

THE TOUCH OF 'JADOO' IN THE COPYRIGHT (AMENDMENT) ACT, 2012: ASSESSMENT OF THE AMENDMENTS TO SECTIONS 17, 18 AND 19

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*The Copyright (Amendment) Act 2012 resulted, in part, from concerted lobbying by composers/lyricists to foster a more equitable sharing of royalties by Bollywood producers and others in the entertainment business. The efforts resulted in the recognition of their right to equitable sharing in the royalties, primarily in the form of amendments to § 17, §18, and §19. This paper seeks to assess these provisions and their likely impact. By highlighting the existing lacunae in law, the author posits possible interpretations that would aid in the realization of the objectives of the amended provisions to a considerable extent. Towards that end, the inter-relation between these provisions is also elaborated on. The pivotal role of the new proviso in § 33(1) is also discussed. The paper also assesses whether the application of these amended provisions will be retrospective, prospective, or retroactive in nature.***

I. INTRODUCTION

In course of the discussions relating to the Copyright (Amendment) Act, 2012 ('Copyright Amendment'), I was rhetorically asked whether a law had ever been struck down for being poorly drafted and completely unworkable. Apart from raising larger questions of statutory drafting and interpretation, this question aptly captures the sentiments of a large number of intellectual property lawyers. While I agree, that the drafting of the newly inserted provisions is imperfect (for instance, the sudden and unexpected appearance of a stranger called 'cinematograph work'¹ in § 17), I confess being a little biased. This is because I have worked with an attorney who represented the cause of music composers and lyricists and played a significant role in the passage of amendments securing their rights.² I do believe that the amendments have the potential to disrupt the equilibrium in the music and entertainment industry;³ my

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** Abstract supplied by editorial board.

¹ As opposed to the defined term 'cinematograph film' used consistently in the statute.

² Mr. Ameet Datta, working on the amendments pro bono for Luthra & Luthra Law Offices.

³ This article does not look beyond the impact of the amendment on this industry.

view however is that this disruption is a much needed one, given the rather inequitable history of the industry.

This paper elucidates on what are now commonly labeled as the Bollywood amendments, championed in large part by Shri Javed “Jadoo” Akhtar on behalf of authors and composers, who had thus far, been at the receiving end of an unfair bargain from film producers and sound recording companies. Towards that end, the paper analyses the changes in §§ 17, 18 and 19 vide the Copyright (Amendment) Act, 2012, and attempt to articulate what, in my opinion, is their correct interpretation. Part II of the paper deals with the amendment to § 17 and the three possible interpretations to the newly inserted proviso. Part III deals with § 18 and § 19 together, and their interrelationship in light of the amendments. Part IV concludes by assessing the operative effect of this Amendment, that is, whether it will operate retrospectively, prospectively or retroactively.

II. SECTION 17: INCORPORATION OF A NEW PROVISIO

A. *CONFLICTING INTERPRETATIONS OF SECTION 17*

§ 17 of the Copyright Act, 1957 (‘the Act’) is indicative of whom the copyright will vest in upon the creation of a copyrightable work. It lays down the general rule that the ‘author’ (as defined in § 2(d) of the Act) of a work shall be the owner of the copyright in the work.⁴ Seven exceptions to this

⁴ For the readers convenience, § 17 has been reproduced below:

§ 17. First owner of copyright: Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein

Provided that—

- (a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;
- (b) 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;
- (c) 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;
- (cc) in the case of any address or speech delivered in public, the person who has delivered such address or speech or if such person has delivered such address or speech on behalf of any other person, such other person shall be the first owner of the copyright therein

general rule are made in the form of a proviso. A similar pattern is evidenced in all the exceptions. All exceptions provide for the types of ‘work’ to which the exception applies,⁵ the situations in which the exception may be invoked,⁶ and the individual/entity who may assert first ownership.

As evident from above, the Copyright Amendment introduces a second proviso⁷ applicable to works incorporated in cinematograph films, mandating that nothing in clauses (b) and (c) of § 17 shall affect the right of the authors of “original literary, dramatic, musical and artistic works”.⁸ It may be noted that this proviso is not numbered – i.e. it is not ‘clause (f)’. A perusal of its content reveals that it is not limited to clause (e) either. Additionally, this proviso simply uses the words ‘provided that’ unlike the addition to § 18(1), which uses the words ‘provided further’⁹ (signifying that the proviso is to operate as another exception/condition to the subsection itself rather than to the first

notwithstanding that the person who delivers such address or speech, or, as the case may be, the person on whose behalf such address or speech is delivered, is employed by any other person who arranges such address or speech or on whose behalf or premises such address or speech is delivered;

- (d) in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;
- (dd) in the case of a work made or first published by or under the direction or control of any public undertaking, such public undertaking shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

Explanation. For the purposes of this clause and section 28A, “public undertaking” means:

- (i) an undertaking owned or controlled by Government; or
- (ii) a Government company as defined in section 617 of the Companies Act, 1956; or
- (iii) a body corporate established by or under any Central, Provincial or State Act;
- (e) in the case of a work to which the provisions of section 41 apply, the international organisation concerned shall be the first owner of the copyright therein

Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of subsection (1) of section 13.

⁵ For instance, clause (a) applies only to a literary, dramatic or artistic work; (b) applies to a photograph, painting, portrait, engraving or a cinematograph film; (c) covers all kinds of works (it uses the words ‘a work’); (cc) deals with specific subsets of literary works i.e. ‘address or speech’; (d) covers ‘a Government work’; so on and so forth.

⁶ For instance, clause (a) deals with “employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship...”; (b) deals with commissioned works; (c) covers works created under employment (other than where (a) or (b) apply), etc.

⁷ It reads as follows: “Provided that in case of any work incorporated in a cinematograph [film], nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of § 13”.

⁸ As provided in §13(1)(a).

⁹ The words “Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made...” apply to Clause (1) of § 18 : “The owner of the copyright in an existing work...may assign to any person the copyright either wholly or partially”; they do not apply to the preceding proviso that reads: “Provided that in the case of assignment of copyright in any future work the assignment shall take effect only when the work comes into existence”. The word ‘further’ makes it clear that the proviso is additional, and not a limitation on the exception/condition itself.

proviso). Therefore, in my view, the new proviso is an exception applicable to the first proviso (i.e. the seven sub-clauses) of § 17, and not merely to proviso (e) that immediately precedes it. While it may seem unnecessary to make much of the numbering and positioning of the proviso, in my view, as I shall explain later, it does play a role in understanding the true import of the newly inserted proviso.

The ambiguity in the second proviso arises in relation to words ‘the right’, besides the undefined term ‘cinematograph work’. The proviso does not expressly state which ‘right’ of the author it seeks to safeguard. Couldn’t the amendment simply have said “ownership of the copyright in the work” shall vest in the author, rather than left it ambiguously at ‘right’? The lack of clarity leaves room for at least three possible interpretations. One view is that the proviso, in line with the amendments in § 18 and §19 that seek to guarantee the right to royalty, pertains to the same. However, is there a ‘right to royalty’ under the Act? Isn’t royalty a logical corollary of a right and not so much a legal right in itself? It is suggested that the proviso clarifies that, notwithstanding the initial vesting of copyright in the one who commissions (clause (b)) or employs (clause (c)) an author for the creation of works to be incorporated in cinematograph films, the right to receive an equal share of royalty (as contemplated under §§ 18 and 19) shall remain with the author. While § 18 and §19 provide for assignments and waivers, this proviso envisages a situation where the copyright originates in a person other than the author. Therefore, as an illustration, one who commissions the script of a film will become the first owner of the copyright in the script; however, the scriptwriter will retain his right to equal royalties as envisaged under §§ 18 and 19.

The second view is that the ‘right’ referred to in the proviso is the copyright itself (the ‘ownership’), and not merely the right to receive royalties. As per this line of argument, the word ‘right’ in the proviso must be construed in its contextual framework i.e. ownership, and not merely in relation to payment of royalty. Therefore, in the above mentioned illustration, one who commissions the script of a film will not automatically become the first owner of the copyright in the script.

The third view, a relatively more imaginative one at that, is that the ‘right’ refers to some other right altogether which the Act confers (such as the ‘author’s special right’ or moral rights enshrined under § 57). Accordingly, the proviso clarifies that notwithstanding commissioning/employment, where the copyright originates in another, the author’s moral rights shall continue to vest with him/her. The argument is buttressed by the observation that § 57 retains these rights only in case of assignment, and not where the ‘first owner’ is someone other than the author. Pursuant to such an interpretation, in our illustration above, while the one who commissions the script of a film shall be the first owner of the copyright, the author would not retain any right to royalty; all he would be entitled to is his ‘special right’ under § 57.

I am inclined to agree with the second interpretation discussed above. A plain reading of the proviso shows that it prevents clauses (b) and (c) from impacting the ‘right’ of the author (of a literary, musical, dramatic or artistic work) when the work in question is incorporated in a cinematograph film. To identify the ‘right’ in question, it is pertinent to ascertain the manner in which clauses (b) and (c) could impact the right of the author in the first place. Whatever the answer, the proviso mandates that the same effect shall not occur with respect to certain specified kinds of works, that is, “any work incorporated in a cinematograph film”.

In light of the interpretation given to § 17 provisos (b) and (c) by the Supreme Court in *Indian Performing Right Society v. Eastern India Motion Pictures Association* (‘EIMPA case’),¹⁰ these clauses that ‘shift’ the default ownership of copyright from the author to the producer, apply to the cinematograph film, as well as the works created for incorporation in the film. Thus, as per this ruling, § 17(b) and (c) operate to vest ownership of copyright even in the underlying literary/musical/dramatic/artistic works with the producer and not the creator. The EIMPA case plays a pivotal role in construing the new proviso, and hence, is discussed in detail below.

B. THE EIMPA JUDGMENT

The Indian Performing Right Society Ltd. (‘IPRS’), upon its incorporation in 1969, had published its tariffs, claiming royalties from cinema halls for exhibiting films that embodied lyrics and music created by its members. The producers (acting through Eastern India Motion Pictures Association (‘EIMPA’) and other associations) asserted their ownership over the literary and musical works on the grounds of commissioning of the work, while challenging the tariff before the Copyright Board. The producers’ claim was backed by the cinema hall owners (acting through their association, namely, the Cinematograph Exhibitors Association of India).

In 1973, the Copyright Board, in a well-reasoned judgment upheld the validity of the tariffs. The Board observed that literary and musical works were not covered under § 17(b). Furthermore, in the absence of evidence indicating assignment of the authors’ copyright in favour of the producers, the authors would retain their copyrights.

However, while allowing EIMPA’s appeal against the Copyright Board decision, the High Court of Calcutta in 1974 observed that the authors were precluded from assigning to IPRS what did not belong to them in the first place.¹¹ Relying on § 17(b) of the Act, the Court held that the copyright in the works in question never originated in the authors for them to assign to IPRS,

¹⁰ AIR 1977 SC 1443.

¹¹ *Eastern India Motion Pictures Association v. Indian Performing Right Society*, AIR 1974 Cal 257.

as the section would cover these works as well. In other words, as per § 17(b), copyright ownership in all works associated with a cinematograph film (including underlying musical works and lyrics) vested with the film producer. The High Court noted that an “assignee cannot have a right higher than the right of an assignor”,¹² and held that a general assignment of future works (the kind that IPRS had with its members) had no meaning. IPRS did not own the copyright in the literary and musical works embodied in the cinematograph films, and therefore, could not claim royalties. The High Court granted IPRS a certificate of appeal to the Supreme Court.

In the Supreme Court, the producers and cinema halls argued that having commissioned these works specifically for incorporation in the soundtrack of the film, no royalty was payable to the authors collecting the same through IPRS. It was canvassed before the Supreme Court that § 17(b) which applies to “cinematograph film made, for valuable consideration at the instance of any person” is not limited to the copyright in the film alone, and that it covers even the ‘component part(s)’¹³ of the film.

It is important to note that in the absence of any executed assignment deeds to interpret, the Supreme Court was faced with a situation where it had to determine the issue of ownership of copyrights between the producer and the author in the underlying works or the ‘component parts’. Relying on § 17(b) and (c), the Court opined that, for the purposes of the cinematograph film, the copyrights in the literary and musical works embodied in the film, vest with the producer. However, exploitation of the literary and musical works other than as part of the film¹⁴ would entail availing of a license from the authors.

To say the very least, this ruling has confounded the legal community. Some High Courts have even interpreted it to mandate a ‘merger’,¹⁵ which is contrary to the very fundamentals of copyright law.¹⁶ Also, various High Courts have expressed divergent views on the understanding of this judgment.¹⁷ The industry has been left confused in the aftermath of the ruling, to the

¹² *Id.*, ¶ 32.

¹³ *Id.*, ¶ 6.

¹⁴ As Justice Krishna Iyer explains, “So, beyond exhibiting the film as a cinema show, if the producer play the songs separately... he infringes the composer’s copyright. Anywhere, in a restaurant or aeroplane or radio station or cinema theatre, if a music is played, there comes into play the copyright of the composer... A film may be caused to be exhibited as a film but the pieces of music cannot be picked out of the sound track and played in the cinema or other theatre”.

¹⁵ The concept of ‘merger’ is the notion that when a derivative work (a sound recording or a cinematograph film) is being exploited, the original works (literary, musical, dramatic or artistic works) embodied in such derivative work are not simultaneously exploited. For instance, see *Music Broadcast Pvt. Ltd. v. Indian Performing Right Society*, 2011 (47) PTC 587 (Bombay).

¹⁶ Apart from not being strictly relevant for this discussion, the merger issue is *sub judice*, and need not be dealt with.

¹⁷ Contrast the ruling of the Division Bench of the Madras High Court in *Muthooth Finance Ltd. v. Indian Performing Right Society*, OSA No. 64 of 2009 and MP No. 1/2009 with that of the

extent that the Standing Committee Report on the Copyright Amendment¹⁸ recognized that the judgment enabled wrongful exploitation of the authors' works by the producers.¹⁹

The fallout of the judgment for the industry was that the film producers asserted absolute ownership over the copyright in the works commissioned by them.²⁰ In other words, the producer, i.e., the one who commissions copyrightable works to be included in cinematograph films, came to be treated in the industry as the first owner of copyright not only in the final film, but also in all underlying/component works. Authors of works that were commissioned for inclusion in a film received nothing more than an initial commission. Furthermore, they were unable to enjoy the commercial exploitation of their works independent of the film. The amendment to § 17 clearly sought to rectify the problem posed by this ruling. As observed in the Standing Committee Report, the Copyright Amendment aims at ensuring that the authors of works incorporated in cinematograph films, are not divested of their ownership in such works by an erroneous reading of § 17, as did the Supreme Court in the EIMPA case.²¹

Thus, the authors of certain kind of works i.e., works created for incorporation in a cinematograph film, who were divested of ownership due to a faulty reading of clauses (b) and (c) by the Supreme Court, are now being resurrected as owners through the Copyright Amendment.

Division Bench of the Delhi High Court in *Indian Performing Right Society v. Aditya Pandey*, FAO (OS) 423- 424/2012.

¹⁸ Department-Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010, November 23, 2010 .

¹⁹ *Id.*, ¶ 9.13 – 9.14.

²⁰ Whether the EIMPA case intended this (or actually mandated only that the producers would be owners of the synchronization right in the commissioned works and that the authors/ composers would retain the other rights that the copyright comprises) is a separate issue and not necessary to deal with here. In any case, it is irrelevant in light of the Copyright Amendment.

²¹ Standing Committee Report, *supra* note 18, ¶ 9.13 – 9.14:

“When a song or music is incorporated in a film, it is relating to synchronisation right of author and music composer which is assigned to the producer of the film as per § 17(b) or in the absence of agreement, film producer is the first owner. However, film producer is also getting other independent rights of author and music composer of their works envisaged in § 13 of the Act. As the § 17(b), he further assigns these rights to the music companies for upfront lump-sum amount. When the films songs are performed separately and independently through TV/Radio, restaurants, airlines, auditoriums or public functions etc. film producer becomes the first owner and authors/music composers lose economic benefits of exploitation of their works to music companies who become ultimate owners of these works... The Committee also takes note of the fact that independent rights of authors of literary and musical works in cinematograph films are being wrongfully exploited by the producers and music companies by virtue of Supreme Court judgment in *Indian Performing Right Society v. Eastern India Motion Pictures Association*, (AIR 1977 SC 1443) which held that film producer is the first owner of the copyright and authors and music composers do not have a separate right”.

C. CLARIFYING THE SECOND PROVISO TO § 17

As noted earlier, there are three possible ways in which the second proviso to § 17 could be interpreted. I lean in favour of the second interpretation, since the structure of the proviso and its context militate against the adoption of the first and third interpretations, as detailed below.

If the first interpretation (i.e. the word ‘right’ in the second proviso relates only to the right to royalty, but not to the right to ownership) should be accepted, it would render the second proviso as a mere clarification to clauses (b) and (c). In other words, while clauses (b) and (c) would continue to operate, this new proviso would clarify that the shifting of ownership takes place sans a simultaneous shift in the right to royalty. However, this interpretation flies in the face of the fact that there is no separate right to ‘royalty’ under the Copyright Act.²² In other words, royalty is not an entitlement but a mere consequence of a vested right and is to be negotiated privately between parties.

The new proviso cannot be interpreted to actually define or prescribe a rate at which royalty is to be shared. It is pertinent to note that the new proviso does not contemplate a transfer of ownership; it merely confirms that the author of underlying works in a film remains the owner as well.

Further, as observed previously, the new proviso is not a new clause (i.e. unlike a numbered clause (f), for instance) under the existing proviso. Rather, it is a separate proviso, i.e., an exception or a limitation – to the first proviso. Therefore, it is preferable to read this new proviso as carving out an exception or a limitation to the operation of the first proviso, rather than reading it as a clarification in light of the new principles under § 18 and § 19. Accordingly, while the first proviso stipulates when copyright in certain works would not originate in their authors, the new proviso limits the operation of the first proviso by creating a category of works²³ that are not within the purview of this deviation from the rule that the author is the first owner.

Admittedly, the second view adopts a somewhat purposive construction.²⁴ It is settled that in the face of ambiguity, as is the case here, the mischief rule may be resorted to and a purposive construction may be adopted.²⁵ In any case, being clarificatory in a sense (i.e. that the ownership continues to vest with the authors) this interpretation is more ‘literal’ than the first, which requires a fair amount of guesswork. If despite the introduction of the proviso,

²² It is important to note that even the amendments in §§ 18 and 19 (discussed in more detail in Part III) operate to cap the percentage of royalties that an author can assign/waive to an assignee; they do not create any statutory right to receive royalty.

²³ Viz. “any work incorporated in a cinematograph [film]”.

²⁴ It is not as though the other views readily follow from a textual reading of the proviso either.

²⁵ *The Commissioner of Income-tax, Madhya Pradesh and Bhopal v. Sodra Devi*, AIR 1957 SC 832; *Swedish Match AB v. Securities and Exchange Board of India*, AIR 2004 SC 4219.

copyrights were to vest in the producers /commissioners/employers, and the right to royalty with the author, then the proviso would not serve its purpose of clearing the confusion created by the EIMPA case.

The third interpretation can be disposed off with ease. Under this interpretation, the word ‘right’ is to relate to the moral rights of the author. § 57 enshrines the moral rights of an author and begins with the words “independently of the author’s copyright”. A court of law would therefore find it difficult to justify limiting the applicability of this section to situations where the author is divested of his copyright by virtue of assignment only. If one were to adopt this idea, moral rights would exist only where an author either owns the copyright, or is divested of it only by assignment, thereby excluding other means (for instance, relinquishment). As creative as it may be, this view is not based on sound logic and is contrary to the stated object of the Copyright Amendment. Furthermore, it is also opposed to the copyright jurisprudence that attributes moral rights to the author, independent of and distinct from, all commercial rights related to a copyrightable work.

Additionally, it is pertinent to note that the proviso states, “nothing contained in clauses (b) and (c) shall affect the right of the author” (emphasis supplied). It does not make a reference to the “right to receive royalties” (§ 18), the “right... to claim an equal share of royalties” (§ 19) or to the “author’s special right” (§ 57). Hence, it would be incorrect to equate the ‘right’ referred to in the second proviso to a right that is alien to § 17. By preferring an alternate interpretation, we would limit the scope and application of the second proviso and erroneously remedy a mischief that clauses (b) and (c) do not directly cause.

III. SECTIONS 18 AND 19: AUTHOR’S RIGHT TO ROYALTY DEHORS OWNERSHIP OF COPYRIGHT

§ 18 of the Act empowers the owner of copyright to transfer his title by assignment. It further mandates that the assignee shall assume the role of the assignor. § 19 lays down the requirements of a valid assignment, and also provides for its interpretation by prescribing the duration and the territorial extent of the assignment, in the event the assignment is silent on the same. Further, as per § 30A, the provisions of § 19 pertaining to assignments are applicable to licenses as well.

The stated objective of the amendment is, inter alia, to “ensure that the authors of the works, in particular, [the] author of the songs included in the cinematograph films or sound recordings, receive royalty for the commercial exploitation of such works”.²⁶ With this view, certain new provisions have

²⁶ Statement of Objects and Reasons appended to the Copyright (Amendment) Bill, 2010.

been incorporated within the framework of § 18 and §19 that restrain authors and composers from alienating their right to royalty.

A. SECTION 18: INTRODUCTION OF THREE NEW PROVISOS

§ 18(1) enables transfer of copyright by assignment. Prior to the Copyright Amendment, the only limitation/qualification was that in cases of future works, the assignment would take effect only upon the creation of the work. Through the insertion of provisos, the Copyright Amendment introduced three additional limitations on the right to transfer copyright.²⁷

The first of the three new provisos prohibits assignment of the right to exploit works via media or modes which do not exist or are not in commercial use at the time of the assignment, unless the agreement provides specifically for such assignment. The second one prohibits an author of a literary or musical work included in a cinematograph film from assigning or waiving the right to receive royalties on an equal basis with the assignee. The third one prohibits an author of a literary or musical work included in a sound recording, but not forming part of any cinematograph film, from assigning or waiving the right to receive royalties on an equal basis with the assignee.

²⁷ § 18 has been reproduced below:

“18. Assignment of copyright.

- (1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof:

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work:

Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copy right society for collection and distribution and any agreement to contrary shall be void:

Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.

- (2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.
- (3) In this section, the expression “assignee” as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.”

1. First new proviso: Safeguard in relation to emerging technology

The first of the three is comparatively less contentious in terms of interpretation, though not in terms of its effect. The proviso was introduced as a safeguard against exploitation of creative persons in the entertainment industry. It seeks to protect authors and composers from being made to absolutely and unconditionally part with their copyright, thereby being disentitled to any commercial benefit that may arise from technological advancements in future. The structuring of this proviso is different from the other two, as it does not impose an express prohibition on the author. Rather, it reads as a directive on the interpretation of assignments,²⁸ and states that no assignment shall ‘be applied’ to any exploitation done through such means which were not in existence or in commercial use at the time of execution of the assignment.²⁹ A limitation on this ‘directive’ is that if the assignment specifically refers to such medium or mode of exploitation, then the assignment shall extend to the same.³⁰

While the interpretation of this clause is not very troublesome, the impact it is likely to have is slightly disconcerting. *First*, the proviso, in my opinion, has been worded too broadly, such that it is not limited to literary and musical works. Consequently, the proviso may seriously impact numerous fields other than the film and entertainment industry. For instance, in the information technology industry, hypothetically, Apple would face difficulty in utilizing the source code of the iOS used in the iPad³¹ for a holographic iPhone that maybe launched in future.³² In other words, development of technology in any field would necessitate a return to the original author for procuring additional licenses in respect of the new technology. *Second*, the proviso does not provide an exception for assignment to copyright societies. Therefore, societies that collect royalties on behalf of authors, and make use of assignments from the authors in order to do so, such as IPRS, will face hurdles in collecting royalties for new modes of exploitation. However, from a bare reading of the Standing Committee Report, this appears to be unintended and could possibly be an

²⁸ Perhaps, it may have been better suited under § 19 which deals with such matters.

²⁹ It is pertinent to note the absence of a stipulation (unlike under the following two provisos) that non-conformity would render the agreement void. It may also be observed that such stipulation is also absent in the newly incorporated §§ 19(9) and 19(10).

³⁰ Some argue that the proviso (in particular, the requirement of making a specific reference) is illogical as it envisages and requires parties to refer to media and modes of exploitation that are not in existence at the time of the assignment. I, however, feel it is entirely possible for reference to be made to technologies which are under development, and definitely to those that are already invented but are not ‘in commercial use’ at the time.

³¹ Assuming, for the sake of this illustration, that Apple purchased the source code from an individual in India and the assignment was governed by the law of India.

³² It appears these are not that far off in the horizon! See Concept, available at <http://gadgets.infoniac.com/uimg/apple-black-hole-holographic-device-call.jpg> (Last visited on July 2, 2013).

oversight.³³ It would be interesting to see how the courts deal with this proviso, and whether they limit its scope only to the extent of its objectives.

2. Second new proviso: Safeguards in relation to cinematograph film

The second proviso, as stated above, seeks to guarantee royalty to “the author of a literary or musical work included in a cinematograph film” for *any and all* exploitation of such work (i.e. either with or independent of the cinematograph film) save in circumstances where the underlying work is exhibited as part of the film in cinema halls. The proviso operates by mandating that the author of such works (literary or musical works included in a cinematograph film) “shall not assign or waive” the “right to receive royalties”. It is important to note that the restriction does not apply to the copyright itself. Rather, it is only applicable to the assignment or waiver of the “right to receive royalties”. Illustratively, imagine a situation where Mr. C (a composer) has created certain musical works to be incorporated in a cinematograph film produced by Mr. P. Mr. C then assigns the entire copyrights in such musical works without any restrictions i.e. for its complete term and for the entire world, to Mr. P. This ability to assign the copyright is not impeded by the new proviso.³⁴ What the proviso does restrain is the absolute assignment/waiver of the “right to receive royalties”. Hence, a dichotomy between ownership of copyright and the right to royalties is created. Consequently, while Mr. P is the owner of the copyright,³⁵ Mr. C is now statutorily prohibited from assigning or waiving his right to receive royalties generated by the exploitation of the musical works composed by him. This no doubt may raise some complexity, as the Copyright Act does not recognize a ‘right’ to royalty. However, if viewed as a legally mandated contractual term (rather than an actionable legal right) the provision becomes easier to interpret.

Apart from this, the proviso raises two pertinent questions. *Firstly*, why such a restraint is imposed on the author, thereby intruding his/

³³ Standing Committee Report, *supra* note 18, ¶ 9.19 of the Report states:

“The Committee also observes that many countries permit the assignment of rights in a musical or literary work in past, present and future works. As this assignment pertains to the public performance, communication to public, broadcast and cable transmission rights, it is immaterial whether any new mode/medium of use which was not there at the time of assignment provided that these rights in the literary/musical works have been assigned to the legal heirs and also to a copyright society. As a rule, the copyright society will simply proceed to license new uses, collect royalties and distribute them back to copyright owners. This institutionalized system will greatly benefit the authors/lyricists and the composers as individually they may not be in a position to collect their royalties”. (emphasis added)

³⁴ Other than the right to exploitation *vide* newly discovered/ invented modes (which, as mandated by the first new proviso, would vest in Mr. C notwithstanding prior assignment).

³⁵ Consequently, it would be P negotiating and granting licenses for reproduction, issuing copies, communication to the public, or exercise of any of the other rights enumerated in § 14(a).

her ability to privately contract? The rationale for such restraint is found in the Standing Committee Report as well as the parliamentary debates which show that the authors desired the same.³⁶ The introduction of such a restraint was a policy decision taken by the legislature, to protect the musicians, lyricist and composers from exploitation through the assignment of their rights in entirety. The intent of this proviso was to remedy the unequal bargaining power between the musicians and the producers.³⁷

The next question that arises is in relation to the extent of the aforementioned restraint imposed on the author. The proviso prohibits the assignment of the right to receive royalties “to be shared on an equal basis with the assignee”. Any agreement to the contrary is rendered void. Therefore, assignment of up to 50% of the royalties is permissible under the proviso; anything above that would stand precluded by the proviso. To illustrate, in the above example of assignment of copyright in a musical work executed between Mr. C and Mr. P, the parties may agree to share royalties (collected in relation to that musical work and not some other work) at (i) 70% - 30%, (ii) 50% - 50% or (iii) 20% - 80% respectively. While the first two would be permissible, the third would be precluded by the proviso. An author is, therefore, not permitted by the statute to assign greater than 50% of the share in royalties arising from exploitation of his work.

There are three exceptions to this ‘cap’ of 50% – i.e. three scenarios where the right to receive royalties may be assigned in its entirety. The first scenario entails the assignment of the right to communicate the literary/ musical works to the public, along with the cinematograph film in a cinema hall,³⁸ the second envisages assignment made to a legal heir³⁹ of the author; and the third scenario is where the assignment is made to a copyright society for collection and distribution of royalties. Hence, even though an author opts for, or is forced to, part with his copyright, he is statutorily required to retain his claim to at least 50% of the royalties that may arise from the exploitation of his work in any manner, excluding the royalties paid by cinema halls for exhibition of the film. To illustrate, in the case of royalties arising (in relation to the musical

³⁶ In particular, see the speech of Shri Javed Akhtar, Uncorrected Parliamentary Debates, Rajya Sabha (May 17, 2012).

³⁷ *Id* (Shri Javed Akhtar cited examples of the Minimum Wages Act, 1948, the Dowry Prevention Act, 1961, the Child Labour (Prohibition and Regulation) Act, 1986, etc. He illustrated how the law frequently recognizes inequity in bargaining power and intervenes to prevent the party with the lower bargaining power from being coerced by the other into entering into unfair agreements).

³⁸ See *Indian Performing Right Society v. Aditya Pandey*, FAO (OS) 423- 424/2012 (Without dwelling too much on this (since the matter is *sub-judice*) this, in my view, adequately puts to rest the issue of whether exploitation of a derivative work (i.e. cinematograph film) amounts to exploitation of (and therefore, mandates payment of royalties in respect of) the underlying works i.e. literary and musical works).

³⁹ There is, unfortunately, no clarity on who constitutes a ‘legal heir’. However, that enquiry would involve mixed questions of law and fact, and is likely to be assessed on a case-to-case basis. The ambit of the term would not affect the above understanding of the proviso.

work) from broadcast of the film on television, Mr. C cannot assign away more than a 50% share – such assignment would be rendered void. However, an assignment *may* permit the assignee to appropriate the entire royalties paid (i.e. 100%) in the case of exhibition in a cinema hall.

A question that may arise in relation to the above illustration is why are the words in the parenthesis (“in relation to the musical work”) present? In other words, what constitutes the 50% royalty that is sought to be made inalienable? A plain reading indicates that the section deals with “royalties... for the utilization of such work” (emphasis added). Therefore, the proviso contemplates that the author (as the assignor) ought to retain at least 50% of royalties earned in respect of *his own* work. In other words, the inclusion of a literary or musical work in a cinematograph film, entitles the author only to the royalties that are collected in respect of such literary and musical work, and not the royalties collected in respect of the cinematograph film *per se*. Thus, using the illustration mentioned above involving Mr. C and Mr. P, let us assume that Mr. P (owner of both, the copyright in the musical composition as well as the cinematograph films) licenses a radio station to play the composition in question live, by paying Rs.10 for every performance. Now, Mr. C is entitled in law (subject to the agreement, a guaranteed minimum of) to Rs.5 per performance. The royalty of Rs.10 per play is for the *musical work* alone, and as per the proviso, Mr. C can collect 50% of such royalty notwithstanding the assignment of the copyright. The assignment may permit Mr. C to collect Rs.6 or Rs.7, but *not* Rs.4; the remainder of the royalty rate of Rs.10 per play (which arises in relation to the musical work composed by Mr. C) may be legitimately appropriated by Mr. P. On the contrary, if one assumes that Mr. P had licensed a television broadcaster to broadcast the cinematograph film (along with the musical composition) for Rs.100 per broadcast, then Mr. C is *not* entitled to Rs.50. Rather, he is entitled to only 50% of that portion of Rs.100 that can be attributed to Mr. C’s musical work.⁴⁰ The question of *how* such attribution is to be done in a composite license, i.e. where the rights to broadcast the music as well as the film are given in one license⁴¹ and for a single payment, is not expressly spelt out in the Copyright Amendment. Nevertheless, a solution for the same is contemplated by the Amendment and is discussed in the latter part of this paper. It is clear, however, that what is guaranteed to the author of literary and musical works (which are included in a cinematograph film) is a share in the royalty generated in relation to those literary and musical works.

Further, notwithstanding the contextual history, it is unclear as to why the ‘works’ to which the proviso applies, are limited only to literary or musical works included in a cinematograph film. No apparent reason is evidenced for excluding other types of works (artistic or dramatic) that feature in the film.

⁴⁰ Therefore, hypothetically, if Rs.30 of this sum is the pay attributable by the television broadcaster to Mr. P, then Mr. C is empowered under law to collect Rs.15.

⁴¹ Assuming the two rights vest in the same individual.

Thus we see that lyricist and composers are shielded from exploitation by the producer. Further, in light of the Supreme Court ruling in *Academy Of General Education, Manipal v. B. Malini Mallya*,⁴² arguably even a script writer who creates a dramatic work with ‘literary value’ would be protected. The choreographer, however, and also the designer of the sets used in the film are excluded from the purview of the proviso. Admittedly, the legislature is permitted to make reasonable classifications for the purpose of differential treatment, except that the ambit of ‘works’ in the complementary amendments made to § 19 is far broader. The newly inserted subsections (9) and (10) in § 19 cover ‘any work’ used to make a cinematograph film and not just literary or musical works. This dichotomy is further discussed in the context of §19.

3. Third new proviso: Safeguards in relation to sound recordings

The third newly incorporated proviso in § 18(1) contains a restriction on authors of literary and musical works included in sound recordings, which do not form a part of cinematograph films. The restriction is analogous to the one contained in the aforementioned proviso pertaining to cinematograph films. The only difference between the two is the absence,⁴³ for obvious reasons, of the exception for “exhibition of the work along with the cinematograph film in a cinema hall”. Therefore, in this case, the cap of 50% in the right to receive royalties for exploitation of literary and musical works included in a sound recording (but not a cinematograph film) applies to *any and all* exploitations of the literary and musical works in question.

Thus, one can conclude that while orchestrating the policy decision to protect authors and composers, the Parliament made an attempt to balance out the competing interests of the film producers and the authors/composers. Consequently, it deemed it fit to demarcate ‘a cinema hall’ exception, potentially as an exclusive territory for the former while ensuring that authors/composers receive a minimum of 50% of royalties in every other case.⁴⁴ Although the industry’s economics are bound to regain equilibrium in a manner unfavourable to producers, the Copyright Amendment does not directly take away from the film producers what they are fairly entitled to; it should not be forgotten that the film producer retains 100% of the royalties arising from the film. It is his expectation of 100% share in the royalty arising from the underlying lyrics / music that has been tempered, and it is a minimum of 50% of this share of royalties for the work of the author/ composer that is sought to be guaranteed to the actual creator.

⁴² 2009 (4) SCC 256.

⁴³ Another difference is that the first proviso renders ‘agreements’ contrary to the proviso void, while the latter proviso renders void those ‘assignments’ that are contrary to the proviso. This distinction with seemingly unjustifiable logic is most likely another (in addition to ‘cinematograph work’) inconsequential but avoidable drafting error.

⁴⁴ This, of course, is in relation to the underlying literary/ musical works. As far as the cinematograph film is concerned all rights in any case vest with the producer.

B. SECTION 19: INTRODUCTION OF SUBSECTIONS (8), (9) AND (10)

§ 19 which prescribes the requirements for a valid assignment of copyright, facilitates an understanding of the operation of an assignment. The Copyright Amendment has incorporated three new subsections in § 19,⁴⁵ which are described below.

1. Section 19(8): Pre-existing assignments in favour of copyright societies

§ 19(8) seeks to protect copyright societies. It renders void any assignment of copyright that is contrary to a prior assignment made in favour of a society by a member. The apparent objective of this subsection is better illustrated when read in conjunction with the new proviso to § 17.

As mentioned in the EIMPA case, IPRS was unable to sustain its claim for royalties in the Supreme Court. It was successfully argued against

⁴⁵ § 19 has been reproduced below:

19. Mode of assignment.

- (1) No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.
- (2) The assignment of copyright in any work shall identify such work, and shall specify the rights assigned and the duration and territorial extent of such assignment.
- (3) The assignment of copyright in any work shall also specify the amount of royalty and any other consideration payable if any, to the author or his legal heirs during the currency of the assignment and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.
- (4) Where the assignee does not exercise the rights assigned to him under any of the other subsections of this section within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment.
- (5) If the period of assignment is not stated, it shall be deemed to be five years from the date of assignment.
- (6) If the territorial extent of assignment of the rights is not specified, it shall be presumed to extend within India.
- (7) Nothing in sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) or sub-section (6) shall be applicable to assignments made before the coming into force of the Copyright (Amendment) Act, 1994.
- (8) The assignment of copyright in any work contrary to the terms and conditions of the rights already assigned to a copyright society in which the author of the work is a member shall be void.
- (9) No assignment of copyright in any work to make a cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilization of the work in any form other than for the communication to the public of the work, along with the cinematograph film in a cinema hall.
- (10) No assignment of the copyright in any work to make a sound recording which does not form part of any cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable for any utilization of such work in any form.

IPRS that §17 clauses (b) and (c) preclude the copyright in the literary and musical works from originating in the author – i.e. the author does not become the first owner of the copyright. Rather, the producer is the first owner of the same. Consequently, notwithstanding pre-existing assignments in favour of IPRS by the authors/composers in respect of future works, IPRS was held to be incapable of claiming royalties.

The insertion of the new proviso to § 17 however, envisages that the author, instead of the producer, will be the first owner of copyright. Immediately upon the creation of the work and the corresponding emergence of the copyright in the work, any pre-existing assignment that may exist in favour of a copyright society would transfer the right to the society. The Copyright Amendment further nullifies any agreement executed between the author and the producer, if it is contrary to the terms of the pre-existing assignment in favour of the copyright society.

The inference drawn from the above discussion is that the legislature intended to establish a distinct royalty channel for literary/musical works incorporated in a cinematograph film through a copyright society, and protect the functioning of such ‘channel’. Additionally, the proviso introduced in § 33(1), explicitly corroborates this intention, as will be illustrated in this paper.

2. Sections 19(9) and 19(10): Royalties for works incorporated into cinematograph films and sound recordings

§ 19(9) and 19(10) introduced by the Copyright Amendment are complementary to the provisos incorporated in § 18(1). § 19(9) mandates that notwithstanding any “assignment of copyright in any work to make a cinematograph film”, the author’s right to “claim an equal share of royalties and consideration payable” shall remain unaffected. An exception is made for “communication to the public of the work, along with the cinematograph film in a cinema hall”. It is important to remember that this provision is applicable for licenses as well. Therefore, “a license of copyright...to make a cinematograph film” shall also leave the author’s right to equal royalties unaffected. § 19(10) pertains to sound recordings and is analogous to §19 (9).

These subsections, besides having significant implications insofar as the retrospective/ retroactive operation of the Amendment is concerned as discussed in Part III, lead to certain inferences. *First*, communication of a work incorporated in a cinematograph film along with the cinematograph film (in a cinema hall or otherwise) is a form of ‘utilization’ of the incorporated work. *Second*, the author of the incorporated work has a right to claim “an equal share of royalties and consideration payable” for any utilization of the work. *Third*, no assignment shall affect the above right of the author of the work in relation to any utilization of the work, barring exhibition of the film in a cinema hall

– in which case the aforesaid right of the author *may be* ‘affected’. *Fourth*, in the case of sound recordings, no assignment shall affect the aforesaid right of the author in relation to utilization of the work *in any form* (including as a part of the sound recording). *Fifth*, the ‘assignment’ (or license) in question may be between *any parties*⁴⁶ so long as the assignment is for the purpose of making a cinematograph film or sound recording.

Therefore, in effect, if *any work*⁴⁷ finds itself included in a cinematograph film or a sound recording, pursuant to an assignment or a license between any parties, notwithstanding the terms of the same, the author of the work so included will be entitled to claim an “equal share of royalties and consideration payable” (emphasis added) for utilization of the work. It is important to note that the Copyright Amendment consistently distinguishes between ‘royalties’ and ‘consideration payable’. The distinction seems to be irrefutable if one considers the amendment to § 19(3), where the words “royalty payable, if any”, have been replaced with “royalty and other consideration payable”. Therefore, the “consideration payable” is that which is payable other than the royalty, although the terms have not been defined under the Act. The dictionary meaning of ‘royalty’ is, “a sum paid to a patentee for the use of a patent or to an author or composer *for each copy* of a book sold or *for each public performance* of a work”.⁴⁸ Therefore, in my opinion, royalty would be the undetermined fee which would be calculated as a percentage of the revenues, while the ‘other consideration payable’ would include any other monetary or non-monetary consideration contemplated by law including upfront or ‘lump sum’ payment.⁴⁹

A potentially contentious area, alluded to earlier is the operation of this subsection in situations where the owner of copyright in the derivative work (sound recording /cinematograph film), is the same as that of the copyright in the underlying works, whereby such owner licenses the broadcast of both in one ‘composite’ contract. In such a situation, it is unclear what portion of the royalty would be attributed to the underlying work. For instance, in the example of Mr. P and Mr. C discussed above, if Mr. P licenses the broadcast

⁴⁶ The subsection does not limit the assignments in question to those involving the author himself. In fact, the Amendment contemplates (as evident from the amendments in § 17 and §18) that copyright (as opposed to the right to receive royalties) may be owned by persons other than the author. Consequently, it may often be these other persons who assign/ license the “copyright... to make a cinematograph film”. The author’s right to an equal share of royalties shall not be affected by any of the terms of such assignment/ license.

⁴⁷ Arguably, under § 19(9), even the author of a sound recording (i.e. the music producer) could invoke this provision as against the film producer to claim a share of royalties!

⁴⁸ Oxford Online Dictionary, available at <http://oxforddictionaries.com/definition/english/royalty> (Last visited on December 2, 2012).

⁴⁹ Strangely, the new provisos in § 18(1) cover only ‘royalties’ and not ‘other consideration payable’. It may be noted that §§ 19(9) and 19(10) preclude only ‘assignment’ and not ‘waiver’ (as opposed to the new provisos in § 18(1) which prohibit both assignment and waiver). Thus, in sum, it would be permissible to waive the right to receive other consideration payable.

of the film (along with the musical composition) for Rs.100 per broadcast of the film, then it is not clear how Mr. C's share would be determined. As stated above, Mr. C would be entitled to 50% of that portion of Rs.100 that is attributable to Mr. C's musical work. However, could Mr. P, in this situation, be permitted to state in his agreement with the broadcaster that Rs. 95 out of Rs. 100 should be appropriated towards broadcast of the cinematograph film (*simpliciter*) and Rs. 5 is in relation to the musical work?⁵⁰ Alternatively, could he enter into two separate licenses with the broadcaster, licensing the cinematograph film for royalty at Rs. 95 per broadcast, and the musical work at Rs. 5, thereby including Mr. C only in the latter? Would this enable the assignee- producer to thwart the objective of the amendment?

The Copyright Amendment has provided the author with protection from the above situation. Possibly, the very object of the aforementioned new proviso to § 33 was to address the potential loophole described above. The proviso prohibits the “business of issuing or granting license[s] in respect of literary, dramatic, musical and artistic works” which are incorporated in cinematograph films or sound recordings, to be carried out by anyone other than a copyright society. § 33(1) therefore prohibits any person or association of persons from carrying on the “business of issuing or granting licenses”. The first proviso to § 33(1) enables “an owner of copyright... in his individual capacity” to grant licenses “in respect of his own works consistent with his obligations as a member of the registered copyright society”. Hence, an individual owner may issue licenses in respect of his own works. However, in case it is a ‘business’ of issuing licenses for the kinds of works mentioned above, then the same would stand precluded. In this context, I submit that an author (i.e. the ‘individual’ who is predominantly envisaged in the first proviso) is someone whose ‘business’ is *to create*. The individual, who is first and foremost concerned with authoring works, and whose secondary activity is licensing these works, would not be considered as one carrying on the aforesaid ‘business’. However, if it is an entity whose primary activity is to collect copyrights (by assignment) and license them to persons/entities who are concerned with the exploitation of the work, then the entity would be in the “business of issuing or granting licenses”. A loose parallel, I suppose, could be made with non-practicing entities or ‘patent trolls’ whose business model comprises of purchasing and enforcing patents. Similarly, the draft Copyright Rules define ‘copyright business’ as “the business of issuing or granting license in respect of a right or set of rights in specific categories of works as conferred by the Act and includes the functions referred to in sub-section (3) of § 34”.⁵¹ Therefore, how the court interprets ‘business’ would be instrumental in an attempt to harmonize the first proviso with the bar under § 33(1).

⁵⁰ This is not an unrealistic situation – and I have seen contracts between content aggregators and exploiters where such ‘reasonable’ distributions are stipulated.

⁵¹ Rule 2(b).

Hence, it is clear from the above that if an individual were carrying on “the business of issuing or granting licenses” as opposed to granting licenses in the manner contemplated by the proviso, the same would be prohibited.

As per the new proviso introduced by the Copyright Amendment, nobody may carry out “the business of issuing or granting license[s]” in relation to a specific kind of works – *viz.* “literary, dramatic, musical and artistic works incorporated in a (sic) cinematograph films or sound recordings”. Since the element of ‘business’ would, as discussed above, exclude the licensing activity from the purview of the proviso in any case, the operating mechanism of this new proviso is unclear. Since only *one* factor (namely ‘business’) would have precluded an individual from granting licenses, hence, it is peculiar that the Copyright Amendment has introduced a limitation whereby *two* factors (namely ‘business’ and ‘specific kinds of works’) need to be fulfilled to have the same effect. The Copyright Amendment could, therefore, be seen as a clarification, mandating the judiciary to assess more closely and stringently whether a ‘business’ is actually taking place. Additionally, pragmatically perceived, this change was warranted as numerous entities were, in fact, carrying on such businesses to the detriment of collective licensing.⁵²

It may be noted here that with the introduction of the provisions for statutory licensing, while the business of issuing licenses would have to be carried out through copyright societies, at least insofar as broadcasting is concerned, it would be the Copyright Board (and not the societies themselves) that determines the rates of royalty to be paid. For other means of exploitation, which do not feature in the tariffs published by the Copyright Board, it would be left to the relevant copyright societies to negotiate the rates of royalty with the exploiter and distribute the collections amongst the members. It is interesting to note that, at least as far as IPRS is concerned, the society was already executing MOUs with its members whereby 50% of royalties collected in relation to a work were given to the original author of that work (notwithstanding ownership of copyright vesting in someone other than the author). In effect, therefore, what the Amendment essentially does is *statutorily* guarantee what was already practiced in the industry, and further, prevent entities that are in a position to circumvent this industry practice from doing so.⁵³

To summarize, apart from copyright societies, licenses may be granted only where it is the owner of copyright granting a license in respect of his ‘*own works*’, the same is being done by the licensor in his individual

⁵² It could also be seen as support to the proposition that the ‘individual’ contemplated under the first proviso is the author himself (i.e. the one who grants licenses “in his individual capacity... in respect of his own works”).

⁵³ In simple terms, to prevent entities such as T-Series, the owner of copyrights for majority of the Bollywood music from continuing their licensing activities independent of IPRS and escaping IPRS’s arrangement of sharing 50% royalties with the original authors of the works.

capacity, and when it does not conflict with his obligations as a member of the copyright society. Moreover, it may also be granted when it does not amount to carrying on of a “business of issuing or granting licenses” – especially where the works involved are literary, dramatic, musical and artistic works incorporated in cinematograph films and sound recordings.

This proviso would significantly impact content aggregators who would either have to go out of business (an unlikely situation), or route their business through copyright societies – i.e. become members of the societies. A constitutional challenge to this proviso by the content aggregators is almost inevitable. Super Cassettes Industries Ltd. (T-Series) has already challenged the amendments on grounds of constitutionality before the High Court of Delhi. Ironically, in *Super Cassettes Industries Ltd. v. Union of India*,⁵⁴ T-Series has restricted its challenge to the compulsory licensing provisions for broadcast brought in by the Copyright Amendment and has not challenged the validity of the new proviso in § 33(1).⁵⁵

The proviso has, however, been challenged in a writ petition filed in the name of Bharat Anand, a producer. On the basis of limited information about *Bharat Anand v. Union of India*,⁵⁶ it appears that the proviso in § 33(1) has been alleged to be violative of Article 19(1)(c) of the Constitution of India. It is asserted that this Article, in addition to guaranteeing a right to form associations or unions, guarantees a right *not* to join associations. Additionally, the proviso is alleged to be contrary to Article 19(1)(g) that guarantees the freedom of trade.

Length constraints do not permit an assessment of whether these ‘restrictions’ on the freedoms contained in Articles 19(1)(c) and 19(1)(g) are within the confines of Articles 19(4) and 19(6) respectively. However, insofar as the aspect of ‘reasonableness’ is concerned, I believe an arguable case for constitutionality can be made. Since there is strong logic in maintaining an independent revenue stream, and the new proviso in § 33(1) is virtually indispensable in fulfillment of the objectives of the amendment, it is possible that a Court may find the restrictions to be reasonable.⁵⁷

⁵⁴ WP (C) 2316/2013.

⁵⁵ A strategic decision, I would say, to prevent having to put forward an interpretation of the new proviso in § 33(1).

⁵⁶ WP (C) 2321/2013 before the Hon’ble High Court of Delhi.

⁵⁷ The HRD Minister’s speech in the Parliament is somewhat useful in understanding the role of the proviso. The legislative intent appears to be that equal royalties ought to be received by the authors through copyright societies under their own control. It was said:

“...the idea being, you can have the work assigned, but you cannot have the royalties assigned. You can use that work through other mediums, but there can be no assignment on royalty. So, the author and the music composer would share royalty with the producer, the assignee, in equal terms. That is really the concept behind these amendments, protecting the right of the author and the music composer. We have had to, therefore, amend Sections in The Copyright Act in respect of copyright societies, wherein we are ensuring equal representation of

Apart from the above, *Venus Worldwide Entertainment Pvt. Ltd. v. Union of India*⁵⁸ has also filed a writ petition against the amendments. It appears from media reports that, like the T-Series writ petition, this petition too does not challenge the new proviso in § 33(1).

To recapitulate, the practical implications of the Copyright Amendment on the mainstream film and music industry are discussed herein. The Amendment contemplates that all authors are or will become members of copyright societies. Upon creation of the works, the copyright societies will be the owners of rights in the works (§ 17 new proviso). The producer will not be able to assign/grant licenses without first taking assignments from the authors. The authors may assign the copyright to the producer, but only after withdrawing such works from administration of the copyright society. In the absence of such withdrawal, the assignment will be rendered void (§ 19(8)). Assuming the author does withdraw the work and assigns the copyright therein to the producer, the producer would only be able to grant licenses *provided* that he has not made a ‘business’ out of licensing copyrights (§ 33(1)). Therefore, in this manner, the copyright society would serve as an independent and protected royalty stream for the authors.

IV. RETROSPECTIVE, PROSPECTIVE OR RETROACTIVE OPERATION?

Having addressed the interpretation of the amendments relating to royalties, I now come to the contentious issues regarding the amendment’s applicability – i.e. whether the Copyright Amendment will apply prospectively,

both authors and composers and owners of rights in copyright societies so that the member of the copyright society is not limited only to producers. There is equal representation of the creators of copyright as well as those who exploit the copyright. And, therefore, we have made amendments in § 33 to that effect, and I would quickly refer to it. This is an amendment to § 33; we have added a proviso: “Provided further that the business of issuing or granting licence in respect of literary, dramatic, musical and artistic works incorporated in a cinematograph film or a sound recording shall be carried out only through a copyright society duly registered under this Act; provided also that the registration granted to a copyright society under sub- § 3 shall be for a period of five years and may be renewed from time to time before the end of every five years; provided further that the renewal of the registration of a copyright society” – and this is important – “shall be subject to the continued collective control of the copyright” the monies, will share those monies equally with the authors. And that is the amendment that was required under The Copyright Act, and that we have done so that the authors and other owners are also equally represented in these societies.”

It can be gleaned that the objective is to create an independent revenue stream for literary, dramatic, musical and artistic works incorporated in cinematograph films and sound recordings, and to place the authors themselves in control of this stream so as to ensure receipt of an ‘equal’ share in royalties.

⁵⁸ WP (C) 2318/2013.

or retrospectively. Insofar as the right to an equal share of royalties is concerned, the Copyright Amendment will, in my opinion, operate retroactively. This assertion is substantiated below.

A. APPLICATION OF THE GOLDEN RULE

The golden rule of interpretation mandates that in the absence of ambiguity, the language of the statute be read as it is.⁵⁹ As discussed in Part II, §18 deals with assignment of copyright and enables an owner of copyright to transfer the copyright to another either wholly or partially. It is unambiguous insofar as § 18 introduces a restriction *vide* the Amendment, i.e., “authors of literary or musical works...shall not assign or waive the right to receive royalties...”. From a plain reading of these provisos, it seems that they shall operate prospectively. The restriction imposed on the ability to assign by the words ‘shall not assign’, shows that it is a mandate on an author that can be applicable only when the provision comes into force.

§ 19, as described above, prescribes the mode of assignment, and deals with manner in which an assignment under § 18(1) is to take place. The plain language of § 19(9) and § 19(10) – i.e. the words “*no assignment...shall affect the right*” – does not restrict the applicability of these provisions to future assignments. In other words, the subsections do not stipulate, “no future assignment... shall affect the right”. From the language, therefore, it appears that these provisions are intended to apply to all assignments, notwithstanding whether their execution precedes or succeeds the enforcement of the Copyright Amendment.

Principles of statutory interpretation inform that the intention of the legislature is to be gleaned from the language used, and attention is to be paid to what has been said as well as to what has *not* been said.⁶⁰ The above interpretation, that § 19(9) and § 19(10) are to apply to all assignments (or licenses) notwithstanding its execution prior to the Copyright Amendment, does not only follow from a plain textual reading of the subsections, but is also supported by the conscious omission by the Parliament of a provision similar to subsection (8) in § 31D. § 31D deals with statutory licensing for broadcast. Since the provision is broad enough to impact agreements already in existence, subsection (8) was introduced. § 31D (8) expressly provides that the section shall not affect agreements already in place, prior to the Amendment coming into force.⁶¹ Hence, where prior agreements were to be excluded from the ambit of the Copyright Amendment, the Parliament made an express provision for

⁵⁹ *Guru Jambheshwar University v. Dharam Pal*, (2007) 2 SCC 265.

⁶⁰ *State of Jharkhand v. Govind Singh*, AIR 2005 SC 294; *J.P. Bansal v. State of Rajasthan*, 2003 (5) SCC 134.

⁶¹ § 31D(8) reads: “Nothing in this section shall affect the operation of any license issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012”.

the same. The absence of such a mandate in relation to § 19(9) and §19(10) reaffirms that these subsections are to apply even to assignments executed prior to the Copyright Amendment.

Can it be inferred from such an affirmation that these provisions are retrospective in nature? In my opinion, an inference to that effect cannot be drawn. The words ‘no assignment’ merely define the scope of these subsections. They do not contain the ‘operative part’ of the provisions. The operative part lies in the phrase “shall affect the right”. A simple reading of these words suggests prospective application, as in the new provisos in § 18(1). Hence, the provisions mean that no (future or past) assignment... shall (henceforth) affect the right of the author of the work to claim an equal share of royalties and consideration payable. The subsections, therefore, operate ‘retroactively’.

There is seemingly a large overlap between the amendments in § 18 and those in § 19. However, as discussed earlier, the nature of the subsections introduced in § 19 is different from that of the provisos incorporated in § 18(1). It is, as per the canons of statutory interpretation, impermissible to adopt an interpretation that would render a part of the statute devoid of any purpose, and every provision thereof is required to be given its fully intended effect.⁶² §§ 19(9) and 19(10), if taken to be applicable only to assignments subsequent to the Copyright Amendment, would render the new provisos in § 18(1) virtually redundant. It would be meaningless to prohibit authors of “literary or musical works” from entering into assignments of more than 50% of their royalty under § 18(1) when §§ 19(9) and 19(10) mandate that no assignment of “any work” would affect the right of the author to claim 50% of the “royalties and other consideration payable”. This redundancy of the provisos in § 18 is largely avoided by the above interpretation. Further, it also supports a logical conclusion that past assignments, where all royalties may have been assigned, would not be rendered void,⁶³ but would no longer affect the author’s claim to equal royalties. In contrast, assignments entered into post the Copyright Amendment whereby all royalties are assigned, would be void.

B. SUPPORT FROM EXTERNAL AIDS

Principles of statutory interpretation clearly indicate that in the absence of ambiguity and where the intention of the legislature is evident from the language of the statute itself, external aids are not required to be employed.⁶⁴ It is permissible, nevertheless, to find support to the intention of the Parliament as evinced in the statute by referring to such external aids.⁶⁵ It is in furtherance

⁶² Rao Shiv Bahadur Singh v. State of V.P., AIR 1953 SC 394; Ram Phal Kundu v. Kamal Sharma, AIR 2004 SC 1657.

⁶³ §§ 19(9) and 19(10) do not render any agreements void, unlike the new provisos in § 18(1).

⁶⁴ Bhajji v. Sub-Divisional Officer, Thandla, (2003) 1 SCC 692.

⁶⁵ Bharat Singh v. Management of New Delhi Tuberculosis Centre, (1986) 2 SCC 614.

of this that the Standing Committee Report is referred to. The discussion on the amendments in §§ 18 and 19 pertains predominantly to the need for a change in law. It does not, unfortunately, reveal how the change was intended to operate. It may be noted, however, that concerns regarding retrospective operation were raised before the Committee.⁶⁶ The Report does not address such concerns.

The parliamentary debates are more useful in this regard. Insofar as the issue of the royalties payable to the authors and composers is concerned, the parliamentary debates are clear that the Copyright Amendment is to operate retroactively. As an illustration, it was said in Parliament that while the author of a song released in 1960 would not be permitted to claim royalties accrued from utilization of the song from 1960 till date, the Copyright Amendment would empower him to claim the royalties arising from the exploitation of the same song subsequent to the Amendment coming into force.⁶⁷

The parliamentary debates elaborate on the ‘historic injustice’⁶⁸ to the authors of creative works. The fundamental objective of the Amendment was to “correct this historic injustice”.⁶⁹ Several times during the debates, reference is made to the penury of authors and composers.⁷⁰ In the conclusion to his speech, the Minister spoke of the plight of the author once he is old and does not have a source of income. It is said that the change in the law would help such authors since the songs that they had written at an earlier stage in their lives would continue to be used commercially.⁷¹ If this is to be taken as the mandate of the Parliament, then the interpretation suggested above is correct. The aforesaid understanding that “no (future or past) assignment... shall (henceforth) affect the right of the author” to royalty fulfills the stated objective of the legislature.

V. CONCLUSION

To sum up, the arguments put forth in this paper are three-fold. *First*, the newly inserted proviso to § 17 pertains to copyright ownership and

⁶⁶ Standing Committee Report, *supra* note 18. For instance, at ¶ 9.4, in relation to § 18, IPRS had stated:

“The amendment was also silent as to whether the future exploitation of existing repertoire would be subject to the amendment or not. If made effective retrospectively, it would lead to tremendous litigation, taking away existing valuations/properties ownerships”. Further, at ¶ 10.4, the SIMCA (i.e. the South India Music Companies Association) with respect to § 19 had stated: “Sub-section (8) had retrospective operation on existing arrangements where money had already been paid based on the existing assessment of the market... the rights already assigned to producers/ label could not be exploited by them in future on the initial terms”.

⁶⁷ Speech of Shri Javed Akhtar, *supra* note 36.

⁶⁸ Uncorrected Parliamentary Debates, Lok Sabha, May 22, 2012, 13984.

⁶⁹ *Id.*, 13985.

⁷⁰ Ustaad Bismillah Khan, Mubarak Begum, etc. in the Lok Sabha; and Pandit Khemchand Prakash, O.P. Nayyar, Majrooh and Shalendra in the Rajya Sabha.

⁷¹ Uncorrected Parliamentary Debates, *supra* note 68, 14029.

confirms that copyright in underlying works included in a cinematographic film shall continued to vest with the author of that specific underlying work. *Second*, the provisions for mandatory royalty sharing in §§ 18 and 19 leave significant room for interpretation. However I have proffered what I think to be a workable interpretation of these provisions, consistent with Parliamentary history and what was sought to be remedied. Further, I have noted that these provisions are to be read in conjunction with the new proviso in § 33(1) upon which the operation of the entire scheme of the Copyright Amendment appears to rest (a rather precarious arrangement given that various parties are bound to fight tooth and nail to challenge this proviso). *Lastly*, I argue that the amendments have ‘retroactive’ effect in so far as the mandatory royalty sharing provisions are concerned.

Much of the Amendment, despite having brought into force over a year ago, is yet to see tangible results. While transaction attorneys now do keep in mind the new provisions of the Copyright Act, given the uncertainty surrounding the interpretation of the Copyright Amendment, there is no uniformity in how transactions are structured.

In my view, a major roadblock in the implementation of the amendments is the *Indian Performing Right Society v. Aditya Pandey*,⁷² a matter pending before the Hon’ble Supreme Court. The judgment will conclusively determine whether the exploitation of a derivative work (i.e. cinematograph film or sound recording) involved a simultaneous exploitation of an embodied original work (i.e. literary, musical, artistic or dramatic work), and consequently, whether licenses are required by the exploiter in relation to such embodied original works (in addition to licenses for the derivate work).⁷³ The judgment is likely to deal with the understanding of § 17, §18 and §19, and since the Amendment in the law has also been urged before the Supreme Court, it is likely to contain useful observations on the new provisions as well. I do believe that before this ruling (or the rulings in the constitutional challenges before the Delhi High Court) the authors / composers are unlikely to reap benefits of the Copyright Amendment in a real way.

It remains to be seen the manner in which the courts perceive this social justice driven legislation. Nevertheless, from a long-term perspective, these provisions are bound to give the industry the much needed jolt towards infusing more fairness and encouraging recognition of exploitative behavior. Even if the amendments do not survive judicial scrutiny, they may prove instrumental in mobilizing authors and composers, resulting in greater bargaining power amongst them in the industry even *de hors* statutory protection.

⁷² SLP (C) 21082-83 / 2012.

⁷³ As stated above, I do not believe such an argument can be sustained in view of the amendments, but I would refrain from discussing this as the matter is *sub judice*.