the work of directors themselves, or alternatively to engage directors to work as assistant directors which would impede the progress of their careers'. This reasoning is just a hypothetical scenario and apprehension without a sound

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<sup>40</sup> S.2 (uu)- The Indian Copyright Act of 1957

reasoning, no producer or production house can survive without the input and creative labour of a director. The lawmakers should not fear the possible misuse of a provision, instead should create a mechanism to curb the possibility of misuse of a provision.

The final observation of the Parliamentary Standing Committee is that as per the existing system, the principal director is not taking any equity risk in the production/performance of a film and it is the producer alone who runs the risk of his investment not being recovered. Herein the Parliamentary Standing Committee is superseding the basic principles and purpose of copyright. The authorship status is determined solely on the basis of the equity risk/capital investment and no room was left for the intellectual labor and creativity.

The recommendation of Copyright (Amendment) Bill of 2010, was summarily rejected stating that the director can claim their dues and rights through contractual arrangement. Due to lack of statutory recognition even the director of National award-winning movie<sup>41</sup> is knocking on the doors of judiciary for justice. In the case of *Sartaj Singh Pannu v. Gurbani Media Pvt Ltd & Anr*<sup>42</sup>, Sartaj Singh Pannu, the director of the film Nanak Shah Fakir, approached the Delhi High Court for orders restraining producer from releasing the film in dispute, without giving him credit as the 'sole Director' of the film. The Court declined the relief sought by the petitioner, since there is no statutory provision to honour the prayer of the petitioner. Though the Court denied the relief sought by the petitioner, the Court identified that copyright law relating to Films are anomalous in nature. The court stated that a director of a film is a moving force behind the creative work that goes into film making; the Court further stated that their creative work and effort is not statutorily acknowledged as an author or even as joint author. While making this observation, the Court is quoting the UK law which is counting film as a work of "joint authorship"<sup>43</sup>, 'author'<sup>44</sup> as a person who creates it; and most importantly the provision which identifies both the producer and the Director as authors in the case of films<sup>45</sup>. The Court is criticising the Amendment of 2012 in omitting the rights of Directors. Because of the statutory vacuum, the Director is even denied of basic right to exhibit his name as 'Director' in title card of the film. In a copyright parlance the Director would not be able even to assert any moral right. In the instant case, the petitioner argued

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<sup>41</sup> Nanak Shah Fakir (2016)- Nargis Dutt Award for Best Feature Film on National Integration-2016

<sup>42</sup> 2015 (4) ARBLR 176 (Delhi).

<sup>43</sup> S.10(1A), The Copyright, Designs and Patents Act, 1988 (CH. 48) (United Kingdom).

<sup>44</sup> S.9, The Copyright, Designs and Patents Act, 1988 (CH. 48) (United Kingdom).

<sup>45</sup> S.9(2)(ab), The Copyright, Designs and Patents Act, 1988 (CH. 48) (United Kingdom).

that Film and its Director come under S.2 (c) (iii)<sup>46</sup> of the Act, which means that there is a craftsmanship of a director in the making of a film making him an Author worthy of copyright protection. By relying upon S.2(c)(iii) the petitioner is trying to supersede the limitation posed by S. 2(d) of the Copyright Act, which is only recognising the producer as the author of film. This makes it evident that there is no room for interpretation of any of the provisions to protect the legitimate interest of the Director.

Though the Court denied the relief sought by the plaintiff Director, observed and stated that the Director is an integral part of film making and Director is involved in all departments of film making, Director is the captain of the team and hence the Director's moral right is to be recognised let alone the right to commercially exploit the copyright in a film. Director is a creator of an 'artistic work', i.e. a work of 'artistic craftsmanship'; a good Director is someone with craftsmanship<sup>47</sup>. A Director will be involved in almost all stages of film making - the development of the story line, the casting of actors, the lyrics, the musical score, the dialogues, and during the actual filming, the position or angle of the camera, the lights, the layout of the scene, ensuring continuity and so on. These observations made by the Court are giving a clear indication that there should be provisions for protecting the creative labour and effort of principal Director. The court is stating that the Directors are to be protected and our laws are to be updated.

### **The need for statutory recognition of Joint Authorship in Films as recommended by the Copyright (Amendment) Bill, 2010**

The basic aim of copyright is providing essential incentives for authors to create, it is an incentive to the creative labour involved in the making of a work. In film it is the creativity of the film director that is transformed and fixed in the form of a film. A director is presumed to be the person responsible for the creation and completion of film, and hence director shall be rewarded for the same. Because of lack of statutory recognition Principal director remains out of the purview of the authorship and his rights remain at stake with the producer<sup>48</sup>.

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<sup>46</sup> S.2(c)(iii), The Copyright Act, 1957 (Act 14 of 1957).

<sup>47</sup> The Court is quoting from a book on Bergman, namely 'Ingmar Bergman: A Reference Guide' by Birgitta Steene, published by Amsterdam University Press, in 2005 and substantiate that the work of Director is equivalent to that of a craftsman.

<sup>48</sup> Director's Authorship Under Indian Copyright Law: An (Un) Indian Approach? ,Lokesh Vyas And Akshat Agarwal, *Journal Of Intellectual Property Studies*, Volume Iv Issue I

An author is a human being who exercises subjective judgment in composing the work and who controls its execution<sup>49</sup>. In the case of film these requisites of being an author is met with only by the director of the film. Director is the core person without whom films can't be conceived, created and screened before the audience<sup>50</sup>. If film is to be treated as a 'Work' worthy of copyright protection, the Principal Director should also be identified as the 'Author' or one among the authors of film, because of their intellectual and creative contribution.

Furthermore, going by the Hegelian approach, an intellectual property is an expression of one's personality<sup>51</sup>. In the case of film, it is the artistic personality of the principal director that is being expressed. As per Hegelian approach, when a person externalises his ideas using his mental faculties, he actually expresses his will. Such an expression should be regarded as his property and given protection by the state<sup>52</sup>. By investing the money for the making of the film, the personality of the producer is not getting expressed through the film. Going strictly by the Personhood theory only the principal director shall be deemed as the author of the film. Because of the distinctive nature of film as a class of work, one cannot totally ignore the role of producer and rightful legal claim of the producer over the film. Hence an ideal scenario in the case of film authorship is to identify both the director and the producer as the Authors of film.

The 'producer owns all' approach has been in practice from the inception of Copyright Act way back in 1957. The rationale for the protection of the producers is primarily a utilitarian one, which is having an incentive mechanism for production rather than incentivising the creativity<sup>53</sup>. The essential role of the copyright is to foster creativity, without recognising the actual creator of a work, whose creativity is being expressed into a form of work, this cardinal role of copyright itself is being questioned.

Internationally the co-authorship/joint authorship of film is widely accepted. Many of the nations has statutorily recognised Joint Authorship in the case of film, through which both the producer

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<sup>49</sup> Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003).

<sup>50</sup> Eileen Morley & Andrew Silver, *A Film Director's Approach to Managing Creativity*, 55 Harvard Business review (1977).

<sup>51</sup> Justice Huges, *Philosophy of Intellectual Property*, Georgetown Law Journal (1988)

<sup>52</sup> Kanu Priya, *Intellectual Property and Hegelian Justification*, 1 NUJS L. REV. 359, 361 (2008).

<sup>53</sup> 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 - WIPO Academy, University of Turin and ITC-ILO - Master of Laws in IP - Research Papers Collection - 2012-2013*

and director of the film is recognised as the authors of the film like the UK and member nations of European Union. The Directors are the actual author of film and would therefore be the original copyright holder. But in Indian scenario the contribution of the directors is ignored as the law as it stands today does not vest any rights in a film in its director. In India, the authorship of film decided solely on the basis of the financial risk undertaken by the Producer and no weightage is given to the Creative contribution of the principal director of film. There is hardly any difference between the concept of authorship and ownership when it came to films in India. Due to this lack of statutory recognition and ineffective contractual arrangements, the directors of Indian films are missing out on both economic and moral rights which are enjoyed by their international counterparts.

Earlier the only source of revenue for the film was from the cinema halls; hence distribution and distribution rights were key to the film business. Exploitation of a cinematographic work is no more confined to the communication to public in the cinema hall. It has grown along with the technological development<sup>54</sup>. The revenue contribution can be classified as 75% from Theater release (Domestic & Overseas), 3% Video rights, 11% Satellite rights, 11% from ancillary sources of revenue<sup>55</sup>. As a reward to the financial risk undertaken by the Producer the entire revenue generated from cinema hall is owned by the Producer. No authors of the work incorporated in the film can claim share/royalty from the revenue generated from the cinema halls<sup>56</sup>. The revenue generated from the cinema hall is around 75% and the rest of the 25% of the revenue is derived from other sources. The revenue generated by a film beyond the cinema hall itself is huge and there is no claim for directors even though it is essentially an outcome of their creative labour. The quantum of revenue generated is manifold to the capital investment<sup>57</sup>, and the directors are often settled with little amount of money in the name of remuneration. The revenue generated from the sale of Satellite rights and Digital Rights for streaming online a major source of revenue and a safety net that reduces the risk of capital investment in the film making process<sup>58</sup>. These sources of revenue accelerate a film's journey to 'break even' or even 'table

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<sup>54</sup> Pascal Kamina, *"Film Copyright in the European Union"*, Cambridge University Press, 2002 (incomplete)

<sup>55</sup> Swapnil Narendra, "Turnover of Indian Film Industry", www.filmmakersfans.com, Feb, 2017, available at <http://filmmakersfans.com/research-annual-turnover-indian-film-industry/>

<sup>56</sup>S.18. Assignment of copyright, the Indian Copyright Act of 1957

<sup>57</sup> Selvalakshmi M, India Hema Verma, Neeta Jain –'Emergence of Indian Film Industry in the International Markets: Facilitators and Impeders '-International Journal of Asian Business and Information Management, Volume 11, Issue 3, July-September 2020

<sup>58</sup> Selvalakshmi M, India Hema Verma, Neeta Jain –'Emergence of Indian Film Industry in the International Markets: Facilitators and Impeders '-International Journal of Asian Business and Information Management, Volume 11, Issue 3, July-September 2020

profit' in some occasions. Sharing of the revenue from Satellite rights and Digital revenue is one major economic right missed out by Indian Principal Directors. The remuneration received by the director is miniscule when compared to the revenue generated by the film, and hence it is only a fair demand to provide royalty to the directors (like the musicians, script writer etc.) for the revenue received from other sources of revenue than the theatre run in domestic market.

While rejecting the proposal to recognise the Principal Director as a Co-author of film, one of the main reasons provided was that they shall secure their economic and moral rights through contractual arrangement as it is done in the US. There is certain inherent limitation to the Contract mechanism in Indian film industry. There is no standard format of contract, often the contracts are drafted by the producer and they are favouring their interests alone. There is no guideline as to the terms of contract that is to be entered into between the director and the producer, the scope of this negotiation is highly limited, often these agreements are taking away all possible rights of the director over their creative work (Film)<sup>59</sup>. 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, this often ends up in the creation of highly one-sided contracts. Negotiations and writing of agreements often happen during the shooting of the film and this leaves the director in a weaker bargaining status. Director will be more keen in 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 director. A newbie director or director with no bargaining power or medium repute is never protected by the terms of contracts. What we could gather in from the industry practice of contracts and its enforcement is that, it is not beneficial to the directors who is weaker on bargaining capacity. The directors wouldn't have had faced this plight if their rights were recognised by way of statute.

## Conclusion

A work is an expression of its creator. Film is the creative expression of the Director of the film. An author is an artist who confronts and adapts the external elements to their work and expresses it with their interpretation to the audience. All authors leave an inscription of their creativity and

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<sup>59</sup> 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*

personality in their work and they should be recognised and rewarded for the same<sup>60</sup>. In the case of film, the creative force in the creation of film is the director. Hence the shall be recognised as the author of film. By recognising the creative contribution of the Directors of the film, the entrepreneurial efforts of the producer is not marginalized. Both producer and Directors are to be treated as the Co- authors of Film considering their creative contribution and entrepreneurial contribution. By recognising the Directors as a Co-author, the producer is not alienated from the benefits of copyright protection, only a rightful distribution of royalty and protection of moral rights of the Directors are aimed at. As is it's a matter proved beyond doubt, film is a collaborative art form, hence it is only natural to treat it as a jointly authored work as it was proposed in the Copyright (amendment) Bill of 2010. Directors are to be treated as co-author of film along with the producer.



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<sup>60</sup> “Films and authorship” in the film studies reader Hollows K Hutching P Jancovch M Arnold Publishers pp 45 81, as read in Authorship in Cinema: Author and Reader , Basal Goskel Demiray, Cinej Cinema Journal , Vol. 4.1 (2014), ISSN 2158 -8724