



RIGHT OR WRONG: ANALYSIS OF JURISPRUDENCE & LEGAL FRAMEWORK MORAL RIGHTS IN THE ARENA OF FILM INDUSTRY

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The concept of copyright protection exists to not only reward the creator of the work for his intellect but also to serve as an incentive for more people to create work which may eventually be for the benefit of the society. The rewards of this Intellectual property Right can be reaped in monetary forms where in the owner has the right to exploit the copyrighted work by way of selling, lease, license etc. Another form of rights inherently attached to the copyrighted work is moral rights. Moral rights are those set of rights which ensure due attribution of the copyrighted work when it is exploited by the user. These rights are justified in the sense that the author of the work who is also the first owner may give up the ownership of the copyright but the fact that he is the creator of the work should not be forgotten. Thus while one exploits the copyrighted work, he has to give due credit to the author of the work for his creation. Moral rights are also significant for preservation of culture of a nation. Film industry of a country is not only a vital source of revenue but also the reservoir of plethora of creative content. The stakeholders in the film industry who are eligible to get copyright protection include the musicians, performers, lyricists, producers of sound, art directors etc. Thus the emphasis on moral rights in the film industry becomes all the more important since every stake holder has to be attributed

due credit for his work. This paper thus seeks to evaluate the growing importance of moral rights in the film industry & comparatively analyze the scenario with regard to moral right in the U.S., U.K. and Indian jurisdictions, the legal framework of the same along with certain relevant case studies, to emphasize on the rationale and need to grant moral rights in the copyright arena specially the film industry.

Key words- Moral Rights, Copyright, Author, Owner, Film Industry.

MORAL RIGHTS: THE CONCEPT

The creation of an artist is an expression of his idea or opinion. This idea can be expressed in many tangible forms, for instance in words, pictures, music or photos. This unique expression of the idea that carries a certain amount of originality deserves protection. The author is also given the right, over his work, to sell it off or share it with a prospective buyer or user. Even when this happens, there are certain rights over his work that the author never loses. Such rights are moral rights. These rights represent social values with regard to the fact that the creation of the author was a result of a lot of effort and labor and thus his creativity is not merely to earn a livelihood but something beyond that and should be appropriately valued and protected.

Moral rights were first recognized by the French courts in the early nineteenth century.¹ In the first half of the twentieth century, the concept was gradually introduced into the copyright laws of

¹ Georges Michaelides-Nouraros, *Le Droit Moral de l'Auteur* 17 (1935).



European countries with a civil law tradition.² The rationale for granting moral rights exists in the personality of the author or creator that his creation reflects. Economic rights are more than necessary to keep the body and soul combined but moral rights give due respect to the creator and his creation. His work is seen as a service to the society and thus should be protected even when he does not remain the user of copyright. The recognition of these aspects, moral rights bring about cultural focus to copyright law.

Films are a huge part of the 21st century, almost inseparable. The film industry of a country contributes to its economy and if the industry is as huge as the US, India or UK, then it is one of the most important revenue generating systems over which the economy of the nation depends to a certain extent. Motion pictures are widely admired as an original expression of art form of the 12th century. Films are a mixture of a number of artistic expressions, words, images, drama, music and the thread that puts these elements together- technology. The complex nature of this form of art presents a challenge to the image of the artist as individual, whose work reflects a unified artistic concept, embodied in a doctrine of moral rights.³ Authors, be it of dramatic work, literary work, artistic or musical work and films have moral rights over their creation even though the ownership of the copyright may not rest with them. Moral rights grant the right to an author to be

respectfully attributed for his work since the work is reflective of his personality.

DIFFERENT KINDS OF MORAL RIGHTS

The Right of Attribution (“Paternity”)

Also known as “right of paternity”, is the right by which authors, even when he is no more the owner of the copyright of his creation, can still claim authorship over the same. This right determines fixating the same of the author to this creation so that he is attributed for the same at any point of time when anyone uses his creation. Simultaneously it also bestows the right of anonymity if the author seeks the same.

ii. The Right to Integrity

This right emanates from the rationale that “the work of art is an expression of the artist’s personality so distortion, dismemberment or misrepresentation of the work mistreats an expression of the artist’s personality, affects his artistic identity, personality and honor, and thus impairs a legally protected personality interest.” This right guarantees a general protection against any sort of distortion or modification of the work.

iii. Other Subsidiary Rights

Apart from the above mentioned, to cover additional circumstances, there exist certain subsidiary rights which include rights such as to create, publish, withdrawal of published work from sale, the right to prevent “excessive” criticism of a work, and the right to prevent any other violation of the author’s personality

² Claude Colombet, *Propriété littéraire et artistique et droits voisins* 22 (1992).

³ Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology*, Chapter 7 at page 375, Oxford University Press, 2011.

MORAL RIGHTS AND FILMS



Films are the most complicated form of art. It's a tremendous process of transforming one idea to various forms and expressions. It includes every aspect of art i.e. music, words, literary work, and drama. Singularly, however complicated these components be, when intertwined in one, they become all the more complex and spectacular in nature. By the virtue of this complex nature, the final outcome or a film requires moral rights protection. United States being a notable exception, moral rights in this medium are recognized in most countries of the world.⁴

The practical relevance of these rights especially in the cinematography arena is without an iota of doubt. The nature of creation involves abundance of copyright and thus moral rights form an integral part of the same. Many international cases have arisen in the past over the issue of granting moral rights to authors and even performers who contribute to films in one way or the other. The advancement of technology in the 21st century has transformed the world of cinemas giving a new dimension to this art form. Digital images of personalities can be altered to re-create characters from any point of time to any point in time. The communication of movies via the platform of internet is another ease that technology has provided us with. Technology has brought the industry under one big umbrella making access and sharing easy and beneficial to everyone. India for instance has surpassed US, now being the world's largest film maker. But unlike US, India has welcomed moral rights with an open arm. In fact, it is this acceptance of moral rights that

has helped to keep alive a cultural discussion around movies. All these things contribute to the question of moral rights and why is it necessary to have the same in a film industry.

US SCENARIO AND CASE STUDIES

In USA, moral rights have been existing since 1948. *Shostakovich v. Twentieth Century-Fox Film Corp.*,⁵ was a copyright lawsuit regarding moral rights jurisprudence. The movie titled *The Iron Curtain*, which was based on a soviet spy. Twentieth Century Fox has utilized compositions as background music of composers who happened to be the citizens of the Soviet Union. The name of the composers, Shostakovich was also used in the picture when one of the characters incidentally referred him in appreciative way. American Judges expressed that there is possibility that Moral Rights of integrity of composer has been violated as the work was mistreated and also due to the music having been in public domain couldn't be claimed copyright over. The court faced the challenge of how to enforce and prove these moral rights. The Judges also faced the difficulty while finding an appropriate standard and placing the moral rights of another with members of society. Thus, looking for a remedy in such a situation was a herculean task. The Court however concluded that "the association of work with discourse and political views was not in itself to qualify violation of integrity. In the absence of copyright, others may use the

⁴ Most Western European countries, including France, Germany, Italy, Austria, Spain and Belgium have special provisions on moral rights in films.

⁵ 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), aff'd, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949),



names of the authors in copyrighting, publishing or compiling their works.”

In particular when USA joined Berne convention, one requirement to be adhered to was protection of moral rights of the author of the work. USA became concerned regarding implementation in its law and there are possibly three methods of satisfying the commitments

- 1) General reform of US copyright act (which was not adopted).
- 2) Passing special legislation (specially confined for protecting the Moral rights of artist of visual right).
- 3) Case precedents

In post Berne era case law was only basis for deciding moral rights. But it met with limited success.

INDIAN SCENARIO AND CASE STUDIES

India, in 1952 got its first copyright Act and changes were made to the same to provide for moral rights in 1994. Ever since moral rights have

been frequently a matter of legal dispute

.The leading case in this regard *Amar Nath Sehgal V. Union of India &Anr*,⁶ was the very first in the trail of cases regarding moral rights. It questioned the existence of moral rights over a mural that was created by the author even when the copyright over the same was assigned to Union of India.

The Court took help from national and the international laws for protection of the moral

⁶2005 (30) PTC 253.

rights of the Author and held that nothing prejudicial to the work, which is of such nature that it hampers the reputation of the author, shall be done so as to violate moral rights.

Pradeep Nandrajog J. ruled: “*mural whatever be its form today is too precious to be reduced to scrap and languish in the warehouse of the Government of India. It is only Mr. Sehgal who has the right to recreate his work and therefore has the right to receive the broken down mural. He also has the right to be compensated for the loss of reputation, honor and mental injury due to the offending acts of UOI*”.

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The Courts interpreting moral rights act with the intention of broadening the horizon of protection of copyright for the authors of various copyrighted works. Under the Indian copyright laws, there are two rights covered under the ambit of moral rights namely the right of integrity and right of paternity. Even so, the courts have always acted progressively to stretch the protection through wider interpretations of the existing laws.

UK SCENARIO AND CASE STUDIES

In UK, the landmark judgment came in *Confetti Records & Others v Warner Music UK Ltd*⁷. The Claimants were copyright holder of track. The Defendant offered to use the track, and there negotiations for the same. A fax was sent, that contained the terms and “subject to contract” conditions. The Claimants agreed to the offer. But, before

⁷ [2003] EWHC 1274; [2003] EMLR 790 Court Chancery Division.



the payment and contract had not been concluded, Claimants informed to renegotiate so that the track should not to be used until negotiations are complete. But the Defendant had already used it. The Claimants initiated action to restrain the defendant from using it. The originator (the third claimant) of track also brought action for “derogatory treatment” of the work relying on sec.80 (2) (b) CDPA 1988. On the issue of whether defendant’s addition of a rap to the track constituted derogatory treatment under s.80 (2) (b) CDPA 1988, the court held that “derogatory treatment of work is committed when it had prejudiced the author’s reputation. The know meaning of “rap” expert evidence is required. It had not been proved nor any evidence that concluded prejudice to the originator’s reputation so the claim for derogatory treatment is invalid.”

COMPARATIVE STUDY OF U.S.A., U.K. AND INDIA

Legal Framework of the United States

Moral rights differ from one nation to another, but, at a global stage, the Berne Convention bestows upon the author of the copyrighted work two kinds of moral rights namely the right of paternity that is the right to claim authorship of their work (right of paternity) and to stop any modification of it that would be harmful to their reputation (right of integrity). The U.S. is a member of Berne Convention but it does not provide for moral rights. The Visual Artists Rights Act of 1990 (VARA) in America is single law that talks of some moral rights in film industry, but it does not include works which are created as “works made for hire”.

VARA is the first act to provide protection for the moral rights of visual artists all over the country,⁸ it does not protect artists in the film industry. Works made for hire, such as films, are excluded from VARA’s definition of visual art.⁹

A number of court decisions have been laid down that enforce the concept of moral rights, beginning with *Fairbanks v Winik*¹⁰. Here, Fairbanks rise to fame increased his value. One Majestic studio having the ownership of copyright of his films sold the same to one Triangle Film Corporation. The same was tried to be sold in 1922 for re-editing. Then, in 1922, even sans copyright, Fairbanks filed an injunction suit to stop Triangle’s action contending that the modification of his films to two-reel, serial format would be “detrimental to (his) standing in his profession, in that he has never appeared in a two-reel picture, but has only appeared in feature pictures of five or more reels”

The court thoroughly went through Fairbanks’s contract with Majestic, which gave the right to Fairbanks to review the final cut of his films. Thus the decision of the court was in favor of Fairbanks, protecting his moral rights as an artist. Due to the lack of protection of moral rights the most pressing problem is of colorization of old black and white motion pictures. It is

⁸ Dillinger E, *Mutilating Picasso: The case for amending the visual artists rights act to provide protection of moral rights after death*, *UMKC Law Review*, 75 (3) (2007) 909.

⁹ Kaplan B, *Visual artists’ rights in a digital age*, *Harvard Law Review*, 107 (8) (1994) 1988.

¹⁰ *Fairbanks v Winik*, 198 N.Y.S. 299, 299 (Sup. Ct. 1922); *Fairbanks v Winik*, 201 N.Y.S. 487, 488 (App. Div. 1923).



alterations to works are an infringement of moral rights of directors, screenplay writers and artists. In turn it also affects the economic rights of producer. “There is a conflict between the personal moral rights of the artists and the property rights of the producers. As Profs Patterson and Lindberg point out “property is a favored child of the common law, whereas personal rights, a stepchild. When there is a conflict between the two, the property rights almost invariably prevail.”¹¹

Legal Framework of the United Kingdom

In UK Copyright regime, Designs and Patents Act (CDPA) 1988, recognizes the author of a work as the first owner of copyright and it also mentions about the position of authors and performers but the exceptions to the rule. The employer or the crown is the first owner of any copyright work ‘made in the course of employment’, subject to agreement between them or in the course of his duties respectively. The ambiguity is in the wording of ‘in the course of employment’. In order to determine this Court of Appeal in *Stephenson Jordan & Harrison Ltd v MacDonald*¹² adopted the “skill, labor, and judgment test on the basis of justice and common sense”.

In *Noah v Shuba*¹³ it was held: “where an employee performs work beyond the employment contract, namely a contract of service; the employee will become the first owner of the copyright work”.

¹¹ Patterson L R & Lindberg S W, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press, Athens), 1991, p. 166.

¹² [1952] 1 TLR 101.

¹³ [1991] FSR 14.

The categorization of “employee or self-employed” is essential to determine ‘copyright ownership’ where there is need of subsequent exploitation. This concept is dicey depends on its facts of each case, Cooke J in a case in 1969 mentioned “the more the degree of individual obligation the worker has in his art, the greater the possibility that worker is an independent contractor.”

In case of *Griggs Group v Ross Evans*¹⁴ it was held that “exclusive license would not be enough for the business work, the court was ready to imply a beneficial assignment of copyright to the commissioner of artwork in order to give business efficiency to the commissioning arrangement.”

In this case, the court gave wide interpretation to beneficial ownership and thus included commissioned works within its purview, and further held “section 11 CDPA 1988 subject to a non-statutory exception in the case of works made by independent contractors”. The impact of such decision was that:

- 1) It snatched the shield conferred on authors thus no opportunity to say whether they wish to transfer their rights so tacit inducement is there.
- 2) In conditions where such works have unexplored applications, author of commissioned works have to face problems if he desires to further exploit these works with the commissioner's competitors. This is apparent in cases where licenses relating to software and architectural plans.

In joint authorship each will have their own individual rights against infringement, they can assign individually

¹⁴ (No.1) [2005] EWCA Civ 11



but the whole work can be licensed without the consent of co-owners.

Pre CDPA 1988 era, moral rights and their remedies for infringement fall under contract and defamation so torts law, passing off and obligation created by contract were only remedies.

After CDPA 1988 came into force moral rights are directly given to authors and directors of copyright literary, dramatic, musical and artistic works and copyright films, these moral rights are followings:

1. The right to be identified as author (in section 77(1) i.e. Paternity Rights).
2. The right to object to a derogatory treatment of work (Integrity Right).
3. The right not to have work falsely attributed (False Attribution Rights).
4. The right of privacy to certain photographs and films (Privacy Right).

Performers' Right in the UK

The Performances (Moral rights, etc) Regulations 2006, there are two moral rights granted to:

- 1) Performers
- 2) Authors

These regulation are under part II of the CDPA 1988, confers the paternity right and the integrity right. A performer is now granted:

- 1) A right to be identified as performer in his live aural performances and any performances fixed in phonograms,
- 2) Under section 205F part II CDPA 1988, a performer is provided an integrity right in his performance.

Legal Framework of India

Moral rights are the rights of attribution and integrity over the works performed¹⁵. There have been various case laws that support moral rights in the film industry in India.

In the case of *Indian Performing Rights Society Limited v. Eastern India Motion Pictures Associations*¹⁶, Justice Krishna Iyer opined-

“Artists enjoy protection in the music work while the producer enjoys protection for the work as a whole. This shows that the work of actor has not been mentioned as such by the judicial precedents. Actors mainly depend on the producers in order to get their royalty and fix their morality rights. However, the morality rights itself does not give adequate protection to the actors. Manisha Koirala’s work in the movie was distorted in such a way that it could hamper the reputation of the actress and so there was a need of addressing the plights of the actors in films”.

The Copyright Act in India has does not provide any specific provision relating to ‘acting’. The question remains unanswered as to whether acting comes within the scope of ‘work’ or not as defined under Section 2(y) of the act. In the case of *Fortune Films v. Dev Anand*¹⁷, the Division Bench of Bombay High Court held :

“acting does not come within the purview of a ‘work’ and so cannot be entitled to claim

¹⁵ Sterling J., World Copyright Law (Sweet and Maxwell, London), 1998, p. 55.

¹⁶(1977) AIR SC 1443.

¹⁷In the High Court of Bombay,(1079 AIR Bom 17.



copyright protections. Actors are considered as performers under Section 2 (qq) of the Copyright Act, 1957.”

Copyright Amendment Act, 2012

The Copyright act has been amended to include a new provision, i.e. Section 38B (b), which specifically mentions “*the performer of a performance shall, independently of his right after assignment, either wholly or partially of his rights, have the right to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation*”. Thus, the copyright scope of protection has been widened to include performance in a cinematograph film. Even so, an important question to answer at this point of time is regarding section 2(q) of the Copyright Amendment Act 2012, which defines a performance as “*a performance is any visual or acoustic presentation made live by one or more performers*”. Whether this definition is broad enough to take under its ambit the performance of actors in a movie and if so, will moral rights to the actors be granted in the same respect?

Moral rights as per the Indian Copyright Act 1957 have been given to only to the authors and not to the actors (Sec 57). The WPPT has expressly denied ‘moral rights’ to audio-visual performers such as actors¹⁸, partly due to India’s insistence during negotiations, leading several commentators to opine that this was due to the powerful producer’s lobby in both Hollywood as well as

¹⁸ “ www.wipo.org/pressroom/en/releases/2002/p302.html.”

Bollywood which seeks to deny actors any rights¹⁹. The purpose behind conferring moral rights on authors is to rationalize their creativity and not just the economic interests. In same way actors use their “own skill and labor” in order to bring creativity element in the movie.

WAIVER OF MORAL RIGHTS

Under Section 57 of the Indian Copyright Act even if the work is assigned either wholly or partially, the special Rights continue to vest in an author, held in *Smt. Mannu Bhandari v. Kala Vikash Pictures Pvt. Ltd. and Anr.*²⁰. After the death of author the right to integrity is inherited by the legal representatives of the author but under Sec57 of Indian copyright act following does not amount to infringement:

- 1) Failing to display a work or in manner which satisfies author.
- 2) Lawful possession of a copy of computer programmes.
- 3) Backup copies for temporary protection.

Justice Pradeep Nandrajog in *Amar Nath Shegal v. Union of India*²¹ “*In the material world, laws are geared to protect the right to equitable remuneration. But life is beyond the material. It is temporal as well. Many of us believe in the soul. Moral Rights of the author are the soul of his works. The author has a right to preserve, protect and nurture his creations through his moral rights.*”

The Special Rights cannot be assigned but

¹⁹ “Fiona Macmillan ‘The Cruel C: Copyright and Film’, 2002 Eur IPR, p 21.”

²⁰ “AIR 1987 Delhi 13.”

²¹ 2002(2)ARBLR130(Delhi); 2005(30)PTC253(Del).



the position as to its waiver under Indian law is still doubtful. Thus it can be inferred that moral rights are legal rights, and may be waived. But it still unanswered whether the same apply to arena of copyright. In the **United States** under Visual Artists Rights Act (VARA) of 1990, it is expressly provided for waiver of moral rights but it can be waived in following manner:

- 1) It must be signed.
- 2) It must be on written agreement.
- 3) It must specifically mention the work.
- 4) It must mention the use to which waiver applies.

Similarly, in the UK, moral rights of the author of the copyrighted work under section 87 CDPA 1988 are barred from the following:

- 1) It cannot be assigned
- 2) There can be waiver of the moral rights by consent.
- 3) It must be on instrument in writing.
- 4) It must be signed by the authors.
- 5) Waiver can be specific or general,
- 6) It should be related to both present and future works
- 7) It is subjected to potential subsequent revocation.

Even though waiver is an essential second side of the coin, the existence of this flexible waiver has had many negative impacts for instance exercising undue economic pressure during bargain i.e. when the copyrighted work has to be attributed to the author of the work, the author remains in the position to claim economic benefits owing solely to the fact that he is the author and his work being used by anyone has to be duly credited to him. The author also has to be more cautious because he has to anticipate

terms of contract for his self protection against future exploitation of work. Another shortcoming of the Copyright law of the UK is that the low threshold of originality to determine copyright eligibility criteria can lead to multiple claims from multiple authors for moral rights. In such a scenario what benefits do moral rights accrue for the author who has put in labor to create work.

CONCLUSION

Moral rights form an integral part of any creative work as they provide a certain amount of protection to the work even when it does not remain in the hands of the author. Such rights prove to be necessary considering that the next owner of copyright, who is not the creator, may hamper the work and subsequently the reputation of the author. Such an act will run contrary to the intention of the author with which he created the work, if it is to be used carrying its essence. Even though the stand of a motion picture is not sufficiently clear in the digital era. Directors and screenwriters, receive little solace from copyright law's numerous protections as copyright primarily benefits the copyright owners.²² Even though many contradictions exist in the statute and there may not be sufficient laws to promote healthy moral rights regime, the spirit would always be bent in favor of giving a beneficial interpretation to the contributors, be it in any form. In such a scenario a set of concrete laws or guidelines to the copyright regime is the need of the hour and thus appropriate legislative

²² Silver J A, A bad dream: In search of a framework for copyright infringement claims involving digital imagery in motion pictures, IDEA: Intellectual Property Law Review, 35(1995) 407.



measures should be taken to bring about the needed changes.

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