



## Author and Owner Intersection in Sound Recordings in The Copyright Act of India

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The present work focuses on the intersection of author and owner concerning sound recordings. The interpretation of copyright law on the author and owner intersection by the Court's are rather varied. It may be because the restricted issues at its hand lead the courts. More particularly, interpretation of provisos (b) and (c) of Section 17 of The Copyright Act, 1957 leads to differing interpretations by the Courts. The present analysis is made by studying three recent judgments to understand the author and owner conflicts of sound recordings.

**Keywords:** Copyright, Authorship, Ownership, Sound Recordings, Cinematograph Films, Musical Works, Work For Hire, Audio Recording

Composite works like cinematographic films and sound recordings usually have more than one author. However, while defining the author for the cinematographic film and sound recording, The Copyright Act, 1957<sup>1</sup> (hereinafter the Act) *vide* Section 2(d)(v)<sup>2</sup> provides that the producer shall be the author.

Section 2(xx)<sup>3</sup> of the Act defines 'sound recording' as a recording of sounds that may be reproduced regardless of the medium in which it was recorded. It is an independent original work commissioned by the producer.

The term 'Cinematograph film' is defined as any work of visual recording and includes a sound recording accompanying such visual recording per Section 2(f)<sup>4</sup> of the Act. It is helpful if the process of cinematographic film is visited here. Usually, the situation for a song is given to the music director and the lyricist. Based on the lyrics provided by the lyricist, the music director composes tune, rhythm, instrumentalisation, which forms the musical work. With this musical composition, singers sing the song in a recording studio, and it gets recorded in a media to create the sound recordings.

Recordings are given to the choreographer who choreographs the piece with the performing artists. Then, the performance of the artists is visually recorded without the sound recording. Finally, the sound recording is synchronised with the visual

recording by the editor to make the cinematographic film. Therefore, at least four independent intellectual properties are created in this process: lyrics, musical composition, sound recording, and cinematographic film. All can co-exist at the same time.

As per Section 2(d)(v) author of a sound recording is the producer. Section 17<sup>5</sup> of the Act states that the author of the work shall be the first owner. Contrary to this provision is spelt out in the provisos.

The effect of the provisos (b) and (c) of Section 17 of the Act was considered by the Supreme Court in *IPRS Ltd. v EIMP* (1977),<sup>6</sup> and it was observed as follows:

*"... According to the first of these provisos viz. Proviso (b), when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric, therefore, i.e. the sounds for incorporation or absorption in the soundtrack associated with the film, which as already indicated, are included in a cinematograph film, he becomes the first owner of the copyright therein, and no copyright subsists in the Composer of the lyric or music so composed unless there is a contract to the contrary between the Composer of the lyric or music on the one hand and the producer of the cinematograph film on the other. The same result follows according to aforesaid Proviso (c) if the Composer of music or lyric is employed under a contract of service or*

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*apprenticeship to compose the work. It is, therefore, crystal clear that the rights of a music composer or lyricist Can be defeated by the producer of a cinematograph film in the manner laid down in provisos (b) and (c) of section 17 of the Act. ...”*

The question of authorship and consequent ownership where the composer of music or lyricist is employed under a contract of service or apprenticeship to compose the work is answered in *A&M Records Limited and Another v Video Collection International Limited* (1995) (High Court, Chancery Division UK)<sup>7</sup>. In this, the Court has observed:

*“... On the facts before me I take the view that Mr Pullen was the person who undertook those arrangements. He did so as the agent of Inside Edge. Having been told by Torvill and Dean what they wanted, he set about seeking a musician who was suitable for the task of making sound recordings suitable for use at the skating championships. He found Mr Ross. He made an agreement with him that Mr Ross would set up a studio and musicians at his (Mr Ross's) expense in return for a fee that would enable Mr Ross to make a profit for himself. It was known that the recordings proposed would be used not only at the skating championship but also in the course of compiling a CD for sale to the public. So it was, as I see it, that Mr Pullen as agent for Inside Edge undertook the arrangements for the making of the recording. Since that is so Mr Ross does not own the copyright in the recording. According to section 9(2), it is Inside Edge that owns the copyright...”*

Though, Mr Ross independently worked on the rendering by having commissioned and paid for musical arrangements, booked and paid for the recording studio, paid for 51 musicians, engaged sound engineers and others, paid for other miscellaneous expenses, he cannot own the copyright.

It is pertinent to note that the music composer may be working independently without any control from the producer; however, the producer has all the rights to demand change of renderings, modifications of specific arrangements of the musical scheme or even ultimate rejection of the composition. Therefore, the final control on the compositions is at the hands of the producer. He has complete dominion over the commissioned works. Failure or success of the musical piece does not in any way affects the composer. The composers are ensured of their remuneration irrespective of the end results.

If the composer wants to retain his authorship or ownership of the sound recording, he must have an agreement with the producer to this effect. Failure to do so will not confer any such rights.

As per Section 2(p)<sup>8</sup> of the Act, the term 'musical work' consists of music and graphical notation of such work, and it excludes any words or any action intended to be sung, spoken or performed with the music. Therefore, the musical work includes the music and its graphical notation and nothing more. It may be fixed on a sheet of paper or as a phonorecord.

In Para 46 of *Saregama India Ltd v Suresh Jindal* (2006),<sup>9</sup> the Court has stated that the musical work is the music itself and its graphical notation per Section 2(p) of the Act. It does not include any words or actions intended to be sung, spoken and performed with the music. Therefore, there is a distinction between musical work and a song. The song may be with or without music. Even a song that has music will not become a musical work under the said section, said the Court.

### **Owner and Author intersection**

Three current case laws of Madras High Court are taken for analysis, namely, (i) *AGI v Ilaiyaraja* (2019),<sup>10</sup> (ii) *IRMC v AGI* (2020),<sup>11</sup> and (iii) *Mrs Sellapappa Keeran v S. Vijayaraghavan* (2021).<sup>12</sup>

As defined in Section 2(p)<sup>1</sup> of the Act, the musical work does not include any words or any action intended to be sung or performed with the music. Per Section 2(d)(ii)<sup>14</sup> of the Act, the author of a musical work shall be the composer. The author of the musical works has the copyright, *vide* Section 14<sup>15</sup> of the Act, to reproduce the work in any material form, issue copies of the work, perform the work in public, make a cinematographic film, and make translation and adaptation.

### **Condition Precedent and Condition Antecedent**

What is discussed in Section 14(a) is a condition precedent. It means that if a literary, dramatic or musical work exists, it can be used to make a cinematographic film or sound recording. Whereas if a producer commissions a cinematographic film, consequently, he engages lyricist, music composer for a reward, it becomes condition antecedent. Then, Provisos (b) and (c) of Section 17 of the Act comes into play.

*Wallerstein v Herbert* (1867) 16 L.T. 453, as cited in *IPRS v EIMP* (1977), it was held that the music

composed by the plaintiff composer was for a reward. It was to give effect to specific situations in the drama entitled "Lady Andley's Secret". Furthermore, it was held that the composition was not an independent creation but was merely an accessory to and part and parcel of the drama. Hence, the plaintiff composer did not have any right in the music. This kind of work falls under the condition antecedent.

It was held in *IPRS v EIMP* (1977) by the Supreme Court that under provisos (b) and (c) of Section 17 of the Act, the producer of a cinematographic film can defeat the Composer's right of music or lyricist by engaging them.

### ***AGI v Ilaiyaraja* (2019)**

*AGI v Ilaiyaraja* (2019) was tried before a single-member bench, and the final judgment was pronounced on 4 June 2019. In *AGI v Ilaiyaraja* (2019), the Court has discussed elaborately to arrive at a harmonious interpretation of the various provisions of the Act. The Court has taken the composer's stature and pleadings to rule out the applicability of the employer-employee relationship under a contract of service or apprenticeship as set out in Proviso (c) of Section 17 of the Act. It is to be noted here that the Court did not provide any more objective reasoning to arrive at its conclusion to rule out the applicability of Proviso (c) of Section 17 of the Act. It will be discussed in detail in a little while.

On the other hand, the Court has delved deeper into other provisions and concluded the applicability of Proviso (b) of Section 17 of the Act. The critical part is that if the composer wants to retain the first owner of the sound recording, the onus is on him to have an agreement with the producer to this effect. In the present case, the composer was not able to provide any such contract. The Court held that the producer of the cinematographic film would be the first owner of the sound recording.

The Court walked further to find out what can be offered to the composer based on the Scheme of the Copyright Act. It is interesting to note that the Court has found and applied the force of Section 57<sup>16</sup> of the Act, which deals with the inalienable author's special rights to paternity and integrity, to confer the rights under Section 14 in Para 58.

However, the legislature's intention is evident from the wordings of Section 57 of the Act that it is independent of the author's copyright. It is irrespective of any economic rights. The authors are

conferred with these special inalienable rights to paternity and integrity. Section 57 of the Act in no way confers copyright on the authors. Extending it, to read Section 14 into, is an overreach, which is not envisaged by the scheme of the Act.

The question that went unanswered in the present case is whether the ownership of musical work or lyrics commissioned for consideration lies with the producer or not? As is seen earlier, the musical composition and lyrics come into existence only after the commissioning of the work by the producer. These works did not exist earlier to give the force of Section 14 of the Act.

Based on the definition of cinematographic films, it is reasonable to understand that it includes sound recordings. However, does the sound recording include musical work? The practical answer is yes; it contains musical work. It clarifies that the musical work is the one that gets commissioned by the producer, and subsequently, it gets recorded along with the lyrics as a sound recording. By this logic, the economic exploitation of musical work also lies with the producer.

One would argue that there is a specific provision in Section 13(4)<sup>17</sup> of the Act, which states that the copyright in a cinematographic film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which the film or the sound recording made.

However, there are two limbs to Section 13(4) of the Act. Firstly, there shall be a work in existence. It means the prior existence. Secondly, cinematographic film or sound recording shall be made using the whole or substantial parts of the existing work. Therefore, in the present case, it fails the test of *prior existence*.

It is essential to revisit Proviso (c) of Section 17 of the Act. It includes all the work defined in Section 2(y)<sup>18</sup>. But for Proviso (c), one cannot fix musical work per se anywhere else in the scheme of Section 17 of the Act. It is because, Proviso (a) of Section 17 of the Act deals only with literary, dramatic, or artistic works. Proviso (b) of Section 17 relates to photographs, paintings, portraits, engravings, and cinematographic films.

Proviso (c) of Section 17 deals with work made in the course of employment under a contract of service or apprenticeship. Though it includes works made under formal employment, it also encompasses 'work made for hire' under a contract.

If the work is not created under formal employment, one needs to evaluate whether the work is done for hire. US Supreme Court has stressed a test in *Community for Creative Non-Violence v Reid* (1989).<sup>19</sup>

Firstly, the work must have been specially commissioned for the producer. Secondly, the 'work' is for use in any one of the specified nine categories<sup>20</sup>. A motion picture is one such category. Thirdly, there must be a contract to create the work for consideration. If all these are satisfied, then the work is made for hire.

Instead of relying only on the composer's stature, it will be a better rationale to include the test indicated by the US Supreme Court.

#### ***IRMC v AGI (2020)***

*IRMC v AGI* (2020) was tried before a single-member bench, and the final judgment was pronounced on 13 February 2020. In *IRMC v AGI* (2020), the actual defendant is the composer of the music. The Court has held that cinema is a blending of multiple intellectual works. The producer is the person who took the initiative and responsibility of blending those works. On coordinating, the producer is the first owner logically. It is the producer who can desegregate the blending, if necessary. For example, the work of a song involves two distinct intellectual works, namely lyrics and music. The music composer cannot have any rights over the lyrics and *vice versa*. Therefore, the Act has rightly conferred the first right of ownership with the producer, said the Court.

The Court further elaborated that the burden of proof is on the composer to show any contract to the contrary. Having failed to produce any such agreement, the composer cannot claim any right of ownership. However, the composer is vested only with the special rights mentioned in Section 57 of the Act and nothing else. Here, the Court has limited only moral rights and denied any economic rights.

The Court has also stressed that the meaning of the terms owner and author are neither interchangeable nor synonymous. A music composer can be the author of the work but cannot be the owner unless the producer gives up his rights in favour of the composer in writing. Therefore, Proviso (b) of Section 17 of the Act indeed overrides the author's right. The Court has referred *AGI v Ilaiyaraja* (2019) and clarified the position of law to a more significant extent.

#### ***Mrs Sellappapa Keeran v S. Vijayaraghavan (2021)***

*Mrs Sellappapa Keeran v S. Vijayaraghavan* (2021) was tried before a single-member bench, and the final judgment was delivered on 1 September 2021.

Pulavar Keeran, a scholar, delivered lectures on Tamil literature during the period 1960-90. His scholarly orations demonstrated the nuances of Tamil literature and brought out the parallels from the modern scientific theories. During his life term, he was contacted by a recording company. He made numerous recordings with the recording company, and the company offered those recordings for sale. Subsequently, he lost his life. Then the ownership dispute between the legal heirs of Pulavar Keeran (plaintiff) and the recording company (defendant) arose. Hence, the present suit.

Before the Court, the predominant issue was about authorship and ownership of the recording. From the copyright perspective, an audio recording is considered a sound recording per Section 2(xx) of the Act. Per Section 2(d) of the Act, author of a sound recording is the producer. It is the basic premise to interpret other provisions of the Act. Section 17 of the Act states that the author of the work shall be the first owner. The provisos to Section 17 of the Act govern contrary to this position.

In the present case, the defendant is the one who approached the Pulavar Keeran, commissioned the performance and produced the recordings. Hence, the defendants were in the position of the *author – producer* for the recordings. It is expected that the plaintiffs shall prove contrary to this position to gain ownership.

Whereas, the Court, in the present case, raised a question in Para 12.1, as follows:

“...In order to ascertain the scope of the rights based on the rival claims, it has to be first decided as to who is the author of the work concerned, whether it is Pulavar Keeran as the author of the original literary work or the first defendants the produce of the sound recording.

Once the above question is answered then the rights will automatically flow under Section 13, and 17 of the Act.”

Leaving the question of the authorship of the work aside, the Court has started the discussions on the scope of Section 17 of the Act and opined in Para 12.3 that:

“... Proviso (a) and (b) of Section 17 will not apply to the case on hand, as it is not the case on either of the parties that the recording were made for the

*purposes of publication in any newspaper or magazine in the course of employment of Pulavar Keeran with such newspaper or magazine. Clause (b) of the proviso to Section 17 will not also apply as it does not relate to a literary work.*"

Hence, the Court thought it was left only with Proviso (c) of Section 17 of the Act to find out the author. The Court has found out that there was no employee-employer relationship between the parties and further said that the defendant can be the owner only when he can show that the work has been done in the course of employment or under a contract of service or apprenticeship. Since it was not proved to the satisfaction of the Court, it was decided that Pulavar Keeran was the *producer – owner* of the work.

The Court has further opined in Para 12.5 as follows:

*"...Once it is conceded that the recordings were made by Pulavar Keeran, he would automatically become the author of the work and the first Copyright would vest with him or his legal heirs..."*

The Court has finally declared that the plaintiffs are the author and first owner of the copyright in the sound recordings.

*Mrs Sellappapa Keeran v S. Vijayaraghavan* (2021) raises many questions for the stakeholders and exposes the gap in the Act. Most importantly, in the scheme of Section 17 of the Act, it does not explicitly identify sound recordings and musical works.

### Summary of the analysis

As seen in *IPRS v EIMP* (1997), *AGI v Ilaiyaraja* (2019), and like cases, the Courts have read the sound recordings within the Cinematographic films. However, how to fit in a stand-alone or collaborative / joint works of sound recording or musical work in the scheme is still unclear.

In *Mrs Sellappapa Keeran v S.Vijayaraghavan* (2021), the recordings were made at the defendant's place. The defendants organised the recording and produced the records, using their infrastructure and their engineers. The masters were in their possession. Furthermore, they have made copies of the cassettes for sale. Some of which was offered for sale through the author. It is apparent from the series of transactions between the author and the defendants that there was no employee-employer relationship or any contract of service *ab initio*. The Court has read the provisions backwards in *Mrs Sellappapa Keeran v S.Vijayaraghavan* (2021). It has applied Proviso (c) of

Section 17 of the Act first to find out the producer and moved on to decide the authorship. However, it is important to note that Section 17 of the Act begins with "subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein" and it is followed by the Provisos. Hence, it is important that the authorship has to be decided first to proceed on to decide the ownership.

A work may have resulted from a distinctive collaborative or joint effort between various persons. Though the Act defined the work of joint authorship<sup>21</sup>, it deals only with contributions that are inseparable or not distinct. For example, a book or an article. The Act is not explicit on the distinct joint authorship or ownership of sound recordings or musical works. Therefore, it requires a revisit to get better clarity.

### Conclusion

The above analysis shows a statutory gap to address author and owner conflicts, particularly with stand-alone or distinct collaborative/joint works of sound recording or musical work. It appears that Section 17 of the Act needs a relook. Due to the scheme of Section 17 of the Act, interpretation by the courts vary. Until the legislators look into these issues, our courts need to formulate proper guidelines to address the problems highlighted.

### References

- 1 The Copyright Act, 1957 (Act 14 of 1957) as amended by The Copyright (Amendment) Act, 2012 (India).
- 2 Section 2(d) (v): "author" means in relation to a cinematograph film or sound recording, the producer.
- 3 Section 2(xx) "sound recording" means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.
- 4 Section 2(f) "cinematograph film" means any work of visual recording and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films.
- 5 Section 17, First owner of copyright. — Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Provided that
  - a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the

- purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;
- b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;
- c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein; Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of Section 13.
- 6 *IPRS Ltd v EIMP Association* (1977) 3 SCR 206.
- 7 *A&M Records Limited and Another v Video Collection International Limited* (1995) EMLR 25.
- 8 Section 2(p) "musical work" means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.
- 9 *Saregama India Ltd v Suresh Jindal* (2006) AIR 2006 Cal 340.
- 10 *AGI Music SdnBhd v Ilaiyaraja and another* (2019)2019 SCC Online Mad 1960.
- 11 *Indian Record Manufacturing Company Ltd v AGI Music Sdn Bhd, Ilaiyaraja and another* (2020) C.S.No.296 of 2016 & O.A.No.338 of 2010, decided on 13 Feb 2020, Madras High Court.
- 12 *Mrs Sellappa Keeran v S. Vijayaraghavan and another* (2021) CS No. 241 of 2004, decided on 01 Sep 2021, Madras High Court.
- 13 Section 2(p): "musical work" means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.
- 14 Section 2 (d) (ii) "author" means in relation to a musical work, the composer.
- 15 Section 14. Meaning of Copyright.— (1) For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—
- (a) in the case of a literary, dramatic or musical work, not being a computer programme,—
- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
  - (ii) to issue copies of the work to the public not being copies already in circulation;
  - (iii) to perform the work in public, or communicate it to the public;
  - (iv) to make any cinematograph film or sound recording in respect of the work;
  - (v) to make any translation of the work;
  - (vi) to make any adaptation of the work;
  - (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);
- (b) ---
- (c) ---
- (d) in the case of a cinematograph film,—
- (i) to make a copy of the film, including—
  - (A) a photograph of any image forming part thereof; or
  - (B) storing of it in any medium by electronic or other means;
  - (ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film;
  - (iii) to communicate the film to the public;
- (e) in the case of a sound recording,—
- (i) to make any other sound recording embodying it including storing of it in any medium by electronic or other means;
  - (ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;
  - (iii) to communicate the sound recording to the public.
- 16 Section 57. 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 or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation: Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub-section (1) of Section 52 applies.

*Explanation*— Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this Section.]
  - (2) The right conferred upon an author of a work by sub-section (1), may be exercised by the legal representatives of the author.
- 17 Section 13. Works in which copyright subsists.—
- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,—
    - a) original literary, dramatic, musical and artistic works;
    - b) cinematograph films; and
    - c) sound recording.
    - (2) ---
    - (3) ---
    - (4) The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recording is made.
- 18 Section 2 (y) "work" means any of the following works, namely:—
- (i) a literary, dramatic, musical or artistic work;
  - (ii) a cinematograph film;
  - (iii) a sound recording;
- 19 *Community for Creative Non-Violence v Reid*, (1989) 490 U.S. 730
- 20 A work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.
- 21 Section 2(z) – "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.