

## **Copyright and Related Rights Law**

**Dr. Rohan Cherian Thomas**

**Faculty of Law**

**NALSAR University of Law, Hyderabad**

**WEEK - 06**

**LECTURE – 27**

### **Justification for Producer Authorship**

Welcome back to this course on copyright and related rights law. This week we are discussing certain types of works that are considered copyrightable, despite not having to satisfy a foundational requirement for the subsistence of copyright, which is originality. In the previous session, we discussed how works such as sound recordings and cinematograph films can, in fact, be considered copyrightable as unoriginal works. In today's discussion, we are going to connect our previous session's discussion by looking at the manner in which a producer is considered the author of the work. A significant question that arises with respect to films is why the director of the film, who plays a crucial role in the development of the film's expression, is not considered an author. In fact, it also leads us to a question of whether this is, in fact, the case in other parts of the world as well.

Therefore, to answer the question of how a producer is considered the author of a cinematograph film, we must look at how the director is considered an author or not considered an author. In order to appreciate the role of a director in the making of a film, we must have a preliminary understanding of the roles that directors play in the making of a film. And what better way would it be to understand these roles than through an agreement, between the producer and the director, regarding the service of direction. Such an agreement is found in the case of Sartaj Singh Pannu versus Gurbani Media, a case decided in 2015.

In this particular case, the question revolved around the claimant who was claiming to be the sole director of the film. The manner in which this case was decided by the court is not something we are going to particularly deal with. Rather, we are more interested in the agreement itself, which has been placed on record with the court and which is found within the judgment itself. Let us see the important provision from this service agreement for direction: clause 4 of this agreement, which sets out the duties entrusted to the director. Let us see clause 4, sub-clause 1: it states that in his capacity as a director, he

shall attend all pre-production and production meetings, budget conferences, rehearsals, and similar matters, and assist in the selection of locations, cast, and technicians.

We can see that in this role, there is no particular intellectual expression that is arising. But nevertheless, it is an important role of the director. Clause 4(2): shall cooperate with the producer in the preparation of the proper detailed production schedule within the set budget as decided by the producer for the production of the set film. Clause 4(3): liaise with the principal personnel involved in the production of the said film, such as the art director, the costume designer, the principal cinematographer, etc. Clause 4(4), and this is important because this particular subclause talks about the intellectual effort in terms of an expression that arises from the director, and it says: Direct the set film at the locations, dates, and times specified in the production schedule and/or the revised schedules until the completion of the set film and the receipt of the censor certificate. The director shall not absent himself on the dates, time, and location specified in the production schedule and/or the revised schedules.

Clause 4(5) Upon completion of the principal photography and recording of the said film, supervise the carrying out of the cutting, titling, editing, post-synchronization, scoring, dubbing, and completion in order to make due and proper delivery of the said film to the producer. Here, you can also see a great deal of intellectual effort that comes in on account of the director's intervention. But what these provisions within this agreement are telling us is that the role of a director in the film is crucial. Not only is there intellectual creation in terms of expression, but there is also an overall management of the happenings in a film, right from casting to the point of delivery of the finished film to the producer.

The director plays a very important role. But because we are discussing copyrightability, and as we have understood, copyright can only extend to the expression and not to any other aspect, such as the expenditure of labor, which by itself is not an expression, we must focus on the intellectual effort of the director. Focusing on such intellectual effort, we see that a director plays a very important role in the expressions coordinated among performers who are performing for the film. In such a scenario, we must ask the question: why is the director not an author? If the film and the expression of that film are primarily attributable to the director, and such expression is recorded or fixated in the form of a cinematograph film, then isn't all the criteria required for the subsistence of copyright satisfied by the director? In this connection, let us ask the question of whether the producer is fixing the expression himself. On this point, let us understand that our reference to a producer could be a reference to a natural person or a legal person.

We have heard of production houses such as Red Chillies, which is a production house, and Walt Disney, which is also a production house, but a producer can be a natural person as well. We have also understood, when we looked at the definition of a producer

in the Indian Copyright Act, that a producer is a person who takes the initiative and responsibility for making the cinematograph film. This is largely connected to the question of financial investment and the bringing together of various contributors in the making of a film. In that sense, we don't see any particular kind of creative effort. Sure, there is an effort, but there isn't any creative effort.

And even if there is some kind of intellectual contribution, is that intellectual contribution fixed in the form of an expression by the producer? It is not. As we have seen, it is the director who is fixing the expression. Therefore, even if we are saying that the producer is bringing in an intellectual contribution, the fixing is happening through the director, and the producer is not doing it himself or herself. On this point, let us look at how a work of joint authorship is defined within the Indian Act. We see that under Section 2(z), a work of joint authorship is defined as a work produced by the collaboration of two or more authors in which the contributions of one author are not distinct from the contributions of the other author or authors.

What do we understand about authorship? In our previous discussions, when we discussed subject matters and originality, what we discussed was that when a work is expressed, we must see whether the work is an independent creation. To identify such an independent creation, we must locate the authors of such work. What a work of joint authorship, then, according to this definition, is saying is that the collaborators who are authors are coming together in such a way that their expressions are not distinct in terms of the contribution. Now how is the question of whether there is originality in an expression considered in the question of joint authorship? So, for instance, let us say that the producer is, in fact, providing some intellectual contribution. Would this intellectual contribution have to satisfy some minimal level of creativity by itself? In other words, the producer and the director, if they are to be considered joint authors, wouldn't the producer and the director independently have to prove that their contributions are original in themselves? And only then can they be considered joint authors.

But even if we can say that we can consider originality an intellectual creation, an intellectual contribution by the producer, there is still another problem, which is that the producer is not fixing the expression himself. The fixation is happening through another person, who is the director. How can the producer claim copyright protection then? A very important case that came before the Delhi High Court was *Najma Heptullah versus Orient Longman*. Orient Longman is a publishing house. In this particular case, the book *India Wins Freedom* was published, in which the subject matter of the book was provided by Maulana Azad, and the language of the book was that of Professor Kabir.

The collaboration between Maulana Azad and Professor Kabir was such that Maulana Azad would describe his experiences and Professor Kabir would take them down; but not take them down in such a way as to take dictation but rather apply his own mind in

generating the language. You can see here that Maulana Azad had not fixed the expression himself but rather he was doing it through Professor Kabir. What the Delhi High Court had stated was that surely the intention of the Copyright Act cannot be to give the status of an author only to the person in whose language the literary piece is written, while completely ignoring the person who contributed the entire material which enabled the person to show his mastery over the language. In other words, the court expressed that if the subject matter or the content which essentially gave value to the expression was attributable to a person who was not writing that expression - then how is it that we can say that this person is not an author? We must remember that when we discussed the definition of joint authorship, we saw that authors who are collaborating are authors in their own right, and their contributions are original and independent.

We cannot say that a person who is taking dictation word by word and writing down what another person is saying - Is in some way satisfying originality, especially considering that expressions would have to satisfy a minimal degree of creativity, something that we have clearly understood from the application of *Eastern Books versus D.B. Modak*. What the court is stating is that a literary work consists of matter, material, or subject that is expressed in a language and is written down. Both the subject matter and the language are important.

It is difficult to comprehend or accept that when two people agree to produce a work, where one provides the material on his own, and the other expresses the same in a language that is presentable to the public, then the entire credit for such an undertaking or literary work should go to the person who has transcribed the thoughts of another. The judge says, "To me, it appears that if there is an intellectual contribution by two or more persons pursuant to a reconvered joint design to the composition of a literary work, then those persons have to be regarded as joint authors." The consideration of a collaboration in creating a work means that two people have come together to generate a work that is a result of intellectual effort. Such collaborators must ideally be considered joint authors, provided that their contributions can be considered original themselves. Something that we see has been expressed by many courts over a century is a reflection of that which arises from an early case of *Levy versus Rutley*.

It is not necessary that all should contribute to the same extent, but all collaborators must fit the description of an author. Since collaboration is required, a work is not a work of joint authorship unless it is made in furtherance of a common design. Where the producer undertakes the responsibility of bringing different contributors together in the making of the film, is that something that can be considered purely an effort-based consideration? Where is the expression that can be considered a subject matter? Even if there is some expression that we can attribute to a producer. The producer would have to be considered an author. There would have to be some kind of subject matter.

Now, when a director directs, it is because the director can, in fact, fall within, say, the management of a script, which is technically bringing in certain additions to let us sum up what we have understood. When a producer is considered in line with the definition provided in the Indian Copyright Act, We are seeing that the producer is an author, because of the initiative that the producer takes towards making a film and the responsibility of making the film. Which is the financial investment and bringing these contributors together. But in terms of intellectual effort, we don't see any intellectual effort. This intellectual consideration, which is rather attributed to the director, would then pose a problem if the producer is to be considered an author.

I'm sure now you can see the problem if the producer is considered an author from the perspective of creativity. Because of this problem, the producer is recognized as the only author of the film, and because a director is not considered an author, the director cannot satisfy the description of an author. Because such a description cannot be satisfied, the director cannot also be considered a joint author. Therefore, the film would not be considered a creative effort because if it were to be considered a creative effort, Then that intellectual effort would necessarily raise a question about the authorship of the director, which has been avoided in the Indian Copyright Act. Therefore, we can now very clearly say that creative contribution is not the basis for producer authorship in India.

And this is very, very clear from section 13 and our prior understanding in the previous session when we discussed how cinematograph film is a subject matter without being an original work. Originality requires not just an expenditure of labor; it requires skill, judgment, and a minimal degree of creativity, something that producers would generally find difficult to satisfy. Let us look at an alternate way in which this conflict, so to speak, is being handled in another part of the world. Let us consider the French postal code. I will be referring to some of the provisions within the code, which will help us understand how this issue is being dealt with in a completely different way.

In Article 113-7, the French IP code states, "Authorship of an audiovisual work shall belong to the natural person or persons who have carried out the intellectual creation of the work." At this point, from this provision, we can clearly see the departure. Section 13 of the Indian Copyright Act, which doesn't require originality for the subsistence of copyright in cinematograph films, can be clearly distinguished from the approach to authorship in audiovisual works in France, where there is clearly a requirement for intellectual creation. And on account of this understanding, it states that unless proved otherwise, the following are presumed to be joint authors. And who are these collaborators? Author of the script, author of the adaptation, author of the dialogue, author of the musical compositions, and the director.

You can see here if you change the philosophical understanding of authorship to where authors' rights are considered the dominant perspective in copyright. And as placed

against the possibility that investment could be considered as a consideration for copyright: The French perspective, which is focused on intellectual creation, would necessarily give consideration to an author such as the director. In L121-5, the French IP code states that an audiovisual work shall be deemed completed when the final version has been established by common accord between the director or possibly the joint authors on the one hand and the producer on the other. The reference to the producer has also been interpreted within the French IP code; I will come to that in just a bit. But the reference to the producer here is an important consideration: the producer is the person who will engage in the commercialization of the film.

And in order to do so, the producer would have to be satisfied with the completion of the film. Therefore, a distinction can be made between intellectual creators and the producers' responsibility in terms of what he or they are bringing to the table with respect to the film. In L132-23, the court says that the natural or legal person who takes the initiative and responsibility for making the work shall be deemed the producer of an audiovisual work. Further, the author shall guarantee the producer the undisturbed exercise of the rights assigned. To sum up our discussion, we can see that the French IP code centers on authors' rights with respect to subject matters of copyright.

And therefore, if a contribution cannot satisfy intellectual creation, then such a person could not be considered an author. But because the producer is playing a very important role with respect to the film, this provision demonstrates how the producer would effectively control the film in terms of its commercialization. You can see that the code very clearly states that the author shall guarantee to the producer the undisturbed exercise of the rights assigned. In terms of a difference in philosophical approach, we would note that to consider copyright purely from the perspective of intellectual creation, could possibly run counter to the understanding of copyright as something that is in place to prevent unauthorized usage of someone's work. Film piracy is a major evil that producers have to deal with when they release a film in the market.

The sheer complexity of the market and the amount of risk that producers must take can pose a major disincentive for them to invest in the creation of films. In order to provide them with an incentive to invest, such as enabling the film industry to thrive, and through which many people fix their livelihood, it would be important for the producer to have copyright protection over the work. To establish such control, it would be important that the producer doesn't have to contend with a copyright control that is coming in on account of collaborators of underlying works or even a joint author. Because of a difference in understanding of how to approach copyright, it would be possible in certain jurisdictions, as we have seen in India, for there to be a copyright that is awarded purely for original creations; and copyright, which is also being granted for works that are not the result of intellectual creations, particularly, but the result of investment. In the next session, we are going to discuss the kinds of problems that can arise with respect to the

ownership of such works as cinematograph films and sound recordings, particularly because of the many different components that are covered within such works.

Thank you for joining me. See you all in the next session. Thank you.