

THE SCOPE OF COPYRIGHT ARBITRATION IN THE INDIAN FILM INDUSTRYMEGHNA AGARWAL¹ & NISHTHA GUPTA²**I. INTRODUCTION**

With the advent of globalisation and merging borders, the scope of arbitration as a dispute resolution mechanism has increased manifold. Various industries are realising its significance in resolving disputes in a cheap, amicable, efficient and speedy manner. Indian film industry is a multi-million dollar industry, with the most expensive productions amounting to 100 crore rupees (approximately USD 20 million). Today, the Indian film industry is the highest producer of movies, producing approximately one thousand movies annually.¹ It provides employment to over two million people. By 2001, India's entertainment industry had attained 30% growth in the economy.² This gigantic industry faces a plethora of legal disputes each day. However, the cases which involve complex issues of copyright, performance rights and distribution rights are rarely pursued as the Indian legal system cannot guarantee any efficacious remedy in such matters whereas arbitration, on the other hand, can play a crucial role in solving these disputes.

Bollywood is often accused of copying films, scripts, music or ideas from domestic as well as international cinema. Some are inspired, some are copied, and some are adapted while others are sheer replication of the original work. Few notable examples include "*Mere Yaar Ki Shaadi Hai*"³ which can be termed as a cultural copy of "*My Best Friend's Wedding*"⁴, "*Wanted*"⁵, which copied "*Pokiri*"⁶, "*Kaante*"⁷, which was the Indian version of "*Reservoir Dogs*"⁸ or "*Ghajini*"⁹, which took inspiration from "*Memento*"¹⁰. The music industry is also not untouched by

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¹ Stefan Lovgren, *Bollywood: Indian Films Splice Bom.bay, Hollywood* (July 1, 2012), http://news.nationalgeographic.com/news/2004/01/0121_040121_bollywoodfilms.html.

² UK Film Council, *The Indian Media and Entertainment Industry* (June 11, 2012), <http://www.ukfilmcouncil.org.uk/filmindustry/india/>.

³ *Mere Yaar Ki Shaadi Hai* (Yashraj Movies 2002).

⁴ *My Best Friend's Wedding* (TriStar Pictures 1997).

⁵ *Wanted* (Eros International & Sohail Khan Productions 2009).

⁶ *Pokiri* (Vaishno Academy 2006).

⁷ *Kaante* (White Feather Films 2002).

⁸ *Reservoir Dogs* (Miramax Films 1992).

⁹ *Ghajini* (Geetha Arts (India) & Reliance Entertainment (Overseas) 2008).

¹⁰ *Memento* (Summit Entertainment (USA) & Pathé (UK) 2000).

this phenomenon. The evident examples include the copying of “Pungi” song by Pritam¹¹ from a music composition of an Iranian band and songs of film “*Asbig Banaya Apne*” composed by Himesh Reshammiya. Until now, the mainstream Indian film industry escaped litigation suits due to lack of awareness amongst the Hollywood or foreign film or music industry and lack of profit in a suit instituted through Indian legal system. Bollywood is now being viewed as a lucrative market by the foreign producers. They have started investing in the Indian film industry and are likely to pursue legal suits against the Indian film producers. Earlier, Hollywood, Bollywood and Kollywood had separate and distinct audience, one being unaware of the other. With merging borders and technological advancement, Bollywood and other industries have come closer now and Indian audiences also acknowledge foreign movies and music.

The Hollywood producers are also aware of these copyright infringements; however, they choose not to initiate litigation as it would require great amount of time, money and energy.¹² Nevertheless, recently some Hollywood producers have pursued legal suits against Indian film makers. Fearing possible litigation, the Indian film producers have started purchasing music and film rights of the original work. These contracts deal mainly with copyright issues. It is contended that the breach of such contractual obligations will attract litigation and would cost time and money to the parties in dispute. Moreover, since the Indian Copyright Act favours imitation over originality, it is difficult for this evolving law to do complete justice to the pleader. A viable alternative would be to incorporate arbitration clauses in these contracts. This would not only save the parties time and money but would also ensure that their reputation in the market remains unharmed, leading to a win-win situation for them. Thus, arbitration is an effective solution to create a balance between the rights of the creator as well as the rights of the purchaser. If drafted carefully, the agreement can protect the sanctity of the original work, creating a well-defined demarcation between imitation and inspiration in the industry.

The arbitration mechanism comes as a blessing in disguise for the Indian filmmakers who play a safe bet on successful works in the field. They usually defend their lack of creativity by shields of financial uncertainty, insecurity of success and adaption of western values in the Indian society.

Arbitration, in general terms, is a settlement presided by a third party on a dispute between two or more conflicting parties. The resolution is based on a case by case approach with many types of relief accessible such as monetary compensation, specific performance and restitution, injunctions and declaratory

¹¹ Bansal Robin, *Pritam To Take Legal Action Against Iranian Band* (June 10, 2012), <http://www.hindustantimes.com/Entertainment/Bollywood/Pritam-to-take-legal-action-against-Iranian-band/Article1-832141.aspx>.

¹² Badam Ramola, *Is Bollywood A Hollywood Clone?* (July 3, 2012), <http://www.cbsnews.com/stories/2003/06/04/entertainment/main557012.shtml>.

suits. To support the international economic development and adapt to the emerging global scenario, the Arbitration and Conciliation Act, 1996 was enacted. The law provides a cheap, efficient and speedy alternative to litigation. The present Act applies both to international and domestic arbitrations, unlike the UNCITRAL Model Law. It, further, goes beyond the UNCITRAL Model Law in the area of minimizing judicial intervention.¹³

The arbitration mechanism helps in reducing the risk of transactional commerce and improving international economic relations. While entering into a business relationship, the business houses do not foresee its failure. However, no agreement is perfect and unforeseen contingencies may occur anytime. To deal with such circumstances, it is important to enter into arbitration agreements. These agreements ensure reliability, pragmatism, promptness and fairness in the process of dispute resolution.

A process like arbitration assumes special importance for a developing country like India. If India could develop a strong arbitration base, then it would take care of the speedy disposal of copyright cases, thus allowing filmmakers or music composers to efficiently protect the rights over the original work. It would also provide them with an easy recourse at their disposal.

Choosing litigation as a settlement process is a complex and tedious procedure followed in courts that requires signing and registering numerous documents, even for instituting a simple suit.¹⁴ In a country like India, where the courts are filled with backlog cases, proceedings are time-consuming and matters go on for years, with the film-making industry involving millions of dollars, pursuing copyright litigation would be a daunting task. The copyright law in India is liberal in its construction of the definition of 'copyright' itself; ADR in such situation comes as an efficacious remedy for the parties that cannot afford to lose time in 'avoidable litigation' and are eager to settle the matter, forget it and move forward in their respective pursuits without any waste of time.¹⁵

Another key point in the copyright issues is confidentiality. Since Indian filmmakers are alleged with charges of copying the plots, ideas and music from their original creator, it can be a matter of goodwill and market reputation for the maker and can place work, worth millions of dollars, at stake. The claim could make or break one's professional existence in the industry. Hence, confidentiality and privacy are the biggest advantages of arbitration, together with party autonomy, speed and informality that makes it a better alternative dispute resolution mechanism for Indian filmmakers. Privacy is a deeply

¹³ S.K. Dholakia, *Analytical. Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003*, 39 ICA's ARB. QUAT. 3 (2005).

¹⁴ Law Commission of India REP. NO. 131, at 7 (1988).

¹⁵ G Gandotra, "Arbitration and Conciliation Act, 1996: Need for a few Amendments", 51(1) SEBI& CORPORATE LAWS 188 (2004).

established custom in arbitral proceedings which concerns the right of the parties to not divulge confidential facts or any other information to third parties and not to make the dispute public which is a legal obligation on the part of their representatives and the arbitrator. Arbitration is essentially a private dispute settlement mechanism that does not attract media attention or hurt the feelings or reputation of the parties.

The paper makes an attempt to investigate the possible legal discourse in the current scenario to settle the dispute wisely by opting for an arbitration agreement for buying rights of the movie or music. It further observes the effect of litigation in the light of recent legal controversies surrounding Bollywood. It also analyzes how arbitration can rescue the producers, directors, writers and music composers of Indian film industry, if they choose to incorporate arbitration clauses in the contracts entered by them to buy the rights in the original work.

II. COPYRIGHT LAWS IN INDIAN FILM INDUSTRY

Bollywood has time and again copied and imitated film scripts from both national and international cinema. The recent controversy between Kollywood and Bollywood surrounding *Ladies v. Ricky Bahl* is yet another example.¹⁶ In cases involving copyright issues, the producers can take benefit of various legal provisions under the Indian Copyright Act, 1957 to escape liability.

An inspired creation is not an infringement of the copyrighted work.¹⁷ Neither the Act of 1911, nor the Act of 1957, defines, whether inclusively or otherwise, what a copy is. According to the courts in India, the expression ‘to make a copy of the film’ would mean to make a physical copy of the film itself and not another film which merely resembles the film.¹⁸

Moreover, it is believed that ‘a copy is that which comes so near to the original as to give to every person seeing it the idea created by the original’.¹⁹ Cultural copy²⁰ of regional cinema is considered a valid excuse to justify the acts of plagiarism by the Indian filmmakers.

¹⁶ “NaanAvanIllai”, a hit Tamil movie in 2007; a lawsuit was filed in Madras High Court on 8 December 2011.

¹⁷ See TIMMNEU, *Bollywood is Coming! Copyright and Film Industry Issues Regarding International Film Co-Productions Involving India*, 8 San Diego INT’L L.J. 123 (2006).

¹⁸ Refer S. 14 (d) (i), Copyright Act 1957.

¹⁹ See Bayley, J., *West v. Francies*, [1969] (1) Queen’s Bench 349 referred in *Barbara Taylor Bradford v. Sahara*, TV I.L.R. 1 (Cal.) 15.

²⁰ Cultural copy of regional film would mean to adapt or change the original work by adding or substituting certain scenes, fight sequences, songs, comic situations,

The presence of songs, dramatic sequences, language and varying situations definitely alters the original concept to a great extent. Thus, it creates legal difficulties for Kollywood²¹ or Hollywood studios to initiate copyright infringement proceeding against a Bollywood film producer.

The Bollywood film producers are acquainted with these prevailing copyright standards and they often regard it as an excuse to copy and culturally imitate regional and international films.

Plagiarism is a well accepted norm in Bollywood; they add comic scenes, songs, fight sequences to stretch a two hour script to one that lasts around three hours.²² Thus, this evades evading their liability for copyright infringement, as it can be easily argued that the film is no more a replica of the regional work and the very expression in which the copyright subsists has been changed.

In India, the copyright protection that is accorded to film²³ or sound recordings²⁴ is narrower than that for literary²⁵, dramatic²⁶ or artistic work²⁷. The reason, perhaps, could be that they have to be original to satisfy the test of copyright ability, whereas the requirement of originality is absent for claiming copyright in cinematograph films or sound recordings.²⁸

'Original' is the independent input of author from which others are derived.²⁹ It is one of the key determinants of copyrightability³⁰. Originality is not a key requirement for subsistence of copyright in a cinematograph film or a sound recording.³¹ It is a combination of one's skill, labour and judgment.

The courts have enumerated the substantial and material similarity tests. R.G. Anand v. Delux Films³² was the first case in India where the Supreme Court dealt with the issue of copyrightability in an idea. In this case, the author of the play *Hum Hindusthani* sued a production company for making a movie that was

characters amongst others in order to make the remake acceptable to prevalent conditions in the Indian Society.

²¹ Kollywood is the name used for Tamil film industry.

²² See VikramdeepJohal, *Plagiarism as an Art-form* (June 25, 2012), <http://www.tribuneindia.com/1998/98nov08/sunday/bollywood.htm>.

²³ Refer S. 2(f), the Copyright Act.

²⁴ Refer S. 2(xx), the Copyright Act.

²⁵ Refer S. 2(o), the Copyright Act.

²⁶ Refer S. 2(h), the Copyright Act.

²⁷ Refer S. 2(c), the Copyright Act.

²⁸ Star India Private Limited v. Leo Burnett (India) Private Limited, 2003 (2) Bom.CR 655.

²⁹ See Hariani Krishna & Hariani Anirudh, *Analyzing "Originality" In Copyright Law: Transcending Jurisdictional Disparity*, 51 IDEA 491 (2011).

³⁰ *Id.*

³¹ See S. 13 (b) and (c), the Copyright Act.

³² [1978] 4 S.C.C. 118.

allegedly an “exact copy” of his play. However, the court held that copyright doesn’t exist in an idea but in an expression. Therefore to determine whether or not there has been a violation of copyright, one has to see if the reader, spectator or viewer, after having read or seen both the works, is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.³³ The court would look into both the quantitative and qualitative similarities before determining the violation of copyright infringement.

The above tests have guarded the interests of the Indian producers who tested scripts in lieu of negligible payments to their script-writers. The Copyright Act does not protect any theme or idea. It only gives protection to the expression of such idea or theme. In *Barbara Taylor Bradford v. Sahara TV*,³⁴ the complaint was filed against a serial called “*Karishma -The Miracle of Destiny*” which had been financed by a public limited company, ‘Sahara’. The plaintiff, Barbara Taylor, a renowned author, claimed that the said serial infringed her copyright in her authored book named “A Woman of Substance”. However, the Calcutta High Court, relying on the judgment laid down in *R.G. Anand v. Delux Films*,³⁵ held that there was no infringement of copyright as a theme is not protected under the copyright law. The theme does not sell by itself; it requires significant amount of money and then it starts selling³⁶. If the two works have the same theme, but are developed differently, then there is no copyright infringement because the second work constitutes a new work. Since the theme was adapted and developed for an Indian audience, there was no substantial and material similarity between the book and the television serial.

The industry also faces similar issues when dealing with music compositions. Originality in a musical composition consists not just of melody or harmony, but also the combination of these two, in addition to any other elements, such as rhythm or orchestration.³⁷ A copyright subsists only in original works. Thus, even using a relatively small portion of an original work is enough to constitute substantial similarity for copyright infringement actions.³⁸

A derivative work, on the other hand, is a work based upon one or more pre-existing works. It may include abridgement, musical arrangement, dramatization, translation, fictionalization, sound recording, amongst others. A work consisting

³³ [R.G. Anand v. Delux Films and Ors.](#), A.I.R. 1978 S.C. 1613.

³⁴ (2004) I.L.R. 1 Cal. 15.

³⁵ [1978] 4 S.C.C 118.

³⁶ See Timm *supra* note 17.

³⁷ *Tempo Music, Inc. v. Famous Music Corp.*, 838 F. Supp. 162, 168 (S.D.N.Y. 1993).

³⁸ See *Bridgeport Music v. UMG Recordings* 585 F.3d 267, 272 (6th Cir. 2009).

of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a derivative work.³⁹

Under the Indian Copyright Act the derivative works are referred as “adaptations”⁴⁰. The Indian music industry clearly is in an advantageous position as the Act protects the adaptation of musical works.⁴¹ Thus, if a song noticeably borrows a harmony from an earlier song it can be termed as a “derivative work”; however, it would be considered harmful by the society only when its material similarity to the original adversely affects the demand for the original.⁴² But, “to invoke copyright protection in a derivative work, variation must be substantive in nature than merely trivial.”⁴³ This interpretation of law acts as a shield to protect Bollywood which shamelessly borrows tunes from famous songs of South-Indian film industry. The absence of penalties for copycats in the music industry has encouraged them to copy existing music works. The public is mostly unaware of these acts and these infringements often go unnoticed.⁴⁴ Eminent music directors have been seen to observe these unethical practices.

For instance, when one of the rights holders of “*Naan.AvanIllai*”, sued the producers of “*Ladies v. Ricky Bahl*” in the Madras High Court, the court would first apply the lay observer test. The complainant would have to show that there is enough of a similarity between the two films that an ordinary person would recognize as a copy. Would people watching “*Ladies v. Ricky Bahl*” and “*Naan.AvanIllai*” feel that one was a copy of the other? Although there might be some plot differences and the inclusion of several song and dance numbers, “*Ladies v. Ricky Bahl*” could be unmistakably based on the latter. The plots may be largely parallel with nearly identical scenes, characters, and even dialogues.

A work “inspired” by another copyrighted work is not necessarily a copyright infringement.⁴⁵ Thus, the courts may ignore the presence of imitation and regard such work as another form of expression. As a result, such cases mostly end up in out of court settlement. Thus, efforts to litigate may not be worthwhile. However, if a similar case is submitted for arbitration, the arbitrators may judge all the equities concerned and allow the balance of such equities in administering their decisions.

Distribution rights are also similarly exploited. When the agreements for distribution rights are signed and contracted for, issues relating to the collection

³⁹ See Jishnu Guha, *Time for India's Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT'L & COMP. L. 225 (2005).

⁴⁰ Refer S. 2(a) (iv), the Indian Copyright Act of 1957.

⁴¹ S. 14(a)(vi) and (e).

⁴² Refer Hariani *supra* note 29.

⁴³ Eastern Book Company and Ors.v. D.B. Modak and Anr., A.I.R. 2008 S.C. 809.

⁴⁴ See Harini Ganesh, *The Need For Originality: Music Infringement In India*, 11 J. MARSHALL REV. INTELL. PROP. L. 170 (2011).

⁴⁵ See Tim *supra* note 17.

of total revenue and the extent of distributor's rights often come into picture. Sometimes, distributors are not given their due share in the profits and sometimes distributors stay the release of the project causing damage to the production-houses.⁴⁶ The industry consists of individuals dealing with the distribution of prints and films. The executors, producers and distributors can make a film financially successful only after collaborating with each other. The "exclusivity clause"⁴⁷ in the distribution contracts plays a crucial role in determining the rights of the film in the commercial market. Issues relating to professional marketing, distribution of materials, holding of exhibitions or fests are common, pertaining to distribution rights. In the recent judgment of *Moserbaer India Limited v. Movie Land*,⁴⁸ the Hon'ble Delhi High Court discussed the significance of possession of copyright with distributors in cinematograph films. In order to avoid long delays and maintain the flow of revenue through a project's profit in market, arbitration provides a great opportunity to settle the dispute as soon and as amicably as possible.⁴⁹ Arbitration assists the Indian filmmaker in protecting their rights in distribution processes and protects them from incurring major losses in the valuable market, if the project loses its audience.⁵⁰

In *Star India Private Limited v. Leo Burnett (India) Private Limited*,⁵¹ the Court held that "contrasting Sections 14(d) and (e) on the one hand and Sections 14(a), (b) and (c) on the other, in the latter case the owner of the copyright has exclusive right to reproduce the work in any material form. This is absent and excluded in so far as the former case (cinematograph film or sound recording)". There is an exclusive right in the former to copy the recording of a particular film or sound recording. It is only when actual copy is made of a film by a process of duplication. The expression 'to make a copy of the film' would mean to make a physical copy of the film itself and not another film which merely resembles the film⁵². The production of another film is not included under Section 14(d)(i) and such other film, even though it resembles completely the copyrighted film, does not fall within the expression 'to make a copy of the film'. Therefore, if the film has been filmed or shot separately by a person and it resembles the earlier film,

⁴⁶ Eric Ervin, *Arbitration in the Independent Film Distribution Contract: An Independent Filmmaker's Tool to Battle Large Litigation Budgets*, 3 CARDOZO ONLINE J. CONFL. RESOL. 5 (2002).

⁴⁷ JAY KENOFF, ENTERTAINMENT INDUSTRY CONTRACTS: NEGOTIATING AND DRAFTING GUIDE, 2 (Donald Farber ed., Matthew Bender & Co., Inc., 1999).

⁴⁸ IA Nos.10052/2007 and 10722/2007 in CS(OS) No. 1625/2007.

⁴⁹ Gerald F. Phillips, Survey, *The Entertainment Industry is Accepting ADR*, 21 LEGAL AFFAIRS 1 (1999).

⁵⁰ Shawn K. Judge, *Giving Credit Where Credit is Due: The Unusual Use of Arbitration in Determining Screen Writing Credits*, 13 OHIO ST. J. ON DISP. RESOL. 221, 231-232 (1997).

⁵¹ 2003 (2) Bom. CR 655.

⁵² *Id.*

the subsequent film is not a copy of the first film and, therefore, does not amount to infringement of whole of the copyright of the first film.⁵³

III. LITIGATION V. ARBITRATION

There have been numerous conflicts in the past pertaining to copying of plots, scenes, songs or ideas between Hollywood producers and Indian film makers. In October, 2010, Century Fox filed a suit for the stay of release of “*Knock Out*” as it was believed to be based on the movie “*Phone Booth*”. The division bench of the Bombay High Court reversed the stay, differentiating between “ideas” and concept of “expression of ideas”.⁵⁴ In 2009, American Studio, Twentieth Century Fox, filed Rs. 70 million suit against the Mumbai-based, B.R. Films, for copying “*My Cousin Vinny*” in “*Banda Ye Bindass Hai?*” which was settled out of court to release the film on time.⁵⁵ Warner Bros. filed a suit against the makers of “*Hari Puttar*” claiming it to be a copy of the “*Harry Potter*” franchise which it lost, though it’s a rare case for a claim to succeed. Makers of Will Smith starrer “*Hitch*” also started talking about a 30 million dollar law suit against producers of “*Partner*”.⁵⁶

Fearing million dollar suits, shutting down of projects mid-production and stay order that might prevent the movie or song release, many producers and composers have started complying with the copyright laws by buying the rights of re-producing original work. Examples include securing rights to remake Hollywood movie “*Wedding Crashers*” in “*Jodi Breakers*” by Orion Pictures in 2008, Vidhu Vinod Chopra signing a contract to adapt Chetan Bhagat’s novel into a film⁵⁷ and Karan Johar buying rights of “*The Immortals of Meluha*” for adapting it into a film.

The controversy surrounding “*3 Idiots*” for curbing due credit of its author demonstrates the current Indian situation where a copyright issue is governed by loose copyright laws, inefficient judicial system, backlogged courts and time consuming procedure. It is this picture of Indian legal system that prevents one from bringing an action against the film-makers who infringe the rights of others. If, on the other hand, the work is borrowed with a legal sanction, it can

⁵³ *Id.*

⁵⁴ Janwalkar Mayura, *Judge watches films to decide if rip-off slur valid* (July 1, 2012), http://www.dnaindia.com/mumbai/report_judge-watches-films-to-decide-if-rip-off-slur-valid_1452255.

⁵⁵ Blakely, Rhys, *Plagiarism case could stop Bollywood borrowing from Hollywood* (July 5, 2012), www.thetimes.co.uk/tto/arts/film/article1865287.ece

⁵⁶ Krishna Sonali, *Partner may face \$30 Hitch* (July 13, 2012) http://articles.economictimes.indiatimes.com/2007-08-08/news/27673674_1_hitch-indian-films-bollywood.

⁵⁷ *Upset Aamir Khan hits out at novelist Chetan Bhagat* (July 15, 2012), http://www.dnaindia.com/entertainment/report_upset-aamir-khan-hits-out-at-novelist-chetan-bhagat_1329677.

save the film-maker the loss of reputation and the monetary loss in market when a film is hit with such allegations.

Copying or borrowing ideas from other original works is nothing new and may not be a bad phenomenon if proper authorization is sanctioned from the owner. Rich Taylor, the Vice President of Public Affairs for the Motion Picture Association of America, concedes, “borrowing ideas, scripts and remaking them in different cultural contexts are a part of international cinema” but the right way to obtain the work and rights over it is through a license or an assignment.⁵⁸ An arbitration agreement in such conditions can make the task easier to a great extent.

Arbitration has certain advantages over litigation⁵⁹ that makes it the preferred mechanism for solving dispute concerning matters of copyright infringement in films or albums which puts goodwill at risk and involves high monetary stakes.

1. Mutual relationship remains intact: Since in arbitration, parties are encouraged to participate and determine the structure and process of resolution, they are more likely to work amicably towards the same rather than being hostile towards each other, as in the case of litigation. Bollywood is a market of competition. Success of the project is very crucial but if the successful project is revealed to be based on unethical practices, it would definitely taint the relationship between the owner of the original work and the Indian filmmaker who derived profit from it.⁶⁰ Arbitration tries to settle this angst of the parties and assists them in reaching an acceptable solution.
2. Cheap: Arbitration is a cheaper mechanism than litigation, not because the arbitrators charge less but because the process is quicker and less complicated than litigation proceedings, leading to the total expense being less⁶¹. When millions of dollars are already at stake and suits claiming approximately the total profit claimed by the project, arbitration, being a cheaper mechanism, helps the producers rather than litigation which can entail liability of millions of dollars on the filmmakers, if found guilty.⁶²

⁵⁸ Aseem Chhabra, *How Original is Bollywood?* (June 23, 2012), <http://www.rediff.com/entertai/2002/oct/31bolly.htm>.

⁵⁹ Julia A. Martin, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917 (1997).

⁶⁰ Like in the case of ‘3 Idiots.’

⁶¹ Anita Stork, Note, *The Use of Arbitration in Copyright Disputes: IBM v. Fujitsu*, 3 HIGH TECH. L.J. 241, 254 (1988).

⁶² Gregg A. Paradise, *Arbitration Of Patent Infringement Disputes: Encouraging The Use Of Arbitration Through Evidence Rules Reform*, 64 FORDHAM L. REV. 247 (1995).

3. Speedy: Unlike litigation, arbitration is a speedy process and does not involve tedious litigation procedures which consumes a lot of time before the dispute is finally settled. Most of the time the damage to the reputation or the project has been done already and the parties are only left with a choice of monetary compensation that can be claimed.⁶³ The choice of the author or creator to allow or disallow the person to replicate the work is no longer vested with him. Situations where an agreement is made and arbitration is chosen as a settlement mechanism, speedy justice⁶⁴ can be ensured and the creator can claim royalty for the infringement done. He may also stay the release of the infringed product into the market. The arbitrator has the power to issue interim orders which may give parties temporary relief.
4. Flexible: The process of arbitration is flexible and the parties can choose the manner, law, procedure, time, date and the arbitrator itself. Choosing an experienced veteran from the field as an arbitrator can assist the filmmakers in proving their point and understanding the issue of copying work⁶⁵. Unlike litigation, which works according to calendar dates, rigid judges, complicated laws, legal formalities and documentations, arbitration is a smooth process which can be worked out according to the convenience and consent of the parties.⁶⁶
5. Confidential: Confidentiality clause is one of the most important features of arbitration process. When a project's profit depends majorly on market reputation and credibility of the producer and any harm or allegation on the project can sham the gross profit at box-office, no film-maker would want bad publicity for its product slated for release. In such situations, if a dispute arises, arbitration maintains the privacy of its parties along with settling the matter. It does not tamper with the public position of the parties either by revealing the dispute or by divulging private information.⁶⁷
6. Quality of Judgement: The quality and fairness of court judgments can be questioned on the basis of bias or unreasonableness.⁶⁸ Due to involvement of numerous technicalities in these complex copyright matters, the judgments are often unpredictable because the judges lack

⁶³ Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'LARB. 267 (1996).

⁶⁴ Tom Arnold, *Suggested Form of Contract to Arbitrate a Patent or Other Commercial Dispute*, 2 [TEX.INTELL. PROP. L.J.](#) 205, 208 (1994).

⁶⁵ Kerr J., *International Arbitration v. Litigation*, J. Bus. L. 164 (1980).

⁶⁶ DAVID W. PLANT, ALTERNATIVE DISPUTE RESOLUTION IN PATENT LITIGATION 197, 255 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. 258 (1988) (1988).

⁶⁷ Bryan Niblett, *Intellectual Property Disputes: Arbitrating the Creative*, DISP. RESOL. J. 65 (1995)

⁶⁸ *supra* note 62.

requisite technical experience in the field. In such cases, adjudication by arbitral tribunals can ensure the higher quality of award because the arbitrator can be of the same specialized field with the knowledge of the relevant laws, language, conditions and technology involved.

7. Neutrality: An issue involving copyright can take a graver form due to rapid increase and exploitation of the global technological advancement. Copyrights can be exploited from various locations simultaneously and the suit can be favouring one party over the other. In such situations, arbitration provides a neutral mechanism⁶⁹ for solving of the dispute where both the parties are familiar and the institution is not biased towards one party.

As such, arbitration and litigation are substitutes for each other⁷⁰ but arbitration allows parties to avoid the costliness and delays of litigation. It is a convenient way to amicably solve commercial disputes. The parties are free to choose an arbitrator of their own choice. They can also select the number of arbitrators, the venue for arbitration and the rules of arbitration. However, it has been observed that the arbitrators often overstep their authority. In a U.K. case, the arbitrator exceeded his jurisdiction and penalized a third party (who was not a signatory to the license agreement) after relying on an oral testimony.⁷¹ Thus, a producer who is not experienced in ADR should preferably use the services of an arbitration institution.⁷² For instance, the arbitration proceedings against the Yash Raj Films were quashed by the Bombay High Court⁷³ when the plaintiffs (who provided software solutions for the film “*Tashan*”) filed for both litigation and arbitration. Filmmakers should emphasis on formulating uniform rules of arbitration, specific to the film industry.

In *Tandav Films Entertainment P. Ltd. v. Four Frames Pictures and Ors.*,⁷⁴ an exclusive license agreement was entered into between the parties. The scripts of certain songs and the writer's rights for the film ‘*Khosala ka Ghosla*’ were exclusively licensed to Tandav Films. Thereafter, Tandav Films signed several license agreements for the underlying works including dialogues, screenplay, music etc. All rights excluding the music rights were further licensed to UTV Software by Tandav Films for a period of fifteen years. The agreement contained an

⁶⁹ ALAIN PLANTEY, INTERNATIONAL ARBITRATION IN A CHANGING WORLD, IN *International Commercial Arbitration, International Arbitration in a Changing World* 67, 70 (Albert Jan van den Berg ed., 1993)

⁷⁰ 25 OHIO ST. J. DISP. RESOL. 433.

⁷¹ *Jonesfilm v. Lions Gate Films, et al.*, IFTA Arbitration No. 03-08 referred in *Judicial Review of Arbitration Awards After Cable Connection: Towards a Due Process Model* 17 UCLA Ent. L. Rev. 1

⁷² *supra* note 46.

⁷³ *Onyx Musicabsolute.com Pvt. Ltd. and Ors. v. Yash Raj Films Pvt. Ltd. and Ors., Onyx Mobile Pvt. Ltd. and Virtual Marketing India P. Ltd.*, 2008 (5) ALL MR 26

⁷⁴ 2009 (41) P.T.C. 515(Del.)

arbitration clause. Consequently, UTV Software assigned the musical rights of the film to Big Music, for a Tamil film. The plaintiff contended copyright infringement and argued that since the dispute (over music rights) was unrelated to the agreement signed by the parties, they would not be governed by arbitration. However, the court held that the parties must appoint arbitrators to settle the dispute in question.

The above decision can be attributed to the popular conception that where ever two contradictory constructions are possible, construction that gives effect to the arbitration agreement should be preferred.⁷⁵

In *Nasir Husain Films Pvt. Ltd. v. Saregama India Pvt. Ltd. and Anr.*, the petitioner was a well-renowned producer of Hindi cinematograph films and film songs.⁷⁶ The petitioner owned all copyrights in certain films, film songs and sound recordings.⁷⁷ An assignment deed was signed between the petitioner and the respondent for assignment and exploitation of the works in question.

The petitioner's songs, music, lyrics and sound recordings were being circulated by the respondent through various modes, including ring tones, though they were not authorized to do so under any previous agreements. The petitioner alleged that such unauthorized exploitation not only amounted to breach of the terms of the previous agreements but also was in violation of the petitioner's copyrights in the songs and the music. The petitioners claimed all outstanding amount or royalties under the previous agreement and demanded further to cease and desist from making use of the petitioner's works/songs/music/lyrics, *inter alia*, through or by way of ringtones downloadings thereof. The court observed that "the settlement of draft itself cannot be treated as valid and binding agreement".⁷⁸ Unless accepted in writing or communicated, the draft of agreement cannot be treated as final and agreed agreement of arbitration.

IV. HOW TO DRAFT AN EFFECTIVE ARBITRATION CLAUSE?

The arbitration clause in a contract is separate from the other clauses in the contract. Courts have held that repudiation of the contract, *ipso facto*, does not put an end to the arbitration clause contained therein.⁷⁹ Therefore, drafting an arbitration agreement which clearly reflects the intention of the parties is considered a herculean task. Since an arbitration clause is an agreement in itself, the contract survives even when all the further performances undertaken by the

⁷⁵ Oil & Natural Gas Commission v. Sohanlal Sharma I.L.R. 1969 (2) Cal. 392.

⁷⁶ (2010) 2 Comp. L.J. 412 (Bom.).

⁷⁷ *Id.*

⁷⁸ (2010) 2 Comp. L.J. 412 (Bom.).

⁷⁹ Damodar Valley Corporation v. K.K. Kar, A.I.R. 1974 S.C. 158.

parties have ceased. The arbitration agreement is often regarded as a collateral and ancillary contract in relation to the main contract, of which it forms a part.

The arbitration clause should reveal the intention of the parties to arbitrate. The use of permissive language allows the parties with an option to choose arbitration. The Ontario Court of Appeal held that a clause which provided that the parties may refer any dispute to arbitration was a binding arbitration agreement.⁸⁰ However, in India, the Supreme Court took a different position, observing that an agreement which states that the parties may go to suit or to arbitration, does not amount to arbitration agreement.⁸¹ Therefore, a contract signed between a foreign production house and an Indian film maker must clearly state that the parties have agreed to arbitration in case of any disputes.

While interpreting the correspondence between the parties, the court has to examine whether there was an agreement to arbitrate and whether there was meeting of the mind between the parties which could spell out a binding contract between them, but the court is not empowered to create a contract by going outside the language.⁸² It is suggested that the parties must clearly mention the venue and rules of arbitration to be followed in case of any possible disputes. The parties being free to appoint their own arbitrators, can appoint arbitrators from the entertainment industry, thereby, giving them the advantage to effectively deal with technical issues involved in the disputes.

The film makers must be aware of the basic concepts of arbitration in India. "A license in respect of any copyright has to be in writing and the document should reflect the intention to grant the license or assign the particular copyright".⁸³ A mere understanding that the dispute would be referred to the arbitrator does not suffice to be an arbitration agreement if the agreement is not in writing.⁸⁴ The agreement must be written to ensure predictability and accountability.

The courts have generally held that an arbitration agreement must be in writing⁸⁵ but need not be signed.⁸⁶ But the Maharashtra High Court⁸⁷ took a contrary view, stating that the arbitration agreement in writing must be signed by both the

⁸⁰ Canadian National Railway Co. v. Lovat Tunnel Equipment Inc., 3 Int ALR N-5 (2000), 174 DLR (4th) 385 (Ontario Court of Appeal, 8th July 1999)

⁸¹ Wellington Associated Ltd. v. Kirit Mehta, A.I.R. 2000 S.C. 1379.

⁸² M/s. Rickmers Verwaltung GMB H v. A.P. Industrial Infrastructure Corporation Ltd. A.I.R. 1998 S.C.W. 3672.

⁸³ PVR Pictures Ltd. Vs. Studio 18 2009(41)P.T.C.70(Del.)

⁸⁴ Jayant N. Sheth, Proprietor Struet Mast Engineers v. Gnaneshwar Apartment Co-op. Housing Society Ltd, 1999 (2) Arb. L.R. 115 (Bom.).

⁸⁵ Section 7(3) of the Arbitration and Conciliation Act, 1996 requires that the arbitration agreement shall be in writing. An oral agreement of arbitration is not legally recognized.

⁸⁶ Satish Chandra v. State of UP, A.I.R. 1983 S.C. 347.

⁸⁷ Pramod Chimanbhai Patel v. [Lalit Constructions and Anr.](#), 2002(6) Bom. CR 72.

parties to have a binding force. Preferably such agreements must be signed by the parties to avoid any ambiguity.

The arbitration clause may be incorporated either in the main contract or in a separate agreement.⁸⁸ The conduct of the parties is vital in determining the nature of the arbitration agreement. A bill containing arbitration clause, even though not signed by either party, binds the parties for arbitration.⁸⁹ Even the acceptance of invoices containing an arbitration clause and making payments thereunder constitutes an arbitration agreement.⁹⁰ Similarly, exchange of letters, emails and tele-fax can also constitute a valid arbitration agreement. It is not necessary that the terms of the agreement must find place in one document only. The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.⁹¹ They may also be ascertained from the correspondence consisting of a number of letters.⁹² The intention of the parties in such cases is to be gathered only from the “expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone, can it be said that a binding contract was capable of being spelt out from the correspondence”.⁹³ Such specific arbitration provisions should be included in all contracts of the film industries including employment agreements (between filmmakers and artists), license agreements and distributorship agreements.

It is noteworthy that such transactions often require the parties to enter into multiple contracts but it is well-settled law that “the arbitration clause in the original contract would not cover the dispute arising from fresh or subsidiary contract.”⁹⁴ The parties must formulate separate arbitration clauses for each fresh contract. They can also opt for arbitration by inserting reference clauses in the contract.

Ideally, clear words should be incorporated to demonstrate the intention of the parties in a contract.⁹⁵ However, if any kind of ambiguity arises in the arbitration clause, it should be addressed by expert determination. In such cases, efficacy must be given to the contract rather than to invalidate it.⁹⁶ It is not necessary that

⁸⁸ Bihar State Mineral Development Corpn. v. Encon Builders (P) Ltd, (2003) 7 S.C.C 418.

⁸⁹ M/s. Oriental Fire and General Insurance Co. Ltd v. M/s. New Suraj Transport Co. (P) Ltd, A.I.R. 1985 All 136.

⁹⁰ Asia Soft (India) Pvt. Ltd v. Globesyn Technologies Ltd, 2005 (2) RAJ 163 (Del.).

⁹¹ Section 7(2) of the Arbitration Act, 1996.

⁹² Union of India v. A.L. Rallia Ram, A.I.R. 1963 S.C. 1685 (1690).

⁹³ Dresser Rand S.A. v. [Bindal Agro Chem Ltd.](#), A.I.R.2006 S.C. 871.

⁹⁴ M/s. Umrao Singh and Co. v. State of Madhya Pradesh, A.I.R. 1976 M.P. 126.

⁹⁵ J.K. Jain v. Delhi Development Authority, A.I.R. 1996 S.C. 318.

⁹⁶ Union of India v. M/s. D.N. Revri& Co., A.I.R. 1976 S.C. 2257.

the clause uses the term 'arbitration' or expressly states that the decision rendered should be final and binding.⁹⁷ The intention of the parties⁹⁸ and the essence of the clause should be made apparent by the words used in the agreements. Incorporation of such clauses in the license agreements by the filmmakers would be significant in protecting the interests of the investors.

V. CONCLUSION

Until recently, arbitration was only confined to traditional industries. As discussed above, by resorting to arbitration, the filmmakers can avoid unnecessary delay and costs to settle a dispute. Unlike litigation, arbitral proceedings can be scheduled as per the convenience of both the parties. The parties can discontinue fulfilling their obligation under the contract after the initiation of the arbitral proceedings. In order to avoid exercise of excessive jurisdiction by the arbitrator, the parties should incorporate rules of arbitration in the original contract. It is suggested that parties should choose arbitrators within the film industry who possess requisite technical knowledge in the field. Since confidentiality and privacy are guaranteed in the arbitral proceedings, the filmmakers can protect their goodwill and market reputation, thus, saving millions of rupees that is at stake.

Since the Hollywood producers are now investing in Indian cinema, there is a possibility that numerous copyright law suits would be filed in future. To avoid such circumstances Indian filmmakers have started purchasing the film and music rights in foreign films. Since the stakes are high in such ventures, it is advised that the parties include the arbitration clause in such contracts. Such clauses can also be incorporated in employment⁹⁹ and distribution contracts. These clauses are vital in securing the interest of the investors. Such an arbitration agreement should only cover subject matters which the parties can settle in a private settlement agreement.¹⁰⁰ They should not defeat the laws currently prevailing in the country. The Indian Copyright Act hardly provides any protection to the original author of the cinematographic film, but with the help of a well-drafted arbitration agreement, the original author can easily secure his commercial interests. For example, the parties may by mutual agreement decide not to change the original name of the movie. Such a stipulation would have a binding effect in law. Thus, the parties can formulate their own contractual laws without crossing the boundaries of copyright law in India.

⁹⁷ Sushila Seth v. State of MP, A.I.R. 1980 Del. hi 244.

⁹⁸ New India Erectors v. ONGC, 1997 A.I.R. S.C.W 941.

⁹⁹ There are various copyright issues which can arise between a film-maker and his employees (music-director, composers, script-writers, etc.).

¹⁰⁰ William Grantham, *The Arbitrability of International Intellectual Property Disputes*, 14 BERKELEY J. INT'L L. 173 (1996).