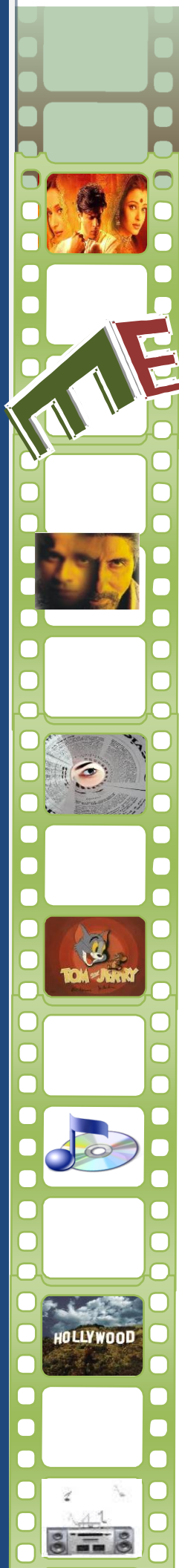


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Indian Film Industry:

Tackling Litigations

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TABLE OF CONTENTS

CHAPTER I: INTRODUCTION	4
CHAPTER II: CONCEPTUALIZING THE PROJECT & AUTHORIZING THE SCRIPT	6
A. THEFT OF IDEA, STORY AND SCRIPT (INFRINGEMENT OF COPYRIGHTS)	6
B. DISPUTES ARISING OUT OF INSUFFICIENT DOCUMENTATION	7
C. GRANT OF RIGHTS TO MULTIPLE INDIVIDUALS	8
D. ADAPTATION AND REMAKE RIGHTS	8
<i>i. Adaptations of films from Hollywood or any other local Indian language</i>	8
<i>ii. Adaptations from books and the authors' special rights</i>	9
CHAPTER III: PROTECTING & SECURING THE TITLE OF THE FILM	10
A. REGISTRATION WITH INDUSTRY ASSOCIATIONS	10
B. PROTECTING THE TITLE UNDER THE UMBRELLA OF INTELLECTUAL PROPERTY LAWS	10
<i>i. Copyright protection</i>	10
<i>ii. Trademark</i>	10
<i>iii. Registration of titles as trademarks:</i>	11
CHAPTER IV: PROTECTING THE LYRICS, MUSIC AND RECORDINGS	12
A. INTELLECTUAL PROPERTY IN A SONG	12
B. OWNERSHIP OF THE INTELLECTUAL PROPERTY IN THE MELODY.....	12
C. LITIGIOUS STRAINS OF MUSIC.....	13
D. REMIXES & COVER VERSIONS - ARE THEY LEGAL?	14
E. NEW MEDIA:.....	15
F. DEBATE ON THE RIGHT TO CLAIM ROYALTY IN RELATION TO UNDERLYING WORKS / PUBLISHING RIGHTS	16
G. MANAGEMENT OF RIGHTS THROUGH COPYRIGHT SOCIETIES.....	16
H. COMPULSORY LICENSING OF PUBLISHED AND UNPUBLISHED CONTENT:	17
<i>i. Circumstances when a compulsory license may be granted:</i>	17
CHAPTER V: INFRINGEMENT OF COPYRIGHT AND PIRACY	19
A. INFRINGEMENT OF COPYRIGHT	19
B. LEGAL FRAMEWORK FOR COUNTERING COUNTERFEITING AND PIRACY	19
<i>i. Strong Intellectual Property Laws:</i>	19
<i>ii. The Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007</i>	20
<i>iii. The MPDA, Goonda Acts and other efforts</i>	20
<i>iv. John Doe Orders</i>	21
CHAPTER VI: DISPUTES – VIA CONTRACTUAL RELATIONSHIPS & VIA DISTRIBUTION / EXPLOITATION RIGHTS	23
CHAPTER VII: FILMS AND CENSORSHIP	25
A. FRAMEWORK.....	25
B. WHAT IS A CINEMATOGRAPHIC FILM?	25
C. CBFC AND CERTIFICATION OF CINEMATOGRAPH FILMS.....	25
D. GROUNDS ON WHICH CERTIFICATE HAS BEEN REFUSED	26
E. WHETHER CERTIFICATION IS REQUIRED FOR PRIVATE EXHIBITION OF CINEMATOGRAPH FILMS.....	26
F. VALIDITY OF BAN BY STATE AUTHORITY POST CBFC CERTIFICATION	26

G.	BROAD LEGAL PRINCIPLES GOVERNING CENSORSHIP	27
H.	STATUTORY OFFENCES CONNECTED WITH PUBLIC EXHIBITION OR BROADCAST OF FILMS	27
	<i>i. Obscenity</i>	27
	<i>ii. Defamation</i>	28
	<i>iii. Other statutory offences</i>	28
	<i>iv. PAC, Self- Regulation Guidelines and broadcast of films and related media</i>	29
	<i>v. Public Interest Litigation and Change in Broadcasting Regulations</i>	30

CHAPTER I: Introduction

The Indian media and entertainment sector, particularly the film industry—popularly known as Bollywood, has experienced robust growth over the last few years and has become one of the fastest growing sectors of the economy despite the economic downturn.¹ In last few years, several Bollywood films have successively broken previous records on box office collections, which have perhaps also prompted both multinational entertainment companies and Indian conglomerates to invest in Bollywood films.

Traditionally, the Indian film industry has been social relationship centric, under which the arrangements/agreements were either oral or scantily documented and the disputes were usually resolved without going into arbitration or litigation. This, however, meant absence of proper chain of title documentation leading to uncertainty in the flow of rights. Only in the past few years, the Indian film industry has woken up to the need for written contracts and protection of intellectual property (“IP”) rights. The need arose because the Indian film industry witnessed a paradigm shift in its structure in the last decade. Previously, the films were funded by private money lenders, often mafia money, primarily interested in the collections from distribution rights or the box-office and ignored the residual income from the repurposing of the IP. But after it was accorded the “industry status” in 2000 by the Government of India, the following years saw the films receiving funding from the banks, and Indian corporates such as Sahara, Reliance group, Mahindra and foreign studios such as Warner Bros., 20th Century Fox and the like. The banks, Indian corporations and foreign investors insisted on written contracts with the producers and required the producers to have watertight contracts with the cast and the crew including appropriate chain of title documentation. With the increase in commercialization opportunities, the talents that hesitated to sign even a one page contract until early 2000 started presenting detailed written contracts to preserve their commercialization rights, e.g., merchandising rights.

On one hand, though the growth of this industry has been stupendous, on the other hand, the glitzy world of Bollywood has seen a rush of litigations for reasons including infringement of IP rights and breach of contract (e.g. non-payment and non-fulfillment of commitments by talents, distributors and producers). The phenomenon has struck innumerable movies of late, including the Oscar winning *Slumdog Millionaire*, requiring the producers and distributors to spend their days prior to the openings pacing court corridors instead of preparing for their premieres.

Sometimes, these controversies seem to crop up strategically, just before the release. The Roshans were among the earlier ones to be hit, with damages of INR 20 million before the release of the film *Krazzy 4* in 2007, as music composer Ram Sampath had alleged that the title song of the movie had been plagiarized from tunes he had composed earlier. Attempts were made to stall the releases of magnum opus *Jodha Akbar* and *Singh is Kinng* on religious grounds, while *Ghajini* was victimized by litigations over remake rights and copyright infringement just five days before its release.

Earlier, there were quite a few unauthorized remakes of foreign films in various Indian languages. However, no actions were taken against such films, probably because foreign studios did not consider India as their target market. With the globalization of the Indian film industry and entry of foreign players in India, there is an increase in litigation

¹ Indian media and entertainment industry stood at US\$ 14.4 billion in 2010, up 11 percent over the previous year. The industry is slated to grow at a compounded annual growth rate (CAGR) of 14 per cent by 2015 to reach US\$ 28.1 billion, according to a report by the Federation of Indian Chambers of Commerce and Industry (FICCI) and research firm KPMG. The Indian film industry stood at US\$ 1.9 billion in 2010 and is projected to grow at a CAGR of 9.6 per cent and reach US\$ 2.6 billion by 2014

Source: <http://www.indiainbusiness.nic.in/industry-infrastructure/service-sectors/media-entertainment.htm> (Website last visited on October 11, 2011)

on this account as well. Bollywood production house BR Films had been sued by 20th Century Fox for allegedly copying the storyline and script of its comedy *My Cousin Vinny* in the movie *Banda Yeh Bindaas Hai*.

Appropriate due diligence and negotiations at the documentation stage play a critical role in curbing unwarranted litigation. For ensuring that the contracts are foolproof, one must be aware of, prior to negotiations, not only the commercial aspects but also legal issues such as intellectual property rights and enforceability of the contractual arrangements.

In this paper, based on our experience and research, we have endeavored to lay out the best practices and strategies to be adopted *vis-a-vis* litigation that may arise at each stage of the film making process.

CHAPTER II: Conceptualizing the Project & Authoring the Script

Script creation is one of the early steps in making a film. The process involves conceptualization of idea, creation of a concept note, followed by preparation of the storyboards and script. Several individuals are generally involved in this process such as the originator of the idea, producer, director, script writer, dialogue writer and script doctor. The concept may be the brainchild of the producer, director or scriptwriter but the producer is required to ensure that all rights² that vest in each of the individuals participating in the script creation process are duly acquired by him to complete the chain of title.

Some of the issues that may arise at this stage are as follows:

- A. Theft of idea, story and script (Infringement of copyrights)
- B. Disputes arising out of insufficient documentation
- C. Grant of rights to multiple individuals
- D. Adaptation and remake rights

Some of these issues may arise out of contractual breaches, while the others may arise due to breaches of legal rights.

A. Theft of idea, story and script (Infringement of copyrights)

When a writer has an idea and wishes to scout for script development funding, he needs to share the idea with multiple individuals. Copyright law grants protection not to an idea but to its expression. Hence, there is no copyright protection available to an idea, unless given a tangible form with adequate details. With a single idea (or even concept note), multiple storylines can be developed, each capable of separate copyright protection. Hence, the only way the script writer may be able to protect the idea or concept note would be through non-disclosure agreements (NDAs). The courts have upheld protection of idea through such non-disclosure agreements or when the idea has been communicated in confidence.³ In the case of *Zee Telefilms Ltd. v Sundial Communications Pvt. Ltd.*⁴, Sundial developed the idea of a TV series called *Krish Kanhaiy* and approached the Managing Director of Zee and shared a concept note where the basic plot and the character sketches were outlined in confidence. Later, it was found that a TV series called *Kanhaiya* was broadcasted on Zee TV and this series was substantially similar in nature to the idea that Sundial had communicated to Zee. Sundial filed a suit against Zee and, *inter-alia*, sought for injunction. At the interim stage, a single Judge bench of Bombay High Court granted an injunction. In an appeal against this injunction by Zee, the Bombay High Court opined that an average person would definitely conclude that Zee's film was based on Sundial's script and hence upheld the injunction against Zee as Sundial's business prospect and goodwill would seriously suffer if the confidential information of this kind was allowed to be used. In cases of disputes, in addition to NDAs, the writer would have to prove that he originated the idea and the date of origination. We have discussed below the methods by which he could do it.

Points to be included in the script assignment

contracts

- Specific waiver of rights of author under section 19(4) of the Act otherwise the assignment is deemed to automatically expire if rights are not used within one year of assignment;
- Term and territory of assignment should be specifically mentioned;
- Advisable to specifically mention each right assigned to avoid conflict in interpretation of the agreement at a later date.

² As per section 2 (y) of the Copyright Act, 1957, copyright vests in literary works such as scripts

³ See, *Anil Gupta v Kunal Dasgupta*, AIR 2002 Del 379; (iii) *Zee Entertainment Enterprises Ltd. v. Gajendra Singh and Ors.* MANU/MH/0834/2007; (iv) *Urmi Juvekar Chian v. Global Broadcast News Ltd. and Anr.*, MANU/MH/0315/2007 and (v) *Celador Productions Ltd. v. Gaurav Mehrotra*, MANU/DE/0045/2002

⁴ 2003 (5) BomCR 404

Copyright protection for concepts, scripts & screenplays:

Concepts, scripts, screenplays are protected as literary works under the Copyright Act, 1957 (Copyright Act) and get protection if they are original.⁵

In most countries, copyright subsists in the work without any formal registration. The moment the work is created, it gets protection. India is a member of the Berne Convention and the Universal Copyright Convention. The Government of India has passed the International Copyright Order, 1999 according to which any work first made or published in any country - which is a member of any of the aforementioned conventions - is granted the same treatment as if it was first published in India.

To create evidence of creation of the concept notes / script, some of the recommended steps are -

- to apply for the registration of the script with copyright offices,
- to register with the writer's association/s,
- to mail the script (as discussed below)

The Copyright Act provides for the procedure for registration of copyright in literary work. Such registration only serves as *prima facie* evidence of the ownership of copyrights. Such evidence is rebuttable i.e. if a third party is able to prove that it is the owner of the relevant work, then the registration obtained may be cancelled by the Registrar of Copyright and/or disregarded by the court. However, such registration process may take a year or two. A practice that has developed in the industry is to register the script with the writers associations like the Film Writers Association of India. This again proves date of creation of the script. Typically, the industry respects such registrations. However, there is no legal right conferred by such registration but acts only as evidence for the purpose of establishing date of creation.

Therefore, one of the best methods to prove date of creation of the work, ownership of copyright, and other details with respect to the work, is to mail a copy of the script (whether in print or in electronic format) to the originator of the work himself or to a trusted friend. The email or the sealed package, as the case may be, can serve as good evidence of the date of creation of the work and ownership of the copyright.

B. Disputes arising out of insufficient documentation

As discussed earlier, the Indian film industry, at one point, lacked documentation to evidence the chain of title. With many stakeholders now understanding the need for it, one would assume that disputes arising out of faulty documentation are eliminated. The reality is quite different though! The lack of knowledge of the intricacies of laws, and emergence of new technologies and convergence, still leads to inaccurate, incomplete or incomprehensive documentation, resulting in contractual disputes.

One must ensure that the term and territory of the assignment should be specifically mentioned in the assignment deed with authors. In the absence of the same, the Copyright Act provides that the assignee shall hold such assignment for only five years and limited to the territory of India.

⁵ *RG Anand vs Delux Films & Ors.(SC) & Vipul Amrutlal Shah vs Shree Venkatesh Films Pvt. Ltd. & Ors.(Cal HC) and Barbara Taylor Bradford v. Sahara Media Entertainment Ltd., MANU/WB/0106/2003 (Cal HC)]*

Further, the producer/production company must ensure that in the assignment agreements/letters, the authors waive their rights under the provisions of Section 19(4) of the Copyright Act which provides that the assignment of rights will be deemed to have expired if they are not exercised within one year of the date of assignment. This is of particular importance to the film industry, where scripts may be adapted into a film years after they are authored. This provision should also be borne in mind while acquiring rights in relation to lyrical and music works.

C. Grant of rights to multiple individuals

When the chain of title is unclear, issues relating to ownership of rights over the script are bound to arise. This is especially the case when rights to make a film are assigned to multiple persons in succession or simultaneously. The only solution to this is proper documentation of the assignment of rights preferably in the form of contracts. When precise documents assigning or licensing rights are in place, the settlement of such disputes becomes much simpler.

D. Adaptation and remake rights

i. Adaptations of films from Hollywood or any other local Indian language

Remake of Hollywood films or Indian films 'inspired' by them is not a new phenomenon in the industry. However, Hollywood did not take cognizance of them until their studios entered the Indian film industry with their own projects. They have realized a big potential for the remakes of their Hollywood films.

Sony Pictures threatened to sue the makers of *Partner* for remaking their film *Hitch*, and Hollywood's famous studio 20th Century Fox had moved the Bombay High Court against B R Chopra Films seeking Rs. 70 million damages and an injunction against the release of the Hindi film *Banda Yeh Bindaas Hai* alleging that it was a remake of Oscar-winning film *My Cousin Vinny*. 20th Century Fox had also moved the Bombay High Court against SME Entertainment Pvt. Ltd. for alleged copying of the script and screenplay of their film *Phone Booth* by making/adapting the same in the latter's film *Knock Out* based on a similar storyline. A single judge of the Bombay High Court granted an interim injunction after viewing both films stating that any average viewer of both films would come to the 'unmistakable conclusion' that the defendant's film is a copy of the plaintiff's film. The principle on which this decision is based is "test of concluding whether the second work is a pirated copy depends on the impression of the average viewer". In appeal however, the Division Bench granted an interim stay of the Single Judge's Order and allowed the movie to be released subject to the producers depositing Rs. 15 million with the Court and maintaining accounts of the box office collections.

The Indian producers have now started safeguarding themselves by acquiring rights to remake films. Film maker Karan Johar acquired the rights of the Hollywood film *Step Mom* before making his Bollywood adaptation titled *We Are Family*. Similarly, Abbas-Mustan's film *Players* is an official Hindi remake of the film *The Italian Job* and Nagesh Kukunoor's film *Mod* is an official remake of the Taiwanese film *Keeping Watch*.

In cases of copyright infringement of a film, the court will look at whether there has been any substantial copying of the key elements of the film. Very often, Bollywood filmmakers try to overcome any potential liability by adding elements to the story which are more in tune with the Indian sensibilities. Song and dance, a familial background and other cultural elements are added to the story in order to distinguish it from its Hollywood original. In case of an infringement action against the Indian production house by the Hollywood film makers, the former may argue before the court that while certain elements may be similar, the finished product is different and not a replica of the Hollywood film and thereby there hasn't been any substantial copying of the original film.

However, more often than not, procuring adaptation or remake rights may cost a fraction of the budget of the film and goes a long way in minimizing future litigation and potential liability. Therefore, it is recommended to procure the adaptation or remake rights at the stage of pre-production itself. In fact, there have been instances in recent times when Hollywood studios have taken measures to proceed with initial legal action against Bollywood filmmakers for alleged copyright infringement. The involved producers, instead of taking the matter all the way to court, have preferred to procure a license from the owner and settle the matter out of court.

ii. Adaptations from books and the authors' special rights

When the script is taken from a previously authored book, apart from the assignment of copyright, it is also pertinent to take into account section 57 (1) (b) of the Copyright Act which deals with Authors' Special Rights which, *inter-alia*, gives the author the right to claim authorship. While it is obvious that some changes are inevitable when a novel is converted to a motion picture, the provision states that the work cannot be distorted or mutilated or otherwise cause disrepute to the original author. If the filmmaker defaults, the author and his legal heirs can sue him under the provisions of the Copyright Act claiming violation of moral rights. Moral rights are not assignable. The Indian courts are yet to opine on whether the same can be waived.

CHAPTER III: Protecting & Securing the Title of the Film

The title of the film is one of the key assets of the film. A film is usually tentatively titled at the pre-production stage and procures a definite title at a later stage. The title of a film has been one of the most disputed aspects of a film in recent years.

A. Registration with industry associations

As in the case of scripts, the Indian film industry has developed the practice of registering titles with societies or associations like Indian Motion Pictures Producers Association (IMPPA), the Film and Television Producers' Guild of India, the Association of Motion Pictures and Television Programme Producers (AMPTPP) and Western India Film Producers' Association. The film industry, as a general rule, has great reverence for these associations and follows their rules and regulations. Usually, only the members of an association can apply for the title registration with that association. Each association, typically, cross checks the database of the other association before granting registration, so as to avoid any overlap in the titles registered. However, registration with societies and associations does not have any legal sanctity, except that the courts may take cognizance of the registration to ascertain the first user/adopter of the title. Associations allow suffixes and prefixes (including tag lines) to distinguish between the film titles. Around 2009, Anil Kapoor's project *Shortcut* ran into trouble when producer Bikramjeet Singh Bhullar raised objections that he had registered the title *Shortcut* with the film associations much before the former had even conceived of the project. Kapoor quickly remedied the situation and changed the title of his film to *Shortcut: The Con is On*.

B. Protecting the Title under the Umbrella of Intellectual Property Laws

i. Copyright protection

The Indian Courts have taken a uniform view, like the U.S. Courts, that the title alone cannot be protected under copyright law. Only in exceptional cases, there may be scope for copyright protection.

ii. Trademark

In general, titles are protected according to the fundamental tenets of trademark and unfair competition law. Film titles can be segregated into two categories: the titles of a series of films and the title of a single film. Particular examples of well known Indian film series titles are *Hera Pheri & Phir Hera Pheri*, *Dhoom & Dhoom II* and *Munna Bhai MBBS & Lage Raho Munna Bhai*. In case of single film titles, it must be proven that such a title has acquired a wide reputation among the public and the industry and has acquired a secondary meaning. Secondary meaning in layman's terms means that the average movie goer associates the title with a certain source, production house, etc. and there would be a likelihood of confusion in the mind of such person if the title is used by another person for a different film. Even pre-release publicity of the title may cause the title to acquire sufficient recognition and association with its owners to give a secondary meaning to the title of the film. Typically, the courts look at the following factors for contribution towards creation of secondary meaning for the title:

- the duration and continuity of use;
- the extent of advertisement and promotion and the amount of money spent;
- the sales figures on purchase of tickets and the number of people who bought or viewed the owner's work; and
- closeness of the geographical and product markets of the plaintiff and defendant.

iii. *Registration of titles as trademarks:*

Under the Indian Trademarks Act, 1999 (Trademarks Act), film titles qualify as 'service marks'⁶ rather than trademarks. They fall under Class 41 of the Fourth Schedule of the Trade Marks Rules, 2001. To ensure that one has the exclusive right to the title and that it is completely protected by law, it is advisable to register it as a service mark under the Trademarks Act. The registration of a trademark constitutes *prima facie* validity of the same in legal proceedings⁷.

A fine example of the benefits of the registration of title as a trademark is perhaps the *Sholay* case. In 2007, Sascha Sippy, grandson of GP Sippy (producer of the 1975 blockbuster film), approached the Delhi High Court alleging copyright and trademark infringement by director Ram Gopal Varma. Varma had produced the film titled *Ram Gopal Varma ke Sholay*, and also used the character names from the original film, *Sholay*. *Sholay* was one of the most popular movies in India during its time and has become a household name where the audience associates the title with the Sippys, thereby giving it a secondary meaning. They have not only obtained trademark registration for the title of the film *Sholay* but have also registered the character names 'Gabbar' and 'Gabbar Singh'. After months of legal battle between the parties, Ram Gopal Varma finally agreed to change the title of his film to *Ram Gopal Varma ke Aag*. He also agreed to refrain from using any of the names of the characters from the original story.

When considering an application for temporary injunction, the plaintiff has the burden of proving the *probable existence of secondary meaning* in the title of the film leading to the likelihood of confusion and likelihood of success at trial. Where the plaintiff cannot make a strong case of secondary meaning or the likelihood of confusion, a preliminary injunction, in all probability, will be denied. When a plaintiff introduces sufficient evidence on secondary meaning and the likelihood of confusion, the defendant's use of literary title needs to be preliminary enjoined. Registration of a trademark acts as an added advantage in such situations.

Warner Bros. attempted to restrain Mirchi movies from releasing their film, *Hari Puttar: A Comedy of Terrors* due to the phonetic and visual similarity of its title to that of the *Harry Potter* film series.⁸ The Delhi High Court, however, dismissed the application stating that a literate or semi-literate viewer could easily discern the two movies on the principle "*even if there is any structural or phonetic similarity between the competing marks, the real test to determine deceptive similarity is whether the targeted audience is able to discern the difference between the marks*". The Delhi High Court also held that Warner Bros. had caused a three month delay in filing the case, and cited the principle that "*if the plaintiffs stood by knowingly and let the defendants build up their business or venture, then the plaintiffs would be estopped by their acquiescence from claiming equitable relief*". This case also reiterates the Courts intolerance towards laches and delay in approaching the Court in case of film litigations.

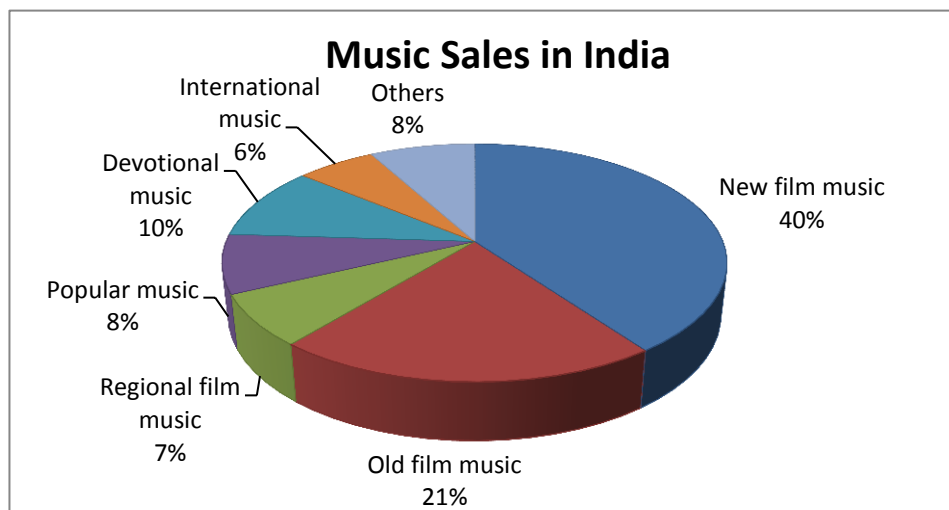
⁶ Section 2(1) (z) of the Trademarks Act, 1999

⁷ Section 31 of Trademarks Act, 1999

⁸ *Warner Bros. Entertainment Inc. and Ors. V. Harinder Kohli and Ors.*, 155 (2008) DLT 56

CHAPTER IV: Protecting the Lyrics, Music and Recordings

The Indian music industry was estimated to be worth Rs. 9.5 billion in 2010 showing a growth of 25.7% over 2009 and is projected to be INR 21.4 billion in 2015.⁹ As shown in the graph below, Indian music comprises of different genres.¹⁰ Over two-third of the revenues earned by the music industry flowed from the music of Bollywood and regional film.¹¹ If exploited properly, this ensures a steady revenue flow beyond the typical box-office to the film producers.



A. Intellectual property in a song

To a layman, a song would seem to be a single piece of melody. However, from a copyright law perspective, a song is a seamless integration of lyrical and musical works blended with the performances of singers and musicians into a sound recording. Each of these is protected under the Copyright Act.

B. Ownership of the intellectual property in the melody

As a general rule, the author of the copyrightable work is the first owner¹², unless there is an agreement to the contrary or in case facts fall within the purview of the exceptions provided under the Copyright Act¹³. The lyricist, composer and producer are considered the

Protection under the Copyright Act

The lyrics or the words in a song are protected as a piece of "literary work".

The musical compositions including background scores are protected as "musical works". It means works consisting of music including any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music, like lyrics of the songs.

Sound recordings are protected, regardless of the medium on which such recording is made or the method by which the sounds are produced.

"Performers Rights" subsist in the performances rendered by the singers, musicians and other artistes while recording the songs (including audio-visual) and are protected under the Copyright Act.

⁹ Indian Entertainment & Media Outlook, 2011, Price Water House Coopers

¹⁰ Based on statistics available at <http://www.indianmi.org/national.htm> as on October 10, 2011

¹¹ FICCI- KPMG Indian Media and Entertainment Industry Report 2010 at p. 102, available at <http://www.kpmg.com/IN/en/IssuesAndInsights/ThoughtLeadership/Frames2010.pdf>

¹² S. 17 of the Copyright Act

¹³ Refer to Section 17 of the Act

authors and thereby the first owners of the lyrics, musical compositions and sound recordings, respectively. However, Section 17 of the Copyright Act provides that if the work is created in the course of employment or for consideration, then the employer or the person so commissioning the work for consideration becomes the first owner of the copyrightable work.

This aspect came up for discussions in the case of *Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association and Ors.*¹⁴, where the Supreme Court held that the producers of a cinematograph film who commission the works or create the works through composers or lyricists under a contract of employment, are the first owners of the copyright in musical and lyrical works forming a part of the cinematographic film. No copyright vests in the composer or lyricist unless there is a contract to the contrary between the composer/lyricist and producer of the cinematograph film.

In *Anandji Virji Shah v. Ritesh Sidhwani*¹⁵, the plaintiffs, who is one of the music composers of the songs *Yeh Mera Dil* and *Khaike Paan Banaraswala* in the 1978 film *Don*, initiated action against the producer of the 2006 remake with the same title, *Don* (defendant). The defendants had procured the rights from M/s Nariman Films, the producers of the original film, under a written contract and modified and incorporated the songs in the remake version. Relying on the *Eastern Indian Motion Pictures Association* case, the Bombay High Court held that the contract between the producers of the original film and the plaintiff (and Kalyanji) was a contract of service and thus the rights were vested with the producer and not the composers. Therefore, the producer had the legal and subsisting right to assign any part or whole of the rights in the songs to the defendants and thus, the contract between them was valid.

In India, due to the heavy bargaining power of the producers, with perhaps the exceptions of the likes of world-renowned, multiple Academy Awards winning composer A.R. Rehman, the trend is for the lyricists and the composers to, invariably, assign all the rights subsisting in their works to the producers for a fixed amount.

There is a proposal to amend the Copyright Act to alter this position and to protect the interests of composers and lyricists. It says that an assignment of copyright in any work has no effect on the right of the author to claim royalties for exploitation of works other than as a part of cinematograph film for which it is made. If this amendment goes through, lyricists and composers will have greater bargaining power while negotiating their contracts and royalties.

C. Litigious strains of music

Music has always been the soul of Indian cinema and considerable time, energy and money is expended to create the same. Infringement of lyrics and music has long been the bone of contention in the Indian film industry. However, of late, the right holders have begun to approach the courts to seek justice and have contested the infringers fervently.

Points to remember while negotiating Music contracts

While negotiating the assignment agreement on behalf of the producer/sound recording house, it is important to procure adequate representations and warranties from the lyricists and musicians with respect to the originality of the music and lyrics in the assignment agreement.

A corresponding indemnity provision should also be built in the agreement for any breach of these representations and in case of future third party disputes arising out of such breach.

¹⁴ AIR1977SC1443

¹⁵ Suit (L) 2993 of 2006, Bombay High Court

The Bombay High Court dealt with an interesting matter in relation to the film *Krazzy 4*.¹⁶ Music composer Ram Sampath had alleged that the title song of the movie had been plagiarized from tunes he had composed earlier for an advertisement for Sony Ericsson and was extremely popular and known as “the thump”. Under the agreement between Sampath and the producer of the advertisement, the copyright in the musical composition/tune remained with Sampath and only a license was given to use the same in the advertisements for a period of one year. The defendants had obtained a no objection certificate from Sony Ericsson for using the tune. The Bombay High Court passed an order directing an injunction on any use of the song containing “the thump” tune and selling any recordings of the same. This matter was finally settled out of court between the parties.

Similar to the cases of title and script infringement, the courts have rarely condoned delay in music infringement cases. For instance, in the case of *Gaurav Dayal v. Rabbi Shergill*.¹⁷, singer Rabbi Shergill had moved the Delhi High Court just two days before the scheduled release of the film *Sorry Bhai* alleging that one of the songs in the movie was lifted from his album *Avengi Ja Nahin*. The Single Judge of the Delhi High Court restrained the producers of the film *Sorry Bhai* from releasing the soundtrack of the film because it was likely to injure the intellectual property rights of singer Rabbi Shergill. On appeal, however, in view of the delay in initiating the action i.e the gap between release of the music for the film and filing of the plaint, the division bench of the same court allowed the release of the soundtrack of the film, with the condition that the producers maintain accounts of the revenues and submit the same to the court.

Lyricists and music composers are not the only ones approaching the courts to safeguard their rights. Singer Neha Bhasin sued music director Anand Raj Anand and producers of the film *Aryan Unbreakable*¹⁸ for not giving her credit in the song *Ek look Ek look* recorded by her. The Delhi High ordered the defendants to cease sale or distribution of all records of the song which did not give Ms. Bhasin due credit. By way of this order, the Delhi High Court ensured that the singers are given due credit and that their rights are protected even if no copyright vested in them.

D. Remixes & cover versions - Are they legal?

Remixes are popular in India, and several Indian music producers are known to borrow heavily from old film songs as well as western music, without obtaining the required licenses. It is also a common practice in the film industry to make cover versions of existing songs. An issue that arises is whether making a cover version or remix of an existing song violates the copyright in the song.

The Copyright Act provides that cover versions of a sound recording can be made two calendar years after the end of the year in which the first sound recording was made after satisfying conditions specified in the Copyright Act. Further, no alterations can be made to the original sound recording without obtaining the consent of the owner. If the cover versions are made in accordance with the provisions of the Copyright Act then it does not amount to infringement.

Similar provisions do not exist in relation to remixes. However, in case of remixes, the test of substantial copying of the song shall be applied. Though this is a subjective test, a remix would be considered infringement if the average audience is likely to associate the remix song with the original song. Hence, if the remix of a song (that partakes substantially from the original song) is made without the permission of the owner, the remixed version will be

¹⁶ *Ram Sampath v. Rajesh Roshan* 2009(2)MhLj167

¹⁷ 2009(39)PTC205(Del)

¹⁸ *Neha Bhasin v. Anand Raj Anand*, 132(2006)DLT196

considered to have violated the copyright in the original sound recording, as well as the underlying lyrical and musical works.

Often, such remixes attract claims of copyright infringement and it is important for music composers to take due care while creating new versions of old songs. Indian producers and composers are also increasingly becoming aware of their rights and have started taking steps for the recovery of damages in cases of infringement.

Bappi Lahri, the famous music composer, filed a suit in the US against Universal Music & Video Distribution Corporation, Interscope Records, Aftermath Records and others for unauthorized use of an excerpt from one of his musical compositions *Thoda Resham Lagta Hain* in the popular song titled *Addictive* and failure to credit his authorship. The Federal judge in Los Angeles, California, in response to the lawsuit, prohibited further sales of the song *Addictive* until Lahiri was listed on the song's credits. Saregama India Ltd., the Mumbai based film and music company which was assigned the copyright in the song *Thoda Resham Lagta Hain* by the producer of the film which contained it, followed his trail and filed a separate copyright infringement suit. The US Court consolidated both the suits, and eventually passed a subsequent judgment holding that Bappi Lahiri's name exclusion from the credits did not amount to 'unfair competition' and therefore, set aside its previous order which required the defendants to give credit to Bappi Lahiri's authorship in the song¹⁹. As far as Saregama was concerned, the defendants settled the matter with them.

With the increasing awareness of litigation, many producers have officially started buying the rights or procuring licenses to use old songs and lyrics in their films. For instance, famous Indian film producer Karan Johar obtained the rights to use the Elvis Presley classic *Jailhouse Rock* as a part of a song in his film *We are Family*.

E. New Media:

With the revolution of digital media technology and the Internet, music is now increasingly shared and streamed through websites which allow a user to transfer, listen to and watch copyrighted works. The current legal framework, however, is not strong on the protection of copyright material over digital networks and India has still not acceded to what are known as the Internet Copyright Treaties adopted by the World Intellectual Property Organization (WIPO) for protection of copyrights to keep laws in sync with advances in information technology. However, the Indian Courts have come down strictly on infringers of intellectual property on the Internet. In the case of T-Series against YouTube in 2007, T-Series obtained an interim injunction against YouTube and Google from showing copyrighted material belonging to T-Series without a license or permission. They claimed that these websites, by hosting such content, benefited monetarily without paying the copyright owners any royalty.

Section 79 of the Information Technology Act, 2000 ("IT Act") exempts websites from liability of infringement for user generated content. However, if the website has a filtering mechanism or some other form of controlling the content it hosts, it shall not be exempt from liability. The High Court of Delhi has recently ruled that social networking sites (SNS) such as YouTube, MySpace etc. may be held liable for copyright infringement caused due to infringing material posted on such websites, if it is shown that such intermediaries had control over the material posted, had the opportunity to exercise due diligence to prevent the infringement and derived profits out of such infringing activities.²⁰ In such cases, a defense that an intermediary is not liable for the third party activities on the website is also not of assistance because Section 79 of the IT Act has to be read in conjunction with Section 81 of the IT Act, which makes

¹⁹ As stated in *Bappi Lahri and Ors. Vs. Universal Music and Video Distribution Corporation and Ors*, US Court of Appeals for Ninth Circuit, Case No. No. 09-55111 available at <http://www.ca9.uscourts.gov/datastore/opinions/2010/06/07/09-55111.pdf>

²⁰ IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008

it clear that though the provisions of the IT Act may override other laws for the time being in force, they cannot restrict the rights of the owner under the Copyright Act.

F. Debate on the right to claim royalty in relation to underlying works / publishing rights

In India, there are divergent views on the issue of claim of royalty by owners of publishing rights (i.e. rights subsisting in lyrics and musical compositions), when a sound recording is broadcast or communicated to the public. On one hand, the Madras High Court²¹ has held that owners of publishing rights should be entitled to royalty payment even if the right of sound recording has been assigned to the music or film producer. On the other hand, the Bombay High Court²² has held that no such payment to music composers and lyricists is required if the music composer and lyricist voluntarily transfer sound recording rights to a producer. Any public broadcast subsequent to such assignment would fall under the purview of copyright to broadcast sound recording to the public. This view has also been adopted by the Delhi High Court²³ in as recently as July 2011. The order of the single Bombay High Court, however, has been stayed by the division bench of the said Court.

Interestingly, a proposed amendment to the Copyright Act²⁴ intends to make provision for award of royalty to music composers and lyricists even after sound recording rights have been assigned to the third party. Such an amendment will bring much needed clarity on this issue. However, if the proposed amendment does not find favor with the legislators, it would be up to the Supreme Court to settle the position of law.

G. Management of rights through Copyright Societies

Copyright Societies (or Collecting Societies) have been established under the provisions of the Copyright Act²⁵ in order to effectively administer rights of the copyright owners²⁶. They act as a single point of contact for

²¹ *The Indian Performing Rights Society Limited, Vs. The Muthoot Finance Private Limited*, 2010(42)PTC752(Mad)

²² *Music Broadcast Private Limited v. Indian Performing Right Society Limited* [Bom HC, Suit No. 2401 of 2006]

²³ *Indian Performing Right Society Ltd. v. Mr. Aditya Pandey & Anr.* [Del HC, CS(OS) 1185/2006]

²⁴ Amendment to S. 17 of the Copyright Act, as proposed in the Copyright Amendment Bill, 2000

²⁵ Section 33 and 34 of the Copyright Act

²⁶ Section 34 of the Copyright Act- Administration of rights of owner by copyright society

(1) Subject to such conditions as may be prescribed.--

(a) a copyright society may accept from an owner of rights exclusive authorisation to administer any right in any work by issue of licences or collection of licence fees or both; and

(b) an owner of rights shall have the right to withdraw such authorisation without prejudice to the rights of the copyright society under any contract.

(2) It shall be competent for a copyright society to enter into agreement with any foreign society or organisation administering rights corresponding to rights under this Act, to entrust to such foreign society or organisation the administration in any foreign country of rights administered by the said copyright society in India, or for administering in India the rights administered in a foreign country by such foreign society or organization;

Provided that no such, society or organisation shall permit any discrimination in regard to the terms of licence or the distribution of fees collected between rights in Indian and other works.

(3) Subject to such conditions as may be prescribed, a copyright society may--

(i) issue licences under section 30 in respect of any rights under this Act;

(ii) collect fees in pursuance of such licences;

(iii) distribute such fees among owners of rights after making deductions for its own expenses;

(iv) perform any other functions consistent with the provisions of section 35.

assigning/licensing the rights subsisting in the works in the members' repertoire and collect royalties on behalf of them.

The main Copyright Societies vis-à-vis music are the Indian Performing Rights Society Limited ("IPRS")²⁷ and the Phonographic Performance Ltd. ("PPL")²⁸. India has a peculiar situation where some of the music labels having substantial repertoire are not members of PPL, including Yash Raj Films and Super Cassettes Ind. Ltd. (owner of the label T-Series) whose radio broadcast rights are not administered by PPL. These societies have been very active in filing suits for injunctive reliefs against infringers of rights of their members and recovering damages. For instance, during new years, religious festivals, songs are broadcasted or sung at various public places. Moreover, IPRS has sent legal notices to several malls, hotels and restaurant chains including the Sankalp Group of Hotels and the Neelkanth Group in Ahmedabad and Mumbai for playing copyrighted music commercially in violation of the licensing norms of performing rights in musical works during the garba festival.²⁹

The *locus standi* of Copyright Societies to institute suits for infringement of copyright seeking injunction, damages etc. was challenged in a suit before the Delhi High Court. But the Court ruled in favor of such Societies holding that the very object of providing for such Copyright Societies was not only to administer the license regime and recovery of fee in a better manner but also to prosecute claims for infringement. The vesting of Copyright Societies with the right to institute and carry forward infringement suits is a primary step towards ensuring effective enforcement of rights by these Societies in these works.

H. Compulsory licensing of published and unpublished content:

The Copyright Act provides for compulsory licensing of certain copyrighted works in certain circumstances and has granted the power to the Copyright Board (Board) to grant such a license and fix royalties.

i. Circumstances when a compulsory license may be granted:

a) Circumstances under which Indian works can be compulsorily licensed

- When the owner of the copyright refuses to republish his work, or perform his work in public and by reason of such refusal the work is withheld from the public³⁰;
- When owner of the copyright refuses broadcast of his work or work contained in a sound recording³¹;
- When the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found³²;

b) Circumstances under which other works can be compulsorily licensed (only foreign literary and dramatic works fall within the purview of compulsory licensing under this category)

If the translation of a foreign literary or dramatic work is required for purposes of teaching, scholarship and research³³;

²⁷ IPRS represents authors and composers and administer the performing rights, mechanical and synchronization rights of the members

²⁸ PPL represents music companies and is mainly engaged in administering the broadcasting / telecasting and public performance rights on behalf of over 160 music companies which are its members

²⁹ Available at <http://www.radioandmusic.com/content/editorial/news/licensing-bodies-gear-navratri>, last visited on October 10, 2011

³⁰ S. 31(1)(a) of the Copyright Act

³¹ S. 31(1)(b) of the Copyright Act

³² S. 31A(1) of the Copyright Act

³³ S. 32(1A), Provisio to S. 32(1A) and S. 32(5)(a) of the Copyright Act.

c) Circumstance under which both Indian and other work can be compulsorily licensed

- For translation of any literary or dramatic work³⁴;
- For translation of text incorporated in audio-visual fixations prepared had published solely for the purpose of systematic instructional activities³⁵;
- After the expiration of the relevant period³⁶ from the date of the first publication of an edition of a literary, scientific or artistic work, if -
 - the copies of such edition are not made available in India³⁷;
 - such copies have not been put on sale in India for a period of six months to the general public³⁸; and
 - where such work is connected with systematic instructional activity, if it is not priced reasonably related to price normally charged in India³⁹.

In the year 2010, the Board passed a landmark order and settled the long standing royalty dispute between private FM radio stations and music companies represented by PPL. The Board, through its order dated August 25, 2010⁴⁰, granted a compulsory license to the FM radio companies for all works falling in the repertoire of PPL and made royalty payable by them to music companies at par with international standards.. The Board rationalized the royalty rates from the current Rs. 2400 per needle hour or 20% of the net advertising revenue, whichever was higher, to 2% of net advertisement earnings of each FM radio station to be distributed on a pro rata basis to all music providers who were applicants in the proceedings. The Board has justified this compulsory license on the basis of a greater public interest being served since existing rules prohibit radio companies from broadcasting content like news and current affairs. The Grant of Permission Agreement entered into between the Ministry of Information and Broadcasting in India and the radio companies also obligates the radio channels to be a "free to air" service i.e. no subscription fee can be charged from the public at large. An appeal has been filed against the order of the Board before the Madras High Court, and is pending judgment. Meanwhile, an application for grant of interim stay, sought for in the appeal before the Madras High Court, was dismissed by the Court and this dismissal was upheld by the Supreme Court⁴¹. The Supreme Court refused to interfere in this matter and has requested the High Court to dispose of the pending appeals. It is now for the Madras High Court to decide on the method to be adopted for determination of the royalty payable. However, the issue of high royalties payable to other music labels like Yash Raj Films and T-Series who are not members of PPL is still a grey area and remains open to interpretation.

³⁴ S. 32(1) of the Copyright Act.

³⁵ S. 32(5)(b) of the Copyright Act.

³⁶ "relevant period", in relation to any work, means a period of seven years from the date of the first publication of that work, where the application is for the reproduction and publication of any work of, or relating to, fiction, poetry, drama, music or art; Three years from the date of the first publication of that work, where the application is for the reproduction and publication of any work of, or relating to, natural science, physical science, mathematics or technology; and Five years from the date of the first publication of that work, in any other case.

³⁷ S. 32A(1)(a) of the Copyright Act.

³⁸ S. 32A(1)(b) of the Copyright Act.

³⁹ S. 32A(1)(b) of the Copyright Act.

⁴⁰ See *Music Broadcast Pvt. Ltd & ors vs. Phonographic Performance Ltd*; dated August 25, 2010

⁴¹ in SLP (C) Nos. 5727-5735 of 2011, decided on 05/04/2011

Chapter V: Infringement of copyright and piracy

A. Infringement of copyright

With respect to each type of copyrighted work, the Copyright Act recognizes certain rights. When they are violated, the owner of the rights can sue for infringement by filing a civil suit and claim injunctive reliefs and damages. Criminal remedies are also available in case of copyright infringement, but which are exercised typically in matters of piracy. In a civil suit, a separate application is required to be initiated to seek interim injunction i.e. injunction granted pending final outcome of the suit. As such, interim reliefs can be obtained within 24 – 48 hours from filing of the suit, if a *prima facie* case, urgency, balance of convenience and comparative hardship can be established in favor of the plaintiff. Copyright infringement may relate to script, musical works, remake rights, or distribution rights.

In the recent past, the courts have become extremely cautious of vexatious litigations or litigations that are delayed despite knowledge of infringement. Often, the courts have dismissed the petitions on the grounds of laches and have termed such petitions as an attempt to garner publicity. Therefore, it is important for the plaintiff to avoid any delay and to approach the court immediately upon learning of such infringement.

Piracy of copyright is a phenomenon prevalent worldwide and can be in the form of illegal distribution, exhibition, copying, downloading, or uploading. Piracy causes huge losses, not only to the owners of copyright but to the industry and the economy as a whole. Despite recent stringent measures taken by the government, India is, unfortunately, among the top five countries in the world, in terms of piracy.⁴²

The problem of piracy has increased with rapid advances in digital media technology. New technological solutions along with the worldwide reach of the Internet are making it easy for the pirates to carry on their illegal activities. Increase in the number of file-sharing networks and portals has also increased infringements by the consumers themselves.

Major Indian players have come together and formed the Alliance Against Copyright Theft (AACT) to fight piracy. The alliance has Reliance Big Entertainment, Moser Baer Entertainment, UTV Motion Pictures, Eros International and the Movie Producers and Distributors Association (MPDA) as its members. The AACT has conducted multiple successful raids in Mumbai and Gujarat.

B. Legal framework for countering counterfeiting and piracy

i. Strong Intellectual Property Laws:

The Indian laws governing intellectual property rights (IPRs) are compliant with the world standards set out in the TRIPS (Trade Related Aspects of Intellectual Property Rights). The Copyright Act provides for both civil and criminal remedies in case of copyright infringement. The police have the power of search and seizure to the benefit of the IP owners in cases of copyright infringement. Even the judiciary has proactively taken steps to curb piracy, by imposing punitive damages on offenders in civil matters and granting injunction in *qua timet* (anticipatory) actions. To ensure speedy delivery of justice in IP infringement matters, the Supreme Court of India has directed all subordinate courts in India to decide IP disputes within four months.⁴³

⁴² India Entertainment and Media Outlook 2011, Price Water House Coopers

⁴³ *Bajaj Auto Limited v. TVS Motor Company Limited*, Civil Appeal No. 6309 of 2009 arising out of S.L.P.(C) No. 13933 of 2009

Although Indian laws on IPRs are strong, often the actual court cases in India take twelve to sixteen years to reach a final hearing. Therefore, it becomes crucial for the aggrieved IP holder to obtain some temporary relief pending final decision of the court. A variety of ad-interim and interim reliefs can be availed by the aggrieved IP holder before Indian courts, including injunctions, Mareva Injunctions, appointment of the commissioner or the court receiver, Anton Piller orders, John Doe (Ashok Kumar) orders, and other orders such as discovery and inspection, or orders for interrogatories. The grant of such reliefs usually takes a couple of days from the day of making the application before the Court.

ii. *The Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007*

The Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 (IPR Border Rules) empowers the Central Government to prohibit the import of goods that infringe IPRs. There has been a notification in force since January 18, 1964, prohibiting import of goods infringing trademarks and design. The new IPR Border Rules expand upon the subject of the 1964 notification and prohibit the import of goods infringing patents, copyrights and geographical indications as well. For the smooth implementation of the evolving IPR regime, the IPR Border Rules also stipulate the establishment of an IPR Cell at each Customs House which is vested with the responsibility of verifying the applications, providing web-enabled registration formalities and corresponding with the risk management division and other Customs bodies.

iii. *The MPDA, Goonda Acts and other efforts*

The Maharashtra government had notified an ordinance to curb audio-video piracy, prescribing preventive detention and equating IPR pirates with drug offenders under the Maharashtra Prevention of Dangerous Activities (MPDA) Act, 1981. The MPDA allows the police to place offenders or potential offenders in detention for as long as 3 months without bail, and up to a maximum of 12 months.⁴⁴ The power of preventive detention has been found to be constitutional⁴⁵, but is subject to strict procedural safeguards⁴⁶.

In addition, the States of Tamil Nadu, Karnataka and Andhra Pradesh also equate pirates and counterfeiters, *inter-alia*, with bootleggers and drug offenders and punish them with imprisonment up to a maximum of 12 months under the respective applicable State laws, which are colloquially referred to as the 'Goonda Acts'. It is notable to mention the efforts made by the Tamil Nadu police in combating piracy and identifying and investigating piracy related cases. In 2008, Chennai Police Commissioner Mr. R. Sekar stated on record that about 180 cases relating to piracy have been registered in the State with many persons being detained under the Goonda Act and a total of Rs. 130 million worth of piracy has been pre-empted and prevented in the State.⁴⁷ In 2009, a total of 2,204 cases were registered by the Tamil Nadu Police under different heads of offences like seizure of DVD / VCD / ACD cases, cable TV operators etc.⁴⁸ In 2010, 2690 cases of piracy were detected by the Tamil Nadu Police, 1,122 people were arrested in connection to piracy and pirated CDs / VCDs worth Rs.44.8 million were seized.⁴⁹ The Goonda Act has helped the Tamil Nadu police to curb piracy and a similar initiative by the legislature at the central level may be able to achieve the same results on a national basis.

⁴⁴ The social service branch of Mumbai police deals with copyright violation and particularly with piracy of physical storage media

⁴⁵[1] *Haradhan Saha and Anr v. State of West Bengal and Ors*, (1974) 1 SCR 1

⁴⁶[2] *Rekha v. State of Tamil Nadu and Ors*, 2011 STPL(Web)273 SC

⁴⁷ *Piracy accounts for 50% of Music Industry's losses* "", <http://www.dnaindia.com/report.asp?newsid=1194524>

⁴⁸ Tamil Nadu Police, 2010- 11 Policy Note on Demand No. 22 available at http://www.tn.gov.in/policynotes/archives/policy2010_11/pdf/home_police.pdf

⁴⁹ Tamil Nadu Police, 2011- 12 Policy Note on Demand No. 22 available at http://www.tn.gov.in/policynotes/pdf/home_police.pdf.

iv. *John Doe Orders*

In law, the name 'John Doe' or 'Ashok Kumar' (in the context of Indian courts) is used to identify unknown/nameless defendants, who have allegedly committed some wrong, but whose identity cannot be ascertained by the plaintiff. In such cases, in order to avoid delay in the process of justice due to anonymity of the defendant, the court names the defendant as 'John Doe', until such time the defendant is identified. This is particularly important in cases of copyright piracy since it is not always possible for the copyright owner to identify and drag all infringers to court, especially where the infringement is on such a large scale.

The principles which are applicable for grant of interim relief are applicable for obtaining 'John Doe' orders as well, i.e. the plaintiff is required to prove the existence of a prima facie case, balance of convenience in its favor and irreparable loss caused due to the illegal activities of the defendant.

Such 'John Doe' or 'Ashok Kumar' orders have also been granted by the Delhi High Court in judgments relating to recent Bollywood films *Thank You* (which set the precedent for the films), *Singham*, *Bodyguard* and *Speedy Singhs*. The court, with an aim of preventing piracy in the media industry, passed ad-interim ex-parte injunction against the unidentified defendants.

In the *Thank You* case⁵⁰, the producer, having experienced violation of its copyright in its earlier films committed by several known and unknown cable operators who telecast pirated versions of the plaintiff's films on cable networks, was apprehensive of damages being caused to it monetarily and in terms of reputation due to the violations committed. As a result, prior to the release of *Thank You*, the plaintiff filed a suit before the Delhi High Court seeking to restrain the cable operators, known and unknown, from telecasting / broadcasting / distributing pirated versions of the film. The Delhi High Court passed a restraining order in favor of the plaintiff.

Similarly, in the *Singham* case matter⁵¹, the producer was apprehensive of the fact that copies of the movie will be made and sold/distributed in the form of DVDs/CDs in the market and/or shown on TV by cable operators. This may result in causing huge financial losses to the plaintiff. Thus, the plaintiff filed a suit before the Delhi High Court and contended that if the film was shown/broadcasted on cable/internet/DTH or illegally distributed through CD, DVD, Blue-ray, VCD MMS, tapes etc, by unauthorized personnel, the same would cause huge burden on the plaintiff as public would refrain from visiting the theatres to watch the movie. This will result in lower collections at the box office and would prejudice the interest of the plaintiff. In this case, the Court, relying on the principles of *quia timet* passed a restraining order against all defendants and other unnamed undisclosed persons from distributing, displaying, duplicating, uploading, downloading or exhibiting the movie in any manner and infringing the copyright of the plaintiff through different mediums without prior license from the plaintiff.

When a 'John Doe/Ashok Kumar' order is passed, the plaintiff can serve a copy of the same on the party which is violating the order and seek adherence to the order. Failure to comply with the order may result in initiation of contempt proceedings. It is, however, open to the defendant to argue their case and prove their innocence, like in any other IP infringement matter.

While Indian laws certainly provide for adequate protection, the challenge really lies with its enforcement. The enforcement machinery needs to deal with fly-by-night operators who make the raids more difficult. Also, some police cells are not well equipped nor properly trained to handle counterfeiting cases as they are not adequately educated on the laws governing IP. At times, while dealing with criminal actions, the judiciary is wary to take

⁵⁰ I.A. No. 5383/2011 in CS(OS) No. 821 of 2011

⁵¹ I.A. No. 11242/2011 in CS(OS) No. 1724/2011

action, especially when the IPR is not registered or there is lack of evidence establishing a *prima facie* case in favor of the purported owner of the IPR. Also, though the IPR Rules provide a framework to combat piracy, practically, there are a number of issues that one faces in implementing the processes under the IPR Rules. For instance, under the Trademarks Act and under common law, even unregistered trademarks are protected. Further, copyright does not require registration in order to qualify for protection in India. The right holders often face difficulties in convincing the authorities about their ownership of unregistered IPRs.

CHAPTER VI: Disputes – Via Contractual Relationships & Via Distribution / Exploitation Rights

As stakeholders in the film making and distribution process enter into several written contracts to record their legal and commercial understanding, the contractual disputes arise out of non-performance of contractual obligations or non-payment of amounts that may be due. As far as non-performance is concerned, it is often difficult to seek a quick order of the court for specific performance of the contract, as under Indian law not all contracts can be specifically enforced. Further, at the interim stage, courts do not grant interim orders for specific performance. Contracts for personal services cannot be specifically enforced. Hence, if the talent does not give agreed dates or if the music is not delivered on time, for instance, then the only remedy available would be in the form of damages.

In case the parties to the agreements have agreed that the disputes arising out of the contracts shall be settled by arbitration, the parties can still approach the court for certain interim measures. Section 9 of the Indian Arbitration Act, 1996 lays down certain cases where parties may approach the Court for certain interim measures. It has been held that this power of the Court may be exercised even before an arbitrator has been appointed, overruling the earlier position that the power may only be exercised if a request for arbitration has been made⁵². The court may grant such interim measures of protection as may appear to the Court to be just and convenient. The party approaching the court will need to establish a prima facie case and balance of convenience. For example, if a satellite distributor has procured satellite distribution rights and does not pay the producer on a timely basis, the producer may approach the court to seek interim injunction, pending arbitration between the parties, prohibiting the satellite distributor from further exploitation.

Disputes arising out of distribution / exploitation rights

With newer technologies, new rights may arise. The documentation for distribution rights may not have taken into consideration the future technologies. In such cases, typically, the rights would vest with the producers. Disputes, however, arise when the new rights may be considered only as an extension of earlier rights.

The same issue has been dealt with by the Delhi High Court, in a 2011 case of *Sholay Media & Entertainment Private Limited vs. Vodafone Essar Mobile Services Limited & Ors.*⁵³ wherein an assignment clause was interpreted for the purpose of determining the extent and nature of rights assigned thereunder. The question before the Delhi High Court was whether an absolute right to use the sound track, including songs and music by way of ringtones, callback / ringback / caller tunes etc. (Digital Rights) were assigned to the concerned parties. In this case, the Court observed that per se, no specific rights were retained by the assignor as far as sound-recording of the film was concerned. Further, analysis of definition of the term 'record'⁵⁴ indicates that sound recording rights could be exploited via future devices and mediums as well. Considering the same, the Court ruled in favor of Vodafone and allowed them to continue with the sound recording on digital media. The Court, on a perusal of the documents and after ascertaining the facts of the case, indicated that assignment of copyright would depend largely upon the construction of the

⁵² Sundaram Finance v. NEPC India Ltd, (1999) 1 SLT 179 (SC)

⁵³ 2011 (46) PTC 352 (Del)

⁵⁴ "Record" shall mean and include disc, tapes, including magnetic tape (whether reel to reel, endless loop in cassette or cartridge form, or otherwise howsoever) or any other device of whatsoever nature in which sounds are embodied so as to be capable of being reproduced there from and all such devices as presently known or that may hereafter be developed and known but excluding the sound track associated with a Cinematograph Film.

document and should be interpreted in the strictest sense or else would open floodgates of litigation for music publishing companies with respect to the agreements covering future assignment.

The view held by the Courts, however, appears to be contrary to what the proposals for amendment to the Copyright Act recommend. The proposed amendment has sought for the inclusion of a proviso after Section 18 (1) of the Copyright Act stating that no such assignment shall be applicable to any medium or mode of exploitation of work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically provided for the same. The amendment has also proposed that no author of literary or musical work included in a cinematograph film or sound recording will be permitted to assign such rights to receive royalties except to their legal heirs or to a copyright society for collection and distribution. Any agreements entered contrary to the above, will be rendered void. While this amendment attempts to clear the confusion with respect to assignment of rights, the absence of the said amendment being translated into law is bound to have the inclusion of such assignment clauses in agreements leading to more disputes.

Chapter VII: Films and Censorship

Unlike the US film industry or many other advanced film industries, the Indian film industry comes under the purview of a statutory framework governing public exhibition and broadcasting of films, commonly known as Censorship. A lot of litigation takes place in India in relation to certification of films for public exhibition and commission of statutory offences due to exhibition of a cinematographic film. This chapter deals with the statutory framework and attempts to highlight important issues which arise in its connection.

A. Framework

The exhibition of films is governed by the Cinematograph Act, 1952 (Cinematograph Act) and Cinematograph Rules, 1983 (Cinematograph Rules). The statutory body which is assigned the task to certify films for exhibition is called the Central Board of Film Certification (CBFC), colloquially known as the Censor Board. The broadcast of films on television, including broadcast of film songs, film promos, film trailers, music video and music albums is governed by the Programme and Advertising Code⁵⁵ (PAC) prescribed under the Cable Television Network Rules, 1994.

B. What is a cinematographic film?

A cinematographic film is defined as any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording.⁵⁶ It includes within its scope feature films as well as documentaries.

C. CBFC and certification of cinematograph films

In order to determine whether a film is fit for exhibition in India, all cinematographic films require certification by the CBFC, based on the censorship grades⁵⁷ set out under the Cinematograph Act. The CBFC, upon examination of the application for film certification, may sanction the film under any of the following categories, or may not sanction the film at all. Refusal to sanction implies that the film cannot be publicly exhibited.

- 'U' – Universal viewership or unrestricted public exhibition;
- 'UA' – Viewership is restricted to adults. Children below 18 years can see the film if accompanied by their parents;
- 'A' – Viewership is restricted to adults only;
- 'S' – Viewership is restricted to members of any profession or any class of persons, having regard to the nature, content and theme of the film.

If the CBFC considers certain portions of the film to exhibit obscenity, it may require the applicant to remove those objectionable portions before granting the certification. If the applicant believes he is aggrieved with the directions of

⁵⁵ .Available on http://mib.nic.in/writereaddata/html_en_files/content_reg/PAC.pdf (last accessed 07.10.2011). On 7th October, 2011, the Central Cabinet has approved new uplinking/downlinking guidelines which will make permission/registration to broadcast TV channels subject to strict compliance with PAC. The permission/registration for uplinking/downlinking of channels will be revoked if it is found that the TV channel has violated the PAC on more than 5 instances.

⁵⁶ S. 2(f) of the Copyright Act, 1957. The Cinematograph Act and Cinematograph Rules do not define Cinematographic Films *per se*. However, the definition under the Copyright Act, 1957 has been accepted to apply for the purposes of Cinematograph Act and Rules in *M/S Super Cassettes Industries vs Board Of Film Certification & Ors*, [2010 Del HC, unreported]

⁵⁷ In a bid to amend the existing provisions of the Cinematograph Act, the Government, in late 2009, prepared a draft Cinematograph Bill of 2010 (Bill). Specifically, the Bill proposed changes to the certification system for films where it suggested different slabs of rating for various age groups of film viewers. The Bill, however, is yet to see the light of day and it remains to be seen if the Government will implement its plan to bring about a Cinematograph (Amendment) Act.

the CBFC, he may choose to file an appeal with the Appellate Tribunal constituted under the provisions of Section 5D of the Cinematograph Act.

D. Grounds on which certificate has been refused

Section 5 B of the Cinematograph Act lays down principles for guidance in certifying films. These principles are negative in nature, meaning that a certificate for public exhibition will be granted only if the cinematograph film does not violate any of the principles stated therein. More often than not, certification is graded or refused or granted pending excision of certain scenes based upon non-violation of these principles by the film. These principles are: if the film or any part of it is against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence.

The inverse of such a requirement is that once a cinematographic film is provided with a certificate for public exhibition, it is deemed to have satisfied all the requirements stated above. Such an inference is forceful since a closer scrutiny of the above principles would disclose that they are verbatim reproductions of exceptions to the fundamental right of freedom of speech and expression. Thus, a film certified for public exhibition is also deemed to not offend the aforesaid exceptions in anyway, meaning any litigation before a Constitutional Court on the ground of reasonable restriction on freedom of speech and expression is automatically undermined.

E. Whether certification is required for private exhibition of cinematograph films

The Cinematograph Act provides for certification for public exhibition of films. Thus, an obvious question is whether a certificate from CBFC will be required for purely private viewership. The Delhi High Court has opined in the affirmative, stating a certificate for public exhibition will be required.⁵⁸ In that case, the petitioner was in the business of selling religious VCDs and DVDs with a disclaimer that it was meant for private viewing only. The Delhi High Court dismissed the petition, making CBFC certification approval mandatory for any type of viewership.

F. Validity of ban by state authority post CBFC certification

There are numerous instances when a State Government or a local body has denied exhibition of a cinematographic film even though it had been certified by CBFC as being fit for exhibition. In 2006, the Government of Tamil Nadu imposed a ban on exhibition of the movie *Da Vinci Code*, after it had been granted CBFC certification, on the ground of maintenance of public order.⁵⁹ Recently, the States of Punjab, Andhra Pradesh and Uttar Pradesh imposed a ban on the exhibition of the movie *Aarakshan*, despite CBFC certification having been issued to it.⁶⁰

The Supreme Court has come down heavily on such bans, and quashed them after terming it as 'pre-censorship'⁶¹ The highest Court of the country is very clear that once an expert body (CBFC) has found a film to be fit to be screened all over the country, the State Government does not have the power to organize another round of pre-censorship.⁶²

⁵⁸ *M/S Super Cassettes Industries vs Board Of Film Certification & Ors*, [2010 Del HC, unreported]

⁵⁹ *Sony Pictures v. State of Tamil Nadu*, (2006) 3 M.L.J. 289

⁶⁰ *Prakash Jha Productions & Anr vs Union Of India*, (2011) 8 SCC 372

⁶¹ Para 22 of *Prakash Jha Productions & Anr vs Union Of India*, (2011) 8 SCC 372

⁶² Para 22 of *Prakash Jha Productions & Anr vs Union Of India*, (2011) 8 SCC 372

G. Broad legal principles governing censorship

The issue of censorship of cinematographic films first came up before the Supreme Court in 1969.⁶³ Over the years, the Supreme Court and various High Courts have dealt with several cases relating to censorship of cinematographic films. In March of 2011, the Delhi High Court summarized and described broad legal principles governing censorship.⁶⁴ They have been reproduced below.

- Obscenity must be judged from standards of reasonable, strong minded, firm and courageous men⁶⁵
- If challenged, the burden is on the petitioner (Government) to prove obscenity.⁶⁶
- The film has to be viewed as a whole before adjudging whether a particular scene or visual offends any of the guidelines.⁶⁷
- To determine whether a film endangers public order, the film must have proximate and direct nexus to endangering public order.⁶⁸
- The courts do not ordinarily interfere with the decision of CBFC regarding certification unless found completely unreasonable.⁶⁹

H. Statutory offences connected with public exhibition or broadcast of films

i. Obscenity

The Indian Penal Code, 1860 (IPC) and the IT Act penalize certain actions which may constitute commission of offence in connection with the exhibition or broadcast of films. Specifically, the IPC penalizes production, circulation as well as consumption of obscene material.⁷⁰ Similarly, transmission or publication of obscene material in electronic form is punishable under the IT Act.⁷¹ What is obscene is defined under the IPC to mean any object which is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

Interestingly, persons connected with the exhibition of a film cannot be charged for commission of an offence of obscenity if the film has been certified by CBFC as fit for exhibition to public or a class of public. This was held by the Supreme Court in *Raj Kapoor vs Laxman Gava*⁷².

⁶³ *K. A. Abbas vs. Union of India*, (1970 (2) SCC 780

⁶⁴ *Shrishti School of Art, Design and Technology vs. Chairman, CBFC* W.P. (C) 6806 of 2010

⁶⁵ Observations of Justice Vivian Bose in *Bhagwati Charan Shukla vs. Provincial Government*, AIR 1947 Nag 1. Approved by Supreme Court in *Ramesh v. Union of India*, AIR 1988 SC 775, and cited with approval by Delhi High Court in *Shrishti School of Art, Design and Technology vs. Chairman, CBFC* W.P. (C) 6806 of 2010

⁶⁶ *Life Insurance Corporation of India vs. Prof. Manubhai D. Shah*, (1992) 3 SCC 637

⁶⁷ *Director General, Directorate General of Doordarshan vs. Anand Patwardhan*, AIR 2006 SC 3346

⁶⁸ *Rangarajan vs. P. Jagjivan Ram*, 1989 SCC (2) 574

⁶⁹ *Bobby Art International vs. Om Pal Singh Hoon*, 1996 4 SCC 1

⁷⁰ S. 292 of IPC

⁷¹ S. 67 of IT Act

⁷² 1980 SCR (2) 512. In this case, the producers, actor, photographer, exhibitor and distributor a feature film called 'Satyam Shivam Sundaram' were issued a notice under S. 292 of IPC alleging obscenity and indecency. The accused moved to the High Court claiming abuse of judicial process. One of the main contentions of the accused Petitioners was that no prosecution could be legally sustained in the circumstances of the case, the film having been duly certified for public show by the Board of Censors. The High Court did not conclusively answer the contention, but decided in favour of the respondent (complainant) on the ground that the complaint was neither frivolous nor vexatious and therefore could not be quashed. On appeal, the Supreme Court adjudicated on the contention and held that if the Board of Censors, acting within their jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition, the producer and connected agencies do enter the statutory harbor. That is, if the Board of Censors has permitted screening of movie to a certain class, screening a feature film in pursuance of this permission will not expose the producers and others to criminal proceeding on grounds of obscenity

A survey of decided cases would indicate that criminal prosecution has not just been instituted for public exhibition of a movie, but also for publishing advertisement of cinematographic films in newspapers⁷³ as well as hosting it on the internet⁷⁴.

Is it a crime to show a controversial movie which has CBFC certification? This was precisely the question before the Supreme Court in *Raj Kapoor vs Laxman Gavai*⁷⁵. In this case, the producers, actor, photographer, exhibitor and distributor of a feature film called Satyam Shivam Sundaram were issued a notice under S. 292 of the IPC alleging obscenity and indecency. The accused moved the High Court claiming abuse of judicial process. One of the main contentions of the accused petitioners was that no prosecution could be legally sustained in the circumstances of the case, the film having been duly certified for public show by the CBFC. The High Court did not conclusively answer the contention, but decided in favor of the respondent (complainant) on the ground that the complaint was neither frivolous nor vexatious and therefore could not be quashed. On appeal, the Supreme Court adjudicated on the contention and held that if the CBFC, acting within its jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition, the producer and connected agencies do enter the statutory harbor. That is, if the CBFC has permitted screening of a movie to a certain class, screening a feature film in pursuance of this permission will not expose the producers and others to criminal proceedings on grounds of obscenity.

ii. *Defamation*

The provisions under IPC⁷⁶ lay down that a person defames another if he, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person.

The Patna High Court dealt with a case wherein the cast, crew and producers of a feature film were accused of defamation of lawyers as a class.⁷⁷ In this case, the Court had the opportunity to decide whether certification by CBFC is a defense to the offense of defamation. The Court held that mere certification was not a complete defense, but it created a presumption in favor of the accused that they did not have the knowledge or reasons to believe that their act would harm the reputation of the aggrieved persons. If the presumption is not rebutted, the charge of defamation is not made out.

This must be contrasted with the offense of obscenity, where once certification by CBFC has been granted, no charge can be held against the accused and therefore, no criminal proceedings can be initiated.

iii. *Other statutory offences*

The offences of obscenity and defamation are ones which affect the public at large, and therefore have greater chances of being litigated. Other offences are primarily offences against the State, namely imputations,

⁷³ *O.P. Lamba And Ors. vs Tarun Mehta And Ors.*, 1988 Cri.L.J. 610 is a case in which a complaint was filed against the management of Tribune Newspaper for carrying out advertisement of an English cinematographic film called 'Together with Love'. The picture in the advertisement as well as captions supporting it were contended to be obscene.

⁷⁴ In *Avnish Bajaj v. State* decided by Delhi High Court on 29/5/2008, the Managing Director of a commerce portal was charged with publication of obscene material for hosting a pornographic clip involving two high school students.

⁷⁵ 1980 SCR (2) 512

⁷⁶ S. 499 of the Indian Penal Code, 1860

⁷⁷ *Asha Parekh And Ors. vs The State Of Bihar*, 1977 CriLJ 21

assertions prejudicial to national-integration⁷⁸, sedition⁷⁹ etc. It is difficult to imagine that such a charge could be made against people connected with the film because the CBFC, being a government institution, will filter out any objectionable content. However, if it is assumed that such a charge may come to be levied, the accused can always take the defense of action taken in good faith, believing it to be justified by law⁸⁰. Such a defense was permitted by the Court in the context of obscenity⁸¹. Based on this, it could also be construed that defenses for charges in other actions (such as imputations, assertions prejudicial to national integration etc.) may also be upheld by the Court⁸².

iv. *PAC, Self- Regulation Guidelines and broadcast of films and related media*

The regulation over the content aired via television is done by the Cable Network Television Rules, 1994 (Cable Rules) and Self-Regulatory Guidelines prescribed by the Indian Broadcasting Foundation (IBF Guidelines).

In the context of broadcast of cinematographic films and related media, the Programme and Advertising Code (PAC) issued under the Cable Rules lays down, in effect, the same principles as are applicable to the public exhibition of cinematographic films under the Cinematograph Act.⁸³ It also prescribes that all films, film songs, film promos, film trailers, music videos, music albums and their promos, whether produced in India or abroad, will not be carried through cable service unless it has been certified by the CBFC as suitable for unrestricted public exhibition in India.⁸⁴ The medium of carriage of content has been extended to include the satellite television service platform as well.⁸⁵

In July 2011, the Indian Broadcasting Foundation has introduced the IBF Guidelines for general entertainment television channels with a view to regulate the content aired on television. As the name suggests, these Guidelines are only self-regulatory in nature and have been implemented by the television channels in consultation with the Ministry of Information & Broadcasting. The IBF Guidelines stipulate a programme classification system and categorize all programmes aired on television channels in two categories:

- Generally Accessible 'G' Programmes – suitable for unrestricted viewing by all viewers and/or under parental guidance; and
- Restricted Access 'R' Programmes – which may not be suitable for children and young viewers.

⁷⁸ S. 153 B of the Indian Penal Code, 1860

⁷⁹ S. 124A of the Indian Penal Code, 1860

⁸⁰ S. 79 of IPC states that Nothing is an offence which is done by any person who is justified by law, or who reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

⁸¹ *Raj Kapoor vs Laxman Gavai*, 1980 SCR (2) 512

⁸² Refer to judgement of *Raj Kapoor vs Laxman Gavai* described under section on Censorship for understanding of the jurisprudence related to action taken in good faith.

⁸³ Rule- 6. Programme Code. – (1) No programme should be carried in the cable service which:-

(a) Offends against good taste or decency; (b) Contains criticism of friendly countries; (c) Contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes; (d) Contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths; (e) is likely to encourage or incite violence or contains anything against maintenance of law and order or which promote anti-national attitudes; (f) Contains anything amounting to contempt of court; (g) Contains aspersions against the integrity of the President and Judiciary; (h) Contains anything affecting the integrity of the Nation; (i) Criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country ; (j) Encourages superstition or blind belief; (k) Denigrates women through the depiction in any manner of the figure of a women, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to women, or is likely to deprave, corrupt or injure the public morality or morals; (l) Denigrates children; (m) Contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups ; (n) Contravenes the provisions of the Cinematograph Act, 1952. (o) is not suitable for unrestricted public exhibition

⁸⁴ Proviso to Rule 6 of the Cable Rules

⁸⁵ *Pratibha Naithani v. Union of India (UOI) and Ors*, unreported judgment dated August 23, 2006

The 'G' category programmes are permitted to be aired at any time of the day, while the 'R' category programmes (aimed at adult audiences) can be aired between a time slot of 11 p.m. to 5 a.m. only.

The IBF Guidelines prescribe that any person who operates a television channel in India and provides broadcast content services is required to obtain prior certification (based on the two categories specified above) from the CBFC for, *inter-alia*, all films (including foreign films, music videos, albums, trailers, promos, songs). The broadcast service provider is permitted to air the films on television or radio only after obtaining the requisite certification.

Thus, PAC and the IBF Guidelines both require television operators to obtain CBFC certification for broadcasting any cinematographic film or related media.

The IBF Guidelines also provide for a programme classification system. Under the system, programmes are required to be categorized under various themes such as crime and violence; sex, obscenity and nudity; horror and occult; drugs, smoking, tobacco, solvents and alcohol; religion and community; and harm and offence. For instance, in terms of programmes that may have obscene content, separate criteria have been laid out for the content that may be construed as falling under the 'G' category and the 'R' category of programmes.

The general thought behind this is that apart from films that may be exhibited in cinemas and on television, controversial scenes in programmes appearing on television should also be regulated, specifically in light of certain television shows that were aired during prime time slots and stirred up controversy.

Any person who is aggrieved by any content appearing on television is entitled to file a complaint before the Broadcast Content Complaints Council (BCCC), which has been constituted by the broadcasters under the guidelines.

v. *Public Interest Litigation and Change in Broadcasting Regulations*

The exhibition of cinematographic films on the silver screen was largely unregulated till 2005. In December of 2005, as a result of a public interest litigation writ petition filed by one Pratibha Naitthani, the High Court of Bombay⁸⁶ restricted cable television operators and multi service operators from screening films with adult content on cable television unless such films were certified for unrestricted public exhibition by the Central Board of Film Certification. By virtue of another order passed in the same case⁸⁷, the application of the ban was extended to foreign broadcasters and DTH service providers as well. The IBF Guidelines, on the other hand, have set out that adult content may be permitted to be aired on television only between 11 pm to 5 am. This has been done with a view to regulate the content and to ensure such content is aimed at adult audiences only.

⁸⁶ *Pratibha Naitthani v. Union of India (UOI) and Ors*, 2006 (2) Bom CR 41

⁸⁷ *Pratibha Naitthani v. Union of India (UOI) and Ors*, unreported judgment dated August 23, 2006

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