
CREATION OF THE COPYRIGHT SOCIETIES IN CINEMATOGRAPH WORK, AN ANTITHESIS TO THE BASIC IDEA OF FREE COMMUNICATION

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ABSTRACT

To protect the vulnerability of Cinematograph work along with other forms of copyrightable works (within the meaning of section 13 of The Copyright Act, 1957) the legislative intention incorporated into the original act of 1957 a new chapter by substitution referred to as Chapter VII (Chapter VII, substituted by the Act no.38 of 1994, vide s. 11, (w.e.f. 10-5-1995)).

In particular, second proviso to section 33 of the amending act of 2012 (The Copyright Amendment Act, 2012) directed unequivocally that the license related to various copyrightable works incorporated in the Cinematograph work shall be undertaken by the Copyright Societies registered under section 33(3) of the Act and not by any other agency.

While this move by the legislature was intended to establish a just and equitable administrative frame work in the shape of a registered copyright society so as to safeguard the interests and rights of the cinematograph authors and producers, yet this noble move has an inherent lacuna.

This paper highlights this lacuna and discusses that how the powers conferred upon the copyright societies shall bring in arbitrariness which is in utter violation of the basic ethos of our constitutional frame work as incorporated in Article 14.

Keywords: Cinematograph Act, Copyright Act, Copyright societies, communication, Intellectual Property Rights

INTRODUCTION

Copyright, as a type of intellectual property right, empowers the owner of such right to prevent and prohibit unscrupulous elements from copying or more specifically infringing their “artistic, literary, dramatic and cinematograph works” (Dhar, 2022). Whilst there are various forms of intellectual works (supra) which together are the subject matter of the Copyright Act, yet in this paper we confine ourselves to a matrix of intellectual property commonly referred to as Cinematograph work. We have used the term matrix to signify the fact that our focal intellectual property i.e., cinematograph, consists of an array of many intellectual properties like literary work, artistic work, music, dramatics and phonogram/sound recording, thus is one of the most prominent subject matters of the Copyright Act, 1957 within the meaning of section 2(y) and section 2(f) of the act and is highly susceptible as far as infringement is concerned.

The concept of ‘Copyright Protection’ is best explained by the High Court of Judicature at Bombay as under: “Copyright, it is a form of intellectual property. With advancement in technology, it is very easy to copy. The basic test in actions based on the infringement of the copyright is that if a thing fetches a price, it can always be copied and therefore, it needs adequate protection.” (Burroughs Wellcome (India) Ltd. v/s Uni-sole Pvt. Ltd. and Another (1999), 19 PTC 188., 1999).

Effectiveness of the Copyright protection entails promoting and rewarding the human creativity and in the advanced society it has emerged as an indispensable support system for intellectual, cultural and economic activity. Copyright statute promotes the creation of artistic, literary, dramatics, musical and cinematograph films by conferring certain exclusive rights to their authors and creators.

‘Cinematograph’ being the focus point of study of this paper can be understood as a subject matter of The Copyright Protection by a conjoint reading of sections 2(f) which defines the term ‘*cinematograph film*’ along with section 2(y) defining the term ‘*work*’ and Section 13(1)(b) which identifies the ‘*works in which copyright subsists*’ and in which under clause-b Cinematograph Films are inclusive.

A most significant and expedient amendment brought by the Copyright (amendment) Act, 2012 was introduced in the field of cinematograph film, wherein before the amendment the film as a whole was considered as the exclusive property of the producer, but now by the virtue of the

amendment of 2012 it got fragmented into various and separate components like literary, artistic, musical work including sound recording in which each fragment was defined as the separate copyright work of the author who created it rather than the entire work being given under the ownership of a producer. Hence due to the operation of this 2012 amendment, original authors were given their due right e.g. music composed and lyrics written, even if these were created for a cinematograph work.

To elaborate, a feature film may be exhibited by the producer, but he cannot pick out from that feature film a sound track and a music component and play those in a separate venue, which would amount to infringement, unless such actions are protected under proviso (b) or (c) of section 17 of the Act (Dhar, 2022).

Second significant step taken by the central legislature was the introduction of the concept of Copyright Society in the field of Cinematograph works which aims at the collective protection of the works of the authors and producers involved in the creation of a content which collectively is referred to as a cinematograph film. This amendment and introduction of society in the field of cinematograph was utmost in requirement as no authors or producers can keep a vigil of their intellectual property to such an extent which the copyright society by the virtue of its organizational strength can maintain and keep. Therefore, for protection of their creations and for reaping the optimum economic benefits from those creations it was in the ultimate interest of the authors and the producers that they become part of such an integrated society and the same was fulfilled by the amendments in the Copyright Act in 1994 and subsequently in 2012.

THE COPYRIGHT SOCIETY AND ITS FUNCTIONS

A Copyright Society is a collective administration society registered under Section 33 of the Copyright Act, 1957. Such a society comprises of authors and other owners including the producers of a cinematograph work. The minimum membership required for registration of a society is seven. Ordinarily, the Act allows only one society to be registered and thereby conduct the business in respect of the same class of work. A copyright society is entrusted to issue or grant licences in respect of any work in which copyright subsists in a cinematograph work. As per the second proviso to section 33 of the Amending Act of 2012 (The Copyright Amendment Act, 2012), the business of issuing or granting license in respect of literary,

dramatic, musical and artistic and other works incorporated in a cinematograph films or sound recordings shall be carried out only through a copyright society duly registered under this Act. Thus, the Act has introduced a system of compulsory licensing and collective management of the performing rights.

Therefore, the Indian legislature has established the Copyright Society with the primary and equitable aim of enhancing organizational strength and resources to effectively monitor authors' works and efficiently collect royalties on their behalf.

In view of the above, section 33A was introduced in the Act so as to enable the Copyright Societies to publish their tariff cards for issuing of Performance Licence for public communication of the contents of cinematograph works and in turn to impose and collect royalties for the same from a class of public who are using those works for their economic benefits.

THE ANTITHESIS

As discussed above, the Copyright Act was amended in 1994 and subsequently in 2012 with the fair objective to have an inclusive copyright society in the field of Cinematograph work and all intellectual properties contained thereunder and to protect the rights and interest of the authors with regard to their copyright contents and the public communication thereof. While the motive at outset seems just, yet as we traverse through the basic idea of Public Communication as reflected in Section 2(ff) of the Act and Tariff Scheme as incorporated in section 33A along with the Tariff card as issued in line and in compliance of the Act by the Copyright society registered in this behalf under the aegis of the Act, we come across a grave and highly palpable contrast between what was conceived with the amendment in the Act and what has actually been implemented.

For the sake of brevity sections 2(ff), 33A and as gist of tariff card is produced hereunder:

Section 2(ff) “communication to the public” means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

Explanation —For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public; (The Copyright Act 1957 (14 of 1957), 1957)

Section 33A. Tariff Scheme by copyright societies. — (1) Every copyright society shall publish its tariff scheme in such manner as may be prescribed. (Copyright Office Government of India, n.d.)

(2) Any person who is aggrieved by the tariff scheme may appeal to the Appellate Board and the Board may, if satisfied after holding such inquiry as it may consider necessary, make such orders as may be required to remove any unreasonable element, anomaly or inconsistency therein:

Proviso 1: Provided that the aggrieved person shall pay to the copyright society any fee as may be prescribed that has fallen due before making an appeal to the Appellate Board and shall continue to pay such fee until the appeal is decided, and the Board shall not issue any order staying the collection of such fee pending disposal of the appeal:

Proviso 2: Provided further that the Appellate Board may after hearing the parties fix an interim tariff and direct the aggrieved parties to make the payment according to pending disposal of the appeal. (Copyright Office Government of India, n.d.)

Gist of tariff card published by the Society- Cinefil Producers Performance Limited (herein after referred to as CPPL), registered in April, 2023 and dealing with licensing and CPL for Cinematograph:

Category Code	Classification of Tariff rates	Classification of Tariff rates	Remarks/Observation
<i>Shopping malls</i>		<i>Based upon Class A/B/C cities</i>	<i>No classification based on</i>
<i>Mini Malls</i>			

<i>Stand Alone Shop</i>	<i>Per sq ft. basis or seating capacity or number of rooms</i>		<i>content/cinematograph item being charges for display</i>
<i>Commercial Motor Operators</i>			
<i>Hospitality and Leisure Establishment</i>			
<i>Gym</i>			
<i>Spa</i>			
<i>Saloons</i>			
<i>Hostels</i>			
<i>Rooms-Hotel/Club/Resort</i>			
<i>Nursing Home/Hospitals</i>			

Source: Cinefil Tariff Scheme (www.cinefilindia.com/tariff/) (Cinefil, n.d.)

On harmonious construction of the above-mentioned provisions of the act and Tariff Rate Card published by the Society we come across following interpretations.

Firstly, the Term ‘*public*’ as defined in the Act is not defined within unequivocal terms and has a connotation of highest possible amplitude so as to bring within its definition a term of ambiguity as to who should be defined as Public, because, if we go by this definition then even household members or say a residential society having several members who are otherwise consuming the Cinematograph film or say, some music track inbuilt in it which may or may not be displayed as a part of that film, on a personal basis and not for any economic benefit, will become the part of *Public* within the meaning of the section 2(ff) of the Act and will

indirectly come within the ambit of CPL(Cinematograph Performance Licensing) and royalty imposition by the Copyright Society on the account of unauthorised display or communication of the content as per the definition of the tariff card being published by that Copyright Society. Due to this element of non-clarity in the definition of the term Public under section 2(ff) of the Act the Tariff Rate Card as published by the Registered copyright society has even included in its area of influence the rooms of hotels, hospitals and hostels where the cinematograph films are being displayed for private amusement and entertainment and that too after paying the proper subscription fee to the broadcasters, OTT media or the cable network providers as the case may be. Thus, there is no Public Communication of the content which can be referred to as infringement and the imposition of royalty on the account of non-clarity within the meaning of the term Public is bereft of reasonable classification within the meaning of Article 14 of the Constitution of India.

Secondly, on plain reading of the section 33A, which was incorporated by the amending Act of 2012 we come across an interpretation that, the legislature made an unqualified assumption that the tariff rate card for which they empowered the Copyright Society shall be sacrosanct and shall solve all the problems related to content infringement which were prevalent in the domain of Cinematograph Films, and this interpretation is apparent from the fact that there is no provision provided in the above mentioned section for the person or entity to register its protest with regard to the tariff being imposed on them for display of the content publicly thereby meaning that they are not and cannot be allowed to challenge the tariff card at the very first instance when it was being imposed and all they are permitted to do is to invoke the Appellate provision (which was incorporated into the act after five years of amendment on 26-05.2017). Moreover, the Appellate provision was incorporated with balance of convenience being tilted towards the Copyright Society giving them an upper edge whilst the burden of proof was shifted from the Copyright society in violation of section-101 of the Indian Evidence Act, 1872 (produced as under for the sake of elaborating the point of law). For elaborating the above fallacy, section 101 of Indian Evidence Act is reproduced hereunder:

“Section 101: Burden of Proof- Whoever desires any Court any judgement as to any legal right or liability dependent on the existence of facts which he asserts, must proof that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. (Indian Evidence Act, 1872, 2020)

Illustrations

- a. *'A' desires a Court to give judgement that 'B' shall be punished for a crime which 'A' says 'B' has committed. 'A' must prove that 'B' has committed the crime.*
- b. *'A' desires a Court to give judgement that he is entitled to certain land in the possession of 'B', by the reason of facts which he asserts, and which 'B' denies, to be true. 'A' must prove the existence of those facts. (Indian Evidence Act, 1872, 2020)*

Therefore, the tariff scheme was given a sacrosanct status and the entity who is alleged to commit an act of infringement is considered guilty at the first instance and thus, has no option to challenge it but to deposit the entire amount first with the society and then only the entity is permitted to approach the Appellate board, notwithstanding the fact how much arbitrary they may be.

Thirdly, when we interpret the Tariff Rate Card/scheme as published by the Copyright Society (CPPL), for bringing any entity under its ambit on the pretext of public communication of the content of its members, we find that Tariff Scheme too has huge fallacy in its construction. Although, the Scheme was meant to check and thereby collect the royalties and penalty for Public performance License and the infringement of content (within the meaning of Section 52 defining infringement) and while, as on April 20, 2023, as far as content under protection of the society is concerned there are approximately 4500 films mentioned on the official website which include Border, Refugee and Suryavanshi and there are about 480 members; yet, the Tariff Rate card assumes the shape and form of Tariffs as being issued by a typical Municipal Corporation who is engaged in the business of collection of license fee for utilization of space for public display without any regard to the content (which being the subject matter of protection for which the idea of copyright society was conceptualised in The Copyright Act) being displayed. Further, as per the official website, CPPL has not yet opened the membership for Television Producers and bring action on those who are engaged in the act of infringing those contents. Also its tariff card has no mention of the content in respect of which the rates are ascertained, thereby meaning that the Tariff card is not framed content-wise or intellectual property-wise, but purely on the basis of display location-wise like malls/hotels/hospitals/hostels/seating capacity etc., which is in strict violation of the fact that the Society was created not in antithesis to public communication but to provide an organised

channel for smooth display of the contents of its members and for increasing the scope of communication of the cinematograph film and its incidental intellectual properties who were brought under the ambit of separate protection by the amending act of 2012.

CONCLUSION

While the concept of Copyright society was coined under the Copyright Act to leverage the process of checks and royalty collection keeping the original authors' rights at centre stage, however as explained above there has been a basic and conceptual failure when it comes to the implementation part of it, because of various factors ranging from vague definition of the foundation-term like 'public' and the Tariff Scheme as published by the concerned copyright society. This gives the copyright societies unabated powers with respect to licensing and collection of royalties particularly in a typical complex form of copyrightable work viz. Cinematograph, without explaining and thereby demarcating the categories of cinematograph work and their identification with regard to infringement and coupled with the definition of public communication within the meaning of section 2(ff) of the act, wherein the term 'public' is of highest possible connotation and has not been defined unequivocally.

In order to actually reap the benefits of vigilance offered by the body or association referred to as Copyright society there is a strong need to re-frame all the contents which are under the control of such society and the same should be hosted on the website of the society. These should also be sent through various modes of communication to all the installations or institutions which are a subject matter of consideration as per the Tariff Scheme so that these institutions/installations can be made aware as to what constitutes infringement.

Again, there is a requirement of an amendment in section 33A of the Act, with respect to bringing an action against the Copyright society at the first instance whenever any entity or institution is served with the notice for collection of royalty or for procuring Public Performance license. All, these amendments or changes are required in order to ensure the basic principle of natural justice that any entity which is being imposed with fine or otherwise should be given as fair chance to represent itself viz "Audi alterum partem".

NOTE: The analysis in the paper shall not be treated as prejudicial to the interest/rights of the copyright society or any instrumentality incidental therewith and connected thereto.

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