

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 1

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Enjoyment of Rights by Creators and Producers: Concept of Co-existence of Rights – With Special Reference to International and Indian Position

DR. VISHNU SANKAR P.¹

ABSTRACT

Copyright is an intellectual property right granted to all the creators of an” work”. However, these rights are normally mutually dependent. For example, there cannot be an Cinematographic film without a literary, dramatic and artistic work involved, and all these works are independently created by different authors who are vested with independent rights. This makes it clear that the exploitation of film entails the exploitation of the other underlying works too, and thus the rights need to co-exist while the exploitation takes place. This will make sure that the independent authors are adequately remunerated for their contribution to the whole work. The international and Indian position regarding the same often exists in a dubious manner, and it is the aim of the paper to shed light on the same.

Keywords: *Copyright, Co-existence of Rights of Authors, Berne Convention, Indian Position.*

I. INTRODUCTION

Intellectual property rights, like any other property rights, are exclusive rights granted to any creator of any work or invention.² Thus every individual creator has independent right over their creation. But what will be the position of the creator when he merges his work into another work? Who will retain the authorship of the total work? Will the individual creator still retain the authorship over his work? The typical example of these cases is seen in the cinematograph film in copyright context. As generally well known, copyright recognises various works such as literary, artistic, dramatic, musical, cinematographic works. Here each work has its own individual creators but when it comes to the cinematograph film, it is a conglomeration of works like the literary, artistic and musical works etc. Therefore, the above posted questions become relevant. In simple words the question may be reframed as the same- does the rights of the

¹ Author is an Assistant Professor at IUCIPRS, CUSAT, India.

² N.S. GOPALAKRISHNAN & T.G. AGITHA, PRINCIPLES OF INTELLECTUAL PROPERTY, 247 (2D. EASTERN BOOK COMPANY, LUCKNOW, 2009).

authors of individual works co-exist with the rights of the author of the cinematograph film? It is the aim of this paper to analyse and understand how these questions are answered by law and the judiciary and whether they are the appropriate answers to these questions.

The paper is divided into four major sections. The first section deals with the concept of co-existence. The second section deals with the international perspective of co-existence of rights and how the international framework deals with the same which covers mainly the Berne convention, WPPT, WCT and Beijing convention. The third part deals with the Indian legislative position regarding co-existence of rights and judicial interpretation of the provisions and the concept. The last part is the conclusions and observations of the author.

II. CONCEPT OF CO-EXISTENCE OF RIGHTS

The concept of co-existence of rights occurs in the case of merger of works in order to bring out a new work. coexistence means that even though a copyrightable work is merged into another to create a new work, the rights of the old original work is retained at the same time the rights in the new work is created on the new work. This implies that the creation of new rights and author in the new work does not erode away the rights of the author in the other individual work. The rights of the authors are mutually exclusive. The typical example is the cinematograph film. In a cinematograph film the work is created by the inclusion of various works such as literary work, artistic and musical and dramatic work. Therefore, the question is, whether the owner of the copyright of film, the producer, who has rights granted under the copyright Act can override the rights of the individual owners of copyright in individual works. The concept of co-existence mandates that, the rights of the individual copyright owners cannot be taken away by the producer and that the infringement of any of the rights of the authors of literary, artistic works, etc. can object to the same.

III. INTERNATIONAL LEGAL FRAMEWORK OF CO-EXISTENCE OF RIGHTS

The Berne convention basically provides for copyright protection to literary and artistic works.³ The convention basically provides for reproduction right to the authors of literary and artistic works⁴ and also right to authorise public performance⁵ and communication to public⁶. In addition to the same, the authors shall enjoy the right to authorise broadcasting⁷ and

³ Article 1 of Berne convention for the Protection of Literary and Artistic Works, 1886.

⁴ Article 9 of the Berne Convention for the Protection of Literary and Artistic Works, 1886.

⁵ Article 11 (1) (i) of the Berne convention for the Protection of Literary and Artistic Works, 1886.

⁶ Article 11 (1) (ii) of the Berne convention for the Protection of Literary and Artistic Works, 1886.

⁷ Article 11 bis (i) of the Berne convention for the Protection of Literary and Artistic Works, 1886.

communication to public through wire or wireless means⁸. The most important Article for our analysis is however Article 14 which deals with the right to cinematographic adaptation of their literary or artistic work⁹, reproduction and distribution of the same. The same Article empowers the public performance of the adapted work.¹⁰ It is also provided in the Berne that the cinematograph film so derived from such works shall be subject to authorisation of the authors of the literary and artistic work from which the cinematograph film has been adapted.

The concept of co-existence, as said above, springs up when the cinematograph film comes into the picture. Under Article 14 bis, the Berne treats a cinematograph film as an original work and that the author of the cinematograph film shall enjoy the same rights as those of the author of literary and artistic works¹¹. This is where the conflict seems to begin. This implies that there can be a right to make film, reproduce and distribute the same etc and all those other rights guaranteed to an author of literary and artistic work. Therefore, the question is whether the author of a literary or artistic work object to the reproduction or distribution of a film based on his work on the ground that his permission has not been obtained for the reproduction and distribution of the film? If so, can a producer of the film obtain these rights from the author of the literary and artistic work through a contract? Berne points out that ownership in copyright of a cinematograph film shall be a matter of legislation.¹² And the important contribution of Berne is that Berne recognises the contributions of those who made up the film. As per Berne, the countries have the freedom to recognise those authors of works which contributed to the making of the cinematographic work unless the authors are restricted through a contract.¹³ However this provision shall not apply to the authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof.¹⁴ This implies that the rights of the author of literary, artistic, dramatic and musical works and the director shall co-exist with the rights of the owner of the film and cannot be transferred through a contract. Thus Berne convention recognises co-existence.

WIPO Performances and Phonograms Treaty (WPPT), 1996: Under Article 2 of WPPT it states that the rights recognised under Berne shall not be affected by WPPT which implies that the co-existence recognised under the Berne convention shall be also recognised under WPPT. The footnote to Article 1 (2) states the understanding of this provision which says that when a

⁸ Article 11 bis (ii) of the Berne convention for the Protection of Literary and Artistic Works, 1886.

⁹ Article 14 (1) (i) of the Berne Convention for the Protection of Literary and Artistic Works, 1886.

¹⁰ Article 14 (1) (i) of the Berne convention for the Protection of Literary and Artistic Works, 1886.

¹¹ Article 14 bis (1) of the Berne Convention for the Protection of Literary and Artistic Works, 1886.

¹² Article 14 bis 2 (a) of the Berne Convention for the Protection of Literary and Artistic Works, 1886.

¹³ Article 14 bis 2 (b) of the Berne Convention for the Protection of Literary and Artistic Works, 1886.

¹⁴ Article 14 bis 2 (c) of the Berne convention for the Protection of Literary and Artistic Works, 1886.

work of copyright is brought into a phonogram, the right of the author of the work to object to any act of his work without his permission shall not cease on the ground that the assent of the owner of the phonogram (producer) is needed.¹⁵ The Treaty also specifies that no reservation of the provisions of the treaty shall be made.¹⁶

Beijing Treaty: Diplomatic Conference on the Protection of Audiovisual Performances, commonly called as the Beijing Treaty, too recognises co-existence of rights. Article 1 (3) of the Treaty says that no obligations under the WPPT shall be waived by this treaty which means that the treaty recognises the co-existence of rights enshrined under the WPPT.¹⁷ But the treaty also provides that the national legislation may provide for the performer to transfer the exclusive authorization rights granted to him under Article 7- Article 11 of the treaty through a contract.¹⁸ Therefore Beijing treaty even though recognises co-existence of rights of the authors, they also empower the national legislation to provide for provision for transfer of their rights through a contract unlike Berne.

IV. INDIAN POSITION ON CO-EXISTENCE OF RIGHTS OF AUTHORS

Under the present Indian copyright Act, the concept of co-existence rights is well built in. However it has been a long and confusing journey for the legislature for clearly demarcating the same especially with the judicial decisions of the apex court bringing out negative stands towards the concept. It would be worth a journey if one travels through the legislative and judicial responses that shaped the current law regarding co-existence of rights.

Article 14 of the Indian copyright act authorises the authors of copyrightable works with certain economic rights. The rights include the right to distribute, reproduce, communicate to public etc.¹⁹ However, the Act further states that copyright in a cinematograph film or sound recording shall not affect the separate copyright of the in a cinematograph film or sound recording made.²⁰ This section makes it very clear that even if a work of copy right is incorporated in a cinematograph film, the rights of the author over the work does not erode away. However, the apex court felt different. In the *Indian Performing Right Society, Ltd v. Eastern India Motion*

¹⁵ Agreed statement concerning Article 1(2) of WPPT, 1996: It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.

¹⁶ Article 15 of the WPPT, 1996.

¹⁷ This Treaty shall not have any connection with treaties other than the WPPT, nor shall it prejudice any rights and obligations under any other treaties.

¹⁸ Article 12 of the Beijing Treaty, 2012.

¹⁹ Article 14 of the Indian Copyright Act, 1957.

²⁰ Article 13 (4) of the Indian Copyright Act, 1957.

Picture Association²¹ supreme court held that when a composer having copyright in his musical work, authorised by a license its incorporation in the sound track of a film, no further license was required from him to perform the music in the public by the exhibition of the film as the exclusive right to exhibit the film belonged to the owner of the copyright in the film.²² This conclusion the court arrived after what court calls “as an harmonious construction of the Article 13 (1) and Article 14. The court erred in this conclusion. The court erred mainly in interpreting the Article 13 (1). Thus, court practically foreclosed the chance of recognising co-existence of right. The court also failed to recognise a prevailing precedent which was *The wellington Cinema v. The Performing Right Society Ltd.*²³ in which the Bombay High Court rejected the contention that by authorizing the use of his work in a cinematograph film the author or the composer gave up the performing right in his work in so far as exclusive performing right came into existence with respect to the film created.²⁴

The court further examined the importance of section 17 of the Act. The question was whether the producer of the film can defeat the right of the composer. The court referred to the provision regarding the first owner of copyright and held affirmative. Court interpreted section 17(b)²⁵ of the Act as to when a producer of a film commissions a composer or a lyricist for a reward or valuable consideration for the purpose of making his film by incorporating the work in the sound track of the film, he becomes the owner of copyright therein and no copyright subsists in the composer of the lyric or music unless there is a contract to the contrary. And section 17 (c)²⁶ was interpreted to mean likewise when the composer or lyric is employed under a contract of service or apprenticeship.

The 2012 amendments were brought in to rectify these mistakes made by the Hon. Supreme Court of India. A proviso was added to the above Section 17 of the Act wherein it was clarified that ownership in a cinematograph film shall not affect the right of the author in the original literary, dramatic, musical and artistic work.²⁷ In the case of assignment of copyright, the new proviso states that the author of literary or musical work included in a film cannot assign or

²¹ A.I.R. 1977 S.C. 1443.

²² K. Ponnuswami: *Performing Rights of Intellectual Worker : Judicial Annihilation : JILI1986 Vol: 28 : P.475.*

²³ I.L.R. (1937) Bom. 724.

²⁴ K. Ponnuswami: *Performing Rights of Intellectual Worker : Judicial Annihilation : JILI1986 Vol: 28 : P.475.*

²⁵ Section 17 (b) states that “subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.”

²⁶ Section 17 (c) states that “in the case of a work made in the course of the author’s employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.”

²⁷ Section 18 of the Indian Copyright Act, 1957.

waive his right to receive royalty if the work is utilized in any manner other than showing it along with the film in a movie theatre.²⁸ Also the amendment clarified that no contract between the producer and the author of the work of literary or musical work can assign the right to receive royalties and consideration on utilizing the work other than on utilizing the work in a movie theatre.²⁹

V. CONCLUSION

Thus, the current Indian position has fully utilized the flexibilities that has been granted by the Berne convention through the 2012 amendments and rectified the mistakes that have been created by the judicial decisions. The impact of the mess created by the apex court seems well realized not only by the legislature but even by the judiciary. In *Muthoot Finance Ltd. v. IPRS*,³⁰ court held that any stipulation on the agreement stipulating that the author of a literary or dramatic work cannot use the term which was incorporated in the film or sound record cannot be held valid. The decision is to be welcomed with both hands. But unfortunately, in *IPRS v. Aditya Pandey*,³¹ court again reiterated and followed the decision of 1977 in IPRS and again held that “the three works exist independent of each other, and do not co-exist- joined by an umbilical cord”.³² However the amendment of 2012 has clarified this position and thus currently the position is settled and the authors find relief in the amendments in legislature recognising expressly the co-existing contribution and right of theirs with that of the producer of the film.

²⁸ Section 19(9) of the Indian copyright Act, 1957.

²⁹ Section 19 (10) of the Indian Copyright Act, 1957.

³⁰ *Muthoot Finance Ltd. v. IPRS*, OSA No.64/2009.

³¹ 2012(50)PTC460(Del)

³² 2012(50)PTC460(Del).