Q&A: Copyright Ownership and Transfer in India

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Ownership and transfer*Eligible owners*

Who is the owner of a copyrighted work?

As a general rule, the author of a work is the first owner of the copyright in a work. For an original literary, musical, dramatic and artistic work, it is the person who created or composed the work and for a sound recording and cinematograph film, it is the producer of the work. In the case of a photograph, it is the photographer. For computer-generated works, the author (ie, first owner of the copyright) is the person who causes the work to be created.

The exceptions to this rule are covered in section 17 of the Copyright Act, and are summarised below:

- In the case of literary, dramatic or artistic works made by the author in the course of their employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship for the purpose of publication in the newspaper, magazine or periodical, the proprietor of the publication shall be the first owner of the work for the purposes of its publication in a newspaper, magazine or similar periodical. In all other respects, the author is the first owner.
- In the case of a work that is a photograph, painting, portrait, engraving or cinematograph film that has been created at the instance of any person for valuable consideration, such person is the first owner of the copyright in the work. However, this does not affect the rights of an author in any original literary, dramatic, musical or artistic work that is incorporated in a cinematograph film.

In the case of *Indian Heritage Society & Anr v Meher Malhotra & Anr* (CS(OS) No. 2717 of 2011), the Delhi High Court granted a permanent injunction in favour of the plaintiff who was not the photographer, but was held to be the first owner of copyright in the photographs. This was because it was at the plaintiff's instance that the photographs were taken for a valuable consideration paid to the photographer. The general rules regarding ownership of works are as follows:

- in the case of a work created by an author in the course of their employment under a contract of service or apprenticeship, the employer is the first owner of the work. However, this does not affect

the rights of an author in any original literary, dramatic, musical or artistic work that is incorporated in a cinematograph film as has been clarified by the 2012 amendments to the Copyright Act;
- in the case of any address or speech delivered, the person making the address or delivering the speech, or the person on whose behalf they do so, is the first owner of the work;
- in the case of a government work, the government is the first owner of the work;
- in the case of a work made or first published by a public undertaking, the public undertaking will be the first owner of the work; and
- in the case of works created by international organisations, the international organisation would be the first owner of the work.

Employee and contractor work

May an employer own a copyrighted work made by an employee?

If a person in the course of their employment under a contract of service or apprenticeship creates any work, their employer becomes the first owner of the copyright in the work, as long as there is no contract to the contrary. Hence, an employer's ownership is automatic by virtue of the employer-employee relationship. However, for any literary, musical, artistic and dramatic works that are incorporated in a film, the employer does not become the first owner of the copyright and the employee author retains the first ownership. A specific assignment of copyright in such a case is required by the employer.

May a hiring party own a copyrighted work made by an independent contractor?

In the absence of an assignment in favour of the hiring party, the first owner of the copyright is the independent contractor. The hiring party would have only an equitable right to use the material created for the purpose of hiring or commission, and possibly against any assignment detrimental to such use.

To own the copyright, the hiring party would have to obtain an assignment in writing from the independent contractor.*Joint and collective ownership*

May a copyrighted work be co-owned?

Yes. Joint authorship of a work is established only when the work is produced by the collaboration of two or more authors where the contribution of one author is not distinct from the contribution of the

other author or authors.

The leading case of joint authorship in India is *Najma Heptulla v Orient Longman Ltd and Ors*, AIR 1989 Delhi 63.*Transfer of rights*

May rights be transferred? If so, what rules and procedures apply?

Yes. Copyright and neighbouring rights can generally be transferred by assignment, by testamentary disposition or by inheritance.

However, moral rights are not assignable. Furthermore, with the amendment of the Copyright Act in 2012, authors of literary or musical works that are included in cinematographic films or sound recordings have an inalienable right to receive royalties for the exploitation of their works, and this right to receive royalties cannot be assigned by the author to anyone except their own legal heirs or to a copyright society for the purpose of collection and distribution of royalties. Similarly, where performances of performers are incorporated in cinematographic films or sound recordings, such performers also have inalienable rights to receive royalties for the exploitation of their performances, and this right to receive royalties cannot be assigned by the performer to anyone except their own legal heirs or to a performers' rights society for the purpose of collection and distribution of royalties.

Additionally, apart from other specific requirements listed in the Copyright Act for a valid assignment (eg, identifying the work, right assigned, territory, duration), it is also necessary to specify both the royalty and other consideration payable in the assignment agreement and this may also be applicable for licence agreements.

There is a requirement under the act for mentioning the territorial extent and the duration of the assignment. Further, the period of assignment would be considered to be five years, if such period is not otherwise mentioned. In such a case, after the expiry of the five-year period, the copyright in the work will revert to the assignor.*Licensing*

May rights be licensed? If so, what rules and procedures apply?

Yes, the owner of a copyright may either license the entire copyright or the licence may be confined to one or more interests in the copyright. The copyright may be licensed to more than one person non-exclusively. However, a licence would not result in a change of ownership of a work. Like assignment, the grant of any licence is also required to be in writing, and the details of work, territory and term should be specified. If it is not specified, the term shall be presumed to be five years and

the territory shall be presumed to be restricted to India only. A licence agreement needs to be in writing. However, there is no requirement for it to be signed, as is mandatory for assignment agreements.

Are there compulsory licences? What are they?

Yes. The Copyright Board is empowered to grant compulsory licences with regard to Indian and foreign works. Some of the purposes for which compulsory licences may be granted are:

- when a work has been withheld from the public because the owner of the work has refused to grant a licence to republish or perform the work;
- when a work or a translation thereof has been withheld from the public because the author of the work is dead or cannot be found, or because the copyright owner cannot be found; and
- when a compulsory licence is required for making a work available to persons with disabilities.

The Copyright Act also provides for statutory licences to broadcasters and statutory licences for cover versions.

In the case *Tips Industries v Wynk Music* (Order dated 23 April 2019 in Notice of Motion (L) No. 197 of 2018 IN Commercial Suit IP (L) No. 114 of 2018) involving an online streaming service and the scope of statutory licences that can be granted to such a broadcaster, the Bombay High Court held that:

- section 31D does not allow for 'download or purchase' of the copyrighted work and the act of the defendant in permitting users to download and store copyrighted music for unlimited future use constituted a 'sale' and a not mere 'communication to the public', which section 31D contemplates; and
- section 31D was intended to cover only radio and television broadcasting, and did not cover internet broadcasting.

In another case, *Shumita Deb v Saregama*, a dispute involving cover versions, the Supreme Court of India emphasised the importance of strict compliance with the mandatory requirements laid out in section 31C of the Copyright Act and, upon an undertaking of such strict compliance by the respondent, disposed of the special leave petition filed by the petitioner.

In the case of *Music Broadcast Limited v Tips Industries Ltd & Ors*, which was decided on 30 December 2020, the Intellectual Property Appellate Board (IPAB) held that for radio broadcasting of musical works and sound recordings, there should be separate statutory royalty rates for owners of musical works and sound recordings, and owners of underlying works, and accordingly fixed the specific royalty rates. In particular, it was observed that the payment of the royalty and consideration for the sound recording as a whole must be made to the owner of the sound recording (ie, the producer), whereas the distribution of the royalty on a shared basis must be made between the

relevant owner of the underlying work (authors and composers) and the assignee or owner of the sound recording.

The Delhi High Court, less than a week after the IPAB judgment, made a contrasting decision in the cases of *The Indian Performing Right Society Ltd (IPRS) v Entertainment Network (India) Ltd* (Radio Mirchi) and *Phonographic Performance Ltd (PPL) & IPRS v CRI Events (P) Ltd & Ors*, holding that when sound recordings are broadcast, the underlying works are not considered to be independent of the sound recording and, therefore, a separate licence for communicating the underlying works is not required.

While the IPAB recognised the rights of the authors of underlying works, the Delhi High Court did the opposite, thereby leaving the sharing of royalties a contentious issue. Both judgments have been challenged and are pending before the Division Bench of the Delhi High Court as at April 2021.

The Bombay High Court in the case of *Anil G Karkhanis v Kirloskar Press and Another* (MANU/MH/1141/2023), granted a licence under section 32 of the Copyright Act to the petitioner to translate a literary work from English to Marathi. Section 32 allows the publication of a translated work after seven years from the first publication without the authorisation of the author. The petitioner, Anil G Karkhanis, was granted the licence to produce and publish the translated version of Madeleine Slade (popularly known as Mira Behn)'s autobiography *The Spirit's Pilgrimage* in Marathi. Originally authored in English, the work was first published in 1960 in India by Orient Longman Private Ltd and in the United Kingdom by Longmans, Green & Co. The petitioner argued that, despite best efforts, he was not able to locate any publishers and thus had approached the court to issue the licence. This is perhaps India's first licence to be granted under section 32 of the Copyright Act 1957.

Are licences administered by performing rights societies? How?

Yes. Performing rights societies (the Indian Performing Right Society Limited, the Phonographic Performance Limited and the Indian Singers' Rights Association) are copyright societies for the collection, licensing, administration and enforcement of rights. Such copyright societies are required to be registered under section 33 of the Copyright Act in order to legally continue the business of granting licences and collecting royalties. In the absence of valid registration, courts have struck down the licences granted by such societies (see *Leopold Café Stores v Novex Communications Pvt Ltd*). Further, the Division Bench of the Madras High Court in the case of *Lyca Productions v J Manimaran* (2018(73)PTC[Mad[DB]) held that an organisation that is not a copyright society is not competent to administer any right in any work, including cinematographic films.

On 18 April 2023, the central government registered M/s Cinefil Producers Performance Limited as

a copyright society under section 33(3) of the Copyright Act in the realm of cinematographic film works. It is a society formed by film producers and other owners.

After the 2012 amendments to the Copyright Act, the newly inserted section 33(3A) required all previously registered copyright societies to re-register themselves. However, a few music-collecting societies refused to do so and, as a result, the legality of their business came under question. After an investigation, one of the societies re-registered itself as a copyright society, although enquiries were made relating to its management. These societies collect performance royalties for literary and musical works, for sound recordings and for cinematograph films. Another copyright society, the Indian Reprographic Rights Organisation, was duly registered in 2013.*Termination*

Is there any provision for the termination of transfers of rights?

A copyright may be transferred in one of two ways, namely by assignment or by licensing. Licences may be exclusive or non-exclusive.

Assignments can be in part or in full in a future or existing work subject to statutory presumptions such as the term, unless specified otherwise in the agreement or unless the agreement provides a contingency. Rights not utilised in a work within a period of one year from the date of assignment or licence are deemed to lapse back to the assignor.

An assignment more than five years old can be revoked by the Copyright Board if the author can show that it is, or has become, onerous. Transfers of rights might also, conceivably, be held to be unlawful under the law of contract. Again, a licence would normally be liable to termination if the licensee failed to comply with the conditions of the licence.

This is clear from section 51 of the Copyright Act, which states:

> When copyright infringed. Copyright in a work shall be deemed to be infringed -
>
> (a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act.

Recordal

Can documents evidencing transfers and other transactions be recorded with a government agency?

Yes. If the copyright in a work has been registered with the Copyright Office and its particulars have been recorded in the Register of Copyrights, then transfer of ownership may be recorded in the Register pursuant to an application to the Registrar of Copyrights in a prescribed form, along with a prescribed fee.

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