# SCRIPTWRITERS' COPYRIGHT CONUNDRUM: AN ANALYSIS

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**Abstract**

The objective of this article is twofold, the first being to determine whether a script is a literary or dramatic work and second, whether the author of a script, the scriptwriter, may exercise the right under proviso (3) to s.18 r/w s. 19(9) of the copyright act, 1957 as amended in 2012 which guarantees authors contributing to the making of a film an unwaivable and inalienable right to receive equal share of royalty. It is demonstrated in the first part that a script being a work of action is to be regarded as a dramatic work under copyright law. That being the premise, it is elaborated in the second part that since the right to royalty provision introduced in the act is applicable only to authors of literary and musical works, scriptwriters would not be able to avail the benefit of these sections being authors of a dramatic work. It is concluded that despite a script being the backbone of a film, it is unfair to confine the benefits of the provision exclusively to authors of literary and musical works whilst excluding scriptwriters. Accordingly, it is proposed that the law requires a reconsideration, such that the words 'literary and musical works' are deleted from proviso (3) to s. 18 of the act and its benefits stand extended in equal measure to all authors contributing to a film, specifically to the scriptwriters.

***Keywords:*** *Scriptwriter, film, copyright, dramatic work, royalty*



## I. Introductory

IN CONTRAST to the Berne convention's notion of the copyright subject matter, which adopts an all-encompassing terminology of 'literary and artistic works',[1] the Indian copyright act, 1957 (hereinafter 'the act'), in perhaps keeping with the United Kingdom (hereinafter 'UK')

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[1] Berne Convention for the Protection of Literary and Artistic Works (as amended on Sept. 28, 1979), art. 2.

traditions,[2] delineates a list of subject matters in which copyright subsists, namely, original literary, dramatic, musical, artistic works as well as in cinematograph film and sound recording works. Within each category are wide arrays of works, each possessing standard features or properties which are typical to that subject matter. For instance, irrespective of a subject work's literary merit, any written or printed matter which originates from an author, such as a couplet, catalogue, compilation, computer code or commentary *etc.* are all characterized as a literary work. It is based on the subject matter that copyright law attaches rights to the author of a copyrighted work, prescribes the duration of protection for such work and also provides enforceable remedies for wrongful appropriation.

On the issue of scripts, more particularly in the film context, the subject is clouded with confusion even on a question as fundamental as whether scripts are to be considered as a literary or dramatic work under the Indian copyright law regime. Although copyright in a dramatic work, as far as the concepts of economic rights of an author and term of protection are concerned, is no different from a copyright in any literary production, yet an infringement of one right is certainly not akin to infringement of the other. Notably, an author of a dramatic work is not entitled to claim the special right to royalty available in proviso (3) to s. 18 r/w s. 19(9) of the act, which is otherwise guaranteed to an author of a literary (and musical) work used in a film. Presently therefore, it is essential to identify the boundaries within which the script of a film falls to ascertain whether its authors (scriptwriters) are entitled to claim the benefit under the said sections which ensures a right to acquire sustainable remuneration, and if it does not, to determine whether the law requires reconsideration by policy makers. Accordingly, this paper explores in part II whether a script is a literary or dramatic work and in part III analyses if an author's special right to royalty introduced *via* proviso (3) to s. 18 r/w s. 19(9) of the act apply to scriptwriters *i.e.* authors of a script. Based on this analysis, a conclusion is arrived at in part IV. Before proceeding further, it needs to be clarified that since the focus of this article is only the above two aspects, the other inadequacies of s. 18 or s. 19 of the act will not be discussed.

## II. Script: a literary or a dramatic work?

For the most part, english dictionaries describe the script of a film as the written text for a movie containing instructions on exactly how to film the movie, how to enact a particular scene,

[2] Pamela Samuelson, "Evolving Conceptions of Copyright Subject Matter" 78 *U. Pitt. L. Rev.* 21-22 (2016).

the dialogues that are to be spoken by the actors *etc*.[3] Such expressions perpetuate an impression that because a script is in the form of written text, it is to be categorised as a literary work. It is probably this very belief which compelled the screenwriters association of India to designate their category of work as "literary works such as the story, script, screenplay, dialogues or any other literary works excluding lyrics" while applying to register themselves as a copyright society.[4] With respect, even courts have proceeded on the premise that a script or screenplay is a literary work.[5] However, in contrast to a novel or a poem which are archetypical examples of a literary work in copyright law, a script is the blueprint or the basic code of a film specifically crafted with the intention of being enacted by a group of performers. A conventional script embodies several unique elements within itself, such as a scene heading, the name of the character and the dialogue to be delivered, the action that needs to be performed when rendering such dialogues or otherwise, descriptions of the emotion *etc*., all knitted together and to be performed meticulously as scripted. In this context, of particular significance is the 2018 practise and procedure manual on literary works released by the copyright office of India[6] which categorizes literary and dramatic works on the premise that "a literary work allows itself to be read while a dramatic work forms the text upon which the performance of the plays rests."[7] Legal commentators also concur with the view that, the essence of the distinction between a literary work and dramatic work lies in the fact that while the former is a work to be read or recited, the latter is to be performed by acting or dancing.[8] Adherence to this approach would imply that, because a script is the text upon which the entire performance/enactment takes place, and it is not conceived to be merely read out or recited, a script ought to be considered a dramatic work and not a literary work. Even an examination of overseas

[3] *See for instance* Lexico Dictionary by Oxford University Press *available at*: https://www.lexico.com/definition/film_script (last visited on Jan. 24, 2021); Cambridge Dictionary *available at*: https://dictionary.cambridge.org/dictionary/english/screenplay (last visited on Jan. 24, 2021); Oxford Learner's Dictionaries *available at*: https://www.oxfordlearnersdictionaries.com/definition/american_english/screenplay (last visited on Jan. 24, 2021). Although technically a screenplay may be different from a script and a more appropriate terminology, in common parlance they are used interchangeably. For the purpose of this article as well, script and screenplay are referred to in the same sense.

[4] Public Notice dated Aug. 24, 2017, Copyright Office, *available at*: https://copyright.gov.in/Documents/notice.pdf (last visited on Jan. 24, 2021). But see, Public Notice dated Nov. 27, 2020, Copyright Office, *available at*: https://copyright.gov.in/Documents/PublicNotice46.pdf (last visited on Jan. 24, 2021 whereby the Screenwriters Association of India filed a subsequent application seeking registration in both literary and dramatic work category.

[5] *See references in Thiagarajan Kumararaja* v *M/s Capital Film Works (India) Pvt. Ltd. & Anr.,* 2018 (73) PTC 365; *Salim Khan* v *Sumeet Prakash Mehra*, NMSL 768 of 2013.

[6] Work Manuals, Copyright Office, *available at*: https://copyright.gov.in/Documents/Manuals/LITERARY_MANUAL.pdf (last visited on Jan. 24, 2021).

[7] Referring to *Academy of General Education, Manipal* v *B. Malini Mallya*, AIR 2009 SC 1982.

[8] Gerald Dworkin and Richard D. Taylor, *Blackstone's Guide to the Copyright, Designs & Patent Act 1988* 24 (Oxford University Press, Reprinted 2002).

legislations, judicial decisions and commentaries brings to the fore a weight of authorities which are in favour of labelling a script as a dramatic work, and some commentators even go to the extent of declaring it as the most obvious example of a dramatic work.[9]

*Pre-requisites of a dramatic work:* Ever since the enactment of the first post-independence copyright statute of India in 1957, the definition of dramatic work has endured unamended and reads as "includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film."[10] Notably, unlike the Australian copyright act, 1968[11] or the New Zealand copyright act, 1994[12] both of which explicitly incorporate the term 'scenario or script for a film' within their respective definitions of dramatic work, the Indian act does not include any such categoric recital. Nonetheless, this does not echo the position that a script cannot be considered as a dramatic work at all, given the very inclusive nature of the definition clause itself. It may be considered at best as representing only an illustrative and not exhaustive list of works which can qualify as dramatic works. This perspective becomes even more apparent from the fact that despite plays happening to be the most common type of dramatic work, they still fail to merit a mention in the definition clause. Nevertheless, given the extent of uncertainty which prevails on the issue, it is necessary to take into account the pre-requisites or properties which any work ought to contain so as to be classified as a dramatic subject matter under copyright law, and accordingly determine whether a script possesses those characteristics.

Since Indian commentaries and case laws discussing this theme are quite sparse, the jurisprudence which has developed in other countries, especially the UK, offers a useful point of reference. The essence of dramatic work, as has been largely emphasized by courts and scholars is the 'performative nature of the work' which requires that the work should be capable of being performed before viewers. In other words, dramatic works are "works created in order

[9] Paul Torremans, *Holyoak & Torremans Intellectual Property Law* 214 (Oxford University Press, 7th edn., 2013) (hereinafter 'Torremans'); Pascal Kamina, *Film Copyright in the European Union* 67 (Cambridge University Press, 1st edn., 2002) (hereinafter 'Kamina').

[10] S. 2(h). Definition clause is extracted from the bare act published by Professional publishers. However, there is a slight difference in the bare act published by Universal publishers as there is a 'comma' after the word 'acting'. *See* Shreya Aren, "The Drama in the Definition of Dramatic Works", *SpicyIP*, Aug. 06, 2010 *available at*: https://spicyip.com/2010/08/guest-post-drama-in-definition-of.html (last visited on Jan. 24, 2021). This difference is visible even in the act published on the WIPO website and the Indian copyright office. However, the act published in the Gazette does not have a comma after the word acting, *available at*: https://copyright.gov.in/Documents/Notification/Copyright_Act_1957.pdf (last visited on Jan. 24, 2021).

[11] Part II – Interpretation, s. 10.

[12] Interpretation, s. 2.

to be communicated in motion".[13] The oft-quoted natural or ordinary meaning which is attributed to a dramatic work is of it being a "work of action, with or without words or music, capable of being performed before an audience."[14] The significance of such a meaning being that, if the work requires some 'movement or action as opposed to being purely static' then, it is to be characterized as a dramatic work.[15] The emphasis here is placed on the element of action, and therefore, a dramatic work need not necessarily include words or music and may simply be a demonstration of a story through sequence of actions or gesticulation.[16] However, Paul Torremans does offer a clarification by noting that the copyright in a dramatic work will only comprise such works as can be printed and published and does not cover the interpretation given to it by the performer.[17]

The other pre-requisite, as determined by courts and scholars in order to be considered a dramatic work is 'fixation and predictability in the performance'. A dramatic work has to be embodied in some material form, affixed in writing or otherwise.[18] It is the "choice of dramatic incident and the arrangement of the situation and plot"[19] that distinguishes a dramatic work from non-dramatic literary works like poetry or prose. It should be also set in the order of performance and must possess attributes such as 'sufficient certainty' or 'unity to be capable of performance'[20] which requires that actors exhibit or perform the work in the very sequence or order in which the work is expressed. Having maintained this disposition, courts have often denied such protection to games and sporting events on account of their inherently

[13] Pascal Kamina, "Authorship of Films and Implementation of the Term Directive: The Dramatic Tale of Two Copyrights" 8 *European Intellectual Property Review* 320 (1994); Hugh Laddie, Peter Prescott, *et.al.*, *The Modern Law of Copyright* para. 2.44 (Butterworths, 2nd edn., 1995) referred to in footnote no. 41 in Kamina, *supra* note 9 at 68-69: "dramatic work requires acting or dancing for its proper representation".

[14] *Norowzian* v *Arks Ltd (No. 2)*, [2000] FSR 363.

[15] *Creations Records* v *News group Newspapers*, [1997] EMLR 444. The set, costumes *etc*. on the other hand are protected as an artistic work, *see Shelley Films Ltd.* v *Rex Features*, [1994] EMLR 134.

[16] Torremans, *supra* note 9 at 215.

[17] *Id.* at 216 referring to *Tate* v *Fullbrook*, [1908] 1 KB 821.

[18] *See generally Brighton* v *Jones*, [2004] EWHC 1157; Hector Macqueen, Charlotte Waelde, *et. al*., *Contemporary Intellectual Property Law and Policy* 67 (Oxford University Press, 2007); Brian L. Frye, "Copyright in Pantomime" 34 *Cardozo Arts & Entertainment Law Journal* 316-317 (2016) (hereinafter 'Frye'); Stephen Rebikoff, "Restructuring the Test for Copyright Infringement in Relation to Literary and Dramatic Plots" 25 *Melbourne University Law Review* 346 (2001); *Wilson* v *Broadcasting Corp of New Zealand,* [1990] 2 NZLR 565.

[19] Kevin Garnett, Gillian Davies *et. al.*, *Copinger and Skone James on Copyright* 7-63 (Sweet & Maxwell, South Asian edition, 2012) (hereinafter 'Garnett, Davies *et.al*.,'); *see generally Hutton* v *Canadian Broadcasting Corp*. (1989) 29 C.P.R (3d) 398 (Alta. Q.B.); *Seltzer* v *Sunbrock*, 22 F Supp 621 (SD Cal. 1938).

[20] *Hugh Hughes Green* v *Broadcasting Corporation of New Zealand*, [1989] RPC 700; *see also* Viola Elam, "Sporting Events as Dramatic Works in the UK Copyright System" 13 *Entertainment and Sports Law Journal* para 28 (2015) (hereinafter 'Elam'); Garnett, Davies *et.al*., *supra* note 19 at 3-43: "Features or elements should be sufficiently linked or connected so as to be capable of performance"; *see generally O'Neill* v *General Film Co*., 171 App. Div. 854, 157 N.Y.S 1028: "to constitute a dramatic composition a work must tell a connected story or series of events."

indeterminate and unpredictable nature.[21] Another similar methodology devised to ascertain the defining points of a dramatic work is by examining whether "using the written script or other record as a basis, is it possible to present a coherent and meaningful show which is capable of being performed."[22] The originality in any work is evaluated by reviewing the arrangement or acting form or the combination of incidents symbolized by the author, as these are the elements reflective of author's expressive and creative choices.[23]

In fact, few of the aforementioned pre-requisites of a dramatic work have also been considered by the hon'ble Delhi high court in the matter of *Institute for Inner Studies* v. *Charlotte Anderson*[24] whilst addressing the question whether an asana of pranic healing could be considered a dramatic work. The court proceeded to rely on a leading UK commentary on copyright law, and consequently summarized that a work may be treated as a dramatic work only if it is 'capable of being physically performed or is accompanied by action'. The court observed that another essential prerequisite for any work to be categorized as a dramatic work is the need for the work to be 'fixed in the form of writing or otherwise', such that there is in place a 'certainty of incidents as a predetermined plan'. This fixation requirement has been interpreted in an earlier case of *Fortune films international* v. *Dev Anand*[25] as a requirement which must be met prior to the acting or scenic arrangement so as to qualify to be a dramatic work. Besides the afore-mentioned requirements, the UK commentary cited in the case of *Charlotte Anderson* further adverts to a third essential element, that the work should have been created with the "purpose of being performed, such purpose being a matter to be deduced from the form and nature of the work." Although this decision does not directly address the subject-matter of screenplay, the commentary which bore considerable influence upon the ld. judge accepts screenplay as a dramatic work.[26]

In a nutshell, a dramatic work should possess the ability to be performed, must be created with the purpose of being performed and it should also be affixed in a construct, which is written or

[21] *See for instance Nova Productions Ltd* v *Mazooma Games Ltd*., [2007] ECWA Civ 219 and *FWS Joint Sports Claimants* v *Canada (the Copyright Board)*, [1991] 22 IPR 429.
[22] Gillian Davies, Nicholas Caddick *et. al.*, *Copinger and Skone James on Copyright* para 3-93 (Sweet & Maxwell Ltd., 17th edn., 2016) referred to in *Banner Universal Motion Pictures ltd* v *Endemol Shine Group Ltd & Anr.*, [2017] EWHC 2600 (Ch).; *see also in* Garnett, Davies *et.al*., *supra* note 19 at 3-44.
[23] *Canadian Admiral Corporation Ltd* v *Reddifusion Inc*, (1954) 20 CPR 75.
[24] CS(OS) 2252/2011; 2014 (57) PTC 228.
[25] AIR 1979 Bom 17. Also, in the opinion of the court, the word 'otherwise' found in the definition clause refers to modern means of recording.
[26] *See discussion on* 'Elements or Features of a Dramatic Work' in *supra* note 24 at p. no. 118.

otherwise (like movement notations, drawings *etc*.),[27] so as to facilitate a synchronization which ensures 'what is performed is as what was planned'.[28] Adhering to the above mentioned pre-requisites, given that a script for a film is a work of action created with the objective of being enacted by performers, and it is customarily fixed in written form which in detail narrates the character - his actions, emotions and dialogues and arrangement of the scenes with certainty and in the order of performance, it undeniably possesses the attributes of a dramatic form and should fall within the rubric of a dramatic work. This perspective of a script being a dramatic work is also endorsed in the United States' compendium on the works of performing arts which describe a dramatic work in terms analogous to those described above. More specifically, a dramatic work is defined as a composition that portrays a story intended to be performed for an audience and which represents the action as it occurs.[29] The compendium itself in unmistakeable terms categorises a screenplay (script for making a motion picture) as having the status of a dramatic work in the company of stage plays, tele plays *etc*.[30] The Australian copyright statute too depicts a dramatic work as any work intended to be performed dramatically and very clearly classifies screenplays, scripts, scenario of a film as dramatic works while simultaneously clarifying that a film will not be considered as a dramatic work.[31] In a fairly recent decision rendered by the court of appeal in *Martin* v. *Kogan*[32] it was concluded that the lower court had erred in labelling a screenplay as a literary work and that a more accurate description is rendered by the term dramatic work, "as its primary purpose lies in being performed, as opposed to being read, like a novel."

*Exclusion of cinematograph film from the definition of dramatic work:* The sole exception which is explicitly carved out in the closing words of the definition of dramatic work is 'cinematograph film'. It may not be entirely out of place to make out a case that this exclusion is because the act recognises cinematograph film as an independent subject matter and the legislature in its wisdom sought to treat a film in its totality, separately and distinctly from the underlying script. A historical perspective on the development of Indian copyright law, as being centred on the UK copyright legislation, may perhaps afford greater credibility to this assertion. The UK parliament, in the Imperial copyright act, 1911 (hereinafter the '1911 act') regarded

[27] *See generally* Frye, *supra* note 18.
[28] Elam, *supra* note 20 at para 11.
[29]Compendium: Chapter 800, U.S. Copyright Office *available at*: https://www.copyright.gov/comp3/chap800/ch800-performing-arts.pdf (last visited on Jan. 24, 2021).
[30] *Id*. 804.4(C) at 55.
[31] *Supra* note 11; *see also* Dramatic Works, The University of Melbourne, *available at*: https://copyright.unimelb.edu.au/information/what-is-copyright/dramatic-works (last visited on Jan. 24, 2021).
[32] [2019] EWCA Civ 1645.

film as a dramatic work;[33] however, subsequently, in the copyright act of 1956, they expressly excluded it from the definition of a dramatic work, though the act clarified that a scenario or script for a film endures within the domain of dramatic work.[34] The legal literature[35] on this subject apprises that, the 1911 act, which is the first British copyright statute that extended protection to a cinematograph film based on the 1908 Berlin revision to the Berne convention, considered cinematograph production as a species of dramatic work.[36] This was because the 1911 act, at that point in time, acknowledged only original literary, dramatic, musical and artistic works as subject matters of copyright law and cinematograph films were not treated as a distinct subject matter having its own specificity. Such an interpretation of the 1911 act is seen to be discussed in an Australian[37] and Canadian court decision.[38] Interestingly, both these decisions made references to the following excerpt from the 8th edition of Copinger and Skone James on copyright which reads as:[39]

> *Turning now to the protection which is accorded to the film itself, we do not find the act (the 1911 UK act) to be very clear upon the point. The difficulty arises from the fact that the film may be regarded from two points of view: it consists of a series of photographs, and from this point of view it is an artistic work (Pathe Freres v. Bancroft (1993) Macg Cap Cas 403); but where scenes are arranged for the purpose of being filmed there may be copyright in these arrangements as a dramatic work, for dramatic work is defined (s. 35 of the 1911 UK act) as including 'any cinematograph production where the arrangement or acting form, or the combination of incidents represented give the work an original character.*

[33] S. 35(1), "Dramatic work includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form which is fixed in writing or otherwise, *and* any cinematographic production where the arrangement or acting form or the combination of incidents represented give the work an original character."
[34] S. 48(1), "Dramatic work includes a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented, *but does not* include a cinematograph film, as distinct from a scenario or script for a cinematograph film."
[35] Anne Baron, "The Legal Properties of Film" 67(2) *Modern Law Review* 193-203 (2004) (hereinafter 'Baron'); Kamina, *supra* note 9 at 22- 26.
[36] Or as an artistic work when a sequence of photographs.
[37] *Australian Olympic Committee Inc* v *The Big Fights Inc*, [1999] FCA 1042.
[38] *Supra* note 23.
[39] *Supra* note 37 at 12-13.

The Australian court further referred to the following passage from Laddie, Prescott and Vitoria, which in a noteworthy development, corrected its earlier version on the issue and stated:[40]

> *On further reflection we perceive weighty arguments to the contrary… It is therefore suggested that the function of the concluding words (of the definition of a dramatic work) was to specify what sorts of material, present in a film, would count as relevant for dramatic copyright purposes. The mere shooting of a real life scene eg. a street procession, would not. The originality would have to reside in the arrangement, acting form or combination of incidents represented, these being the original contribution of the author. He might also get a copyright merely by capturing living images, but this would have to be photographic and not dramatic copyright.*

This perspective has also been endorsed by Sam Ricketson, a leading authority on the Berne Convention who in his interpretation of article 14(2) of the Berne Convention has stated as under, which is also extracted in the Australian case:[41]

> *It seems clear from the wording of this paragraph that protectable 'cinematographic productions' were regarded simply as another species of dramatic work, and little, if any account was to be taken of the technical skills required to make them .....*

However, this standpoint took a different direction in the Gregory committee report of 1952 which deliberated upon variations to be made to the UK copyright act owing to technical advancements and in furtherance to the 1948 Brussels revision to the Berne convention. It was consequentially proposed by the committee that a film is a complete and independent subject matter which deserves standalone protection. These recommendations in the Gregory committee report led to the UK copyright act being amended in 1956 which thereafter prompted a major transformation towards the perception of films within the copyright paradigm in the UK. The two-fold makeover which touched upon the concept was, it introduced a cinematograph film as an independent subject matter of copyright law and simultaneously excluded it from the definition of dramatic work. The clear distinction was that

[40] *Id*. at 15.
[41] *Id*. at 15-16.

copyright in films was to be looked at singularly and that it was distinct from the prevailing copyright subject matters as the act did not insist on films having to satisfy the requirement of originality.[42]

It becomes fairly clear at this point that whilst the 1911 act was in force, a cinematograph film came within the sphere of a dramatic work in the UK and since an analogous definition was adopted in the Indian copyright act, 1914 (which virtually incorporated the 1911 act)[43] a cinematograph film was regarded as falling within a dramatic work even in India.[44] Moving further in this timeline, when the UK copyright act underwent certain amendments in 1956 and excluded cinematograph film from the definition of a dramatic work, it seems that simultaneously the then newly adopted Indian act of 1957 also excluded cinematograph film from the definition of dramatic work.[45] The intention of the Gregory committee, as adopted in the UK copyright act, 1956, was clearly to secure a separate and distinct protection for cinematograph films in the UK. Quite similar to this, the recognizable objective of the concluding words in the definition of dramatic work in the Indian act of 1957 must have been to exclude film in its totality, it being an entirely distinct subject matter of copyright law.[46] The most notable point however is that, notwithstanding the specific exclusion of a cinematograph film, the UK copyright act, 1956 unequivocally alludes that a scenario or script of a cinematograph film would continue to be a dramatic work.[47] Perhaps if the Indian statute had clarified this position, it could have evaded much of the confusion being witnessed presently.

## III. Whether scriptwriters are entitled to claim royalty under s. 18 r/w s. 19 of the Indian copyright act?

[42] Baron, *supra* note 35 at 195; Kamina, *supra* note 9 at 32 – 34; Garnett, Davies *et.al*., *supra* note 19 at 3-35.
[43] *See generally*, Upendra Baxi, "Copyright Law and Justice in India" 28(4) *Journal of Indian law institute* 497, 499 - 500 (1986) (hereinafter 'Baxi'); Lionel Bently, "Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries" 82(3) *Chicago-Kent law review* 1224 - 1232 (2007); Kamina, *supra* note 9 at 31.
[44] For a discussion on the hybrid treatment given to films in India under the 1914 act see Shubha Ghosh, "A Roadmap for TRIPS: Copyright and Film in Colonial and Independent India" 1(2) *Queen Mary journal of intellectual property* 151, 154, 155, 156 (2011) also referring to the Report of the Film Inquiry Committee, 1951 (hereinafter 'Ghosh').
[45] Footnote 15 in Baxi, *supra* note 43 at 502 and also at 509, 510, 512, 516.
[46] Ghosh, *supra note* 44 at 156. *See also,* Arul George Scaria, *Piracy in the Indian film industry: Copyright and Cultural Consonance* 54 (Cambridge University Press, 2014); *see generally in this context* point 4 of the statement of Objects and Reasons to the Copyright Act, 1957 *available at*: http://www.delhihighcourt.nic.in/library/acts_bills_rules_regulations/The%20copyright%20Act,%201957.pdf (last visited on Jan. 24, 2021) and discussion in *Fortune Films International* v *Dev Anand and Anr., supra* note 25.
[47] Although the definition of a dramatic work was further altered by the UK Copyright Act, 1988, the comparison is restricted to the UK Copyright Act, 1956 as the definition clause in India has remained unamended since 1957.

Without a doubt, one of the core objectives of the 2012 amendments to the copyright act, 1957 was to recognise the rights of authors who contribute to a cinematograph film and ensure they receive a continuing stream of royalties from the commercial exploitation of their works by the producer.[48] The amendment's *raison d'être* was specifically to counteract a longstanding industrial practice prevalent in India where authors, in a testament of their weak negotiating power were compelled to transfer their entire rights in the creative work in perpetuity to the producer. This was achieved through exploitative contracts which offered a one-time lump sum payment for the entire repertoire of an authors' rights, while authors rarely received royalties which by reasonable standards could be considered as being commensurate with their work's exploitation or success. It was the maiden speech of Shri Javed Akhtar made in parliament which brought these injustices and unfair market practices into the public realm.[49] He pointed out in categoric terms that these systems were thoroughly detrimental to the interests of authors, and resulted in a life of penury even while their works continued to be commercially exploited both in-film and out-film. Considering royalties as legitimate rewards for an author's creativity and on most occasions their only source of livelihood, authors justifiably advocated for legislative intervention to advance their cause. These sustained efforts finally bore fruit when parliament introduced a slew of protective measures for authors. Amongst all these measures, the noteworthy amendments were the special 'right to equal share of royalty' provisions instituted within the scheme of s. 18 and s. 19 of the act whilst dealing with assignment of copyrights.

The newly instituted proviso (3) to s. 18 and s. 19(9) endeavour to provide authors who are contributing to films, with an unwaivable and inalienable right to receive royalties from revenues generated through all modes of exploitation of their works except when exhibited *via* cinematograph films in a cinema hall.[50] The historical context or rather, the inspiration of the

[48] Department - Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, Parliament of India - Rajya Sabha, *available at*: http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf (last visited on Jan. 24, 2021).

[49] Uncorrected Debates, the Copyright (Amendment) Bill, 2010, Parliament of India – Rajya Sabha, *available* at: http://164.100.47.5/newdebate/225/17052012/Fullday.pdf (last visited on Jan. 24, 2021).

[50] Proviso (3) to s. 18 reads as: Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void.
S. 19(9) reads as: No assignment of copyright in any work to make a cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilisation of the work in any form other than for the communication to the public of the work, along with the cinematograph film in a cinema hall.

legislators for this provision is seemingly derived from article 4 of the EU Rental Directive 1992,[51] which vested in the author an unwaivable right to equitable remuneration from the transfer of their rental right to a film producer.[52] A quick examination would reveal that the elements in this directive are mirrored in proviso (3) introduced in s. 18 r/w s. 19(9) of the act. As a result, these provisions make certain that authors retain the right to receive royalties even though their exclusive rights may be assigned to producers thereby entitling them to a continuing royalty throughout their lifetime for the exploitation of the works. This new right facilitates the dominant objective of copyright law which is to confer on authors just rewards for their labour.

Globally, authors of audiovisual works have waged extensive campaigns seeking legislative support from lawmakers to combat issues surrounding unfair contracts and unequal bargaining power and have specifically sought incorporation of an equitable remuneration right within the legal framework. For instance, the Mexico manifesto of 2014 convened by writers and directors worldwide, the audiovisual campaign of 2017 conducted by literary and dramatic creators in the audiovisual sector have all comprehensively demanded that legislators institute an unwaivable remuneration right within their respective copyright legal regimes.[53] Even a 2015 white paper issued by the society of audiovisual authors in Europe categorically iterated that a collectively enforced unwaivable remuneration right would be the ideal approach that can guarantee fair remuneration to authors in the audiovisual sector.[54] It may be pertinent to point out here that most of these campaigns have been initiated for and on behalf of scriptwriters. These views were further supported in a recent audiovisual remuneration study commissioned by the international confederation of societies of authors and composers (CISAC) and writers and directors worldwide (W&DW) which also endorsed the view that instituting a statutory

[51] Prashant Reddy T., "The Background Score to the Copyright (Amendment) Act, 2012" 5(4) *NUJS L. Rev*. 469, 515 (2012); Renuka Medhury, "Continued Economic Benefit to the Author: Royalties in the Indian Film Industry – Historical Development, Current Status, and Practical Application" in Kung-Chung Liu & Uday S. Racherla (eds.), *Innovation, Economic Development, and Intellectual Property in India and China - Comparing Six Economic Sectors* 203 (Springer open, 2019).

[52] Currently art. 5 of the European Union Rental and Lending Right Directive, 2006 *available at*: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0028:0035:EN:PDF (last visited on Jan. 24, 2021).

[53] *Available at*: https://www.cisac.org/Media/Studies-and-Reports/PDF-files/Writers-Directors-Worldwide-The-Mexico-Manifesto and https://members.cisac.org/CisacPortal/initConsultDoc.do?id=29505 (last visited on Jan. 24, 2021).

[54] *Available at:* https://www.saa-authors.eu/en/publications/55-saa-white-paper-2nd-edition#.YNhXeegzaUl (last visited on Jan. 24, 2021).

provision which secures an 'unwaivable right to obtain equitable remuneration for the exploitation of their works' is best suited for audiovisual authors.[55]

However, the right to royalty assurance incorporated *via* s.18 and s. 19 of the act, notwithstanding the fact that it is a laudable policy measure, seems to inequitably limit its benefits to authors of literary and musical works used in a film. This legislative approach protects only the lyricists and composers of music used in the film and implicitly excludes the other contributors to the film. Though limiting these benefits to authors of literary and musical works may seem right in the specific context of sound recordings, it is nevertheless a superfluous restriction when it comes to a cinematograph film. It is quite commonplace for underlying works to be used in a film and these works range from pre-existing novels, lyrics used in music as a literary work, script as a dramatic work, musical work, sound recordings, decor and costumes as artistic work, performances of actors, singers *etc*. This is why a film is considered a complex collaborative art form.[56]

A well worded or rather an ideal provision would have ensured that authors in each of these categories were rendered adequate protections and be entitled to all the benefits which flow thereon, when a producer utilizes their work. This hypothesis rings even truer in the circumstances surrounding a script as there is now clarity on the issue that, since a script is a dramatic work the scriptwriters would not be entitled to the pecuniary benefits of s. 18 r/w s. 19 of the act despite being one of the most significant contributors to the making of the film.[57] David Kipen's 'schreiber theory' also merits a mention at this point, as it advocates the principle that a scriptwriter is to be regarded as the author of a film in due consideration of the fact that a script moulds the base around which the entire film is built.[58] There are several

[55] Prof. Raquel Xalabarder, International Legal Study on Implementing an Unwaivable Right of Audiovisual Authors' Right to Obtain Equitable Remuneration for the Exploitation of their Works, CISAC, *available* at: https://www.cisac.org/sites/main/files/files/2020-11/AV%2BRemuneration%2BStudy-EN.pdf (last visited on Jan. 24, 2021).

[56] *See generally* Kamina, *supra* note 9 at 130-131; Michelle Cooper, "Moral Rights and the Australian Film and Television Industries" 15(4) *Copyright Reporter* 175 (1997) referred to in Matthew Rimmer, "Heretic: Copyright Law and Dramatic Works" 2(1) *Queensland University of Technology law and Justice* 138 (2002); discussion in Justice V.R. Krishna Iyer's footnote in *Indian Performing Right Society Ltd* v *Eastern India Motion Pictures Association and the Cinematograph Exhibitors Association* [1977] 2 SCC 820.

[57] The anomaly of this situation was highlighted in a conversation with Ms. Anamika Jha, the legal officer of Screenwriters Association, who opined in her personal capacity (without representing the organisation's stand) that, while a storywriter or dialogue-writer may yet be able to claim royalty under this provision as authors of literary works, this benefit is still denied to scriptwriters.

[58] David Tregde, "A Case Study on Film Authorship: Exploring the Theoretical and Practical Sides in Film Production"4(2) *The Elon Journal of Undergraduate Research in Communications* 8 (2013).

countries such as Italy,[59] Estonia,[60] Spain[61] *etc*. which have legislated provisions analogous to proviso (3) to s. 18 r/w s. 19(9). They have all extended their protections to a wider category of authors contributing to films, and quite specifically including scriptwriters within that list as well. Most of these countries even regard such contributing authors as co-authors or joint authors of the film unlike the case in India where the producer is considered as the author and owner of the film.[62]

## IV. Coda

Unless a work conforms to certain statutory requisites, the author of the work has no rights or means to enforce it under copyright law. Therefore, the preliminary issue while evaluating a work in copyright law is to identify whether it satisfies the peculiar requirements of any particular subject matter that the law recognises and protects. It is seen that the distinctive characteristics of a dramatic work are, it should be capable of being performed, fixed in some tangible form and have inter-related sequences with the performers having a very low margin for improvisation. On this basis, in the first part of this article it is maintained that a script, which is a written work consisting of directions for enactment to be presented by performers through actions with or without music and/or dialogue in a public place in the order of its representation, would rightly fall within the label of a dramatic work and not a literary work.

In the second part, it is brought out that an author of a dramatic work is unfairly excluded from being granted the statutory right to equal share of royalties unlike his literary or musical counterparts contributing to a film. A cinematograph film being a collaborative work involving several independent contributions, there is no logical reason why the law should enter into a pick and choose policy by accruing benefits to only a select few while disadvantaging other creative contributors. To this extent, the law may require revision and the words 'literary and musical' may be removed so that there is an equivalent recognition of all the contributors to the film and that benefits of the section flow even to a scriptwriter. Alternatively, the policy makers may specifically delineate in the provision the category of authors who are entitled to claim remuneration. Most countries recognise a wide category of authors in audiovisual works like films including, *inter alia*, the director, scriptwriter, lyricists, composers, cinematographer

[59] Law no. 633 of 1941 for the Protection of Copyright and Neighbouring rights, art. 44 r/w art. 46 and 46*bis*.
[60] Copyright Act, 1992, art. 33(2) r/w art.14.
[61] Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions, 1996, art. 87 r/w art. 90.
[62] *See supra* note 55 for an extensive analysis.

and animator, each of whom are also entitled to exercise an equitable remuneration right.[63] It may also be reconsidered whether there should really exist an exemption under s. 18 and s. 19 of the act with respect to communication of the film in a cinema hall, as dramatic or artistic works, owing to their very nature may have limited use in avenues other than films. As the Indian copyright act is expected to undergo further amendments soon, it is an opportune moment to clarify this ambiguity and bring a quietus to the issue.

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[63] *Id*.