

**DIRECTOR'S AUTHORSHIP UNDER INDIAN COPYRIGHT LAW : AN(UN)INDIAN APPROACH?**

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ABSTRACT

*A movie is an expression of its author's idea and an indubitable reflection of society. However, the authorship of a movie is a nebulous concept and varies from country to country. In India, the producer is the author of a movie whereas, in the UK, both the principal director and the producer are authors. The recent rift over the remaking of the movie Mr. India has kindled the debate over the director's right on a film when the original director expressed his disappointment over the news of a remake of the movie by director Ali Abbas Zafar. The present essay is an attempt to discuss cinematic authorship and to highlight the legislative flaw in granting the authorship of the movie, to the producer. The author has also accentuated the inconceivable extension of authorship to non-human entities which further stretches the concept of a moral right to non-human entities. In conclusion, the author has argued that the present cinematic setting is a relic of the British' Copyright Act, 1956 and needs to be amended now.*

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## I. EXORDIUM: DIRECTOR AND THE INNOMINATE WORK?

A movie is a collaborative work of various efforts and entails a bundle of copyrights. It involves many stakeholders such as screenwriters, producers, performers, editors, directors, cameramen, etc.<sup>1</sup>These stakeholders get independent copyright for their work yet the ultimate authorship vests with the producer in India.<sup>2</sup>Therefore, the director of a movie remains out of the purview of the authorship and his rights remain at stake with the producer. The authorship of the producer is rationalised under Section 2(uu) which defines a producer as “a person who takes the initiative and responsibility for making the work.”<sup>3</sup> The same is also applicable for sound recordings, however, the present article is only limited to the issue of cinematic authorship.

Interestingly, the authorship of the director is not a recent debate in India and has also arisen in the legislative phase of Copyright Amendment 2010 wherein Sections 2(d), 2(z), and 17 were sought to be amended. The said amendment endorsed the joint authorship of the movie and espoused to make the principal director an author of the movie. The amendment was not accepted owing to its inherent flaws. It is noteworthy that the Parliamentary Standing Committee only discussed it from the perspective of producer authorship dilution and never heeded to the creative contribution of the director.<sup>4</sup>

It becomes essential herein, to briefly touch upon the justifications of copyright and whether this idea of a producer being equated to the concept of an author, within the principles of copyright, aligns with those justifications. Copyright, which initially in its consequentialist sense was introduced as a conscious interference into free markets,<sup>5</sup> was reasoned on the basis of it providing essential incentives for authors to create, or for creations to come into existence in the first place. Later justifications for copyright also include the idea of personhood, in the sense of extending the idea of copyrights to being an engine of expression<sup>6</sup> and an imperative autonomous tool therein, to be able to seek rights over a certain expression which originates out

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<sup>1</sup>C Paul Sellors, *Collective Authorship in Film*, 65 J.A.A.C. 263, 265 (2007).

<sup>2</sup>The Copyright Act, No. 14 of 1957, Gazette of India, Extra pt. II sec. 3 (Jan. 21, 1958), § 2(d) (India).

<sup>3</sup>The Copyright Act, § 2(uu) (India).

<sup>4</sup>PARLIAMENT OF RAJYASABHA, DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, 227<sup>TH</sup>REPORT (2010).

<sup>5</sup>Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. Rev. 1328 (2015).

<sup>6</sup>Harper & Row Publrs. v Nation Enters., 471 U.S. 539, 558 (1985).

of one's personality.<sup>7</sup> These justifications have always focused on fostering creation, and giving certain rights and protections to the creators - to recognise their autonomy, incentivise more creation and most importantly, help them survive.

Copyright was largely justified as a personal right<sup>8</sup> and never justified on the grounds that such exclusionary rights may become tools of an impersonal corporation<sup>9</sup> or that of the rich investors. However, in the contemporary sense, giving the status of an "author" to a production company/producer, who merely invests (monetarily) in acts of creation, has become a statutory norm and this can be seen in the Indian Act,<sup>10</sup> as well as in various copyright statutes in the world, especially because of concepts such as the work-for-hire doctrine.<sup>11</sup> Maybe this is why it has been asserted that copyright has got a bad name for itself.<sup>12</sup>

Coming back to the idea of a director as an author, the original debate surrounding the authorship of the director arose in the 1940s, in France by Andrew Austruc, where he analogised a director with a novelist.<sup>13</sup> He argued that the way a novelist uses a pen to create his work, a director uses a camera to create a movie. The theory was further developed by François Truffaut, a French director in 1954 who called a director as the true author of a film.<sup>14</sup> The rationale behind the same was that a director was the central authority of a film whose vision is portrayed through the film. Finally, the idea was crystalised and Americanised by Andrew Sarris as 'Auteur Theory' through his essay named Notes on Auteur Theory.<sup>15</sup>

In the essay, the issue of director's authorship was elaborately argued and the theory regarded a movie as an expression of its director's personality. He justified it on the grounds of personality theory and regarded a movie as an expression of a director's personality. Appositely, he gave a

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<sup>7</sup>Lemley, *supra* note 5.

<sup>8</sup>JOANNA KOSTYLO, COMMENTARY, VENETIAN DECREE ON AUTHOR-PRINTER RELATIONS OF 1545 REGARDING AUTHOR/PRINTER RELATIONS (L. Bently & M. Kretschmer eds., 2008).

<sup>9</sup>Jane C. Ginsburg, *Essay – How Copyright Got a Bad Name for Itself*, 26 COLUM. J. OF L. & ARTS, 61(2002); COLUM. PUB. L. RES. PAPER NO. 02-46 (2002).

<sup>10</sup>The Copyright Act, § 2(f) (India).

<sup>11</sup>Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003).

<sup>12</sup>Ginsburg, *supra* note 9.

<sup>13</sup>Alexander Astruc, *The Birth of a New Avant-Garde: La Camera-Stylo*, originally printed in L'ECRAN FRANCAISE Mar. 30, 1948, <http://www.newwavefilm.com/about/camera-stylo-astruc.shtml>.

<sup>14</sup>John Hess, *La Politique des Auteurs (part one)*, 1 JUMP CUT, 19 (1974).

<sup>15</sup>ANDREW SARRIS, NOTES ON AUTEUR THEORY IN 1962, in LEO BRAUDY & MARSHALL COHEN, FILM THEORY AND CRITICISM: INTRODUCTORY READINGS 451 (7<sup>th</sup> ed. 2009).

three-pronged test to determine an auteur.<sup>16</sup> The first premise of the auteur theory is the technical competence of a director, focusing on elementary skills in craft and technique. The second premise of the theory espouses consistency in the work of a director exhibiting his distinguishable personality. The third limb of the test endorses an interior meaning which is extrapolated from the tension between the director's personality and the material he has to work with. Simply, he emphasised the independence of the director in the creation of a movie. The primary criticism which the authors have with Sarris's theory is that it only provided for singular authorship for a movie and disregarded the efforts of other creators. The theory acted as an instrument to valorise certain directors such as Ophuls, Renoir, Hitchcock etc. by naming them auteurs with no legal implications. Sarris's theory espoused a very selective approach of director's authorship, he called some selective directors as the pantheon of directors and lionized them as auteurs while disregarding other directors and their works.

While the theory played a pivotal role in shaping the cinematic debates and culture,<sup>17</sup> it was not powerful enough to justify the director's authorship in every country. This can be seen from the varied interpretation of cinematic authorship in countries. For instance, EU and Nordic countries which support the author-centric approach, regard the director as the author<sup>18</sup> whereas India and the USA<sup>19</sup> do not subscribe to this approach. The theory promotes an objective test of cinematic authorship and comprehends the author only from the pre-given tests. Such objectivity dwindles the artistic nature of cinema which necessarily involves a subjective concept. It also coincides with the concept of aesthetic neutrality which regards art as a subject phenomenon and posits that what is aesthetic art for one may not necessarily have the same aesthetic reverence for the other.<sup>20</sup> Interestingly, an idea can have multiple expressions and those multiple expressions may have infinite interpretations. Therefore, subjectivity for the art depends upon the person experiencing the art and the creator of the said art. Illustratively, the interpretation of art by an Indian may not be the same as that of a rustic American. Such difference of opinion about the art discomforts the applicability of Sarris's auteur tests. Irrespective of these inherent loopholes

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<sup>16</sup>*Id.*

<sup>17</sup>Sarris, *supra* note 15.

<sup>18</sup>Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 V.L.A J.L. & ARTS 199, 203 (1995).

<sup>19</sup>Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 173 (2016).

<sup>20</sup>*Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249–51 (1903).

of theory, the underlying idea of the theory in question is that the personality should be given authorship and this provides a strong basis for the authorship of the director.

## II. 'PERSONHOOD' JUSTIFICATION OF DIRECTORS' WORK

A movie is a *mélange* of various other arts including songs, drama, dance, acting, music etc. therefore, there are many personalities involved in movie making. From the creativity and copyright perspective, moviemaking has three stages namely, pre-production, production, post-production.<sup>21</sup> In every stage, the creative authority lies with certain stakeholders namely, the directors, screenwriters, producers, and actors to an extent. The pre-production stage is a planning stage where the director sits with the scriptwriter and the producer to decide the production stage. At this stage, casting, budgeting, scouting and selection of shooting locations, drafting of essays and script preparation (subject to final redaction) are decided.<sup>22</sup> This is a crucial stage of filmmaking as it is the stage where a director develops the visual conception of a movie and plans to eventuate it in an envisaged manner. Interestingly, this visual conception is merely a personal idea of the director which has to pass from several phases to get externalised into a movie.

In the production stage, the planning comes into action and the 'filmmaking' begins.<sup>23</sup> At this stage, the director guides the technical crew and controls all the creative and dramatic aspects of the movie. This control is directly connected with the visual conception developed in the previous stage. Undeniably, this vision may change at this stage however, the end result would still be the directors' vision but with some changes. It is to be noted that a director's role is not only limited to managing the creative efforts of various individuals but also includes the harmonisation of various works to create a cohesive whole i.e. a movie.<sup>24</sup>

This also coincides with Aristotle's famous quote "a whole is greater than the sum of its parts", as also dictated by the Court in the case of *MRF Ltd. v. Metro Tyres Ltd.*<sup>25</sup> Notably, a movie is more than its various parts. Merely positioning different works does not gain it a title of the movie, it has to be done creatively and consciously. In the words of Justice V.R. Krishna Iyer, "*Cinema is more than long strips of celluloid, more than miracles in photography, more than song, dance and*

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<sup>21</sup>Eileen Morley & Andrew Silver, *A Film Director's Approach to Managing Creativity*, 55 HAR. BUSS. REV. 59, 61 (1977).

<sup>22</sup>JIM OWENS & GERALD MILLERSON, *VIDEO PRODUCTION HANDBOOK* (5<sup>th</sup> ed. 2012).

<sup>23</sup>Morley & Silver, *supra* note 21.

<sup>24</sup>*Supra* note 21.

<sup>25</sup>*MRF Ltd. v. Metro Tyres Ltd.*, 79 PTC (Del.) 368 (2019) (India).

*dialogues, and, indeed, more than a dramatic story, exciting plot, gripping situations and marvelous acting. But it is that ensemble which is the finished product of orchestrated performance by each of the several participants, although the components may, sometimes, in themselves be elegant entities.*"<sup>26</sup> Thus, a director is not merely a manager or an administrative agent of the producer, rather he/she is the one responsible for all the coordination and management of works in the line of visual conception or aesthetic vision of the movie as developed in the pre-production stage.

Finally, in the post-production stage,<sup>27</sup> all the works produced and shot during the production are synchronised as per pre-conceived vision. This process involves several activities including picture-editing, sound-editing, sound-mixing, visual effects, music scoring, and sound synchronisation, colour correction titles, credits, and editing graphics, gathering distribution materials and making the trailer for the movie etc.<sup>28</sup> In practice, a producer acquires a decisive authority at this stage, which is often cited as the justification of their authorship disregarding the basic essentialists of authorship.<sup>29</sup> Notably, it is heavily influenced by market needs and the investors' view. Thus, capitalistic cannons become the guiding principles here.

All these stages are interdependent and carry the personality of the director. For example, directors such as Alfred Hitchcock, who focuses more on planning and on a well-organised shooting, pay more heed to the pre-production stage.<sup>30</sup> Conversely, directors such as Ingmar Bergman<sup>31</sup> and Arthur Penn<sup>32</sup> who prefer spontaneity and responsiveness, pay special attention to the production stage of a movie. This highlights that all directors have a unique personality which they imbibe in a movie. In India Cinema, Imtiaz Ali an apposite example to illustrate the impact of personality and the consistency in the themes though in a broad manner. He works on the idea of 'Ekko ek kahani, bas badle zamana' (a dialogue from his movie Love Aaj Kal) which literally means that "stories are generally the same, just the time period changes."

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<sup>26</sup>Indian Performing Right Society Ltd. v Eastern Indian Motion Pictures Ass. & Ors., PTC (Suppl) (1) 877 (SC)(India).

<sup>27</sup>*Supra* note 21.

<sup>28</sup>*Supra* note 21.

<sup>29</sup>*Supra* note 21.

<sup>30</sup>ROBERT KOLKER, ALFRED HITCHCOCK'S PSYCHO: A CASEBOOK 97 (1<sup>st</sup> ed. 2004).

<sup>31</sup>ROBIN WOOD & RICHARD LIPPE, ARTHUR PENN: CONTEMPORARY APPROACHES TO FILM AND MEDIA SERIES (Barry Keith Grant ed., 2014).

<sup>32</sup>Gavin Extence, *Cinematic Thought: The Representation of Subjective Processes in the Films of Bergman, Resnais and Kubrick* (Sept. 2008) (Ph.D. Thesis, University of Sheffield).

Like an auteur, he predominantly follows two themes in his movies namely journey and storytelling which majorly encapsulates a love story. Much like his love for mountains, Imtiaz imbibes the pine for love, fascination for mountains, escape from home, the realisation of love after some sort of separation. His characters Aditya and Geet (Jab we Met), Harry and Sejal (Jab Harry Met Sejal), Ved and Taara (Tamasha), Janardhan Jakhar aka Jordan and Heer Kaul (Rockstar), Veera (Highway) share the above characteristics. In his interview, he has expressed the presence of his life experiences in his movies. His movies depict his love for stories which developed in his childhood where he had access to cinema, movies and theatres. This in turn ingrained in him the idea of understanding lives through mirrors and stories.<sup>33</sup>Such imbuing of personality in the cinema provides a strong justification for giving copyright protection.

Given this genealogy, the personhood theory provides a strong justification for the director's authorship. As per the personalists, especially Hegel, an intellectual property ["IP"] is an expression of one's personality.<sup>34</sup> Hegel vehemently argued that when a person externalises his ideas using his mental faculties, he actually expresses his will.<sup>35</sup> Such expression should be regarded as his property and given protection by the state.<sup>36</sup> Pertinently, per David C Funder, "*Personality refers to an individual's characteristic patterns of thought, emotion, and behaviour, together with the psychological mechanisms -hidden or not-behind those patterns*".<sup>37</sup> This definition is important in the current context as the decisions of the directors while making a movie directly emanate from their personality and get externalised in the movie. Therefore, such a deliberate effort of the director to externalise his personality deserves protection.

Further, it also coincides with the theory of J.G. Fichte, who provided strong arguments for literary authorship.<sup>38</sup> He argues that a work has two parts; namely physical form and ideational part. The former can be alienated however, the latter remains inseparable once it is created.<sup>39</sup> Therefore, in the case of a movie, the economic rights over the movie including distribution and reproduction might lie with the producer, but as the personality and unique aspects of the

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<sup>33</sup>Netflix, *Imtiaz Ali On Growing Up With Movies*, YouTube, (Jan. 04, 2021), [https://www.youtube.com/watch?v=tKOqZYqzczE&ab\\_channel=NetflixIndia](https://www.youtube.com/watch?v=tKOqZYqzczE&ab_channel=NetflixIndia).

<sup>34</sup>Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 290 (1988).

<sup>35</sup>Kanu Priya, *Intellectual Property and Hegelian Justification*, 1 NUJSL. REV. 359, 361 (2008).

<sup>36</sup>*Id.*

<sup>37</sup>DAVID C FUNDER, *THE PERSONALITY PUZZLE 2* (7<sup>th</sup> ed. 2015).

<sup>38</sup>Mario Biagioli, *Genius against Copyright: Revisiting Fichte's Proof of the Illegality of Reprinting*, 86 NOTRE DAME L. REV. 1847(2011).

<sup>39</sup>*Id.*

director imbued in a movie cannot be separated from him, the director is entitled to some form of protection. It is worth noting that the creation of a movie by a director demonstrates a director's autonomy of expression of his personality in the movie and if this is not protected, then this would defy the idea of copyright as an engine of free expression.<sup>40</sup> Illustratively, a movie directed by X can be owned by Y Production, but it does not erase the involvement of X with the movie as his personality is deeply embedded in its creation. Thus, it is imperative for the law to differentiate the author and owner of the movie. The contract that usually is entered between a director and the producer suggests the transfer of ownership however this does not necessarily transfer the authorship of the work and disqualify the director from being an author. Such understanding is negated by highlighting the monies paid to the director for the direction of the movie, thus making it appear like a general service agreement where one person sells her creativity to others for a monetary consideration. Such contracting is undoubtedly important for the smooth functioning of the work in an arranged manner and pre-empting the potential conflicts of interests but giving excessive importance to the contractual arrangement sans any statutory gives is very likely to give an impetus to mismatched bargaining power among parties. The same can be fathomed from the Copyright Amendment 2012 which removed the contractual asymmetry between musicians and producers by mandating the equal sharing of royalties among such authors.<sup>41</sup>

The fortunate yet contrasting aspect in the case of musical works was that their creators are statutorily recognised authors so they already had some statutory benefit pre-2012 amendment such as moral rights protection. Such statutory recognition brings them (authors of musical works) under the purview of section 17 of the Act, thus, merely shifting the ownership over the work to the employer without any impact on the authorship. This is absent for directors who have to completely rely on the contractual arrangement with the producer without any recourse under the Copyright Act. In India, directors do not have any collective bodies or copyright societies like IPRS and PPL which are constituted under Section 33 of the Act by authors and owners of the works. These bodies not only represent the interests of authors but also hold strong power in lobbying. These collective bodies are incorporated under the Act through the

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<sup>40</sup>*Supra* note 21.

<sup>41</sup>Abhai Pandey, *Development In Indian IP Law: The Copyright (Amendment) Act 2012*, SPICYIP(Jan.22, 2013),<https://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/>.

2012 amendment focusing on the interests of authors extant in the act which excludes film directors.<sup>42</sup>

The U.S.A. also does not recognise directors as the authors of a movie, however, the Directors Guild of America [“DGA”] is a guild which represents the interest of directors of films and television and this guild holds a strong lobbying power for protecting the legal interests of directors. The adoption of the pseudonym Alan Smithee is an appropriate example of DGA to protect the directors from the undesirable movie version of studios.<sup>43</sup> Interestingly, it was a tool for the directors to dissociate themselves from the work when they did not find the edited movies up to the mark and were afraid of affecting their reputation. Moreover, the Guild proposed certain legislations for the protection of the interests of director rights including the Film Integrity Act of 1987, National Film Preservation Act of 1988, Film Disclosure Act of 1992, The Theatrical Motion Picture Authorship Act of 1995, though not all efforts were fructified.<sup>44</sup> DGA has also tried to safeguard the artistic and creative interests of directors by DGA basic agreement by incorporating a clause of ‘Consultation after Assignment’ under Article 7 in the DGA Basic Agreement.<sup>45</sup> In this way, besides statutory silence on the authorship of directors, there also exists a structural impediment (absence of a body to represent the interests of directors) for directors to not be able to claim authorship through contract.

### III. PRE-DEFINED AUTHORSHIP: A LEGISLATIVE INFELICITY?

Filmmaking is an art and a filmmaker is an artist. However, ‘who is a filmmaker’ and ‘what is required of a person to become a filmmaker’ are two nebulous but regularly debated questions in copyright law. Countries like the USA, which endorses an economic centric copyright law and underpins a capitalistic concept of authorship, regards the financier as the author of the movie. Similarly, India’s copyright law synonymises a filmmaker with the producer who is actually the financier/risk-taker. These two approaches appear to be similar but are fundamentally different. The USA does not give a pre-defined authorship for the work<sup>46</sup> whereas India fixes the authorship to the producer.<sup>47</sup> In principle, both the countries surmise financing as the ultimate

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<sup>42</sup>Zakir Thomas, *Overview of Changes to the Indian Copyright Law*, 17 J. INTELL. PROP. RTS. 324, 329 (2012).

<sup>43</sup>Peter Decherney, *Auteurism on Trial: Moral Rights and Films on Television*, 2011 WIS. L. REV. 273, 299 (2011).

<sup>44</sup>Leslie A. Pettenati, *Moral Rights of Artists in an International Marketplace*, 12 PACE INT’L L. REV. 425, 447 (2000).

<sup>45</sup>DIRECTORS GUILD OF AMERICA, SUMMARY OF DIRECTORS’ CREATIVE RIGHTS UNDER THE DIRECTORS GUILD OF AMERICA BASIC AGREEMENT OF 2017 - FEATURES & LONG-FORM TELEVISION (2017).

<sup>46</sup>Copyright Act of 1976, 17 U.S.C. § 201 (2012).

<sup>47</sup>The Copyright Act, § 2(d) (India).

yardstick for a movie and overlook the element of creativity. Such financial indulgence being the sole target of copyright authorship is fundamentally a flawed concept as it not only deviates from the general notion of authorship but also obfuscates the philosophical foundations of copyright law.

Interestingly, the term author is derived from the Latin word *auctor*, which is developed from the verb *augere* which means “to increase, augment, strengthen that which is already in existence”.<sup>48</sup> The modern meaning as given in Black’s law dictionary defines an author as “one who produces , by his own intellectual labour applied to the materials of his composition, an arrangement or compilation new in itself.<sup>49</sup> Similarly, in the *Burrow Gils* case, the court defined an author as “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.”<sup>50</sup> In the *Jefri Aalmuhammed* case, the author was defined as a person who really represents, creates, or gives an effect to the idea.<sup>51</sup>

In India, there are no specific cases for the meaning of authorship per se. However, in *Najma Heptulla v. Orient Longman Ltd. & Ors.*, Justice BN Kirpal remarked that, “To me it appears that if there is an intellectual contribution by two or more persons pursuant to a reconvered joint design, to the composition of a literary work then those persons have to be regarded as joint authors.”<sup>52</sup> In simple words, to be called an author of a work, the intellectual contribution is requisite. It can also be deciphered from cases discussing originality. Illustratively, in the case of *MRF v. Metro Tyres*<sup>53</sup> and *Yashraj Films*<sup>54</sup>, it has been settled that a movie is an ‘original’ work of authorship. Here, the expression original requires the deployment of skill and judgment coupled with flavour of minimal creativity. Thus, an author is a person who employs his skill and judgment to create work (though minimally creative). However, the current legal cinematic authorship framework replaces it with risk-taking i.e. financing. In *MRF v. Metro Tyres*, all authorship privileges and rights that are provided for an original work of authorship under Section 14 of the Copyright Act, were extended to the author of a cinematographic film. Interestingly, the author of a cinematographic

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<sup>48</sup>AUTHORITY MATTERS: RETHINKING THE THEORY AND PRACTICE OF AUTHORSHIP (Stephen Donovan et. al. eds., 1<sup>st</sup> ed. 2015).

<sup>49</sup>BRYAN A. GARNER, BLACK’S LAW DICTIONARY (6<sup>th</sup> ed. 1990).

<sup>50</sup>*Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

<sup>51</sup>*Aalmuhammed v. Lee* 202 F.3d 1227 (9th Cir. 2000).

<sup>52</sup> *Najma Heptulla v. Orient Longman Ltd. & Ors.* 63 AIR 1989 (Del.) (India).

<sup>53</sup>*MRF Ltd. v. Metro Tyres Ltd.*, 79 PTC (Del.) 368 (2019) (India).

<sup>54</sup>*Yash Raj Films Pvt. Ltd. v. Sri Sai Ganesh Productions & Ors.*, 80 PTC (Del.) 200(2019) (India).

film, as per section 2(d) of the Copyright Act, is the producer/financier. Therefore, as a distinct feature of the Indian Copyright Act, this decision establishes that the equivalent privileges as accorded to someone who inputs skill and judgment in a work, are provided to someone who merely finances a film.<sup>55</sup>

Further, Section 17 and Section 18 of the Copyright Act play a significant role in the ascertainment of the ownership and authorship of the work. In case of movies, these provisions provide a conceptual framework for the author-owner divide and settle issues of the economic exploitation of the work. These provisions expatiate the determination of IP rights through the contractual relationships among various authors thereby suggesting the pivotal role of ‘contract of service’ and ‘contract for service’. However, they decipher the author as per Section 2(d) of the Copyright Act which does not include the director anywhere. Thus, the director always remains out of the purview of copyright law.

Such an anomalous arrangement owns its origin to the British era as it has always remained a guiding cannon for the Indian copyright regime.<sup>56</sup> Before the independence, Copyright Act, 1847 and Indian Copyright Act, 1914 were epitomes of the UK’s Copyright Act, 1842 and the Imperial Copyright Act, 1911 respectively.<sup>57</sup> In that time, movies were not regarded as a separate copyrightable work. Rather, they were given a dual treatment of dramatic work and artistic work.<sup>58</sup> Such consideration created a conceptual flummox in the law and blurred the ownership of the work, e.g. in *Fenning Film Source v. Wolverhampton Co Cinemas*,<sup>59</sup> the producer was regarded as an owner whereas in *Falcon v. Famous Players Film Co*,<sup>60</sup> it was held that the screenwriter was the owner of the work. After independence, India enacted Copyright Act, 1957 by relying on U.K.’s Copyright Act, 1956 which regarded a movie as a separate work and bestowed the authorship to

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<sup>55</sup> Akshat Agarwal, *AI – Generated Work Of Art: Who Deserves The Authorial Credit?*, IPR MENT LAW (Jan. 5, 2019), <https://iprmentlaw.com/2019/01/05/ai-generated-work-of-art-who-deserves-the-authorial-credit>.

<sup>56</sup> Shubha Ghosh, *A roadmap for TRIPS: copyright and film in Colonial and Independent India*, 1 QUEEN MARY J. INTE LL . PROP. 146, 153 (2011).

<sup>57</sup> *Supra* note 56.

<sup>58</sup> *Supra* note 56.

<sup>59</sup> *Fenning Film Source v. Wolverhampton Co. Cinemas*, [1914] 3 K.B. 1171; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

<sup>60</sup> *Falcon v. Famous Players Film Co*, [1926] 2 K.B. 474.

the producer.<sup>61</sup> In 1988, the U.K. made changes in its copyright law and gave the director the joint authorship of the movie.<sup>62</sup> However, India still suffers the same legislative infelicity.

Before, the Copyright Act, 1956 regarded a movie as a dramatic work or a series of photographs, however, post-1956 Act movies have been given a separate status of copyrightable work.<sup>63</sup> The 1956 Act was completed and replaced by the Copyright, Designs and Patents Act 1988 [“CDPA”] with major changes. Under CDPA, the concept of moral rights was formalised and the creator of the work is made the author of the work.<sup>64</sup> However, it also did not give statutory recognition to Directors as authors but merely protected moral rights. Directors got the authorship recognition through the Copyright and Related Rights Regulations 1996 which ascribed them the status of work of the joint author to the movie. Such authorship was given to the principal director (though it was not defined in the act) and producer.<sup>65</sup> Nevertheless, it doesn’t make UK’s copyright law the perfect legislation to develop the concept of authorship. Prima facie, it follows a dualistic approach of copyright wherein economic rights and moral rights stand differently and the absence of one does not necessarily affect the presence of other unlike US copyright law which follows a monist approach regarding both economic rights and moral rights existing in the same person. However, going deeper in the act shows a contrast, as on one hand, it classifies economic rights and moral rights highlighting the artistic individuality and inalienability of works. On the other hand, it allows an author to waive off her moral rights, thus undermining the individuality of the artistic expressions.<sup>66</sup>

#### IV. REVISITING IDEA-EXPRESSION DICHOTOMY

In the simplest words, the copyright is given to the person who expresses an idea and not to the one who finances the author to express the idea.<sup>67</sup> Learned Hand in *Nichols v Universal Pictures Corp.*<sup>68</sup> had held that abstractions that level to the concept of an “idea” apart from how they are expressed are not protected as property, however, the boundary is vague, and nobody will ever

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<sup>61</sup>Upendra Baxi, *Copyright Law and Justice in India*, 28(4) J.INDIA L.INST.497, 506 (1986).

<sup>62</sup>Copyright, Design and Patents Act 1988, C. 48, § 11 (Eng.).

<sup>63</sup>PASCAL KAMINA, *FILM COPYRIGHT IN THE EUROPEAN UNION* (2nd ed. 2016).

<sup>64</sup> Copyright, Design and Patents Act 1988, C. 48, § 9(1) (Eng.).

<sup>65</sup>*Id.* § 11.

<sup>66</sup>*I Supra* note 64 § 87.

<sup>67</sup>The Copyright Act, § 2(d) (India). [Author is always the first owner of the work unless an agreement to the contrary].

<sup>68</sup>*Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

be able to fix that boundary. A way to think about the context of what constitutes an expression is to invoke the Nietzschean idea of “*Perspectivism*.”<sup>69</sup>

An idea itself is not copyrightable but its expression is.<sup>70</sup> The copyright is not concerned with the process of expressing an idea. Even a photograph created through a mechanical process can get copyright if it originates from the photographer’s creative choices and distinct perspective. Thus, as held in the *Feist case*, even original selection and arrangement of the material can get copyright if it is original and involves making creative choices.<sup>71</sup> Unfortunately, this is not generally applied to a director’s work which is often regarded as a managerial task, in spite of the input of a distinct perspective being involved in showcasing the script, in the finest possible way.

Pertinently, Indian copyright law endorses two tests for giving rights in a cinema: firstly, the final screening of the movie, and secondly the risk-taking factor. In the former, copyright takes the appearance of the person/work into consideration. Simply, anyone whose contribution can be noticed in a movie gets some rights. For example, performers, singers, lyricists etc. Whereas, the latter is contextualised as the financing and economic risk-taking. For instance, an investor and a producer who bears the risk if the movie fails. Such a scenario highlights the preference of noticeability and suggests a restricted understanding of the idea-expression dichotomy.

Further, moral rights are defined as the special rights of ‘Authors’ where the author is the one who is mentioned under Section 2(d) and this excludes the director. Thus, the contractual relationship between a director and an author becomes the ultimate governing law irrespective of the creation or the contribution of the director which the copyright law aims to safeguard. The 2015 *Sartaj Singh Pannu*<sup>72</sup> case is a prime example to demonstrate the plight of directors where the judge expressed his incapacity to protect the moral right of a director in the absence of such a right in the act.

In the *Ramesh Sippy case*,<sup>73</sup> the court denied the right to the director and held that unlike literary and artistic work which requires a natural person to be the author, in cinematography, a legal person can be the author. The court held that the “cinematography is not an original work of

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<sup>69</sup>FRIEDRICH NIETZSCHE, STANFORD ENCYCLOPAEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring ed. 2020); see also Pietro Gori & Paolo Stellino, *Introductory Study:Nietzsche on Culture and Subjectivity*, 2 QUADERNS DE FILOSOFIA 11-23, (2015).

<sup>70</sup>Eastern Book Co. v. D.B. Modak, AIR SC 809 (2008) (India).

<sup>71</sup>Feist Publications, Inc. v Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

<sup>72</sup>Sartaj Singh Pannu v. Gurbani Media Pvt. Ltd. &Anr., 63 PTC (Del.) 590(2015) (India).

<sup>73</sup> Ramesh Sippy v. Shaan Ranjeet Uttamsingh & Ors., AIR Bom. 228 (2013) (India).

composition” of one person. Rather, it is a work of collective efforts that are joined by the “entrepreneurship thread’ of the producer. This is problematic at multiple levels as it not only overshadows the creativity of the director with the producer’s entrepreneurship but also dilutes the concept of authorship to non-human entities and extends the moral right to corporates. Such metaphoric justification by the court highlights the relevance of ‘control’ and ‘veto’ power of the producer which is not always the appreciable factor in comprehending authorship as held in *Community for Creative Non-Violence case*<sup>74</sup> and *Kogan Case*.<sup>75</sup>

It blatantly contravenes the personhood and fairness theories of IP which seek to protect the individual values of authorship and bolster the bond between the author and work. Hence, such an anomalous arrangement not only deprives directors of the economic benefits of authorship but also disables them from claiming the benefit of moral rights. Such melancholy can also be illustrated by *16 Casa Duse LLC v. Merkin (2015)*,<sup>76</sup> where the USA Court refused to grant the authorship rights to the director irrespective of his creative contribution in the movie. The court reasoned that a director’s work is not separable from a movie hence, cannot be considered as the joint authors of the work. The reasoning was based on the test of joint authorship which includes two factors namely i.) the intention of the parties, and ii.) inseparability of the work. The facts of the case made it apparent that neither party had an intention to come together to create a work of joint authorship over the work. The work of both (director and the producer) was also not separable. Notably, relying on the inseparability of work the court gave an upper hand to the rights of the producer, thus creating an inconceivable hierarchy of the producer and the director.<sup>77</sup> Using a producer as the dominant author yardstick, the Court overshadowed the creative and artistic decision-making by the overall decision making of the producer which includes the selection of cast, crew and director, coordination of the production of the film, management of the film’s publicity and release.

In absence of the explicit protection under the copyright law, the Courts have to rely on the other branches of laws as done by the US Courts which have gone beyond the contractual clauses and codified canons of copyright laws and provided remedies under tort law, privacy rights, publicity rights, trademark law, contract, defamation, etc. to protect the interest of

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<sup>74</sup>Commentary for *Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S. Ct. 2166 (1989).

<sup>75</sup> *Kogan v. Martin*, EWCA Civ. 1645 (2019) (United Kingdom).

<sup>76</sup> *16 Casa Duse, LLC v. Merkin*, No. 13-3865 (2d Cir. 2015).

<sup>77</sup>*Id.*

authors. In *Vegas v. Esquire*,<sup>78</sup> irrespective of the silence of contract, the Court permitted the author to claim the right of attribution. In *Granz v. Harris*,<sup>79</sup> the defendant deleted some part of the work performance and presented it with the name of the plaintiff which was stipulated in the agreement. The court clarified that such credit is only limited to the work stipulated and the modified work (with some deletions of performances) does not attract the application of the contract as it unfairly associates the work with the author.

Similarly, in the case of *Edison v. Viva International Ltd.*,<sup>80</sup> the Court recognised the author's moral right as a part of the contract law. Similar rulings were also followed in *Clevenger v. Baker, Voorhis & Co.*,<sup>81</sup> and *Archbold v. Sweet*,<sup>82</sup> wherein the Courts acted as a saviour of the moral rights of the authors and denigrated the defendant's act of wrongful attribution of the plaintiff's authorship. Also, in *Beatty v. Paramount Pictures Corporation*, the director was given the right to final cut when the defendant's network distributor cut approximately six and a half minutes from the film. The director argued his absolute right of final cut over the movie which includes television broadcasts, on the other hand, Paramount Pictures relied on the language of the contract which signifies right over the final cut. However, the Court favoured the director and gave the right of the final cut. In this way, the rights of the director can be protected but the Courts cannot be expected to follow uniformity in protecting such rights and ultimately the facts of the case especially the contractual arrangements become the dominating criteria to resolve the issues.

## V. CONCLUSION

Externalisation of an idea through intellectual labour should be the primary yardstick for determining authorship and noticeability should be merely used to comprehend and appreciate the art. In copyright law, authors, disseminators and the audience are three major stakeholders and are imperative for the smooth functioning of copyright law. The role of the financier is undoubtedly important for the creation of a work owing to the inseparable cost in IP creation, especially movie making. Undoubtedly, movie-making involves a huge cost and requires the financier for both, creation and dissemination. For the sake of understanding, the creation of a work can be divided into three stages, namely pre-creation, creation, post-creation. Mainly, the

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<sup>78</sup> *Vargas v. Esquire*, 164 F.2d 522, 526 (7th Cir. 1947).

<sup>79</sup> *Granz v. Harris et al.*, 198 F.2d 585 (2d Cir. 1952).

<sup>80</sup> *Edison v. Viva International Ltd.*, 421 N.Y.S.2d 203, 206 (N.Y. Sup. Ct. 1979).

<sup>81</sup> *Clevenger v. Baker Voorhis Co.*, 8 N.Y.2d 187 (1960).

<sup>82</sup> *Archbold v. Sweet*, (1832) 172 Eng. Rep. 947.

financier is required at the pre-creation (hiring actors, selecting places, the requirement of a pen, paper etc.) and post-creation (publication, performance, dissemination, etc.) stages. The middle stage i.e. the creation stage, where all the creative work is done, is done by the director, authors, and other artistic people who play an active role in this stage. Thus, financing becomes an inescapable part of copyright law. However, regardless of its inalienability in the creation of work, it can in no way be replaced with the authorship. Thus, a producer is important for the creation of a cinematography work and can own the work but it doesn't make a producer the author of the movie. The equation of financing with creativity under Section 2(d) is a colonially coloured legislative infelicity. Keeping this in the act means synonymising creativity with economic prowess. It is high time that the Indian copyright law distinguishes between an author and the owner of a cinematographic film and realise that paying for the creation of a work does in no way mean creating the work. The former requires financing and economic capability whereas the latter requires intellectual labour and efforts. It is very quintessential for the copyright law to balance this dichotomous relationship otherwise it defeats the objective of copyright law.

Keeping the spirit of India's copyright law in mind and relying on the abovementioned argumentation, the authors suggest the following changes Section 2 (d):

*(v) in relation to a cinematograph film or \*\*\*\*\*, the principal director;*

As specified in the above chapter, this is specifically limited to the authorship of a movie and therefore, the authors have not made any comment for the sound recording. Additionally, the definition of principal director should also be added as the director whose creative decision supersedes the decisions of other directors. Also, the following two clauses should be added in Section 17 of the Copyright Act which pertains to the ownership of copyrighted works.

*(f) in the case of cinematograph film produced on or after the commencement of the Copyright (Amendment) Act, \*\*\*\*, the principal director shall be treated as the first owner of copyright.*

*This provision would be used prospectively in order to avoid potential conflicts among the producers and directors arose before the amendment of act (if ever). Amendment is also required in Section 18 wherein the royalty of directors can be mandated like the authors of the literary or musical works.*

It is high time that India and countries which don't recognise director's authorship, change their laws. Such changes might invite certain unwanted issues at the beginning such as resentment from many producers and studios, and it may also affect the film industry in the time being,

however, it is to be noted that “speculation about future harms is no basis for [courts] to shrink authorial rights.” as voiced in the Supreme Court in *N.Y. Times Co. v. Tasini*.<sup>83</sup>

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<sup>83</sup>*N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 (2001).