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■ THE UNRESOLVED
CONTROVERSY IN
INDIAN CORPORATE
LAW, "RIGHT OF
FIRST REFUSAL"

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HOW PRECIOUS IS COPYRIGHT IN THE CREATIVE WORLD!!

Introduction:

Amongst the diverse issues in relation to copyrights dealt by our firm, one of the prominent concerns faced by our clients is how best to protect their copyrights. Few of the movie documentation projects handled by us include popular titles like *Dabangg*, *Zindagi Na Milegi Dobara*, *Chillar Party*, *Partner*, etc. and our forthcoming projects include *Don 2*, etc amongst others. The present article aids an insight on the enormous scope of copyright laws in India and the importance of copyrighting ones work.

The world that we live in today is full of creative people all around us. The word '*creativity*' may be interpreted or understood by different people in different ways. However, confining ourselves to a comprehensive definition given by Wikipedia, we can understand that the term '*creativity*' refers to the phenomenon whereby a person creates something *new* that has some kind of *value* (1). The words '*new*' and '*value*', forming part of the definition given by Wikipedia are the basis or core of the term '*creativity*'. The Black's Law Dictionary (2) defines the term *creativity* as 'The degree to which a work displays imaginativeness beyond what a person of very ordinary talents might create'. However, it is pertinent to note that the Indian copyright laws do not provide protection to a mere '*idea*' but to an '*expression*' of such an idea.

Copyright is a right given by law to the creators of literary, dramatic, musical and artistic works and the producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, the rights of reproduction/remake, communicating the work to the public, adapting, displaying in various formats, live performances and translating a particular work, etc. It ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting their work from infringement and unauthorized copying.

Further, the internet revolution has given millions of people all over the world, a creative outlet, a broadcasting medium, acting as stimuli, thereby providing access to a great number of people on a very large scale.

Original Work:

The Supreme Court of the United States of America held in the case of ***Feist Publications Inc. v. Rural Telephone Service Co. Inc.*** that " *the sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. The requisite level of creativity is extremely low; even a slight amount will suffice.* " This simply means that the term 'original' is a very subjective term and hence can be subject to a wide array of interpretations.

According to the provisions of the Indian Copyright Act, only an author/creator of an original work can claim protection under the laws of copyright. An '*original work*' under the Indian Copyright Act, 1957 (Section 13) means any work, which is:

- (a) An original literary, dramatic, musical and artistic work;
- (b) Cinematograph films; and
- (c) Sound recordings.

Copyright subsists in the following works:

- # Literary Work (including Computer Software) (3);
- # Dramatic Work;
- # Artistic Work;
- # Cinematograph Film;
- # Sound Recording;
- # Work of architecture, etc.

Film Industry and Copyright:

The owner of the copyright in relation to a cinematographic work (i.e. a movie) or sound recording (song) is the producer of such work (4). A producer, according to the Copyright Act means a person who takes the initiative and responsibility for making the cinematograph film or sound recording (5). For a producer of a cinematographic film, the most valuable assets are the script of the film, its title and the lyrics of songs contained in the film. All these assets together form the intellectual property of the film and provide the producer with various other 'Exclusive Rights' as enumerated in the Copyright Act, 1956. These Exclusive Rights consist of (i) Remake Rights (in the original language or in different languages), (ii) preparing derivative works from the existing intellectual property, (iii) producing/enacting the script/story in various other formats of display, (iv) distribution rights, (v) rights to give live performances, (vi) licensing and/or permanent assignment or transfer of these rights.

A copyrighted work is created and compiled by many artists together, who are involved in the process of making the film, however the producer of the film is the copyright owner of the film. These artists work for the producer and create the copyrighted material on the instructions of the producer on "work-made-to-hire" basis in exchange of monetary consideration. The producer, to safeguard his copyrights, enters into artist agreements with the various artists since the inception of the work to be created for the film and carves out work-made-to-hire clause in the said agreements alongwith non-disclosure and confidentiality

clauses. Agreements with such clauses are precautionary steps in protecting the copyright in the film and safeguard the producer from any possible litigation for infringement at the time of the release of the film.

The doctrine of "work-made-to-hire" is applicable to two different set of people involved in the production of the film. Firstly, this doctrine applies to all the persons employed by the producer in regards to the making of the film. In this case, the producer supervises the 'manner and means of production' and the work is created as per the instructions of the producer. Secondly, the doctrine applies to freelancers from whom the producer purchases the work or specifically orders for a particular work to be created for the purposes of the film. In both the cases mentioned above, it is advisable that the producer should execute an expressed contract with the artist with a specific clause stating that the work created is on 'work-made-to-hire' basis. Further, the producer must ensure that in cases where the producer is purchasing any work created by any freelance artist, the agreement executed with such artist must have an express provision for transfer/assignment of the Intellectual Property Right (IPR) of such work in favour of the producer.

Infringement:

Infringement of Intellectual Property Rights means the violation of rights of the owner of the IPR. Any action done by any person, without the consent of the owner/holder of such intellectual property shall amount to infringement of IPR. Piracy is another form of infringement of copyrights, prevalent commonly in cases of artistic, musical and cinematograph films. In general parlance, it means, stealing or theft of someone else's work without proper authorization. This results in huge amounts of losses, monetary and otherwise, to the IPR owner/holder. The Indian film industry, being one of the most capital rich industries in India, faces a grave challenge in order to protect its intellectual property rights from infringement. Though the lawmakers are trying their best to protect the IPR contained in cinematographic films by introducing novel and fool proof laws, till date their efforts have not borne fruits as no law has been able to provide cent percent protection from the various forms of infringements. Therefore, it is advisable for any film-maker/producer, to reduce in writing, all understandings with the various parties involved in the process of film production. It is advisable that there is proper documentation at every stage, right from the inception of the film making process to protection of the IPR in the film so produced. This ensures a smooth sailing for the producer at all times and brings peace of mind at the time of release of the film and further, during the entire term of the copyright.

A singular truth that one can say exists in the film industry or for that matter, in any industry, is that if "*If you can't protect what you own, you don't own anything*" [\(6\)](#).

Conclusion:

One must treat one's creative skills and the fruits derived therefrom with due respect and caution they deserve. In the near future, keeping in mind the current market scenario and the evolutionary state of Indian IPR, things are bound to get ambiguous, before they get clearer, for people who make a living out of their creative work. So, one must understand the importance to protect one's intellectual property rights as one works towards developing and nurturing one's creativity. Keeping abreast with the recent developments in relation to the protection of one's intellectual property, enables the optimum exploitation of one's creativity.

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(1) <http://en.wikipedia.org/wiki/Creativity>

(2) Black's Law Dictionary - Seventh Edition

(3) But there are several differences in approach between India and the US in respect to protection available for computer software. This can be a dissertation in itself.

(4) Section 2 (d) (v) of the Copyright Act, 1957. But rights have been asserted by the signing artists and royalty has been demanded by them.

(5) Section 2 (uu) of the Copyright Act, 1957

(6) Presentation given at the Asian Academy of Film and Television, 2004

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