

THE '3 IDIOTS' CONTROVERSY— FOCUSING ON THE CONTRACTUAL LIABILITIES AND MORAL RIGHTS OF THE AUTHOR

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The Hindi film '3 Idiots' which released in 2009 has achieved that dubious distinction of having attracted the attention of legal academia because of the public war of words between the film's makers on the one hand, and the novelist from whose novel the movie derives considerable inspiration on the other. The genesis of the dispute was in the novelist, Chetan Bhagat's contention that the Production House, namely Vidhu Vinod Chopra Productions, had adapted the content of his novel to an extent far greater, and in a manner far more direct, than what he had been led to believe by way of the Agreement arrived at between them. Another allegation directed against the Production House was concerning the inadequacy of credits acknowledged to the Author by way of the said Agreement. The paper addresses the above issues under two distinct heads, namely the contractual liabilities and those pertaining to the intellectual property rights. It tries to suggest some remedial steps which could be taken by novelists in similar situations in addition to steps which could be taken by the State to give better protection to such vulnerable parties in the future.

I. INTRODUCCION

A film that deliberately trains its guns on the education system and the pressures generated therein ironically became the focal point for a raging debate in academic circles. "3 Idiots", starring some of the Hindi film industry's renowned artists, in addition to being directed by one of the most successful film-makers of the past decade, was the subject of an extended and very public confrontation between the film's makers and the author upon whose novel the film is based. Chetan Bhagat (the author) from whose novel 'Five Point Someone' the film derives its basic characters, plot and context, entered into an agreement for the conferring of the rights of adaptation in the audio-visual format over the said work with Vidhu Vinod Chopra Productions (the Production House). While

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the nature of most principal characters, broad scheme of events and narrative style of delivery was adapted in a direct manner, substantial changes in the plot were effected with an intention of appealing to a constituency larger than the existing one that the book had reached out to. Most such changes were of the nature that is generally carried out during any attempt to adapt a book into a commercial film, particularly in the Indian context. More importantly, however, while the book tended to recount an individual student's attitude towards his academic surrounding, the film transcends the sphere of the individual by seeking to address the larger malaise that has struck our system of higher education, even in the most coveted of institutions.

While the author had been compensated by virtue of the said agreement,¹ (the Agreement) his objections were to the fact that while the film makers had expressed an intention to adapt his work to only the most limited extent, the eventual resemblance to his work was much greater. Further, he claimed that contrary to the arrangement agreed upon, his name had been exhibited in a cursory manner in the series of rolling credits after the film. Thus, he accused the film makers of misrepresentation both with regard to the extent of adaptation of his work into the film, and on the question of granting him requisite recognition for the same. The researchers shall address both contentions with reference to the terms of the Agreement and the general law governing misrepresentation.

The second aspect that the researchers would like to address, as can be inferred from the terms of the Agreement, is of the same being a case of unconscionable bargain. When seen in comparison to the gross investment of the Production House in the venture, and the substantial returns on the same, the amount as was payable to the author for the conferring of rights could be interpreted as unreasonably low, and the contract as one entered into by parties in unequal circumstances. The researchers shall make an attempt to present a conclusive view on the same, with reference to both domestic and international authorities on the theoretical basis, doctrinal evolution and parameters of applicability of the doctrine of unconscionability.

II. A BRIEF LOOK AT THE CONTRACTUAL ELEMENTS OF THE AGREEMENT

A. MISREPRESENTATION: CONCEPT AND APPLICABILITY

The charge of transactional misrepresentation was raised by the author against the Production House, contending that the latter had infringed guarantees as had been provided for in the Agreement, and proffered whilst drawing the same. In the first instance, the author charged the Production House

¹ Agreement signed between Chetan Bhagat and Vinod Chopra Production House, available at <http://www.vinodchopra.com/agreement.pdf> (Last visited on February 12, 2010).

of having adapted and interpreted the story of his original work to an extent much greater than what he claimed had been agreed upon at the point of negotiation. He sought to explain the alleged breach of promise in terms of percentage, contending that the reliance placed upon his work had been to the approximate effect of 70%, while he had previously been assured that such reproduction would be limited to the extent of 10%. The other accusation concerns the timing and form in which the author has been credited in the adapted work.² The concept of misrepresentation arises from the common tendency of contracting parties to proffer all sorts of statements. While such statements might not be incorporated into the terms of agreement, they might go some way in influencing the other party in entering into the same. A statement of this nature is generally referred to as a 'representation', and if untrue, a 'misrepresentation'.³ While the standard remedy available is rescission of the contract, damages may also be awarded in exceptional circumstances.

The common law sees a fundamental difference between misrepresentation and non-disclosure, in that there is no general duty to disclose any material facts related to the subject matter of the transaction, silence not being an element of misrepresentation.⁴ However, judicial opinion on the concept of 'half-truth' has been qualified, wherein, in certain cases, the literal truth may be misleading in the accompanying circumstances. Thus, such a statement of truth might be construed as a misrepresentation if not communicated keeping in mind the associated context.⁵ Similarly, the scope of the doctrine has been widened to include gestures and conduct on part of the contracting party, which resultantly amounts to making a statement that may be considered as actionable misrepresentation.⁶

As regards the question of the production house having adapted his work to an extent greater than had been agreed upon, Clause 2 of the Agreement confers unrestrained rights upon the Production House to interpret and adapt the author's work in any format or form involving an audio visual medium with moving pictures. The author's argument was centered on the allegation that the Production House had exceeded its charge, as conferred upon it by the agreement, by adapting the original work in such a direct manner. He contended that while they had bought the rights to adapt the book, such rights did not extend any further to include, particularly, authorship of the work.⁷ However, the stated contention is rendered ineffective as while a limitation has been placed on the mode of adaptation,

² See *IBN Live*, Author Chetan Bhagat, Team 3 Idiots Trade Insults, December 31st, 2009, available at <http://ibnlive.in.com/news/author-chetan-bhagat-team-3-idiots-trade-insults/107995-8.html> (Last visited on February 7, 2010).

³ O'SULLIVAN & HILLIARD, THE LAW OF CONTRACT 3 (2008).

⁴ As per Lord Atkin in *Bell v. Lever Bros. Ltd.*, [1932] A.C. 161.

⁵ *Notts Patent Brick and Tile Co. v. Butler*, [1885] 15 Q.B.D. 261.

⁶ ANSON, LAW OF CONTRACT 28 (2002).

⁷ Chetan Bhagat, *Closing Remarks*, January 5th 2010, available at http://www.chetanbhagat.com/blog/ge_neral/closing-remarks (Last visited on February 20, 2009).

there is none whatsoever as regards the possible extent of such adaptation. Further, there is an express right conferred upon the Production House as per Clause 5 to exercise the intellectual property rights over the work as gained, to an absolute and unhindered degree. Therefore, the first contention of misrepresentation is invalidated, as, with the agreement conferring such rights upon the production house in an explicit manner, the possibility of associated statements having played a role in determining the author's attitude towards the same is rendered irrelevant. As regards the second charge of the Production House having credited his work in a seemingly insignificant manner towards the end, rather than the beginning of the series of credits, one would like to draw attention to Clause 4 of the Agreement that merely requires the Production House to acknowledge the author in the rolling credits of any audio-visual moving format. Therefore, with no indications whatsoever as prescribing such acknowledgement in any particular manner, the same is deemed to be left at the discretion of the Production House.⁸

B. THE ELEMENT OF UNCONSCIONABILITY

The element of the 'unconscionable bargain' is introduced in the debate surrounding the said Agreement, given the nature of Clause 3 of the Agreement, pertaining to the consideration due to the author upon the transfer of the stated rights over his work. The relevant provision entitles the author to a payment of One Lakh rupees upon the release of any material involving the use of audio-visual software with moving pictures, and a further payment of Rupees Ten Lakhs if the venture, in the opinion of the Production House, were to be a commercial success. The amounts as might be payable to the author, if seen in comparison to the overall investment undertaken by the Production House, and the returns which might reasonably be expected from a venture of such nature, would seem grossly insufficient. As has been discussed in the preceding section dealing with the charge of misrepresentation, the Production House has relied upon the author's work to a considerable extent, in the adaptation of the same. Therefore, the researcher would like to discuss the question of whether the amount of compensation, as mandated by the Agreement, might be considered unconscionable.

Unconscionable agreements refer to those contracts that are deemed "so unfair that they shock the conscience of the Court".⁹ It refers to a situation of inequality of circumstance and standing between the parties, wherein the stronger party's conscience is afflicted as he is deemed to have exercised the same in a manner that may attract moral reproach.¹⁰ A constricted view as regards the position of the parties is offered in *Amrit Banaspati Co. Ltd. v. State of Punjab*,¹¹

⁸ Times News Network, *3 Idiots may sue Chetan Bhagat*, January 4th, 2010, available at [http://timesofindia .indiatimes.com/entertainment/bollywood/news-interviews/3-Idiots-may-sue-Chetan-Bhagat/articleshow/ 5407592.cms](http://timesofindia.indiatimes.com/entertainment/bollywood/news-interviews/3-Idiots-may-sue-Chetan-Bhagat/articleshow/5407592.cms) (Last visited on February 5, 2010).

⁹ POLLOCK & MULLA, *INDIAN CONTRACT & SPECIFIC RELIEF ACTS* Vol. I 12 (2001).

¹⁰ Carole Pedley Chui, *Unequal Contracts*, available at sunzi.lib.hku.hk/hkjo/view/14/1400079.pdf (Last visited on January 30, 2010).

¹¹ AIR 1992 SC 1075 at 1611.

wherein the weaker party was deemed to have 'no meaningful choice, other than the unconscionable one offered'. A wider interpretation, as regards unreasonable terms is seen in *Lily White v. Munnuswamy*,¹² with a term in a launderer's agreement, which sought to recompense clients for stolen goods in an unsatisfactory manner, being held void.

1. Determination of the Position

Our courts have largely viewed unconscionable agreements as within the scope of Section 23 of the Contract Act, seeking to cast them as an ingredient of the Section 23 reference to 'public policy'.¹³ While the concept is hard to define, it has been held to connote some matter that concerns the public good and public interest.¹⁴ The scope of the same has been to enable judicial interference in contracts that might seem unfair or unconscionable, but fall short of undue influence or coercion. The terms that are referred to herein are such that they might be open to disapproval and the court feels unable or is unwilling to impose an outright prohibition.¹⁵ A more traditional view has sought to restrict the ambit of the public policy argument to only those grounds that might seem politically, economically, and socially unsound, with those attracting moral disrepute or censure being left undetermined.¹⁶ It has, on occasion, been seen as a dynamic concept, with the courts requiring it to evolve with changing societal norms and conditions.¹⁷ This requirement of dynamism would indicate towards the doctrine covering cases such as those of the present agreement, which is operational in an era where intellectual property regulation is very much a part of the commercial environment. However, the operational utility of the public policy argument comes into question with a persistent inability on the part of the courts in viewing the concept of unconscionable conduct as distinct from those of economic duress and undue influence.¹⁸

What is perhaps an absolute hindrance to the public policy argument is the ruling in *Amrit Banaspati*,¹⁹ which, restricting the 'dynamic' interpretation in *R.C. Hirachand*,²⁰ held that the application of the principle would be excluded in case both parties were businessmen, and the contract were a commercial transaction. As the concerned agreement stipulates the conferring of Intellectual

¹² AIR 1966 Mad 13.

¹³ As held in *Amrit Banaspati Co. Ltd. v. State of Punjab*, AIR 1992 SC 1075.

¹⁴ As held in *Central Inland Water Transport Corpn Ltd v. Brojo Nath Ganguly*, AIR 1986 SC 1571 at 1612.

¹⁵ *Supra* note 9.

¹⁶ As held in *Gherulal Parakh v. Mahadeodas Maiya*, AIR 1959 781 at 797.

¹⁷ As held in *R.C. Hirachand v. Askar Nawaz Jung*, (1991) 3 SCC 67.

¹⁸ *Supra* note 13.

¹⁹ AIR 1992 SC 1075.

²⁰ (1991) 3 SCC 67.

Property rights in return for some remuneration, its commercial aspect excludes it from the purview of unconscionability as an element of public policy, as is interpreted under Section 23 of the Contract Act. With the *Banaspati* judgement prescribing Section 23 to be the sole avenue for recourse in case of a plea of unconscionability,²¹ the restriction on applying the same in case of commercial transactions becomes absolute in the courts.

2. The Common Law Position: Early Interpretations

The common law understanding of unconscionability as an element antithetical to the effecting of a standard form contract has witnessed a significant shift in attitude over the past century and half. The initial, contemporary reference to the doctrine was made in the case of *Earl of Aylesford v. Morris*²² wherein it was held by Lord Selborne that any contract, in order to stand, would have to be ‘fair, just, and reasonable.’ The principle adopted required the presence of an identifiable weakness on one side, with the other side having taken undue advantage of such weakness. There was, further, a presumption of fraud, with fraud herein not necessarily amounting to either deceit or circumvention.²³ The stated object of the principle enunciated was, in the words of the court, to protect poor and ignorant people who may have acted without competent, independent advice.²⁴ The said principle was reinforced in *Fry v. Lane*²⁵ with the doctrine of unconscionability being applied in a matter involving an agreement of purchase from a poor and ignorant man, having had no independent advice. The court deemed it essential for the furtherance of equity to set aside the said transaction.²⁶

The principal characteristic of the said Agreement that might introduce an element of unconscionability is the conferring of the said intellectual property rights at undervalue. While §3 of the Agreement awards the author a gross sum of Rupees Eleven Lakh in the event of the venture being a commercial success, the overall investment in the project was Rupees Forty Five Crore, with the gross revenue at Rupees Three Hundred and Eighty Two Crore,²⁷ making it the highest grossing Indian film ever.²⁸ A reasonable comparison of the revenues earned by the Production House, and the compensation paid to the author, given the

²¹ *Supra* note 11 at 1613.

²² (1873) L.R. 8 Ch. App. 484.

²³ *Supra* note 10.

²⁴ *Supra* note 6.

²⁵ (1888) 40 Ch. D. 312.

²⁶ A similar opinion might be seen in *Evans v. Llewellia*, (1787) Cox. 33.

²⁷ India Times Movies, *3 Idiots helped multiplexes out of strike slump*, February 9, 2010, available at <http://movies.indiatimes.com/News/3-Idiots-helped-multiplexes-out-of-strike-s slump/articleshow/5550810.cms> (Last visited on February 13, 2009).

²⁸ *Bollywood Earns Big Bucks*, HINDUSTAN TIMES, January 23, 2010, available at <http://www.hindustantimes.com/cinemascope/Bollywood-earns-big-bucks/500901/H1-Article1-500517.aspx> (Last visited on 5 February 2009).

extensive reliance placed upon the author's work, reveals a definite element of disparity. Therefore, it could be contended on part of the author that the said agreement conferring intellectual property rights was at undervalue, given the considerable gains of the Production House, and a belief that such gains might have reasonably been foreseen at the time of making such investment.

The common law position on a transaction at undervalue was defined in the Sales of Reversions Act, 1867, which was subsequently re-enacted by way of Section 174 of the Law of Property Act, 1925.²⁹ While allowing for the rescinding of contracts on grounds on unconscionability, it deems a sale at undervalue to be a ground insufficient in itself. This was a shift from the early nineteenth century attitude of permitting agreements to be set aside on grounds of undervalue. Despite such change of attitude, undervalue remains a material element in cases where there exists another ground for establishing unconscionability.³⁰ Further, it has been held in *Fry*³¹ that it could satisfy as a sole ground in case the disparity is so gross that it itself amounts to evidence of fraud. One must, herein, not subject the mention of 'fraud' to a narrow interpretation, limiting its scope to deceit or circumvention. A broader standard, as was developed in *Ayelsford*,³² needs to be applied in the present context of heightened disparity. Therefore, the principle as enunciated in *Fry*³³ would indicate that the author's contention of transactional undervalue would satisfy the requirement for establishing unconscionability in light of the great disparity between the compensation as received by the author for conferring such rights, and the subsequent revenues earned by the Production House upon exploiting them.

3. Unconscionability As A Distinct Doctrine

The next significant step in the evolution of the unconscionability doctrine in common law jurisdictions were the famed music cases³⁴ of the nineteen seventies and early eighties. Dealing with the common topic of exploitation of young talent in the largely unregulated music industry, the music cases gave Lord

²⁹ Acquisitions of reversions at an under value.-

(1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, shall be liable to be opened or set aside merely on the ground of under value.

In this subsection "reversionary interest" includes an expectancy or possibility.

(2) This section does not affect the jurisdiction of the court to set aside or modify unconscionable bargains.

³⁰ As held in *O'Rourke v. Bolingbroke*, (1877) 2 App. Cas. 814.

³¹ (1888) 40 Ch. D. 312.

³² See *Earl of Aylesford v. Morris*, (1873) L.R. 8 Ch. App. 484.

³³ *Fry v. Lane*, (1888) 40 Ch. D. 312.

³⁴ *Shroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R. ; *Clifford Davis Management Ltd. v. WEA Records Ltd.*, [1975] 1 All ER 237 ; *O'Sullivan v. Management Agency and Music Ltd.*, [1985] 3 All ER 351.

Denning an avenue to elevate unconscionability, as represented by unequal bargaining power, into a substantive doctrine.³⁵ The music cases constitute a distinct category as they involve those whose talents might be undoubted, and yet require assistance in order to exploit such skills. In seeking such assistance, the young musicians may be open to exploitation themselves. Such exploitation is, in most cases, in the form of contracts that are inadequate in terms of compensation, and restrict the professional freedom of such musicians.³⁶

The first of this class was the case of *Shroeder Music Publishing Co. v. Macaulay*³⁷ wherein Lord Diplock did not consider the unconscionable nature of the music company's contract to be an element of public policy in the wider sense. While the concept of inequality in bargaining power between the parties was recognized, the Court held that the dominant *laisse-faire* model, shaped by the Benthamite principles that guided Courts in the 19th century, had allowed the doctrine to be applied only in case of restraint of trade.³⁸ The Court reasoned that as the music company had negotiated the said agreement with an artist whose success had already been established, a contention of unequal bargaining power would be inapplicable. While the interpretation might seem fairly conventional, a significant aspect is the Court's willingness to accept the inequality doctrine as an element of unconscionability, holding it inapplicable only with regard to the given fact situation, rather than rejecting its theoretical basis.

In the case of *Clifford Davis Management Ltd. v. WEA Records Ltd.*,³⁹ Lord Denning sought to expand the basis of determination as was adopted in *Shroeder*.⁴⁰ He advocated a vigilant attitude on the part of Courts wherein, if it were noticed that one party was using its superior bargaining power to 'exact promises that were unfairly onerous', the court should relieve the other party of its duty to abide by such contract. Widening the scope of unconscionability, he put forward the following requirements that had to be fulfilled in order for a contract to be set aside:

- 1) The terms of contract were manifestly unfair.
- 2) The consideration was grossly inadequate.
- 3) Bargaining power was grossly impaired.
- 4) 'Undue influences or pressures' were brought to bear.⁴¹

It is pertinent to note that in his list of prerequisites Lord Denning sought to include the application of undue influence or pressure, not satisfying

³⁵ *Supra* note 10.

³⁶ *Id.*

³⁷ [1974] 1 WLR 1308.

³⁸ CHITTY, ON CONTRACTS – Vol. I 26 (1989).

³⁹ [1975] 1 All ER 237.

⁴⁰ *Shroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R.

⁴¹ As noted in *Clifford Davis Management Ltd v. WEA Records*, [1975] 1 All ER 237.

himself with the mere prevalence of unequal bargaining power. While the case, due to the presence of undue influence and lack of independent legal advice could have been decided narrowly, the court chose a more liberal interpretation in pursuance of its 'bargaining power' doctrine.⁴²

The third of the music cases is that of *O'Sullivan v. Management Agency and Music Ltd.*⁴³ After the decision in *Clifford Davis*,⁴⁴ it was felt that the courts would advance the unequal bargain theory. However, in *O'Sullivan*, it shied away from the general theory of unequal bargains and chose to develop its opinion around the restraint of trade and undue influence model.⁴⁵ The matter herein involved a young singer who had entered into a management relationship with the defendant, a highly experienced and internationally renowned manager and producer in the music industry. One can infer a remarkable similarity of circumstance between *O'Sullivan* and the present Agreement, with both involving the creator of the work, be it a book or a musical piece, being inadequately compensated by the entity deriving commercial benefit out of such work. Holding the premise of undue influence to be an integral element in determining unequal bargaining relationships, the court proceeded to rescind the said contract, deeming it inequitable, and rejecting the defendants' contention that such agreement might not be set aside because it would be impossible to restore the parties to their original position.⁴⁶ The guiding principle, according to the court, was not the ability to rescind effectively, but, to ensure that the demands of justice and equity be met.⁴⁷ Thus, while the reasoning seemed to correspond with Lord Denning's four-point requirement in *Clifford Davis*, the recognized centrality of undue influence and pressure, as against inequality of bargaining power, served to limit the scope of unconscionability to the established application of such undue influence.

Lord Denning has, however, expressed his support for the unequal bargain doctrine even outside the ambit of the music cases. This was evidenced in the case of *Lloyd's Bank Ltd. v. Bundy*,⁴⁸ wherein the court considered the attitude of regarding the establishment of undue influence to be part of a general reluctance to enforce transactions that might be regarded as unconscionable. The doctrine of 'inequality of bargaining power', which was put forward, justified the granting of relief to one who enters into a contract whose terms are unfair, or which transfers property at a grossly inadequate price, without access to independent legal advice. The doctrine, further, did not require evidence of any

⁴² *Supra* note 10.

⁴³ [1985] 3 All ER 351.

⁴⁴ [1975] 1 All ER 237.

⁴⁵ *Supra* note 40.

⁴⁶ RICHARD STONE & RALPH CUNNINGTON, TEXT, CASES AND MATERIALS ON CONTRACT LAW 795 (2007).

⁴⁷ *Supra* note 40.

⁴⁸ [1975] QB 326.

wrongdoing on part of the stronger party, but the presence of a motive guided by self interest, being unconscious of the distress caused to the other party.⁴⁹

A more liberal interpretation, which sought to diminish the requirement of undue influence, was given in *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.*⁵⁰ The elements considered necessary for the application of the doctrine were :

- 1) One party being at a serious disadvantage.
- 2) Exploitation of such weakness by the stronger party in a morally culpable manner.
- 3) The resulting transaction must be overreaching or oppressive towards the weaker party.⁵¹

Thus, the overbearing requirement of establishing the application of undue influence and pressure, which often resulted in a restrictive, formalist understanding of unconscionability, was left out, with a plethora of cases where the disparity in bargaining position itself imposed an unseen element of pressure on the weaker party, being brought within the ambit of unconscionability. The emphasis of this view was on the moral culpability of the stronger party's actions and the quantum of their unreasonableness.

In the context of the present Agreement, while the application of undue influence was never deemed to be a substantive element, the unambiguous determination of an unequal bargaining position would be problematic as, adopting the principle set in *Shroeder*,⁵² an agreement where the 'weaker party' was in fact an author of international repute, could hardly be construed as one with a gross disparity in the bargaining position.

4. Substantive And Procedural Unconscionability

The theoretical basis of the doctrine was, however, questioned on both substantive and procedural grounds in *National Westminster Bank Plc. v. Morgan*,⁵³ which concerned a sale made to a solicitor, who in turn had rendered incompetent advice. The court, in this matter, preferred to develop its reasoning on grounds of undue influence, with grave doubts being cast on the theoretical integrity of the unconscionability principle. It also sought to introduce a distinct procedural aspect of jurisdiction in the debate, holding that the task of restricting the execution of contracts lay within the purview of the legislature, as against for the courts to determine.⁵⁴ It cited prior instances of legislative interference in the

⁴⁹ *Supra* note 46.

⁵⁰ [1983] 1 W.L.R. 87.

⁵¹ *Id.*

⁵² [1974] 1 WLR 130.

⁵³ [1985] A.C. 686.

⁵⁴ *Supra* note 24.

freedom of contract to protect disadvantaged parties from harsh, unconscionable bargains, such as the Unfair Contract Terms Act, 1977, and the Consumer Credit Act, 1974.⁵⁵ The question of judicial competency to rescind contracts on grounds of unconscionability was responded to by recourse to the residuary power of courts, which sought to enable them to interfere in contracts that seemed harsh and unconscionable, and yet had not been subjected to legislative scrutiny. Herein, however, there was a clear intention to enforce a distinction between substantive and procedural unconscionability, with the courts, holding in *Multiservice Bookbinding Ltd. v. Marden*⁵⁶ that any judicial intervention would be permissible only if the conduct of the stronger party were to be morally reprehensible, and not merely on the imbalanced nature of the terms.⁵⁷

This separation of the substantive and procedural elements, while being a recent addition to the doctrine in English Courts, has played an integral role in the American jurisprudence on unconscionability since the 19th century. American jurists have recognized unconscionability to be an established principle that would entitle courts to refuse enforcement of an agreement, with the doctrine being partly statutory,⁵⁸ and partly within the domain of common law. Thus, while procedural unconscionability would connote an element of oppression or wrongdoing in the process of formation of the contract, the substantive element would entail the actual rights and obligations as conferred by the same. The latter, in American courts, finds mention primarily in consumer grievance cases.⁵⁹ The standing position on the point has been the one put forward by L. Brightman in *Redgrave v. Hurd*⁶⁰ wherein the court emphasized the need to establish both procedural unfairness, as well as contractual imbalance. However, in a step that enabled the widening of the doctrine, the court held that contractual imbalance in the extreme could lead to an assumption of procedural unfairness. This attempt at establishing a general, liberal doctrine of unconscionability has found resonance in numerous Commonwealth jurisdictions with both Canadian⁶¹ and Australian⁶² authorities applying the doctrine in a fairly wide range of circumstances.⁶³

⁵⁵ *Supra* note 38.

⁵⁶ [1979] Ch. 84.

⁵⁷ Point reiterated in *Photo Production Ltd. v. Securior*, [1980] A.C. 827.

⁵⁸ Uniform Civil Code § 2-302. Unconscionable contract or Term: (1) If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result. (2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

⁵⁹ *Supra* note 38.

⁶⁰ (1880) 20 Ch. D. 1.

⁶¹ *Black v. Wilcox*, (1976) 30 D.L.R. (3d) 192.

⁶² *Blomley v. Ryan*, (1956) 99 C.L.R. 362.

⁶³ *Supra* note 38.

5. The Inherent Morality Of Unconscionability

Apart from the arguments of substantive and procedural applicability, the unconscionability doctrine has attracted considerable criticism from formalist quarters for what is perceived to be its relatively nebulous character, with indeterminate boundaries. It resultantly offers little guidance to courts in any effort at shaping a conclusive view on the point and can rarely be interpreted in harmony with the other doctrines of contract law. The doctrine requires the direct application of moral theory, as against second order rules,⁶⁴ in addition to an analysis of certain unquantifiable phenomena such as the mental state and intent.⁶⁵ The formalist understanding has been criticized by Eric A. Posner who contends that unconscionability is an intrinsically anti-market factor, serving as a means for the redistribution of wealth. He considers the judicial trend towards separating procedure from substance as an adherence to a more market-friendly understanding of unequal bargains.⁶⁶ Herein, one witnesses the introduction of an element of policy that borrows from the American notion of seeking to establish a relation between judicial opinion and the possible social, economic, and political factors that might influence a particular judge in ruling in a particular manner.⁶⁷ However, such an approach may not lead to any conclusive understanding of the principle in either English or Indian jurisdictions, with negligible importance being attached to the individual tastes and preferences of judges in the determining of judicial opinion.

III. INTELLECTUAL PROPERTY RIGHTS OF THE AUTHOR—A FOCUS ON MORAL RIGHTS.

A. AN EXPOSITION ON THE PLOT OF THE MOVIE AND SUBSTANTIAL SIMILARITY

“3 Idiots” was one of the largest commercially successful movies in the first quarter of 2010, grossing Rs. 375 crores within 4 weeks of opening.⁶⁸ It, in fact, went on to become the highest grossing Bollywood movie of all time, with strong showings at home and abroad raising hopes for further cross-over hits for Indian films.⁶⁹ It epitomizes the new breed of “thinking *masala* movies” in

⁶⁴ See generally H.L.A. HART, CONCEPT OF LAW 91(2002).

⁶⁵ See Arthur A. Leff, *Unconscionability and the Code – The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

⁶⁶ Eric A. Posner, *The Decline of Formality in Contract Law*, The Fall and Rise of Freedom of Contract, 61 (1999) .

⁶⁷ See generally RONALD DWORKIN, JURISPRUDENCE, TAKING RIGHTS SERIOUSLY 3 (2005).

⁶⁸ ‘3 Idiots’ a bigger grosser than ‘Ghajini’: Aamir, UNITED NEWS OF INDIA (New Delhi) December 5, 2009.

⁶⁹ The Independent, Aamir Khan’s ‘3 Idiots’ Becomes Bollywood’s Biggest Grosser, available at <http://www.independent.co.uk/arts-entertainment/films/news/aamir-khans-3-idiots-becomes-bollywoods-biggest-grosser-1859492.html> (Last visited on February 17, 2010). See also Aminah Sheikh & Ashish Sinha, *3 Idiots Makes B’wood History*, available at

Bollywood with humorous punch lines, giving the meaningless song-dance, fighting or action scenes a miss.⁷⁰ Quite obviously a lot of the credit for the commercial success and immense popularity achieved with the audiences is to be credited to the smart storyline, speaking of which brings to mind the controversy swirling around the credits (or lack of it) acknowledged to the author on whose book “Five Point Someone” the movie is without any question based. Incidentally, the script writer, Abhijat Joshi was credited right at the start of the movie whereas Bhagat was credited in the end rolling credits. The credit promised to Bhagat was mentioned under clause 4 of the agreement which reads as follows:-

“It shall be obligatory on the part of the Producer to accord credit to the author in the rolling credits of any audio-visual moving image software (of any format or form in any media or medium) produced by the Producer in terms of the exercise and execution of the Rights granted as under:

Based on the Novel
Five Point Someone
By
Chetan Bhagat⁷¹

This seems to have been technically complied with as the end credits mentions these same words albeit the format has been changed and the credits are given in a one-liner.⁷² The problem lies in the fact that the credit mentioned is rather fleeting and seems to have bypassed most peoples’ attention. Authors of this article for one have failed to notice the credits, unless one was specifically looking for it. Legally speaking Bhagat has no cause for complaint because the Agreement never specified the placement of such credit. Much can be and has been said in this very article about the unequal bargaining powers of parties.⁷³

<http://www.business-standard.com/india/news/3-idiots-makes-bollywood-history/381720/>
(Last visited on February 17, 2010).

⁷⁰ Mr. Shamnad Basheer, Professor and IPR Chair at WBNUJS also holds a similar opinion. See Shamnad Basheer, *The “3 Idiots” Copyright Controversy: Will All End Well?*, available at <http://spicyindia.blogspot.com/2010/01/3-idiots-copyright-controversy-will-all.html> (Last visited on February 17, 2010).

⁷¹ *Supra* note 1.

⁷² Chetan Bhagat, Twitpic, <http://twitpic.com/vjz75> (Last visited on February 17, 2010).

⁷³ However, there is no dearth of opinion on this matter from a contrary viewpoint too. The authors must mention, in this context, *inter alia*, the opinion of Professor Shamnad Basheer, who believes that Bhagat may have a valid case regarding technical breach of contract, since although “as contractually promised, the credits right at the end of the film do mention the fact that the movie is based on the book by Bhagat, it crams up the attribution (“Based on The Novel Five Point Someone By Chetan Bhagat”) in one single line, whereas the contract stretches out the entire attribution to 3 lines.” For further details, see Shamnad Basheer, *3 Idiots and the Morality of Numbers*, <http://www.indianexpress.com/news/3-idiots-and-the-morality-of-numbers/564374/0> (Last visited on July 31, 2010).

Chetan Bhagat contended on his blog that “Pre-release, the makers made press statements like the movie is only ‘very loosely’, ‘2%-5% inspired by the book’. After release, those who have read the book and seen the movie find the film to be an adaptation of *Five Point Someone*. The setting, characters, plotline, dramatic twists and turns, one-liners, theme, message – almost all aspects that make up the story are from FPS. Yes, there are some changes, any adaptation requires that – but it is no way an original story.”⁷⁴ Even after all the allegations and mud-slinging which the entire media and consequently discerning viewers have been privy to, Bhagat had to admit in his characteristic ‘*Hing-lish*’ style that the legalities have been followed.⁷⁵

The crux of the controversy arises with regards to the full credits not being given to the author on which the screenplay is essentially based.⁷⁶ The producer’s contention that the movie has used a trivial amount of 3-5% of the original storyline from the book can however be said to be a frivolous contention.⁷⁷ Having read the book and watched the movie ourselves, we can confidently contribute our two cents to the controversy by saying that though the storyline was significantly spiced up to make it into a successful script meant to capture and keep the viewers’ attention; the additions were not significant enough to so drastically reduce the author’s contribution to the extent of 3-5%. Having said that, it must be mentioned that the script-writers did a commendable job on the adaptation of the book for screenplay with quite a few sub-plots and twists in the storyline. Given the milieu, the natural question to arise would be if a substantial portion of the movie is copied from the book or not. For augmenting our argument we would like to present a comprehensive table of comparison between several points in the storyline in the book as well as in the movie:-

⁷⁴ Chetan Bhagat, *A Book, A Film And The Truth*, Chetan Bhagat’s Official Website, available at <http://www.chetanbhagat.com/blog/general/a-book-a-film-and-the-truth> (Last visited on February 15, 2010).

⁷⁵ See 3 Idiots controversy not a gimmick: Chetan Bhagat, *HINDUSTAN TIMES (New Delhi)* January 7, 2010. See also Chetan Bhagat, *Twitter*, available at http://twitter.com/chetan_bhagat/status/7113983853 (Last visited on February 17, 2010).

⁷⁶ The Times of India, *Chetan Bhagat, 3 Idiots’ Team In Story Credit Row*, available at http://timesofindia.indiatimes.com/india/Chetan-Bhagat-3-Idiots-team-in-story-credit-row/articleshow/54_03167.cms (Last visited on February 22, 2010).

⁷⁷ *Supra* note 70.

Table of Comparison

<i>Similarities</i>	<i>Dissimilarities</i>
Both the movie and the book follow the story of 3 friends and it is based in the setting of a 'top' engineering college. These three characters are shown to bond over shared disaffection for the place and some of the scenes like sitting on the water tank are common to both the book and the movie.	The major dissimilarity is the twist in the tail of the plot—Chatur Ramalingam (played by Omi Vaidya) challenging Rancho (played by Aamir Khan in the movie) to meet him after 10 years to prove who has turned out to be more successful. The sub-plot of impersonation on behalf of another and then the friends' quest to find their lost friend, resulting in the discovery of the real identity of rancho being that of Phunsuk Wangdu, the '3 rd idiot' after a 10 year interval.
The professor in the book disapproves of this friendship or bonding most of the times, similar to that in the movie.	The Institute Director's characteristics of having an 'astronaut's pen', the scene with the breaking eggs, among other idiosyncratic features are not found in the book.
Neha (the main female protagonist in the book and daughter of the professor mentioned above) and Pia (the role essayed by Kareena Kapoor in the movie, also incidentally the daughter of dean of the college) are of a similar kind.	The sub-plot concerning Farhan (essayed by R. Madhavan) aspiring to be a wildlife photographer against the wishes of his father is exclusive to the movie.
The main female protagonist helps the hero in stealing the question papers, by giving them the keys of the room; intentionally in the movie, unknowingly in the book.	There was an entertaining five minute scene carried out by Chatur which highlighted the hazards of learning by rote and without understanding.
The term 'Machine' and its definition, along with the explanation is common in both the book and the movie.	Rancho's and Farhan's promises to get Raju out of coma when he was hospitalized after the suicide attempt shock

Raju, the role played by Sharman Joshi is similar to that described in the book. Interestingly this character has a family background which mentions a father suffering from paralysis, a mother who is a teacher and an unmarried sister—very similar to what was shown in the movie.	Rancho teaching Virus (the Dean of the college played by Boman Irani) how to teach using the terms ‘PreRajulization’ and ‘Farhanitrate’ which are terms fictionalized using the names of his friends are not there in the book
The character of Rancho (played by Aamir Khan in the movie) is similarly creative as the character Ryan in the book.	Pia’s fiancé being obsessive about brands, prices, which helps bring Rancho and Pia closer and also highlights the materialistic side of some people are not there in the book.
The portrayal of the suicide attempt by a student in the college, done by Raju in the movie.	The concept of ‘Aal Izz Well’ and the song which popularized it, which is being talked about all around, is not a copy!
<i>In both the book and the movie, Farhan’s character is the narrator of the story.</i>	While ragging scenes are depicted in both, the methods used differ, with the scene of Rancho turning the tables on the senior being exclusive to the film.

Given the above list, we can safely assume that the movie uses more than a mere ‘5-7%’ of the content in the book. In order to grasp whether the similarities between the book and the movie would tantamount to being substantially similar, it is to be noted that courts look not only at the percentage of copying in comparison to the relative amount of the works but also to the fact as to how creative and original is the copied work and how important and central such creation is to both the works. As there is no precision regarding the quantum of duplication, which qualifies for ‘substantial similarity’, the question of determining the substantial similarity depends on the facts and circumstances of each case. Here the landmark case of *R.G Anand v. M/s. Delux Films & Ors*⁷⁸ becomes important while discussing substantial similarity. The case involved the adaptation of a play written by plaintiff into a movie by the defendants. On a detailed comparison of the script of the plaintiff’s copyrighted play with the movie, the Court held that “although one does not fail to discern a few resemblances and similarities between the play and the film, the said resemblances are not material or substantial and the degree of similarities is not such as to lead one to

⁷⁸ AIR 1978 SC 1614.

think that the film taken as a whole constitutes an unfair appropriation of the plaintiff's copyrighted work. In fact, a large majority of material incidents, episodes and situations portrayed by defendants in their film are substantially different from the plaintiff's protected work..." While applying the principles of substantial similarity to the present controversy, it should be noted that the proportion of duplication of the book by the producers of the movie in comparison to the relative size of the book is not the main issue. What is important is whether the movie copied substantial elements of the copyrighted portions of the book or not. Comparing the similarities and dissimilarities between the book and the movie, there is no denying that the basic structure of the movie is inspired and adapted from the book. Going on this assumption, there is a decent chance of a case on the moral rights of an author over his creation.

B. "DROIT MORAL" AND DEVELOPMENT OF THE CONCEPT IN THE INTERNATIONAL ARENA.

Thus even if the economic rights are assigned away which is no doubt what has happened in this case, the moral rights continue to vest with the author. Moral rights, a civil law concept, provide a means for 'authors' to protect the intellectual and creative aspects of their work, as contrasted with copyright law, which protects a work's economic aspects.⁷⁹ It must be pointed out that the term moral rights is in itself a somewhat gauche translation into English of the original term in French law ("*droit moral*") and refers not to 'morals' as advocated by the religious right, but rather to the ability of authors to control the eventual fate of their works.⁸⁰ The connotations of this French expression are quite different from its English equivalent evoking, as Ricketson suggests, rights of a "personal or spiritual" nature.⁸¹ It finds statutory expression in Article 6*bis* of the Berne Convention, which states: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation".⁸²

⁷⁹ See Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980).

⁸⁰ See Betsy Rosenblatt, *Moral Rights Basics*, Berkeman Center for Internet & Society at Harvard University, available at <http://cyber.law.harvard.edu/property/library/moralprimer.html> (Last visited on February 20, 2010). See also Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41 (1998).

⁸¹ S. Ricketson, *The Law of Intellectual Property* (Melbourne: The Law Book Company, 1984) ¶ 15.56 as referred to in Mira T Sundara Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati*, 2001 SINGAPORE JOURNAL OF LEGAL STUDIES 161.

⁸² Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, as amended on Sept. 28, 1979, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3. Article 6*bis* became part of the Convention in 1928.

The legislation of different countries varies on the question of an author's power to waive his/her moral rights. On one hand, there are several countries like France that impose virtually an unqualified bar on the transfer or the waiver of such rights.⁸³ At the other end there are common law countries which freely allow the waiver of moral rights.⁸⁴ In comparison to mainstream copyright law, the legal fraternity in both the US and European Union considers the laws on moral rights to be not expansive enough.⁸⁵ The US has only recently accepted the concept of moral rights. The concept had originated in France and had been gradually accepted by most civil law countries. Moral rights are a centerpiece of the international Berne Convention for the Protection of Literary and Artistic Works,⁸⁶ which the United States resisted signing for years in part because of the moral rights provision in the Convention. Eventually the United States ratified the Berne Convention and subsequently came up with an amendment in the form of *Visual Artists Rights Act* (VARA) to the Copyright Act.⁸⁷ VARA, however, vests three moral rights with only those artists who create 'visual art'—a very narrow categorization. Now the obvious question that arises at this juncture is as to what constitutes 'visual art'? The statute defines visual art to be inclusive of "a painting, drawing, print, or sculpture, existing in a single copy or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author". The statute specifically excludes from its definition of visual art a number of materials such as motion pictures, audiovisual works, books, magazines, electronic publications, and advertising or promotional materials.⁸⁸ As can be observed from the definition, moral rights under the American statute exclude its protection from covering book writers. To understand why moral rights are granted only to the narrowest category of artists creating 'visual art' and nothing else, we have to look at the two basic premises which are inherent in the doctrine of moral rights. The first assumption is that the art created is not just another product that the artist is selling, but rather an "expression of his innermost being".⁸⁹ As a result the artist has a profound relationship with his art which he cares about deeply as much as a parent would care for a child and not just as another object.⁹⁰ The second assumption embedded in the doctrine is that visual art deserve a special treatment in law as they different from other objects and hence more valuable. The uneven bargaining positions of the film industry and many participants, such as screenwriters, actors and directors, mean these waivable rights are inherently

⁸³ See Matthew J. McDonough, *Moral Rights And The Movies: The Threat And Challenge Of The Digital domain*, 31 SUFFOLK U.L. REV. 455.

⁸⁴ *Id.*

⁸⁵ See, e.g., Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation* (Nov. 27, 2007), SSRN, available at <http://ssrn.com/abstract=1033021> (Last visited on February 18, 2010).

⁸⁶ *Supra* note 8.

⁸⁷ Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2000).

⁸⁸ 17 U.S.C. § 101.

⁸⁹ JOHN H. MERRYMAN & ALBERT ELSEN, LAW, ETHICS AND THE VISUAL ARTS 423 (5th ed. 2007) as referred to in Amy M. Adler, *Against Moral Rights*, 97 CALIFORNIA LAW REVIEW 263(2009).

⁹⁰ See Morris E. Cohn, *Author's Moral Rights: Film and Radio*, 1 HOLLYWOOD Q. 69(1945).

weak. In addition, there is a concern that where moral rights are enforced, they might also lead to the stultification of creativity.⁹¹

Apropos of this discussion, a glance can perhaps be spared for the issue of joint authorship and the U.S. position regarding the same. The U.S. copyright statute has defined a joint work as “a work prepared by two or more authors with the ‘intention’ that their contributions be merged into inseparable or interdependent parts of a unitary whole.” Further, the statute allows creation of works of joint authorship only if the work has been “produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors.” Therefore there are two elements to joint authorship, firstly, each party’s contribution must not be separable from the others contribution, and secondly, the parties must have contributed as an “author”. In simpler terms, an author is considered to be the one who wrote down the words for the script.⁹² Some believe in the paramount importance of the case concerning a claim of co-authorship for the movie *Malcolm X*,⁹³ wherein the U.S. Supreme Court has held that actual authorship was required under the definition of a joint work to be considered an author or a work and that valuable creative contribution alone will not suffice.⁹⁴

C. MORAL RIGHTS IN INDIA—LEGISLATION AND JUDICIAL DECISIONS

In India moral rights are mentioned in Section 57 of the Indian Copyright Act, 1957 which states: “Author’s special rights. (1) Independently of the author’s copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right-

- (a) To claim authorship of the work; and
- (b) to restrain or claim damages in respect of any distortion, mutilation, modification

⁹¹ See Fiona MacMillan, *The Cruel C: Copyright And Film*, 24(10) EUROPEAN INTELLECTUAL PROPERTY REVIEW 483 (2002).

⁹² Wei Ling Chan, *The Writer is King: Copyright in Devised Theatre*, <http://www.artslaw.com.au/legalinformation/copyright/04TheatreCopyright.asp> (Last visited July 31, 2010).

⁹³ *Jefri Aal Muhammad v Spike Lee and Others*, 202 F.3d 1227 (2000); see also the case of *Thompson v Larson*, 147 F. 3d 195 (1990) for similar ruling in the field of theatre.

⁹⁴ Nonetheless, different opinion also exists that the *Malcolm X* dispute centered more around the matter whether the contributions by the claimant were “copyrightable” elements at all in the first place, since he had played more the role of a consultant than an “author”. See Professor Shammad Basheer’s opinion in the comments section of *Shammad Basheer, 3 Idiots and the Morality of Numbers*, <http://www.indianexpress.com/news/3-idiots-and-the-morality-of-numbers/564374/0> (Last visited on July 31, 2010) as well as the comments section of *The 3 Idiots Copyright Controversy: Whither the Moral Right of Attribution*, <http://lawandotherthings.blogspot.com/2010/01/3-idiots-copyright-controversy-whither.html> (Last visited July 31, 2010).

or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honor or reputation...”

Indian law did not initially specify a fixed term of protection for moral rights. In view of Article 6bis of the Berne Convention, the duration of moral rights protection had to match the term of protection of copyright, at a bare minimum. The Copyright Act was amended in 1992 to extend the duration of copyright protection from fifty to sixty years, either from the year of the author’s death or from the year of first publication.⁹⁵ However, protection of moral rights was not necessarily limited to sixty years, but could in theory continue indefinitely. Section 57(2) of the Act supported this view, since it provided for the exercise of moral rights after the author’s death by his legal representative.⁹⁶ With the 1994 amendments, however, section 57(1)(b) clearly implies that the duration of protection for the right of integrity is limited to the term of copyright protection - at most, extending sixty years beyond the lifetime of the author. The section effectively excludes perpetual protection for the right of integrity. However, the duration of the attribution right continues to be undefined.⁹⁷

Under Indian law therefore an author has the requisite moral rights and is not barred from its protection like its American counterparts. In the Indian context, the moral rights of an artist over his work were put to test in *Amar Nath Sehgal v. Union of India*,⁹⁸ in what was a 13-year legal battle which finally settled in 2005. In this case, the appellant/author assigned his copyright in a bronze mural, to the Union of India. The mural was placed in Vigyan Bhavan, but was later pulled down and dumped. The author sued for violation of his moral rights. In response, the defendants made a robust defence (which included two points which would be helpful in studying the controversy at hand) being:-

- the plaintiff (Mr. Sehgal) had assigned his copyright to the defendant (the government) in an agreement dated 31st October 1960;
- the defendant had purchased all rights from the plaintiff, and was consequently free to do as it pleased with the mural⁹⁹

⁹⁵ See S. Ramaiah, INTERNATIONAL COPYRIGHT LAW AND PRACTICE, 3[1] (1999); the provision is contained in § 22 and the details are set out in §§. 23-29.

⁹⁶ See Mira T. S. Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati*, 2001 SINGAPORE JOURNAL OF LEGAL STUDIES 161.

⁹⁷ *Supra* note 82.

⁹⁸ (2005) 30 PTC 253.

⁹⁹ See Binny Kalra, *Copyright in the Courts: How Moral Rights Won the Battle of the Mural*, WIPO MAGAZINE, April 2007, available at http://www.wipo.int/wipo_magazine/en/2007/02/article_0001.html (Last visited on February 19, 2010).

The interim application was decided in 2002 and the case itself was finally decided in 2005. The court ruled in favor of the author saying that: "All rights of the mural shall henceforth vest with Mr. Sehgal". The court also ordered the return of the remains of the mural to the sculptor, and also slapped damages of Rs.500,000 (some US\$ 12,000) on the defendant. The court went on to state that: "These [moral] rights are independent of the author's copyright. They exist even after the assignment of the copyright, either wholly or partially." On the face of it, the odds appear to be stacked heavily against the artist for not only had he created the work on commission, but he had also explicitly assigned his copyright – and so all economic rights - to the commissioning ministry. He thus faced a powerful opponent—the government. Amar Nath Sehgal won his civil law action thanks to the single statutory provision on "author's special rights" in Section 57.

This was a reflection of the stance taken by the Supreme Court in the earlier case of *Smt. Mannu Bhandari v. Kala Vikash Pictures Pvt. Ltd. and Anr.*¹⁰⁰ The Court in that case had stated in no uncertain terms: "Section 57 confers additional rights on the author of a literary work as compared to the owner of a general copyright. The special protection of the intellectual property is emphasized by the fact that the remedies of a restraint order or damages can be claimed "even after the assignment either wholly or partially of the said copyright"... Section 57 thus clearly overrides the terms of the Contract of assignment of the copyright. To put it differently, the contract of assignment would be read subject to the provisions of Section 57 and the terms of contract cannot negate the special rights and remedies guaranteed by Section 57. The Contract of Assignment will have to be so construed as to be consistent with Section 57. The assignee of a copyright cannot claim any rights or immunities based on the contract which are inconsistent with the provisions of Section 57." The consequence being any contract for the assignment of copyright cannot offend the provisions of section 57 and its terms must necessarily be read subject to this section.¹⁰¹

At this juncture, note may be taken of *Phoolan Devi v. Shekar Kapoor*¹⁰² which has an important bearing on the controversy at hand. In this case, the plaintiff claimed that the basis of the film, being a novel dictated by the illiterate plaintiff, had been considerably mutilated by the film producer. The plaintiff sought a restraint order against the defendant from exhibiting publicly or privately, selling, entering into film festivals, promoting, advertising, producing in any format or medium, wholly or partially, the film "*Bandit Queen*" in India or elsewhere. Granting an injunction Justice Jain held that "the defendant had no right to exhibit the film as produced violating the privacy of plaintiff's body and person. The balance of convenience is also in favor of restraining the defendants from exhibiting the film any further as it would cause further injury to the plaintiff. No amount of money can compensate the indignities, torture, and feeling of guilt and shame

¹⁰⁰ AIR 1987 Del 13.

¹⁰¹ See S. RAMAIAH, INTERNATIONAL COPYRIGHT LAW AND PRACTICE, 7[4](1999).

¹⁰² 57 (1995) DLT 154.

which has been ascribed to the plaintiff in the film. Therefore, the defendants were refrained from exhibiting the film in its censored version till the final decision of the suit.” In the context of the controversy we are examining, if the author could contend in a case before the court that the film adaptation of his story mutilated the story such that it affected the mental well-being of the author as he was personally connected to the base storyline, the court could similarly grant an injunction in favor of the author.¹⁰³

Regarding the current controversy over the credits for ‘3 Idiots’, the question would arise as to whether the author contracted away his ‘moral rights’ specifically, and not through the mode of assignment of copyrights of the work? In our concerted opinion, the contract does not waive away the moral rights of the author. Thus, Bhagat would continue to hold the rights over the storyline but such moral rights would not resolve the issue of actual credits being displayed in the movie itself. However we think that it is deceptive of the production house to claim that they used only a very insignificant part of the story of Five Point Someone, thus leading viewers to believe that it is the script writers who have the actual credit of creating the story. This is highly misleading because even though the contribution by the latter in the form of interesting twists and socially relevant subplots cannot be denied, it cannot and should not detract from the fact that had it not been for the basic subject matter which has been taken from Five Point Someone, then these twists and subplots would have fallen flat on their face without the strength of a good story to go on.

The question in this entire controversy has not been regarding whether Chetan Bhagat deserves credit or not. The production house does not deny that the movie is based on Five Point Someone and even gives a fleeting and rather perfunctory credit to the author at the end of the movie. But the question is regarding placement of these credits. Chetan Bhagat wants to be credited at the beginning, when the movie starts whereas the producers justify crediting him at the end, saying that even the script writers including Rajkumar Hirani who had changed the story so much that the end product was significantly different had been credited in the end rolling credits.¹⁰⁴ The real issue at hand could have been solved as Vir Singhvi, a leading Indian journalist and columnist, put it—with a little bit of “grace”.¹⁰⁵ In comparison to the script writer of ‘Slumdog Millionaire’ Simon Beaufoy acknowledging Vikas Swarup in his acceptance speech at the Oscar ceremony,¹⁰⁶ we have the producer and a lead actor mudslinging the author

¹⁰³ Then again, while making this point, the authors must also mention for clarity’s sake, that over and above, the main issue that the Phoolan Devi Case was concerned about was regarding breach of privacy rights, so the chance always exists that the case would be distinguished to be different in terms of facts and subject-matter as compared to the present situation in a court of law, instances of such actions being available in plenty.

¹⁰⁴ Vir Sanghvi, It’s Time For Aamir, Chopra And Hirani To Show Some Grace, *available at* <http://www.virsanghvi.com/vir-world-ArticleDetail.aspx?ID=415> (Last visited on February 19, 2010).

¹⁰⁵ *Id.*

¹⁰⁶ *The Guardian*, Oscars 2009: How Slumdog Millionaire Hit The Jackpot, *available at*

and decrying his justified demands for a visible credit as a publicity gimmick. Considering the number of gimmicks the producers went into for the promotion of the movie,¹⁰⁷ such allegations can hardly have a leg to stand on.

IV. CONCLUSION

The author in this controversy was not entitled to any rights regarding audio-visual adaptations of the movie because he contracted them away. If lessons were to be learned from this controversy, it can be to the effect that authors should incorporate 'safety clauses' in agreements. One such requirement could be that the author himself/herself will script the first screenplay of the movie.¹⁰⁸ In this way, an author would be continuously involved in the process of scripting right from the start. Alternatively the author could also move for the incorporation of a clause which will give the author the right to access the script along with the power to make suggestions which the producers or script-writers have to consider. A clause should make specific stipulation as to when the novelist may make creative inputs (for example at the first draft stage), what obligations the producer has towards that input (for example that such inputs have to be 'considered' or has to be necessarily incorporated) and the method of resolution in case of any disagreement between the novelist on the one hand and the screenwriter/producer on the other (for example that a neutral party like the director of the movie will have the final decision in such circumstances). Or the provision could be for the final script having to be reviewed by the author who can have the right of approval—which he can withhold in case of dissatisfaction with the treatment of his novel in the script. No substantial changes could be made to the script during the filming and production process without the prior approval of the author.¹⁰⁹ In addition to this an agreement could also make specific mention of credit provision. The author can then specify the exact location of the credits in the movie or even ask for shared screenwriting credit where the author would be involved in the script writing process.

All of the above steps which could be possibly taken by the author are chimerical in nature because it is highly improbable that an author will have the necessary bargaining power to stipulate such provisions suggested herein as compared to commercially successful and renowned production houses. Moral rights have the most potential power in this regard, but there is always the chance that a producer may have it waived. In this light, we would propose that the legislation with regards to moral rights in India be given more teeth to deal with

<http://www.guardian.co.uk/film/filmblog/2009/feb/24/oscars-danny-boyle> (Last visited on February 12, 2010).

¹⁰⁷ See Ramanujam Sridhar, *Learning from the Idiots*, BUSINESS LINE (HINDU) January 14, 2010.

¹⁰⁸ See Anthony Mosawi, *The Control By Novelists Of Film Versions Of Their Works*, 6(3) ENTERTAINMENT LAW REVIEW 83 (1995).

¹⁰⁹ *Id.*

increasing cases of exploitation of authors, otherwise controversies like the one that arose regarding ‘3 Idiots’ will continue to arise where even widely read and popular authors are ripped of credit of their stories for a paltry amount of money just because of absence of adequate bargaining power.¹¹⁰

¹¹⁰ See *No Copyright Relief*, INDIAN EXPRESS (New Delhi) January 18, 2010. (“Even as the controversy raged on, the copyright cell of the HRD Ministry that recently got Cabinet approval for comprehensive amendments to the Copyright Act advocating more rights for ‘creative artists’, was not so much in favour of Bhagat. Not only the pre-amended Act, even the amendments proposed to the Copyright Act had no cure for a Bhagat-like situation because he had already signed on the dotted line and received a copyright amount, explained officials”).