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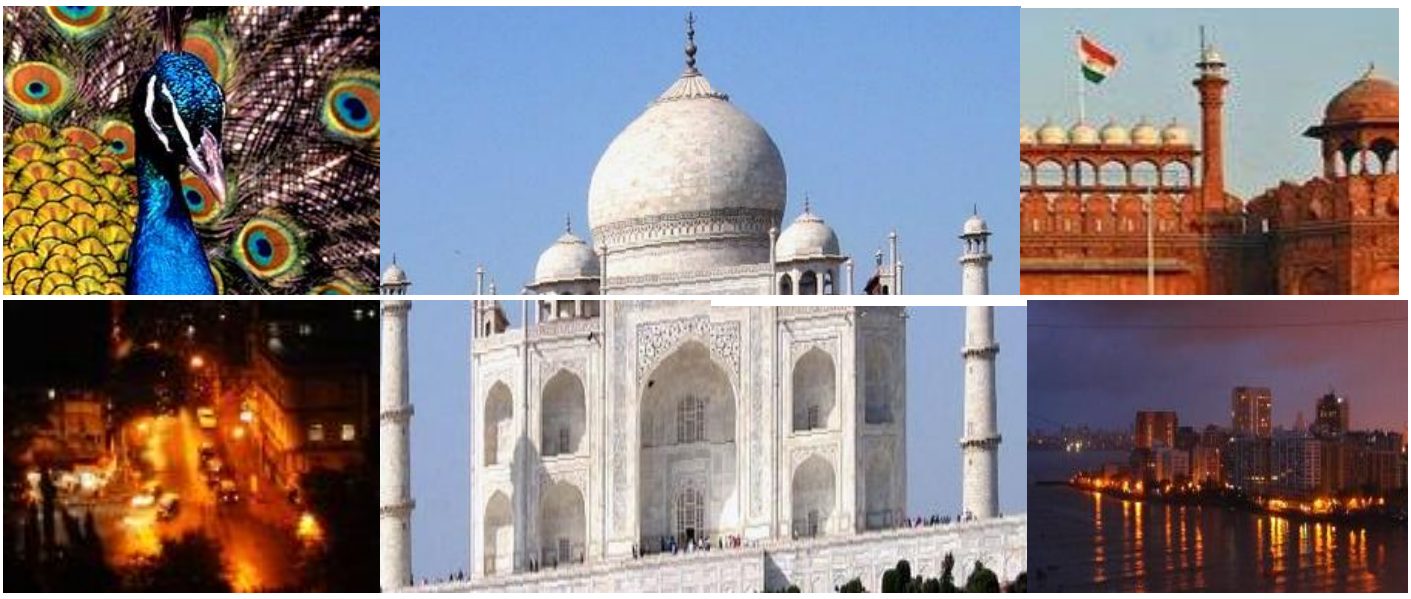

Film Censorship in India: The Urgent Need For Reform

By Mukul Mudgal

The following is an excerpt from the 2013 *Report Of The Committee Of Experts To Examine Issues Of Certification Under the Cinematograph Act, 1952*, chaired by the author.

> Cinema is an artistic expression of ideas, stories and often opinions, sometimes inspired by reality occasionally set to music, designed to enthrall, enchant, or simply to entertain. There are few other mediums of communication that can claim rival levels of pervasive influence and presence in our daily lives.
>
> History shows that films have sparked off political debate and threatened governments, heralded social change

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The Hollywood–Bollywood Issue

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GUEST EDITOR'S COLUMN

By Lalit Bhasin

It is a pleasant task to write the Guest Editorial for this issue of India Law News (ILN) on the important and significant topic of the Hollywood—Bollywood relationship and the potential for growth. The two largest democracies in the world are also producers of the largest numbers of films. Hollywood is definitely the Big Brother, but India has improved significantly in terms of not just the numbers but also in terms of quality, content, technology, entertainment, vast reach in overseas markets, employment generation and financial growth. Hollywood and Bollywood need to develop compatibility and there are indications that mutual appreciation of each other's strengths is being recognized.

Writing this column has not been difficult but finding the right authors has been an uphill task for me, as I wanted the best—those who know the subject and have intensely studied the subject matter of their respective contributions.

The Honorable Justice Mukul Mudgal, former Chief Justice of the Punjab and Haryana High Court has been a familiar name in sports and entertainment laws. He chaired the Committee Of Experts To Examine Issues Of Certification Under the Cinematograph Act, 1952, (the "Mudgal Committee") appointed by the Ministry of information and Broadcasting to review the entire Cinematography Act, 1952. I had the privilege of being a Member of this Committee. We travelled the length and breadth of the country to have inputs from various stakeholders like producers, directors, writers, artists, NGOs and the media. It is high time the Government has a serious look at the crucial recommendations made by the Committee. Justice Mudgal graciously agreed to write an article for this issue on the work of the Committee and we open with his article.

Our next article is by Ms. Leela Samson, a distinguished and renowned artist and head of art-related national institutions who has held the important position of Chairperson of Central Board of Film Certification (CBFC). It is common knowledge that the CBFC has been subject of controversy, which Ms. Samson discusses in her brilliant article in this issue.

We follow with an article by Mr. Anand Desai, head of DSK Legal. Mr. Desai has in-depth knowledge of issues plaguing the film and entertainment industry of India. He holds a unique position of being India's topmost lawyer in the field of entertainment and technology laws. Despite being a busy lawyer he agreed to contribute an article for this issue.

The same is true of the author of our next article. Mr. Amit Naik, Managing Partner of Naik and Naik, undoubtedly one of India's top law firms specializing in film-related laws including compliance, electronic media and almost everything and anything to do with laws pertaining to entertainment related technology.

Next, we have been extremely fortunate in having Mr. Uday Singh, Managing Director, Motion Pictures Association of India provide us with the benefit of his vast experience of Hollywood and the connections with the Motion Pictures Association of the U.S. His article touches upon all issues and aspects, which need to be looked into by the two governments and by industry leaders.

We close with a brilliant and well-researched article by three young but very eminent lawyers on tax-related issues. Samira Varanasi, Ranjana Adhikari & Rajesh Simhan are part of the world- renowned law firm Nishith Desai Associates, which, incidentally, has an office

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in California. Mr. Nishith Desai, the founder, is known for his expertise, inter alia, in tax matters, international tax treaties and bilateral relations.

I would like to use my prerogative as Guest Editor to express my own perspective on some of the key issues raised in this edition of *India Law News*, and comment on some of the great insights provided by our superb panel of distinguished authors. I would particularly like to comment on the controversial subject of certifying films for public exhibition not only as a former Chairperson of the Film Certification Appellate Tribunal, but also as a member of the Mudgal Committee that issued its recommendations in 2013 calling for important changes in the certification process.

Certifying films is a contentious issue, and has become more so in recent times. I have found that people in the business of certifying films are going beyond the law dealing with certification. The directive issued by CBFC Chairman, Pahlaj Nihalani, to cut out cuss words and scenes from films—now put on hold following protests from board members—went against the provisions of the Cinematograph Act. He had no business sending out a directive on what to delete from films. I believe a film has to be viewed in its entirety. You cannot knock out a kissing scene or a cuss word without looking into whether it is integral to the film. Cuss words are quite naturally spoken in States like Uttar Pradesh and Bihar. A scene or a word may appear vulgar mostly when taken out of context.

When I was the Chairperson of the Film Certification Appellate Tribunal (FCAT) from 2011 till nearly 2015, it was our responsibility to see that the orders of the CBFC (Board) pertaining to deletions and variations were sustainable in law. We often found that political films were subject to a lot of censorship. To give an example, there was a film on the plight of fishermen of Tamil Nadu, which was denied a certification by the Board. The film depicted how fishermen were being harassed by the Sri Lankan and the Tamil Nadu governments. The Appellate Tribunal found nothing wrong in the film. To give another example, the Board during my time struck out scenes and dialogues from *Sadda Haq* (2013) (in Punjabi, *"Our Right"*)—a film on the assassination of former Chief Minister of Punjab, Beant Singh. The Tribunal felt the movie was realistic, but we suggested a few cuts that were agreeable to the producer and the director of the film. Although three States, Delhi, Punjab and Haryana, banned the movie, the Supreme Court upheld our order.

I feel that the members of the Board must have some education in the field of art and cinema. It is fine to say that people from all walks of life will be represented on the Board. But there has to be some minimum education among the Board members, who are finally appointed by the Ministry of Information and Broadcasting.

There is no uniformity in certifying films for television and those that are exhibited in theatres. I find television gets away by showing films at odd hours and escapes certification in respect of tele-serials.

The Mudgal Committee, was set up by the Government to review the Cinematograph Act, 1952. I was a member of the Committee. (As already mentioned, Justice Mudgal has graciously provided his own perspective on the work of the committee in an accompanying article in this issue of *India Law News*). The Mudgal Committee suggested that anyone who had problems with the contents of a film should be able to approach the Tribunal. Justice Mudgal expressed the need for the jurisdiction of the Film Certification Appellate Tribunal (FCAT) to be enlarged, as under the mandate of the present legislation only the applicant for certification may prefer an appeal to the FCAT. Therefore, any other person aggrieved by the decision of the certification board is only left with the option of moving the High Courts

(pursuant to their writ jurisdiction under Article 226 of the Constitution of India) and the High Courts take inconsistent stands.

There is the need for implementation of recommendations made by the Mudgal Committee as the same if implemented may resolve many of the problems and issues raised time and again by the film industry. The salient features of the recommendations are the constitution of screening panels, revised form of classification, certification of films, powers of the Central Government to supersede the Board, enhancement of jurisdiction of the FCAT and Appeal.

In his article in this issue of *India Law News* Justice Mudgal lamented the fact that despite the change in name from Central Board of Film Censors to the Central Board of Film Certification (CBFC), the same did not change the fate of the Film industry and CBFC still functions as a censor board and not as a certification board.

In his view, the composition of, and appointments to, the advisory panel, which reviews the film and suggests and recommends certification needs a refurbishment in terms of the qualifying criteria, and composition and mode of appointment. On several occasions panel members who are affiliated to particular political, social or religious group impose such political, religious or personal opinions on the content of the film. Thus, utmost care must be taken to ensure that the process of selection and appointment of such panel members is autonomous.

Justice Mudgal mentions that the present categories of classifications of U, A, U/A and S are insufficient given the innumerable subjects, complex themes and content of the movies being produced today. More particularly, the category of U/A has been found to be inadequate and there is significant ambiguity as to the contents of the films that would classify as U/A.

The recommendations made to the Government which ought to be high on the agenda of the CBFC are holding orientation and cinema-education workshops for new advisory panel members, not allowing the Panel members to continue for more than two consecutive terms, introduction of a 'mature' slot or a water-shed hour on satellite television for adult content cinema, a voluntary by-line by the Producer to the certification describing the film and other such progressive measures and most of all, emphasizing the need to amend the existing Cinematograph Act of 1952, which would introduce one or two more certification categories like UA-15.

In her article in this issue, Ms. Leela Samson, the distinguished Chairperson of CBFC till early 2015 expressed the view that while the constitutional status of CBFC is that of a subordinate office under the administrative control of the Ministry of Information and Broadcasting, the functioning and the decision-making regarding film certification must be independent of any Government or non-governmental influence. It is the bounden duty of the Chairperson and the Board to ensure that this independence of the CBFC is not only maintained, but is also perceived as being maintained.

She also expressed that it is crucial that the Board Members, Advisory Panel Members and the officers of the Board are selected with utmost care. There is need for greater representation of the film industry, educated professionals of integrity with backgrounds in film, media, culture, the arts, science, journalism, law, social work, literature and education on the Board. She lamented the fact that though according to the rules of certification, two-thirds of the members of the Advisory Panel can be recommended by the Chairperson and the Board of CBFC, the names suggested never figure on the final lists made by the Ministry

of I & B. She highlighted that the media has in the recent past noted the incompetence of the Panel members in judging Hollywood films.

She also stated that contrary to public perception, the Chairperson, CBFC does not see all the 1,500 films brought out in every language across the country each year. Rather, the Chairperson and the Board get to know the rating given to a film only when the CEO of the CBFC advises the Chairperson of a problem or when the press or an affected party bare their grievances to the media. Further, it is only when an aggrieved Director applies for a Review of his film, which is the second stage of the certification process, that the Chairperson is informed and he or she looks into a fresh panel that is now headed by a member of the Board or in some cases, the Chairperson himself or herself. It is, therefore, critical that the Advisory Panel members have exposure to films, arts, political forces at play, different religious beliefs, social and institutional processes and are able to understand and respond to the issues that cinema raises.

On the issue of creative freedom of expression and curbing violence during screening of films, Ms. Samson states that it is the responsibility of the State Governments to ensure law and order as there are small groups, churned up by political activists who create trouble with an issue to raise objection and use it as a tool to promote themselves. In the ultimate analysis, she states that if films must be certified in a free society, a process that filmmakers endorse for technical reasons, it is best that the Government in power disassociates itself completely from the process of certification.

One must stress on the importance of freedom of expression. In the U.S., freedom of speech is considered an integral part of American culture, and is protected by the First Amendment to the U.S. Constitution. The Motion Pictures Association of America, through the Classification and Rating Administration, issues ratings for films as "general audience," "parental guidance," "PG-13," "restricted" and "adults only" ratings. I may also refer to Indian position wherein freedom of speech received a boost with the recent landmark judgment of the Supreme Court of India, striking down section 66A of The Information Technology Act (introduced by an amendment of 2008) as unconstitutional (See, *Shreya Singhal vs. Union of India* ([2015] 5 SCC 1 [March 24, 2015], the "Facebook" Case, discussed in Mr. Anand Desai's article).

Mr. Anand Desai in his article in this issue has highlighted the global reach of the Indian market, stating that now even Hollywood studios have realized the potential of the Indian market, and large Hollywood studios including Disney, Fox, Sony and Warner Brothers have set up offices in India. The studios started with distributing Hollywood films in the Indian market, moved to producing Indian films, and have turned towards partnering with Indian studios either through co-productions, or formal corporate acquisitions like Disney-UTV. From a time when the entire Indian film industry was controlled by a few individuals and "film families", there has been a clear shift towards corporates and studios managing the business. Decision making in the film industry has changed from instinctive, talent driven decisions, to defined processes, with emphasis on the quality of content, talent, production values, marketing, and distribution.

Mr. Desai highlights that India also offers economically viable world-class post-production facilities like VFX, 3D and animation. There has been a steady increase in the outsourcing of post-production services to India. Films like *Avatar* (2009), *Life of Pi* (2012), amongst others, were post-produced in India, and India is also becoming a favored destination for shooting films, and enables Hollywood studios to produce films in a foreign location at lower costs.

The Ministry of I & B has been contemplating putting in place a mechanism which facilitates international as well as domestic film producers, and has constituted an Inter-Ministerial Committee for Promotion and Facilitation of Film Production in India. The Committee will act as a "single window" for filmmakers seeking permission from different agencies of the Government of India for filming feature films, short films and TV programs. It will also provide relevant information on locations, crews, talent, facilities, stages, equipment and support services. Furthermore, the Government is also considering tax exemption incentive packages for foreign filmmakers. The Ministry of I&B has recently issued fresh, simplified guidelines for foreign film shooting by foreign nationals and co-productions in India. Foreign artists engaged to shoot in India on a long term basis may apply for a "B-Visa" if the production is commercial in nature, or a "J-Visa" if the production is a documentary or pertains to journalism.

Mr. Desai states that Indian studios are exploring distribution practices like their Western counterparts, such as releasing and exploiting certain properties for a limited period and then withdrawing the properties temporarily to increase their monetization prospects. Another avenue is re-releasing old films after digitally restoring them. Indian studios are also looking at building franchisee properties, which can be exploited across platforms. Films like *Krrish* (first part released in 2006) and *Chhota Bheem* (premiered 2008) have attempted to explore merchandising opportunities, like Disney merchandised properties.

Online piracy continues to be a challenge for India and the US. The Motion Pictures Association (MPA) has been taking anti-piracy actions against internet piracy, theatrical camcorder piracy, DVD piracy, etc. But this has a long way to go, requiring appropriate legislation and effective enforcement.

There exists tremendous potential for mutual cooperation between India and the U.S. in the field of entertainment, across all platforms, and Governments as well as industry participants can easily contribute for overall growth in this area.

In his article, Mr. Amit Naik expresses the opinion that international collaborations have seen Indian film companies tying up with Hollywood production companies for co-production of films in India. The entry of international studios has helped streamline processes, thereby resulting in better value creation for all stakeholders. India and U.S. have always been intertwined within the entertainment industry with Bollywood and Hollywood movies being shot in the U.S. and India, respectively. Dubbed versions of Hollywood films in regional Indian languages have also gained popularity. There is a significant growth in the number of VFX companies operating in India and Hollywood studios outsourcing VFX of their films to Indian VFX companies.

Mr. Naik refers to the fact that Indian cinema has always witnessed the production of remake or adaptations of films from Hollywood. Such remakes and adaptations, even if a scene-by-scene inspiration, were often made without acquiring rights or license from the original producer. Now after the case of *Twentieth Century Fox vs. BR Films* (2009) wherein the Bombay High court protected the copyright of a foreign studio in respect of the Hollywood Film, *My Cousin Vinny* (1992), leading to the first ever settlement for a Hollywood Studio. With the cognizance taken by producers of original films and stringent implementation of copyright laws, acquiring rights to produce an official remake or adaptation is a new trend and now there are several Bollywood films which are official remakes of Hollywood films.

Mr. Naik however laments that despite this noticeable connection shared between the two nations and their entertainment industries, no co-production treaty has ever been signed

between them to promote the production of the Hollywood films in India and to promote production of Indian films in foreign countries. Recently the L.A. India Film Council was formed to facilitate and strengthen motion picture production, distribution, technology, content protection, and commercial cooperation between Hollywood and Bollywood. However a government initiative between the two nations is still awaited.

Additionally, insufficient knowledge about IPRs within India to tackle such problems arising from the infringement of such IPRs further deterred foreign investment in the Indian market. India is currently plagued with certain problems like piracy, corruption, heavy taxation on entertainment industry, no single window clearances, lack of film incentives, ambiguities in certification and copyright laws amongst others, which make foreign film makers reluctant to shoot or produce films in India. However, the slow and steady change in the Indian outlook towards protection of IPRs is the first sign that Indian market is ready to restart negotiations. It is, therefore, necessary that a co-production treaty be signed between the two nations which may include provisions such as cash grants, cash rebates, tax credits, exemptions from customs duty, and provisions to boost tourism, create employment opportunities, increase inflow of foreign exchange, and aid in the advancement of high-tech production facilities and equipment.

He concludes by referring to the progress of the association between the two nations which was more significantly marked by the recent visit made by President Barack Obama to India (25-27 January 2015), which was reflected in a Joint Statement which included recognizing the progress made in constructive engagement on IPR and enhancing engagement on IPR in 2015 under the High Level Working Group on IP, to the mutual benefit of both the countries. With the "Make in India" initiative adopted by Prime Minister, Narendra Modi, Mr. Naik hopes to see some positive reforms in India and co-operation from the U.S. to synergize the two biggest film industries in the world.

The contents of the article contributed in this issue by Managing Director of Motion Pictures Association (MPA) Mr. Uday Singh are from the "horse's mouth." No one could speak with greater authority and knowledge about Hollywood—Bollywood than Mr. Uday Singh, MPA being a prominent stakeholder in the film business between U.S. and India.

The author lauds the India-U.S. joint statement "Shared Effort, Progress for All," which reinforces the need for continued dialogue and cooperation between copyright industries and the Government of India to build an effective IPR regime that encourages development and innovation in the Indian media and entertainment industry. India's industry growth needs to be fueled by policies, which create a favorable legal and business environment for the development of IPRs in copyright industries.

While applauding the initiative by the Government of India for pushing forward a much-needed National IPR Policy that envisages IP as an integral part of India's overall development policy, Mr. Uday Singh has highlighted the need for focusing on key areas that facilitate ease of doing business which include piracy control. He points out that despite contributing ₹ 50,000 Crores ($8.1 billion) or 0.5% of India's GDP to the country's economy and supporting a significant 2 million jobs, the media and entertainment (film and television) sector is plagued by content theft and piracy. The lack of a robust legal framework and uniform enforcement measures to curb piracy in this sector continue to undermine the growth of India's creative industries. The author has suggested that in consonance with global practice, India needs to consider immediately establishing Film Commissions to act as one-stop-shops which could play a pivotal role in attracting foreign productions into country, cutting through red tape, facilitating film shoots, and coordinating with local government and filmmakers to provide all the necessary services for film shoots. On the tax

front, the author emphasized the need for rolling on of Goods and Service Tax (GST) and subsuming the entertainment tax in it (as the existing entertainment tax structure is seriously flawed)and this would definitely make it easy for companies in the U.S. and India to do business—generate higher output and create more employment opportunities.

The article by Ms. Samira Varanasi, Ms. Ranjana Adhikari and Mr. Rajesh Simhan of Nishith Desai Associates, Mumbai is entirely a different contribution in contents from other contributions as this article deals with important issues of content distribution model for digital media and connected tax issues. Until now digital revenue has been a relatively small portion of the revenues earned by the media and entertainment companies. However, the situation is changing and the digital business models and revenue streams have evolved significantly. The authors have explained the key features of Over the Top (OTC) Content distribution, Internet Protocol Television and Content Delivery Network and then examined how digital trends influence the creation and management of content itself. On the tax front, the authors have explained that notwithstanding whether the distributor of content is generating content or facilitating the distribution of content, internet and mobile-based content distribution models could be either user-revenue models or advertising-revenue models. The article is of great topical relevance for U.S. companies.

I am grateful to all the worthy contributors and I hope that the readers will not only enjoy the contents of this issue of ILN but also gain some useful learning.

We close with an article by Ms. Poorvi Chothani of LawQuest who discusses visa issues involving foreign artists wishing to work in India

The India Committee, and my friend Bhali Rikhye, the Editor of the *India Law News*, have helped make the ILN into a great resource center for legal issues, topics, subjects and legislations of mutual interest to lawyers in the U.S. and India. I extend my thanks and appreciation to him for his collaboration with me in producing this special issue on Hollywood—Bollywood.

LALIT BHASIN, LL.D., is a Senior Advocate at the Supreme Court of India and Managing Partner of Bhasin & Co, in New Delhi, which specializes in various areas of law including employment, foreign collaborations and investment, IT, Corporate Law, constitutional law, technology transfer agreements and dispute resolution. Dr. Bhasin is one of the preeminent deans of the Indian Bar. He was Chairperson of the Film Certification Appellate Tribunal (FCAT) from 2011 to 2014. Among his long list of other positions of leadership are President of Society of Indian Law Firms, Vice President of the Bar Association of India, and Founding Co-Chair of India Committee of the American Bar Association's Section of International Law. Dr. Bhasin was awarded Honorary Membership of the International Bar Association in Melbourne in 1994 for outstanding service to the legal profession. He was awarded the Plaque of Honour by the Prime Minister of India in 2002 for outstanding contribution to the Rule of Law. In 2007, the President of India presented him with the National Law Day Award for "Outstanding Contribution to the Development of the Legal Profession in India and for his deep involvement and engagement in the maintenance of the highest standards at the Bar".

CO-CHAIR'S COLUMN

We hope you will enjoy this Hollywood—Bollywood edition of *India Law News*, which is devoted to the very active and growing business and entertainment sector in India.

These are very interesting and exciting times for the India Committee. We have been very active in a number of important areas, and we have a very full program for the coming American Bar Association (ABA) year, which started last month with the conclusion of the ABA Annual Meeting in August.

We have recently had discussions with representatives of the Society of Indian Law Firms (SILF) and the Indian National Bar Association (INBA) about their proposals for the opening of the Indian legal market to foreign lawyers. We have also participated in several discussions with the US Departments of Commerce and State about their interest in this area. We have also shared our views on this very important topic with the US/India Business Council (USIBC). These activities were largely in response to announced initiatives from the Modi government about liberalization of the Indian legal market. The Committee looks forward to continue playing an important role in these discussions as they move forward, and we thank all those who have contributed their time and effort to move things forward. The Committee believes that ABA policy on the ability of foreign lawyers to practice in India as foreign legal consultants (FLCs) is an important step for India to undertake and stands ready to assist all relevant sectors in India in understanding ABA policy and its implementation, should India agree that ABA policy meets India's needs.

The Committee continues to support it well-recognized *India Law News* publication which is now online with all past issues fully searchable. This will enhance the value of *ILN* as an important resource on important topics in Indian law. With three issues forecast for the current ABA year, readers can expect more high-level information about legal issues confronting India and those seeking to do business in India. We are very grateful to Bhali Rikhye, *ILN*'s Editor-in-Chief, the guest editors, and those Committee members who make all this possible.

We would also particularly like to extend our thanks to Lalit Bhasin, who conceived of and guest-edited this Hollywood—Bollywood issue of India Law News, as well to his distinguished colleagues who authored the various articles. We would also like to express our deep appreciation to Dr. Bhasin and his colleagues at SILF as we look forward to another outstanding conference in New Delhi this coming February 17-19, 2016. This meeting is a bi-annual Committee project in conjunction with our colleagues in India, and we expect to offer a number of high-level programs dealing with legal issues that U.S. lawyers must know about doing business in India and vice versa. The conference will take place at the Hyatt Regency in New Delhi. More information will be forthcoming as the planning unfolds, but, in the meantime, please save the date and plan

India Law News

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SUBMISSION DEADLINES

Fall Issue	**August 1st**
Winter Issue	**November 1st**
Spring Issue	**February 1st**
Summer Issue	**May 1st**

Potential authors should review the Author Guidelines and send manuscripts via email to the Editor-in-Chief.

to attend. This will be a meeting that those who are serious about understanding India and doing business there will not want to miss.

We also hope to engage more fully in the coming year with USIBC and with INBA, particularly in connection with INBA's proposal regarding the establishment of a FLC regime in India. We would also welcome their support for the February New Delhi meeting.

Our membership now stands a more than 500, and we would welcome your participation in Committee activities and encourage you to join with us as we move forward. There is no cost for Committee membership for members of the Section of International Law of the ABA.

Richa Naujoks
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FILM CENSORSHIP IN INDIA: *THE URGENT NEED FOR REFORM*

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> causing society to deviate from age-old dogma and also sent real life lovers to their death in their misplaced hope of emulating the classic romances. It is perhaps in salute to such impelling powers of persuasion that it is the only form of art, deemed fit to be regulated by an Act of Parliament.
>
> The present Cinematograph Act was enacted in the year 1952. Cinema has undergone a radical change since. The medium of cinema, the tools and technology associated with it and even its cherished audience have metamorphosed through time. Upon this Committee falls the task of reviewing and recommending legislation, which will regulate, certify and license facets of this ever changing and precocious art form. We have endeavored to accomplish this task to the best of our ability.

From the Preliminary Statement of the Report Of The Committee Of Experts To Examine Issues Of Certification Under the Cinematograph Act, 1952 (28th September 2013, chaired by the author (the "Mudgal Committee") paras. 1 and 2. *[Editors' Note: The committee was tasked with recommending ways in which India could transition from censoring films to certifying them much like the Motion Picture Association of America rates films by categories of viewers. The author, a former Chief Justice of the High Court of Haryana and Punjab, was the Chairperson of that committee.]*

* * *

Unfortunately for India's film industry, the change in name of India's film censorship body from the "Central Board of Film Censors" to the "Central Board of Film Certification" ("CBFC") did not improve the film certification process. The Board continues to function as a censorship board and not as a certification board.

Several key problems in the workings of the CBFC remain. These include political appointments of Board members, a vague rating system open to wide interpretation, and an appellate panel of limited jurisdiction.

As mentioned by the Mudgal Committee Report of the Committee of Experts:

> At almost every public hearing/ interaction held, the Committee was faced with grievances put forth by producers, directors, and Associations etc. that the present procedure for appointment of members of the Advisory panel, their eligibility criteria and the quality of such panel is far from satisfactory. At certain locations, members of such advisory panel lack any form of cinematic understanding, they perceive their role to be that of a Censor Board to cut and chop scenes and in some cases being affiliated to some political, religious or social group, impose without restraint, such political, religious or personal opinions upon content permissible in a film. As by way of a few examples,

> the Committee came across complaints where panel members had objected to use of words such as "boyfriend" or "kiss" used in a scene or even the uncharitably humorous representation of a political figure etc.

Report of the Mudgal Committee, Ch. 4, para 13.1.

Political Appointments

Politically affiliated appointees continue to serve on the CBFC which is the advisory panel that reviews and certifies films. There are still no criteria for the qualifications necessary to serve on the panel, nor on the overall composition of the Board, nor, even on the mode of appointment of panel members. The present appointments to the panel are largely of persons whose political allegiance is with the party in power.

Presently, panel members tend to view any given movie through a political prism with the aim of censoring the movie to satisfy a political end, instead of watching the movie as a movie alone and only making suggestions/recommendations if need be. On several occasions the panel members are affiliated with particular political, social or religious groups and impose such political, religious or personal opinions on the content of the film which is fit for screening. Therefore, the creativity of the film maker lies at the mercy of the advisory panel reviewing it.

Thus, framers of further reforms must take the utmost care to ensure that the process of selection and appointment of such panel members is autonomous. The objective should be that panel members are both eligible as well as suitable to discharge the all-important function of deciding what films the citizens of this country should be permitted to watch.

The Classification or Rating System

The limited classification of films available today is also a major concern. Only four classifications currently exist:

> "U" (unrestricted public exhibition),
>
> "U/A" (unrestricted public exhibition with an endorsement),
>
> "A" (suitable for public exhibition restricted to adults) and
>
> "S" (suitable for public exhibition restricted to members of any profession or any class of persons).

The present categories of classifications are insufficient, given the innumerable subjects, complex themes and content of the movies being produced today. More particularly, the category of U/A has been found to be inadequate and there is significant ambiguity as to the contents of the films which would classify as U/A. There is also uncertainty in the mind of a prospective viewer as to what to expect when a film is categorized as U/A.

Another concern is that after certification of a film, religious groups/ individuals/ authorities may demand banning of the film under threat of demonstrations outside theaters. Their sentiments should be eschewed and it should be the responsibility of the State Government to see that there is peaceful screening of the movie after a Certificate is granted to a movie.

Under the mandate of the present legislation only the applicant for certification may refer an appeal to the Film Certification Appellate Tribunal ("FCAT"). Therefore any other person aggrieved by the decision of the certification board is only left with the option of moving the High Courts and different High Courts take different stands. The limited jurisdiction of FCAT

sometimes even leads to the unscrupulous elements stalling a movie by taking the aid of the High Courts by filing a Writ Petition (under Article 226 of the Constitution of India). By the time the Court decides the fate of the movie the movie has lost its business and it does not matter to the film maker thereafter whether he succeeds eventually in the Court as the interim order banning the film has already caused irreparable damage to the producer of the banned film.

Therefore, it is essential that the jurisdiction of the FCAT is enlarged so as to lessen the burden of the Courts and also provide respite to the film Industry from frivolous petitions being filed against them marring their business.

The innumerable requests made by the film industry for revision of the Cinematograph Act, 1952 to the Ministry of Information and Broadcasting and the innumerable complaints made by various activists, political, religious groups, led to the Ministry in 2013 forming a Committee of Experts headed by the author, to examine issues of certification under Cinematograph Act 1952. Other members of the Committee included eminent persons connected with the film industry and law such as film actress Sharmila Tagore (best known in the West for her performances in the third of Satyajit Ray's *Apu* Trilogy, *Apur Sansar* ("World of Apu") (1959) and Mira Nair's *Mississippi Masala* (1991), renowned Bollywood music composer, writer and lyricist, Javed Akhtar, L. Suresh, Secretary of the South Indian Film Chamber of Commerce (and former President of the Film Federation of lndia), Bharatanatyam dancer and choreographer, Leela Samson (the then Chairperson of the CBFC), Lalit Bhasin, Senior Advocate and President of the Society of Indian Law Firms ("SILF") (who was the then Chairperson of FCAT) and Ms. Rameeza Hakeem, Advocate.

This Committee of Experts (the "Mudgal Committee") held several meetings with representatives of the film industry, film exhibitors, film critics and non-governmental organizations to understand the deficiencies in the existing Cinematograph Act, 1952, and eventually submitted a draft amended Cinematograph Bill in 2013.

In the draft bill the Committee made certain recommendations which, if implemented, may resolve many of the problems and issues raised time and again by the film industry.

The recommendations made by the Expert Committee in brief can be encapsulated as follows:

The Committee recommended that the Board set up a Committee comprising of 9 members representing diverse languages and at least two women members to ensure gender diversity. Such Committee would then prepare a list of members, which should be twice the number of vacancies in the advisory panel (Screening Panel), who in the opinion of such Committee, by reason of their profession, qualifications or experience in the field of art, cinema, drama, law, literature, history, sociology, psychology, media, education, performing arts, or public administration are deemed fit to judge the effect of the film on the public. These qualifying criteria have been designed in relation to subjects which have a direct or indirect bearing on cinema and its content. It was for the Government to appoint members from the panel submitted by the said committee. This ensured professionalism in the preparation of the panel and yet gave the Government sufficient discretion to choose reviewing panel members.

The Committee opined that the provisions in the Act dealing with guidelines for certification must include provisions that protect artistic and creative expression on the one hand while requiring the medium of cinema to remain socially responsible and sensitive to the values and standards of society on the

other. A parameter was suggested that required the members of the Screening panel/Board to view a film in its entirety from the point of view of overall impact, in the light of the theme, context and story of the film and the persons and the period of time to which the film relates. The committee had come across instances where members of the Advisory Panel (Screening Panel) had scrutinized a scene from the perspective of a stand-alone scene as opposed to its contextual and thematic value.

The salient recommended statutory provision of the bill reads as follows:

"15. Constitution of screening panels -

(1) The members of the screening panel shall be selected by a Committee comprising of 9 members constituted from the Board by the Chairperson with at least two lady members and in such manner as to ensure due regional and language representation, to the extent possible.

Provided that it will be open to the Chairperson to invite any member of the Board as an ad hoc additional member of the screening panel to ensure regional representation.

(2) Such Committee in consultation with the Chairperson shall draw up a panel of members to be appointed as members of the screening panel and shall consist of persons, who, in the opinion of the Committee are by reason of their profession, qualifications or experience in the field of art, cinema, drama, law, literature, history, sociology, psychology, media, education, performing arts or public administration, are fit to judge the effect of films on the public.

Explanation – For the purpose of this Section, it is clarified that 'public administration' means the study, development and implementation of public policy and functions.

(3) Such panel of members, which shall be at least twice the number of vacancies, shall be forwarded by the Board to the Central Government who shall from such panel forwarded, appoint the members of the screening panel.

Provided that at least one third of the total number of members on a screening panel shall be women and shall as far as possible be representative of professions or areas of experience set out in sub Section (2) above.

Provided further that all the categories specified in sub section (2) would, as far as possible be represented equally in the panel formed by the Government.

(4) A member of a screening panel shall hold office during the pleasure of the Central Government.

(5) Subject to sub section (4) above, every such member shall hold office for such period not exceeding two years and shall be eligible for re-appointment for one period not exceeding one more term.

(6) It shall be the duty of every member of such screening panel, whether acting as a body or in committees, as may be provided in the Rules made in this behalf, to examine, the film and to make such recommendations to the Board as it thinks fit.

(7) The members of the screening panel shall receive such fees or allowances as may be prescribed."

* * *

The Committee recommended a revised form of classification which comprised of the following categories of public exhibition being that:

U Unrestricted exhibition;

12+	Appropriate for exhibition to persons who have completed 12 years of age;
15+	Appropriate for exhibition to persons who have completed 15 years of age;
A	Restricted to adults; and
S	Restricted to members of any profession or any class of persons, having regard to the nature, content and theme of the film.

The Committee recommended strong pictorial representation and colour coding of the certificates which would easily and clearly communicate the nature of such certification in the following suggested provision.

"22 Certification of films -

(1) If, after examining a film or having caused it to be examined under this Act and the rules made thereunder and having regard to the material in the film the Board is of the opinion that–

a) the film is suitable for unrestricted exhibition, it shall grant to the person applying for a certificate in respect of such film a "U" certificate and cause the film to be so marked in the manner as may be prescribed; or

b) the film is suitable for exhibition to persons who have completed twelve years of age, it shall grant to the person applying for a certificate in respect of such film a "12+" certificate and cause the film to be so marked in the manner as may be prescribed; or

c) the film is suitable for exhibition to persons who have completed fifteen years of age, it shall grant to the person applying for certificate in respect of such film a "15+" certificate and cause the film to be so marked in the manner as may be prescribed; or

d) the film is suitable for exhibition restricted to persons who are adults, it shall grant to the person applying for certificate in respect of such film an "A" certificate and cause the film to be so marked in the manner as may be prescribed; or

e) the film is suitable for exhibition restricted to members of any profession or any class of person, it shall grant to the person applying for a certificate in respect of such film a "S" certificate and cause the film to be so marked in the manner as may be prescribed:

Provided that the certificate granted in respect of any film by the Board before the date of commencement of this Act shall be deemed to be the certificate under this Act;

(2) Where the Board passes any order under Section 20 or Section 21 herein, it shall record reasons in writing for doing so.

(3) Before the issuance of a certificate granted under this section, the applicant or his authorized representative shall deposit, at his own cost, a married print of the film (i.e., a film with an optical sound track), in the same format in which it has been certified or in such other format, with such agency or agencies, as may be prescribed, for archival purpose and record thereof.

(4) A certificate authorizing the public exhibition of any film shall be in such form, signed, displayed and notified in the manner as may be prescribed,

(5) Subject to the provisions of this Act, a certificate granted for a film by the Board under this section shall be valid throughout India for all formats or gauges of that film except that a certificate issued for release of a

film on video format shall be valid for its theatrical release with an endorsement to that effect."

The Committee recommended that, where required, such order or suspension of exhibition be passed not prior to the intended screening, but after and during public exhibition. This would satisfy two important criteria. Firstly, as noticed by the Hon'ble Supreme Court in the case of *Aarakshan i.e. Prakash Jha Productions & Anr. vs. Union of India & Ors.,* now reported as (2011) 8 SCC 372, the very term "suspension of exhibition" presupposes that public exhibition has already taken place, is on-going and the need has arisen to 'suspend' such exhibition any further. Secondly, passing such an order in a given case after and during such public exhibition will also enable the authorities to arrive at an actual and proper assessment of the apprehended breach of public order or its likelihood, since the film is in public domain, being publicly exhibited and actual public reaction can be garnered and assessed. An opinion formed on such material is likely to be more objective, based on reality and actual facts rather than a perceived and/or distant likelihood of breach of public order.

The State Governments also for reasons, political and irrelevant ban the screening at a film on the specious ground that a law and order situation would arise. A motley crowd of troublemakers demonstrating at cinema halls on some occasions are reasons enough for the State governments to stall the screening of a film. This has led to the proposed recommendation by the expert committee as under in the 2013 Bill.

* * *

The major difficulty encountered by film makers was the proliferation of fringe elements who for the sake of catching the public eye create trouble for the screening of films on the ground that the film hurts the sentiments of a particular community/group. This is generally done by going to a civil/writ court very close to the release of the film leading to financial and other troubles for the film maker when interim orders restraining the release of the film are passed. Most of the films are financed with a tight repayment schedule and any delay in the release of the film leads to a financial mess for the film producer. Occasionally collusive litigations are filed so as to garner publicity for the film. The vast network of judicial fora i.e. 24 High Courts with writ jurisdiction and vast numbers of civil courts in numerous States give a handle to the litigant to stall a movie to garner publicity or to extract its pound of flesh from the producer of the film. This is what persuaded the Expert Committee to recommend in the 2013 bill, the enhancement of jurisdiction of the FCAT so as to ensure that there is only one forum where film certification related disputes can be litigated.

The Committee recommended that:

The jurisdiction of the FCAT should be expanded to permit appeals by any person aggrieved by any order/certification passed by the Board. FCAT should be given the power to grant interim orders in addition to the present power. The infrastructure of the FCAT should be commensurately augmented in consultation with the Chairperson of the FCAT, including increasing the number of Members and/or benches;

A right of appeal only to the Supreme Court be provided for from orders passed by the FCAT

"31. Appeal –

(1) Where any person is aggrieved by any order of the Board or of the Central Government, or of any other authority that affects and relates to the exhibition of a film, such person may, within a period of thirty days from the date of such order, prefer an appeal to the Appellate Tribunal.

Provided that the Appellate Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the aforesaid period of thirty days, allow such appeal to be admitted within a further period of thirty days by passing a reasoned order.

(2) Every appeal under this section shall be made in writing and shall be accompanied by a brief statement of the reasons for the order appealed against, where such statement has been furnished to the appellant, and by such fees, as may be prescribed."

Guiding Principles in Evaluating a Film

On the issue of guidelines, the Committee recognized in its Report:

> This aspect was perhaps the most vexed issue, which the Committee encountered. Across the country, the Committee was faced with views and opinions from both ends of the spectrum. While on the one hand, members of the film industry were aggrieved by the fact that films are viewed through a conservative and unnecessarily moralistic prism, on the other hand, women groups and social organizations were of the view that too far and great a latitude is being given to film makers. Such a contra distinctive spectrum of views is representative of nothing but the age-old debate between tradition and change. The Committee is of the opinion that there can never be watertight and rigid guidelines for certification of films. Cinema is a form of art and by its inherent character, capable of varied forms of representation and consequently myriad forms of interpretation. The courts have over the years attempted to grapple, with little success one might add, to give precise meanings to terms such as morality, obscenity and excessive violence etc. These are concepts that are incapable of surgically precise definitions and interpretation of such terms will vary from person to person.

Report of the Mudgal Committee, Ch. 4, para. 14.1.

For overarching guiding principles, the Committee recommended:

The Committee is therefore of the view that the provisions in the Act dealing with guidelines for certification must include provisions which protect artistic and creative expression on the one hand while on the other requiring the medium of cinema to remain socially responsible and sensitive to the values and standards of society. More importantly the Committee strongly regards as necessary, the introduction of a parameter which requires the members of the Screening panel/Board to view a film in its entirety from the point of view of overall impact, in the light of the theme, context and story of the film and the persons and the period of time to which the film relates. We have come across instances where members of the Advisory Panel (Screening Panel) have scrutinized a scene from the perspective of a stand-alone scene as opposed to its contextual and thematic value. Keeping the above in my mind the Committee proposes the following provisions in relation to guiding principles for certification of film.

Report of the Mudgal Committee, Ch. 4, para. 14.3.

The 2013 recommendations of the Mudgal Committee in the form of a Bill is pending with the

Government and once permitted to and passed by the Parliament would become an Act. Passage of the Bill would be an important step in taking politics out of the process of film certification and providing guidelines consistent with current societal values and standards by which films are certified for exhibition.

Mukul Mudgal is a former Chief Justice of the Punjab & Haryana High Court. In addition to having served as Chairperson of The Committee Of Experts To Examine Issues Of Certification Under the Cinematograph Act, 1952 *in 2013, he was appointed in 2014 by the Supreme Court of India to Chair a committee to conduct an independent inquiry into the allegations of corruption against a family member of the chief of the Board of Control for Cricket in India ("BCCI"), and others, including several players. The Committee was also given the larger mandate of investigating allegations of betting and match-fixing involving players in Indian (Cricket) Premier League matches in 2013. The Committee issued its report in January 2015 to the Supreme Court of India and found evidence of significant wrongdoing. Justice Mudgal is presently based in New Delhi and can be reached at mudgalmukul@gmail.com.*

Film Certification in India—A Tight-Rope Walk

By Leela Samson

Conceptually, the Central Board of Film Certification of India is envisioned as an autonomous body that comprises of a group of professionals from different walks of life—allied and related to cinema—who are brought together to make the policies that the CBFC then implements. While the constitutional status of CBFC is that of a subordinate office under the administrative control of the Ministry of Information& Broadcasting, the functioning and the decision making regarding film certification must be independent of any Government or non-governmental influence. It is the bounden duty of the Chairperson and the Board to ensure that this independence of the CBFC is not only maintained, but is also perceived as being maintained for the body is under the constant scrutiny of local and international media and any perceived interference in the working of the Board is detrimental to the image of the Government.

To achieve greater transparency and more objectivity in the working of CBFC, it is crucial that the Board Members, Advisory Panel Members and the officers of the Board are selected with utmost care. Greater representation of the film industry on the Board will enable a form of self-governance that will go a long way to minimize the confrontation between the two that had for long been the nature of their interaction. However, it is not just industry insiders who must come on the Board. Educated, professionals of integrity with backgrounds in film, media, culture, the arts, science, journalism, law, social work, literature and education are also important. I believe that the CBFC has had wonderful people of this nature on its Boards since inception and that is why films of every nature have flourished in the country. We had such individuals on the Board in my time as Chairperson as well, who took their appointment seriously and attempted to make a difference to film culture and the institutional processes that oversee one of the most powerful mediums of modernity.

However, the day-to-day functioning of the CBFC is handled not by Board members but by CBFC officials in every region and hundreds of Panel members - those who actually view and grade films. It is here that the choice of the panel members and officials – their background and experience is of utmost importance. This listing cannot be compromised. These persons simply cannot be appointed because they are political party workers. According to the rules of certification two-thirds of the members of the Advisory Panel can be recommended by the Chairperson and the Board of CBFC. We repeatedly asked the Ministry to take our recommendations seriously so that we could have more cinema-savvy and informed people who view and certify films. Every time we were indulged and asked to send in "good" names. Of course, none of these figured on the final lists made by the Ministry of Information and Broadcasting.

The CBFC certifies Hollywood films, too, and it is often a challenge to get panel members who know the language enough to suggest cuts or advise ratings. The media has in the recent past highlighted the incompetence of these Panel members in judging films. The Chairperson is more often than not, in an embarrassing situation when having to justify the rating made by a panel. Most people believe that the Chairperson of the CBFC sees every film brought out in every language across the country—all 1,500 of them a year! In fact, the Chairperson and the Board get to know the rating given to a film only when the CEO of the CBFC advises the Chairperson of a problem or when the press or an affected party bare their grievance to the media. Else it is not a process the Chair or Board members are involved in. It is true to say that several Boards, and certainly the one I had the pleasure to

leadwere committed to streamlining and updating the processes of film certification allowing for an openness and freedom of expression while remaining extremely sensitive to crucial issues and concerns relating to social and gender inequities and injustices, community sensitivities, as well as national security concerns.

It is only when an aggrieved Director applies for a Review of his film, which is the second stage of the certification process that the Chairperson is informed and he or she looks into a fresh panel that is now headed by a member of the Board or in some cases, the Chairperson himself or herself. It is critical then, that the Advisory Panel members have an exposure to films, the arts, political forces at play, different religious beliefs, social and institutional processes and are able to understand and respond to the issues that cinema raises. It is in this sense that sensitivity to social, cultural and artistic issues and a sense of responsibility to the task at hand is absolutely crucial for the Panel members. Their selection is, therefore, an onerous task, and honest, intelligent and aware members should be appointed to the Advisory Panels. It is also important that Advisory Panel members understand the nature of their appointment, and do not inflate their own importance or see their role in a self-aggrandizing manner—printing visiting cards with this appointment or demanding favors from the film industry in exchange for their role in certification.

Other recommendations made to the Government and which ought to be high on the agenda of the CBFC is holding orientation and cinema-education workshops for new advisory panel members, not allowing the Panel members to continue for more than two consecutive terms, introduction of a "mature" slot or a water-shed hour on satellite television for adult content cinema, a voluntary by-line by the Producer to the certification describing the film and other such progressive measures, and most of all, emphasizing the need to amend the existing Cinematograph Act of 1952, which would introduce one or two more certification categories like UA-15.

Funding—that is the starting point of most discussions in the country today—is not the problem. "Approximately an amount of one crore can be earmarked for this project in the current financial year since top most priority has to be given to this project and executed on a turnkey basis at the earliest" said the Additional Secretary of the Ministry of I & B at a meeting held on September 5, 2014 in his chambers, attended by the Chairperson, CEO and Regional Officers of the CBFC. [A new CEO In-Charge had been appointed who wished to take up pending matters on a war-footing.] We have to speed up our certification process and we have to project ourselves as a transparent and user friendly organization. The existing website should be redesigned and upgraded and ensure that the applicant [producer] need not make several rounds to the CBFC office." (Editor's Note: one crore is ₹ 10 million, or $167,000 based on the currency exchange rate, or roughly $400,000 based on purchasing power parity.)

As Chairperson, I spoke specifically about the nature and appearance of the certificate issued by CBFC—that it had not been upgraded, nor redesigned in 100 years, that this was a visual art form requiring a more attractive image and perhaps using an animated version for display at theatres which would display the grading in a way that would cut across language barriers, that the latest technology needed to be incorporated in it, that the logo of the CBFC still indicates that a cut film is being shown and this logo has to be redesigned to suit the remodified role of CBFC i.e., certification of film and not censoring of film, and that the CBFC hologram had to be designed and inbuilt in the certificate issued by CBFC to avoid duplication and maintain authenticity. The Regional offices needed to be provided with Digital Projection Systems and all Regional Offices should have their own preview theatres. After 100 years of Indian cinema the

CBFC still does not have a designated building that represents the work of certification, with proper reception and conference rooms, or viewing facilities. The present system of going out to the producers' chosen location for previewing a movie has to be discontinued, besides saving precious man hours in travelling through a metropolis like Mumbai!

To this suggestion it was decided that whichever region has space which can be reallocated for a digital theatre shall procure a digital projection system and start functioning within their existing space immediately. The fact is, that no regional office has that kind of space. In case of regions where enough space for accommodating digital preview theatres is not available, Regional Officers were asked to identify suitable locations as early as possible. This last, is a way of brushing a difficult issue under the carpet and moving on. The arts simply do not count. That is the truth. Bureaucrats and politicians simply reflect the people's insensitivity to their own creative processes.

The profile of the CBFC from an earlier conception of a "censoring" agency to one that primarily classifies films as per the Cinematograph Act, 1952 is paramount in today's India. There must be a regular exchange of ideas and open dialogue with the stakeholders to ensure that the trust deficit that had been built up over the years is regularly addressed. We made a commitment to the stakeholders that the Board would make a genuine attempt to ensure that the certification process was transparent, efficient and in tune with contemporary global standards, so that our film content is at par with developments and standards all over the world.

Initiating debate on the significance of cinema, its signifying procedures and narrative structures, and the communicative power of this extremely powerful medium that needs careful handling became one of our Board's priorities. To that end, some of our members who taught cinema and related subjects in colleges and universities in India and abroad were entrusted with the responsibility of developing training and refresher modules for panel members across the different language regions in India. Panel members attended these modules in large numbers, so did filmmakers. The interactive sessions called *Samvaads* that CBFC had been holding for three years across India had become immensely popular among the audience, the filmmakers, the trade bodies and chambers as well as with other stakeholders like the Animal Welfare Board of India, NGOs dealing with women's and children's issues, and other organizations.

However, in the Centenary year of Indian cinema our dream that the new Cinematograph Bill 2010 would be enacted by the Government as a gift to the nation and to the film industry that has contributed to the Indian image in the international arena, besides raking in millions in foreign exchange earnings, lay shattered for want of resolve by the Government. What a missed opportunity! The new Act, when enacted will give more teeth to the CBFC. At the moment, while it is laid down legally that the CBFC certificate is binding and must be upheld, any state government can challenge the certificate and take decisions that go against the certification and set the entire process to naught. The Mudgal Committee has made its recommendations in this regard and we had hoped that individual States banning or delaying the exhibition of certified films would become history.

The cause of the documentary filmmaker who does not have the financial ability of the mainstream film-maker and yet passionately commits to exploring critical social issues despite lack of distribution and exhibition facilities was extremely dear to me. I believed that there should be a different payment structure for documentary films, which would make it easier for them to continue making films that address significant social, cultural and political issues.

In a meeting with the film industry, it was considered fruitful to set up a Joint Committee with representatives of the film industry to frame the guidelines for the late-night slot on television. It was believed then that the framework formulated by this joint committee would serve to inform decisions on films which qualify for that slot, that this would be a mature step for the certification process and that a lot of filmmakers would begin to accept this as a step forward. In time, this slot would become an accepted norm, and even the broadcasters would begin to see this as a boon. Most significantly, this would enable that television content could cater to mature audiences at a suitable time.

Freedom of expression is a basic right. The people of India will decide what they will accept and what they will not, and when. It is the responsibility of the State Governments to ensure law and order. There are small groups, churned up by political activists who create trouble with an issue to raise objection and use it as a tool to project themselves. There is an audience for every kind of cinema and it is the right of the people to watch it.

In the ultimate analysis, if films must be certified in a free society, a process that filmmakers endorse for technical reasons, it is best that the Government in power disassociates itself completely from the process of certification.

Leela Samson is a distinguished Bharatanatyam dancer, choreographer and instructor and a writer. She is known for her technical virtuosity and has taught Bharatanatyam at Shriram Bhartiya Kala Kendra in Delhi for many years. She is a former Chairperson of the Central Board of Film Certification, formerly the Central Board of Film Censors. Ms. Samson was a member of the Committee of Experts to Examine Issues Of Certification Under the Cinematograph Act, 1952, (the "Mudgal Committee").

A SEA CHANGE IN THE INDIA'S FILM INDUSTRY
NEW OPPORTUNITIES FOR HOLLYWOOD

By Anand Desai

India's entertainment industry has always been open to creative ideas from the West in general and the United States, in particular. Indeed, the focus of Indian cinema on Indian cultural preferences has not stopped Bollywood from sometimes openly mimicking Hollywood films, TV shows, and music. In recent years, however, that interest has included business models, as well, which has led Hollywood studios to pay greater attention to India. These Hollywood studios have recognized the vast potential in Indian markets for Bollywood product.

Most large Hollywood studios, including Disney, Fox, Sony, and Warner, have not only set up distribution offices in India, but have moved to producing Indian films. They have done so by partnering with Indian studios either through co-productions or formal corporate acquisitions like Disney-UTV. For example, Disney has started funding the production of Bollywood films. Fox Star has produced almost 30 Bollywood (Hindi language) films, as well as a few "Kollywood" (Tamil language) and "Mollywood" (Malayalam language) films, as well. (Other Hollywood inspired names for India's prolific and varied regional cinema, include "Ollywood" for the Oriya language, and "Tollywood" for the Telegu language films industries.)

This kind of international collaboration has been made possible, in part, because decision-making in the Indian film industry has undergone a sea change, evolving from instinctive, talent driven decisions by a few individuals and "film families" to corporate studio management with defined strategic processes with emphasis on the quality of content, talent, production values, marketing, and distribution. Marketing strategies, including budgeting to implementing those strategies, play a pivotal role in determining which story will ultimately make it to the big screen.

The restructuring of India's studio system has been one of the reasons for Hollywood's interest in Bollywood. Other reasons include India's well-developed infrastructure for film industry.

The Indian film industry now follows a similar approach to the American film industry, monetizing each aspect of film production, and thereby maximizing revenues. Films are financially de-risked at their under production stage. Although a significant chunk of revenues are garnered from theatrical exploitation till date, however newer exploitation platforms are being added, which are resulting in increasingly higher revenues. The Indian market for dubbed films is also expanding noticeably, and Indian film stars are gaining popularity in many parts of the world. Indian studios are exploring Western distribution practices, such as adopting moratorium periods where certain properties are released and then the exploitation of the property is suspended temporarily to increase their monetization prospects.

Another technique is re-releasing old films after digitally restoring them. Indian studios are also looking at building franchisee content which can be exploited across platforms. Producers of films such as "*Krrish*" (a science fiction/superhero movie [2006]) and "*Chhota Bheem*" ("*Little Bheem*," an animated comedy-adventure series about a boy and his friends [premiered 2008]) have attempted to explore merchandising opportunities, like Disney merchandised properties.

Indian film companies are also now aware of the offers of various incentives for film and television production, provided by several American states, such

as California, New York, Michigan, Nevada, and Utah. This includes the California Film Commission which is a one-stop resource for film and TV production, and provides information on how to obtain film and TV tax credits and online permits for filming on government property such as beaches, parks, roadways, public universities, and government buildings. The New York Mayor's Office of Film, Theatre & Broadcasting, addresses all production needs in New York City.

Removing Red Tape

The Ministry of Information and Broadcasting ("MIB"), which is the primary body for regulating the entertainment industry, is considering a mechanism that will facilitate international as well as domestic film productions, and has formed an the Inter-Ministerial Committee to that end. The committee hopes to streamline the production process by acting as the single conduit through which producers may obtain the necessary licenses and permits to produce their films and TV programs. The committee is also expected to provide useful guidance concerning shooting locations, production crews, talent, facilities, stages, equipment, and support services. Furthermore, the government is also considering tax exemption incentive packages to attract foreign film-makers. The MIB has also recently issued simplified guidelines for film shooting by foreign nationals in India. India is also becoming a favored destination for shooting films, which enables Hollywood studios to produce films in a foreign location at a lower cost. Recognizing the bureaucratic impediments inherent in producing films in India, and to promote India as a destination for film shooting, the Indian Government of India recently initiated certain key reforms for the benefit of the film industry.

Streamlined Visa Process For Production Crews

The entry, movement and immigration of foreign nationals into India is governed principally by the Foreigners Act, 1946, the Citizenship Act, 1955, and the Registration of Foreigners Act, 1939, which collectively provide the framework for the movement and behavior of foreign nationals within India. Foreign artists intending to shoot in India on a long term basis may apply for a "B-Visa" if the production is commercial in nature, or a "J-Visa" if the production is a documentary or pertains to journalism.

In the United States, a film and production crew can either apply for "O-1 Visa" for Artists of Extraordinary Achievement (actors, directors, producers, other singular professionals known for their craft), or "O-2" Visa for supporting cast and crew (actors, Assistant Directors, crew who are essential or have been attached to O-1 talent).

State of the Art Post-Production Facilities

Film cities have developed in Mumbai, Hyderabad, Chennai, and Noida. India also offers economically viable world-class post-production facilities like VFX, 3D, and animation. Furthermore, outsourcing of post-production services to India from other countries has steadily increased. For instance, films like *Avatar* and *Life of Pi*, among others, were post-produced in India.

Franchised Programming

India has seen a significant increase in the number of television channels, television serials, and other programs, including franchised programs such as *Bigg Boss*, *India's Got Talent*. The latter category offers a significant platform for individuals who don't have adequate resources to present themselves to entertainment recruiters and society more generally. Indian performers are increasingly capitalizing on opportunities in American productions, and vice versa.

American Entertainers in India

In the past few years India, has increasingly seen American entertainers performing in India, including music performers, stand-up comedians, and other celebrities. However, such exposure has not escaped controversy. For instance, while some Indian audiences have accepted American standards surrounding stand-up comedy and other modes of expression, other, more conservative audiences have actively resisted and have frequently invoked India's speech regulatory regime to censor performances they view as conflicting with "traditional Indian values."

Music Industry Delinked from Bollywood

In India, the music industry is largely dominated by film-based music, while in the United States, independent music performers rule the market. India is slowly but steadily moving towards an independent music culture that is film agnostic, including "indie" music artists who now tour the world performing at various festivals and shows.

Indian Event Management

Indian event and talent managers are mushrooming, and talent is benefiting from the professionalism introduced by effective business managers. The talent pool, which was earlier dominated by only a few families, has now opened up to trained and qualified individuals who succeed on their management and recruitment acumen.

Computer-generated Games and Animation

With the abundance of Indian software professionals, India provides a skilled workforce for developing games and animation, at relatively low cost. This feature of the Indian labor market provides enormous opportunity for digital outsourcing from the United States.

Challenges

Two major areas pose challenges are intellectual property protection and censorship. India courts are enforcing recent laws for providing greater IP protection which brings India closer to international norms. India's censorship laws, on the other hand, are entirely a matter of domestic cultural sensitivities and politics among India's diverse ethnic groups.

Censorship

The freedom of speech under Article 19(1) of the Indian Constitution is not unbridled and can be suppressed if content is considered objectionable, harmful, or is required to be curbed to maintain communal harmony. The Indian Parliament has enacted multiple statutes that combine to form a complex regulatory regime governing the entertainment industry. Key enactments include the Cinematograph Act, 1952 (as amended), the Copyright Act, 1957 (as amended), The Cable Television Networks (Regulation) Act, 1995, the Indian Penal Code, 1860 (as amended), and the Press Council of India Act., 1978.

Furthermore, Indian administrative bodies, such as the MIB, have promulgated regulations and guidelines to complement statutory enactments. For example, the Central Board of Film Certification certifies films as "universal", "adult" or "parental guidance." The Programme and Advertising Codes prescribed under the Cable TV Network Rules (issued under the Cable TV Networks Act) regulate television content. With the increase in the number of general entertainment television channels in India, the Indian Broadcasting Federation ("IBF") felt the need to regulate content and address program related complaints, and a set of self-regulating content guidelines were framed by the IBF and implemented. IBF has also established an

independent complaint redressal system, the Broadcasting Content Complaints Council.

In the United States, fairly unrestricted freedom of speech is considered an integral part of American culture, and is protected by the First Amendment to the U.S. Constitution. Film censorship in America has developed largely through case law, where local, state, and city censorship boards attempt to ban or edit films. This is relatively difficult to do because the authority of these bodies to censor films is circumscribed by American free expression jurisprudence. Indeed, it is extremely difficult to ban or censor speech in the United States under the 1st and 14th amendments to the U.S. Constitution as interpreted by the courts.

This approach stands in contrast to the relative readiness of Indian courts to uphold governmental bans or restrictions on speech or expression found to be offensive or hurtful to the sensibilities of a section of society as defined by a complainant. Even though Articles 19 and 21 of the Indian Constitution guarantee freedom of speech, proponents permitting greater restrictions argue that there is a greater concern in India over the potentially adverse consequences to public order of permitting expression considered offensive to the complaining group than in the U.S. Critics argue that the concern is overstated and sets India on a slippery slope of limiting free expression to the point that the right of free speech becomes meaningless.

While the Indian motion picture industry must work with this tension in Indian freedom of speech jurisprudence, U.S. filmmakers have the relatively easier task of simply complying with the classification system of the Motion Pictures Association of America. The MPAA, through the Classification and Rating Administration, issues ratings to keep mature or adult content from reaching minors, with ratings for film such as "General Audience," "Parental Guidance," "PG-13," Restricted," and Adults Only" ratings. In addition, public dialogues, legislative debate and judicial review have provided filtering strategies in the United States for regulating content on the internet.

Despite a more restrictive approach than in the U.S., laws limiting speech cannot be overbroad. For example in a recent judgment in the case *Shreya Singhal v Union of India*, (2015) 5 SCC 1 (March 24, 2015), the Supreme Court of India struck down as unconstitutional Section 66A of The Information Technology Act (introduced by an amendment of 2008). Section 66A authorized police to arrest persons for social media posts construed "offensive" or "menacing." The law was challenged by Shreya Singhal after she and her friend were arrested by Mumbai Police after posting comments on Facebook in 2012 critical of the total shutdown in Mumbai after the death of Bal Thackeray, the head of the Shiv Sena. Calling Section 66A "open-ended and unconstitutionally vague," the Supreme Court held the section unconstitutional "in its entirety" on the ground that it "arbitrarily, excessively and disproportionately" invaded the right to free speech, right to dissent, right to know, and had a "chilling effect" on constitutional mandates.

> 87. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some.

Criticizing the language of Section 66A, the Court went on to say many things:

> 87. may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

Still, Hollywood/Bollywood collaborations will have to continue to be careful not to offend any group, whether in the majority or a minority that could coalesce to express a grievance that they have been offended to the extent that unless censored the content in question poses a threat to public order. Producers must also be careful to steer clear of section 295 of Indian Penal Code, which makes it a criminal offense for anyone who acts on a deliberate and malicious intention of outraging the religious feelings of any class of citizens. Publisher Penguin India was accused of such malicious intent when it published and distributed Nancy Doniger's book *The Hindus*. Penguin withdrew the publication as part of an overall settlement of the suit).

Continuing Challenges in Intellectual Property Protection

Despite the reasons for optimism articulated above, piracy, particularly online piracy, continues to be a challenge for India and the United States. The Motion Picture Association of America has been fighting internet piracy, theatrical camcorder piracy, and DVD piracy among other forms. However, success in this area is a long way off and likely will require legislation and effective enforcement.

The entertainment industry generates enormous amounts of intellectual property. Both India and the United States have strict laws regulating this area of the economy. However, a possible difference is the widespread protection methods that are implemented in the United States, as against a more fragmented approach that is prevalent in India, partly influenced by India's historical approach of sharing what one creates. In India, it's a common practice for two or more producers to jointly own intellectual property in pre-defined ratios while the Hollywood studios tend to own intellectual property in a single entity instead of co-ownership structure.

In sum it is the new environment in Indian cinema and entertainment industry has created new opportunities for mutual cooperation between India and United States across all aspects of the entertainment industry. However, continuing reforms, in both the public and private sectors is essential to sustain the impressive levels of growth this sector of the economy has been generating.

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THE NEED FOR A MOTION PICTURE CO-PRODUCTION TREATY BETWEEN INDIA AND THE UNITED STATES

By Ameet B. Naik

The motion picture industries of India and the United States have had a long and fruitful relationship going back to the middle of the last century. Notable recent Bollywood movies shot in the U.S. include *Kabhi Alvida Na Kehna* (*"Never Say Goodbye"*) (2006), *Dhoom 3* (*"Blast 3"*) (2013), *Dostana* (*"Camaraderie"* or *"Buddies"*) (2008) and *New York* (2009). All topped box office charts in India. Similarly, well-known Hollywood movies such as *Life of Pi* (2012), *Slumdog Millionaire* (2008), *Bride & Prejudice*, (2004) *Zero Dark Thirty* (2012), the *Best Marigold Hotel* movies (2012 and 2015) and many others dating back to the 1980s—for example, *A Passage to India* (1984), *Octopussy* (1983) and *Gandhi* (1982)—were all shot entirely or in part in India. Dubbed versions of Hollywood films in regional Indian languages have also gained popularity. Further, there is a significant growth in the number of VFX (computerized visual effects) companies thriving in India due, in part, to Hollywood studios outsourcing VFX work for their films to Indian companies. Indian VFX companies like Prime Focus have been instrumental in the production of several Hollywood films, including *Avatar* (2009). United States-based companies continue to recognize the benefits of production in India given India's diverse filming locations, and a skilled yet economical labor force.

Bollywood is the nickname that has come into usage to mean the Hindi language film industry based in Mumbai (Bombay). This article focuses on collaboration between Bollywood and Hollywood and less on the many other centers of motion picture production in India.

In recent years, the pace of this decades old collaboration between Hollywood and Bollywood has picked up significantly. The last few years have witnessed a number of new alliances between Bollywood companies and international film studios, such as Warner Bros, Disney, Fox. These alliances have gone beyond motion pictures into associated fields such as talent management. Additionally, Indian films are acquiring enhanced global recognition, by their increasing impact at international film festivals and the growing demand for them abroad. As India-U.S. ties in entertainment continue to develop, both sides have recognized that streamlining investment and production processes, including intellectual property protection, benefits all stakeholders.

Indian Courts Are Now Enforcing Intellectual Property Rights

In the past, lax intellectual property protection, at least from Hollywood's perspective, allowed Bollywood to produce remakes or adaptations of films from Hollywood. Such remakes or adaptations, even if mirroring the original scene-by-scene, were often made without acquiring rights or licenses from the original producers. Some of these remakes and adaptations, based on source material in the public domain, include *Pyaar Ka Saaya* (*"The Shadow of Love"* [1991], which adapted *Ghost* [1990]), *Main Aisa Hi Hoon* (*"I Am Like This"* [2005], which adapted *I Am Sam* [2001], and *Heyy Babyy* (2007) (which adapted *Three Men and a Baby* [1987]).

Recently, however, India's jurisprudence in media, investment and finance and intellectual property protection has begun to evolve in ways that will facilitate the growing relationship between Indian and U.S. companies in the entertainment field. For example, Indian courts have begun to protect the intellectual property rights of Hollywood production companies in light of unauthorized remakes. In

Twentieth Century Fox v. BR Films &Anr., NMS/1561/2009 (Bombay High Court 2010) (unreported consent order), the court issued an injunction staying the release of *Banda Ye Bindaas Hai* (*"This Guy Is Fearless"* [2009]) pending its decision on an underlying copyright infringement suit which alleged that the Bollywood version was an unauthorized copy of *My Cousin Vinny* (1992). The parties settled before the court's decision. A year later, however, in *Twentieth Century Fox Film Corp. v. SohailMaklaiEntm't Pvt. Ltd.*, NM-2847 (Bombay H.C. 2010), the court found that the defendant Bollywood producer's film *Knock Out* (2010) had infringed the earlier Hollywood film *Phone Booth* (2002). This was the first court decision in India where the Court allowed an alleged Hollywood-plagiarized film to be released subject to the producers depositing a certain sum with the court and maintaining accounts of the box office collections. The matter was eventually settled by the parties.

With the increased willingness of copyright holders to bring suit to protect their works and increasingly stringent application of copyright laws in India, acquiring rights to produce an official remake or adaptation has become a new trend. Today, there are several Bollywood films that are authorized remakes of Hollywood films such as *We Are Family* (2010) (remake of *Stepmom* [1998]), *Players* (2012) (remake of *The Italian Job* (2003), *Bang Bang* (2014) (remake of *Knight and Day* [2010]), and *City Lights* (2014) (remake of *Metro Manila* [2013]). Recently, Anil Kapoor Film Company, Pvt. Ltd., acquired the rights to *24*, an American counterterrorism, action drama television series from Twentieth Century Fox. This is the first adaptation of a U.S.-based fictional TV series in India.

The Road To An India-U.S. Co-Production Treaty

India has co-production treaties with several countries, including South Korea, Canada, France, Germany, New Zealand, and others. Yet, despite the shared historical connection in motion pictures between the U.S. and India spanning over four decades, the two countries and their entertainment industries still have no co-production treaty to promote the production of Indian films in the U.S. and vice versa. Recently, the LA-India Film Council was formed to facilitate and strengthen motion picture production, distribution, technology, content protection, and commercial cooperation between Hollywood and Bollywood. However, this effort has so far not succeeded in motivating either government to pursue a formal agreement addressing film production.

Recently, talks have also taken place in connection with the signing of a treaty that facilitates the protection of Intellectual Property Rights ("IPRs"). A senior American diplomat, Charles Rivkin, voiced his opinion by saying,"[h]olding that transparency, predictability and upholding the rule of law are essential for better ties, the U.S. is keen to restart work on a Bilateral Investment Treaty (BIT) with India for deepening economic relationship." He then continued, "[t]he US wants the Indian economy to grow and reach its potential. Entrepreneurs should know that ideas are not stolen as there is law in place for IPR protection."

The treaty has not yet materialized due to several issues, including the lack of data transparency relating to box office collections and producer and distributor's shares available in public domain. Other factors include an unawareness on the part of U.S. companies of a stronger intellectual property rights (IPR) regime in India. To be sure, foreign investors are still concerned about the fact that India continues to be plagued with media piracy, corruption, heavy taxation on entertainment industry, no single window clearances, lack of film incentives, and ambiguities in certification and copyright laws. These factors make foreign film makers reluctant to shoot or produce films in India.

However, these are the very issues a co-production treaty would address. To begin with, the slow but

steady change in the Indian outlook towards protection of IPRs is cause for optimism that India is serious about restarting negotiations to remove impediments to co-productions. Most of the concerns of Hollywood companies investing in co-productions would be addressed in a co-production treaty. Enumerated below is a list of provisions that any such treaty should include.

- **Cash grants**: Non-refundable funds disbursed to the production companies that help production houses or companies to reduce their production costs. This benefit will allow smaller companies to venture into foreign markets and help propagate the production of niche movies, which tend to be smaller budget, content-driven films.

- **Cash rebate**: Refunds from the actual expenditure incurred at a particular percentage.

- **Tax credit:** A sum deducted from the total amount a taxpayer owes to the treasury. It can be granted for various types such as income tax and VAT.

- **Exemptions from customs duty**: Regulations already exist that enable a carnet card holder to travel between the two countries for filming purposes, among many other purposes, without the need to pay import duty or tax on carried equipment. In India and the U.S., this system is called the ATA Carnet System ("Admission Temporaire-Temporary Admission." The ATA Carnet is an international Customs document that a traveler may use temporarily to import certain goods into a country without having to engage in the Customs formalities usually required for the importation of goods, and without having to pay duty or value-added taxes on the goods, such as commercial samples, professional equipment and certain advertising materials.) However, currently in India, this system permits only the tax-free admission of of goods designated for international trade fairs and exhibitions. It has been proposed to expand the same protections to commercial samples, professional equipment, private exhibitions, film shootings, musical troupes, and sports and media coverage. The Federation of Indian Chambers of Commerce and Industry (FICCI), which is the National Issuing and Guaranteeing Association for implementing ATA Carnets in India, is lobbying the Ministry of Finance to expand the scope of the system to cover professional equipment and commercial samples.

- **Other benefits**: Any agreement should also provide for discounts in travel and lodging costs, easier visa processing ensuring fast approvals of the visa.

Any production treaty containing the above-mentioned points will have a far-reaching effect on both nations and will confer the following benefits:

- **Boost tourism**: The tourism sector helps generate around almost 7% of India's gross domestic product. Hollywood movies like *Eat, Pray, Love*, which was shot in exotic locations around India, highlight the beauty of rural India while showcasing the spiritual and traditional aspects of the country. Similarly, movies like *My Name is Khan* left Indian audiences awestruck at New York's glamorous, fast-paced lifestyle. The Ministry of Information and Broadcasting and Ministry of Tourism have both signed a Memorandum of Understanding to further enhance film tourism. This memorandum aims to endorse India as a filming destination for domestic and foreign filmmakers. Further, the memorandum will facilitate budgetary support for specific film festivals and provide a single window clearance for film shooting permissions. (A single window system enables international (cross-border) traders to submit regulatory documents at a single location and/or single entity.) Eventually, world tourist

arrivals in India should rise from 0.06% to 1% by the end of the 12th Five-Year Plan (2012-17) As more Indians are able to travel overseas, Indian movies shot in U.S. locales are bound to generate greater interest in visiting those venues.

- **Create employment opportunities:** While shooting in a foreign country, it is vital to engage the services of local line producers who understand the workings of the particular venue, which, in turn, generates significant local employment.

- **Increase inflow of foreign exchange:** With producers in one country investing to produce a movie in the other, each side will benefit from the associated localized spending that occurs during the shooting.

- **Aid in the advancement of high-tech production facilities and equipment:** With the constant evolution of technology, the collaboration of know-how and resources to create facilities and equipment will help create a smoother and more efficient way of producing movies, in turn, reducing other miscellaneous costs that arise while shooting in a foreign location like cast and crew costs or other accommodation expenses.

Realizing the benefits of co-production treaties, countries like New Zealand, China, Germany, Canada, France, Brazil, Italy and the U.K. have already entered into co-production agreements with India, in an attempt to secure the benefits outlined above and to tap into the Indian film market. Furthermore, the recent success of the Bollywood blockbuster *Zindagi Na Milegi Dobara* ("ZNMD") ("You Only Live Once," or, literally, "You Won't Get A Second Life"), which was filmed extensively in Spain, resulted in an audio-visual co-production agreement between the two countries in the area of feature films, documentaries and animation films. When ZNMD was shot, the Government of Spain offered a VAT refund of around 18% and streamlined the visa process for those involved in the production. These actions, in turn, led to an increase in the number of Indians visiting Spain after the release of the movie. According to Spain's tourism board, within six months of the release of the film, the number of Indian tourists to the country jumped by 65% to more than 11,500 in 2011. The India's Ministry of Information and Broadcasting expressed satisfaction over the signing of the Spain Treaty by proclaiming that "The agreement provides opportunities for both the countries to pool their creative, artistic, technical, financial and marketing resources to co-produce films.

The development of strong bonds between India and the U.S. was more significantly marked by President Barack Obama's recent visit to India in late January 2015, the ripples of which were reflected in a joint statement with the tag line *''Sanjha Prayaas-Sabhka Vikas"* ("Shared Effort; Progress for All'"). This collaboration included "recognizing the progress made in constructive engagement on IPR and enhancing engagement on IPR in 2015 under the High Level Working Group on IP, to the mutual benefit of both the countries." The leaders of both countries reaffirmed the importance of providing transparent and predictable policies for fostering innovation. Both countries reiterated their respective interests in sharing information and best practices on IPR issues, and reaffirmed their commitment to stakeholders' consultations on policy matters concerning IP protection."

President Obama's visit has further set the stage for greater and closer collaboration between Hollywood and Bollywood to produce and sell motion pictures in the other's domestic market. A co-production treaty between India and the U.S. will address most of Hollywood's concerns by promoting innovation, providing greater IPR protection, creating transparency, and thereby increasing investment opportunities within the Indian entertainment industry and vice versa. A production treaty, along with the

"Make in India" initiative adopted by Prime Minister Narendra Modi, and the reforms his government has undertaken, will build on decades-old cooperation between India and the U.S. to synergize the two biggest film industries in the world.

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Scope For Further Promoting A Budding Relationship between the Film Industries in the United States and India

By Uday Singh

According to the Motion Picture Dist. Association (India) Pvt. Ltd. (MPDA), the local representative office of the Motion Picture Association, India is already the fifth largest international box office market in the world after China, Japan, France and the United Kingdom. *See,* MPAA 2014 Theatrical Market Statistics. (The Motion Picture Association is a trade association representing six major international producers and distributors of films, home entertainment and television programmers: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Studios and Warner Bros. Entertainment Inc.) This growth needs to be fueled by policies which create a favorable legal and business environment for the development of Intellectual Property Rights in copyright industries while facilitating sharing of global best practices and engagement with the International copyright community. The India-US joint statement in early 2015, "Shared Effort, Progress For All" (in Hindi "*Saanjha Prayaas Sabka Vikas*") reinforces the need for continued dialogue and cooperation between copyright industries and the Government of India to build an Intellectual Property Rights regime that encourages development and innovation in the Indian media and entertainment industry.

The MPDA applauds the Government of India (Department of Industrial Policy and Promotion, Ministry of Commerce and Industry) for pushing forward the much-needed National IPR Policy that envisages IP as an integral part of India's overall development policy. However, for protection and development of IPRs in the film and television industry, sector specific IPR/Copyright issues and focus areas that facilitate ease of doing business need to be addressed as highlighted below:

Recognizing Industry Potential

India's creative industries, which include the film and television sectors, have demonstrated their positive contribution to the nation's economy. In 2013, the total (direct and indirect) contribution of the film and television industry to the country's economy was estimated at ₹50,000 Crores (₹500 trillion, or $8.1 billion), equating to 0.5% of India's GDP. *See,* Economic Contribution of the Indian Motion Picture and Television Industry, 2014, MPDA, India, Deloitte. This included the economic contribution of a wide range of sectors that make up the industry value chain, including film production and distribution, film exhibition, non-theatrical revenues (including Cable and Satellite rights, Digital /Online rights, music and home video rights), television production, broadcasting and distribution, and the fast-growing new media sector. The sector also supports a significant 1.8 million jobs.

This industry has the potential to contribute on a much larger scale, however the lack of a robust legal framework and uniform enforcement measures to curb piracy in this sector continue to undermine the growth of India's creative industries. Copyright industries need to be addressed with equal importance with respect to other sectors, while building a robust legal and enforcement framework to ensure that India's creative industries can enforce their IP rights and achieve their full potential in a rapidly changing marketplace.

Controlling Piracy / Content Theft

Content theft negatively impacts profitability, thereby resulting in less investment capital. Lesser capital pegs down the number of films that can be

financed, thereby creating fewer jobs. Over 90% of new release titles originate from cinemas. Infringing copies appear online within few hours of a film release. Online content theft via illegal or "Rogue websites" contribute to, facilitate, and/or induce the illegal distribution of copyrighted works, such as movies and television programming. This affects the performance of the film, the distribution cycle and jobs.

Moreover, according to the Cisco Visuals Networking Index (VNI) forecast, in the next two years, India will have the fastest internet traffic growth (348 million internet users) and become the second largest internet market in the world, surpassing China. As the Digital India campaign and cable TV digitization in the country progresses, there is a growing need for adequate legal protection and enforcement measures to combat piracy through cyberlocker, BitTorrent, web-based file hosting, wireless access control (WAP), blogs etc. which continue to stunt India's creative industries.

The implementation of a strong IPR Regime needs to consider specific amendments and improvements in the legal framework to address both source and online copyright infringement and streamlining of enforcement and copyright administering systems, in addition to running sector specific campaigns to promote copyright industries.

Promoting "Make In India"

In 2014, the media and entertainment industry was recognized as one of the top 25 sectors in the *Make in India* national program to drive growth and innovation. We applaud the recent steps taken by the Government to establish a *Single Window Clearance Mechanism* for film shooting. This will not only help attract international film and television productions to shoot in India, but will greatly benefit the entire production ecosystem for all screen content creation. The MPDA has worked since 2012 through the Los Angeles India Film Council (LAIFC), to support the single window clearance system, which is a stepping-stone in building a film incentive regime in India.

The LAIFC aims to facilitate and strengthen motion picture production, distribution, technology and commercial cooperation and encourage international collaborations between film communities in the U.S. and India. India needs to consider immediately establishing Film Commissions to act as one-stop-shops, coordinating with local government and filmmakers to provide all the necessary services for film shoots. Across the globe, Film Commissions or similar agencies play a pivotal role in attracting foreign productions into a country, cutting through the red tape, facilitating film shoots, and where possible, extending various production and tax incentives. Through the LAIFC, MPDA will continue to encourage initiatives that will help India to develop as a leading international filming destination.

Encouraging Ease of Doing Business: Rollout of GST

One of the basic objectives of the Goods and Services Tax (GST) is to usher in a simple, efficient and equitable tax structure. This objective would be best achieved if entertainment tax is subsumed in the GST. The continuation of entertainment tax in any form outside GST would be a hurdle in attaining the simplicity that the GST seeks to achieve. The existing entertainment tax structure is seriously flawed. It is a patchwork of many taxes, and entertainment rates are abnormally high. The impact of cascading taxes on the industry is significant. The rollout of the GST will definitely make it easy for companies in the U.S. and India to do business – generate higher output and create more employment opportunities.

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Distribution of Content on Digital Media in India

Key Tax Considerations

By Samira Varanasi, Ranjana Adhikari & Rajesh Simhan

We live in an age which can arguably be best described as the age of the internet; and India is not far behind the rest of the world in embracing this revolution. Growth in internet users in India was expected to reach 269 million by mid-2015. In India, the growth in the number of internet users has primarily been driven by the penetration of internet enabled mobile devices such as smartphones and tablets and by the growing outreach of 3G. While India can do with better connection speeds, there has been a sustained increase of the average connection speeds. (FICCI-KPMG Indian Media & Entertainment Industry reports that greater than 4 mbps speeds grew 100 per cent and greater than 10 mbps grew at 200 per cent year-on-year). Some telecom service providers such as Reliance are in fact looking to launch 4G services this year and the sales of 4G smartphones have also increased. With the availability of high speed internet and consequently, the consumption of internet based services in India is only expected to increase in the coming years.

Art and entertainment, in tandem, have also evolved so as to be consumed through the internet; often in a manner that only the internet can provide; with its interactive platform, barrier-free environment and its vast array of choices. Some of the most influential Indian and international entertainers in the Indian markets, especially in music and comedy spaces, owe their popularity to the internet. (These include Hozier, Adele, Nicki Minaj, Avicii, Justin Bieber; individual stand-up comics like Russell Peters and Lilly Singh/Superwoman; and comedy collectives like All India Bakchod, The Viral Fever Videos, Pretentious Movie reviews.) Aside from facilitating the open sharing of knowledge, ideas, culture, and entertainment, the availability of content on the internet also allows the forward thinking entrepreneur to invest in an area that creates quality and niche content whilst also allowing them to partake in the cultural capital as well as profits of artworks. This article seeks to explore the major revenue models available for tapping the appetite of Indian audiences for content distributed in alternative digital sources and major tax considerations of which businesses in this sector should be mindful.

Revenue Models for the Distribution of Content in Digital Media

The modes available for the digital distribution of media content in India have also evolved over the years from the traditional peer-to-peer models ("P2P") such as on BitTorrent, etc. to more commercially sustainable Business-to-Customer ("B2C") and Business-to-Business ("B2B") revenue models (providing content to internet users either for a fee or free of cost) including the following.

(a) Over-the-top ("OTT") Content Distribution

OTT content distribution allows for media content to be made available to the users directly over the internet where the content can either be streamed and/or downloaded including through mobile applications.

Major players providing online video and audio streaming services in the US are apprehensive to access the Indian markets because of the prohibitive and multiple layered licensing costs for the content; and the unsuitable internet infrastructure in India. However, many competitors focused on distributing both

international and local content in Indian markets have already emerged. These include HOOQ; launched by SingTel in association with Sony Pictures and Warner Brothers, which should also allow for the downloading of the content in a bid to the problem of the erratic internet speed in India; Hotstar.com; Ogle; BigFlix; and Ditto TV. Though YouTube continues to be the most popular video streaming website in India. YouTube does not charge the users; and instead relies on advertising revenues. This is also true for the several content providers on YouTube; who have, over the years, been able to make use of programs like the Google AdSense to generate revenues from the cultural capital of their content.

Aside from music and video streaming sites, devices with proprietary software like Apple TV; which permit accessing of media content for a specified fee and mobile applications like PocketTV, EverywhereTV and DishOnline launched by Airtel, Tata Sky and Dish TV respectively are popular platforms for distribution of digital content.

(b) Internet Protocol Television ("IPTV")

IPTV transmits and broadcasts television programs through the internet using the internet protocol, instead of using traditional terrestrial, satellite signal and cable television formats. Accordingly, IPTV requires a certain amount of consistent bandwidth for data to be streamed in order to deliver the right number of moving picture frames. IPTV services may be classified into: (i) live television, with or without interactivity related to the current TV show; (ii) time-shifted television; and (iii) video-on-demand ("VOD"). IPTV, however, is not seen as a commercially viable model for distribution of online content in India because of the restrictive conditions imposed on IPTV service providers under the Guidelines for Provisioning of Internet Protocol Television ("IPTV") Services of 2008. (IPTV Services launched by Reliance Communications, AkshOptifibre, Time Broadband, IOL Netcom, etc. have not fared as well as was expected in the Indian markets.) Further, with direct-to-Home ("DTH") operators such as Tata Sky allowing for recording of shows, etc. for later viewing on their set top boxes as well as through mobile applications, IPTV as a model has limited selling points in the Indian markets.

(c) A Content Delivery Network ("CDN")

CDN is essentially a system of nodes (computer used as a server) and servers deployed in multiple strategic locations; all of which cooperate to satisfy requests for content by end users across geographical locations in the most efficient manner by reducing the bandwidth and delivery costs on the backbone link. The number of nodes and servers making up the CDN may vary depending on the user base of the backbone server.

CDNs use various techniques such as web caching (to store popular content closer to the end-users), server-load balancing (to balance load and improve scalability) and request routing (to identify the best content route for the end user) to achieve the optimization goals. Caching servers belonging to the CDN are co-located by mutual agreement within data centers belonging to the hosting providers of the content providers ("Hosting Providers"), the backbone carriers ("Backbone Carriers") which provide wide-area transport for ISPs) and/or Access ISPs (defined below). CDNs typically pay co-location fees for such services. (Sometimes, Access ISPs are also paid by the CDN for the Access ISP's users.) Requests for content are generally directed algorithmically to nodes that are best suited for servicing the request. CDNs today serve a wide array of digital content including web objects, downloadable objects, live streaming media, on-demand streaming media and social networks.

There are two major revenue models for CDN services—the content centric model driven by the needs of the content providers; and the provider centric model

driven by the needs of the internet service providers giving access to the end-users ("Access ISPs"). The content-centric CDNs like Akamai (believed to be the market leader; significantly, streamed the ICC Cricket World Cup, 2011) and Bitgravity (which has a strong place of presence in India and Australia), among others, earn their revenue from the content providers for replicating and delivering only such content as the content providers specify—thus accelerating the content received by the content consumers. On the other hand, access-centric CDNs serve popular content from caches close to the end-users subscribing to the Access ISPs' services. By caching frequently-accessed content near the end-users, Access ISPs save on bandwidth costs and prevent the end users from defecting to other ISPs.

Major Tax Considerations for Revenue Models in Digital Media

Taxation in India is governed by the provisions of the Income Tax Act, 1961 ("ITA"). While Indian residents are subject to tax in India on their worldwide income, non-residents may be taxed in India only to the extent that such income may be sourced in India. Where the non-resident is entitled to benefits under a Double Taxation Avoidance Agreement ("DTAA") entered into by India with the jurisdiction of the non-resident taxpayer, it may have the option of being taxed under the DTAA to the extent that it is more beneficial to the taxpayer.

While the corporate tax rate in India is 30% on the worldwide income of resident companies, it is 40% on the India-sourced income of non-resident companies (exclusive of surcharge and cess). Where DTAA benefits are available, business income earned by a non-resident taxpayer should not be taxed in India unless its India-focused business activities constitute a permanent establishment ("PE") in India. If however, the income earned by a non-resident taxpayer is characterized as royalty or fee for technical services, the person making the payment of such consideration is subject to an obligation to withhold the tax amount.

As discussed above, notwithstanding whether the distributor of content is generating content or facilitating the distribution of content, internet and mobile based content distribution models could be either user-revenue models or advertising-revenue models. In user-revenue models, the user pays for a service or sale of digital content. In an advertising-revenue model, an advertiser pays the service provider for user activity like viewing a banner advertisement or clicking a hyperlink.

Until recently, courts in India were generally in favor of treating subscription fees for accessing content available online as business income, except where such content was in the nature of technical, industrial or scientific knowledge (*Infosys Technologies Ltd. v. Dy. CIT*, [2011] 45 SOT 157; *Gartner Ireland Ltd. v. DDIT (IT)* 3(1), Mumbai, [2010] 42 SOT 21 (Mum .) (URO); *In re Factset Research Systems Inc.*, [2009] 182 Taxman 268 (AAR - New Delhi); *In re, Dun & Bradstreet Espana, S.A.*, [2005] 142 TAXMAN 284 (AAR - N. DELHI); *Wipro Ltd. v. ITO* [2004] 278 ITR 57 (Bang); *ONGC Videsh Ltd. v. ITO, IT, TDS*, Ward 2(1), New Delhi, [2012] 20 ITR(T) 767 (Delhi - Trib.). This position is also in consonance with the OECD Model Commentary even in the context of downloadable content where the payment does not correspond to the transfer of copyright in the content but access to the content. (Paras 17.1 to 17.4, OECD Model: Commentary on Article 12 [2010] at 231-232).

However, in *Commissioner of Income Tax v. Wipro Ltd.*, ([2013] 355 ITR 284 [Karn. HC], the Karnataka High Court reversed a subordinate tribunal's decision (*Wipro v ITO*, [2004] 278 ITR 57 [Bang.] on the matter and held that payments for accessing online databases should be considered "royalty" under the provisions of the ITA read with the India-US DTAA since "*such right to access would amount to transfer of right to use the copyright held by M/s. Gartner and the payment made….is*

for the licence to use the said database maintained by M/s. Gartner." The court thus created an alternate precedent for subordinate authorities within its jurisdiction (*see also, Bangalore v. Cross Tab Marketing Services (P.) Ltd.*, [2014] 149 ITD 678 (Bangalore - Trib.) The Karnataka High Court did not note the observations of other cases including that of the Madhya Pradesh High Court in *Commissioner of Income Tax v. HEG Ltd.* ([2003] 130 TAXMAN 72 (MP) which required the tax characterization of payments to depend on the nature of information being accessed. Therefore, in spite of this ruling of the Karnataka High Court, if there is no license of the copyright in the content given to the user, revenues of a non-resident content distributor in user-revenue models should be characterized as business income under the Indian income tax law and not subject to tax in India in the absence of a PE in India.

On the other hand, Indian judicial precedent is clear on the view that advertisement revenues earned by non-resident digital content distributers should not be characterized either as royalty (*Pinstorm Technologies Pvt Ltd v. ITO*, TS 536 ITAT (2012) [Mum]; *Yahoo India Pvt. Ltd., ITA* No.506/Mum/2008) or as fees for technical services (*Income Tax Officer v. Right Florists*, [2013] 25 ITR (T) 639 (Kolkata - Trib.) and should therefore not be subject to tax in India in the absence of a PE in India.

One of the major concerns regarding CDNs operating in India is the risk of the content provider being regarded as having a PE in India through the servers of the CDN. Therefore, it remains to be examined whether where a sports website company having its headquarters and main servers in the USA distributes content in India through a CDN that has edge servers in India, the sports website company may be considered to have a PE in India. In order for the presence of a server to constitute a PE risk for a non-resident enterprise in India, the following requirements need to be fulfilled:

- The server should be fixed;
- The server should be used to carry on the business of the non-resident;
- The server should be at the disposal of the non-resident;
- The server should be operated and maintained by the non-resident or the dependent agent of the non-resident.

The issue of the server having to be at the disposal of the nonresident has been emphasized even in cases such as *Amadeus Global Travel Distribution SA v. DCIT*, ((2008) 113 TTJ (Delhi) 767); and *Galileo International Inc. v. DCIT*, (ITA No1733/Del/2001), which was upheld by the High Court of Delhi in *DIT v. Galileo International Inc*, [2009] 180 TAXMAN 357 (Delhi).

Therefore, as with the use of ISPs, which according to the OECD Commentary, should not by itself constitute a PE in India (*see*, Para 42.3 of the OECD Model: Commentary on Article 5 at 110-111), the use of a CDN having servers in India should not trigger a PE risk for the US based sports website in India.

Having said this, the position on the above issues continues to be in flux. India is among the many countries cooperating towards the implementation of the OECD's Base Erosion and Profit Shifting ("BEPS") Action plan by the end of this year; and one of the key areas looking to be addressed is the digital economy. Jurisdictions like Spain have already tested the idea of a website, as opposed to a server, constituting a virtual PE for a non-resident enterprise having online customers in Spain (*Dell Spain v. Agencia Estatal de la Administración Tributaria*, case 00/2107/2007, Tax Treaty Case Law IBFD. With issues like the possibility of a "virtual PE" test and nexus rules based on significant digital presence being on the table, we may be at the

cusp of a sea-change in the tax rules concerning distribution of content on digital media.

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VISAS AND TAX TRAVAILS OF FOREIGN ARTISTS IN INDIA

By Poorvi Chothani

Engaging foreign nationals in the entertainment Bollywood producers. Earlier, foreign nationals were engaged as supporting performers in dance sequences or as cabaret dancers often referred to as "item girls," a term that is not intended to be pejorative. Foreign nationals have also been involved in Bollywood as technicians and cinematographers. As the Indian entertainment industry, with an increasing global reach, has evolved, there has been an influx of artists including actors from overseas, TV personalities, dancers, musicians, international singers and many more. According to some industry opinions, foreign actors are attractive because they (1) offer fresh faces and international personalities, (2) command lower fees (3) do not have impossibly busy schedules, (4) offer the mystique and charm of being "foreign," and (5) foreign women actors tend to be less inhibited than local ones about risqué scenes.

Whatever may be the reason, Bollywood is welcoming the increased number of foreign artists into its fold, many even from directly across the border, despite strained political relationships. In this article we will explore how these individuals may be authorized to work in India.

Background

Hitherto foreign artists of any origin were generally issued business visas, albeit not a legal option in many cases as they were gainfully engaged in work within India. On expiry of their business visas, these artists went back to their countries of origin and were issued fresh visas or came back on business visas for another stint in India. Generally, banks open bank accounts for those foreign nationals who were authorized to work or were in the country on long-term visas, for example, either as students or dependents of Indian nationals. But, banks have continued to open accounts for foreign nationals even if they were on business visas. Payment to the foreign artists was facilitated through these accounts, or they were paid overseas or they were paid in cash (i.e., bank notes).

Overview of Employment Visas

India has always had among other categories, specific B or Business visas and E or Employment visas. However, until 2009 there was not much clarity on when a person must have an employment visa to work in India. In 2009, the Ministry of Home Affairs published guidelines by way of FAQs where the government gave some clarity on the difference between these two categories. Employment visas are generally issued to highly skilled specialists, managers or executives only. Employment Visas are not granted for jobs in positions where large numbers of qualified Indians are readily available. All employment visa applications must be sponsored by a duly registered Indian entity. Employers are required to pay foreign nationals on employment visas in India a minimum annual salary of more than $ 25,000. Any perquisites such as housing, telephone, transport, entertainment etc., which are received in kind, should not be included when computing the salary of the individual. Sponsoring employers are also required to certify that the visa holder will comply with all applicable tax requirements, including the timely filing of tax returns in India.

Foreign national employees who have not paid the appropriate taxes or otherwise complied with Indian tax laws may be required to depart the country. In addition, noncompliant foreign nationals are subject to deportation and possible imprisonment, although this is rare. Either the foreign national employee or the

Indian sponsoring company may incur the cost of repatriation and any penalties imposed by the tax authorities.

Appropriate Visas for Working in Bollywood

The way the FAQs are drafted, it was widely understood that foreign nationals coming to participate in the entertainment industry should obtain employment visas. But in practice we saw consulates issuing business visas to such foreign nationals. The anomaly, we thought was due to the differences between the Ministry of External Affairs that issues visas and the Ministry of Home Affairs that makes the policy. To get this clarified, our firm filed a Right to Information application (similar to a FOIA application) under the Right to Information Act, 2005 with the Ministry of Home Affairs regarding the conundrum faced by foreign nationals coming to engage in brief stints and received a response to the Right to Information request, from the Ministry stating that a Business visa will suffice. This is an anomaly as generally a foreign national can neither "work" in India, nor accept remuneration for "services rendered" while in India on a business visa.

A Business visa is also very inconvenient unless it is for a year or more as the foreign national artists has to leave ongoing projects for long periods of time till they obtain new business visas. The Government of India under one of its FAQs now requires foreign nationals in fields like acting, adventures, modeling etc. to procure employment visas within the ambit of the Employment visa.

Talent management companies, generally being registered Indian entities sponsor the visas for foreign nationals allowing them to stay and work in India for extended periods.

Foreign nationals coming on employment visa to work in the field of modeling, advertising and films are required to submit a contract/agreement signed with the visa sponsor clearly specifying the terms of remuneration. Such foreign artists do not receive a fixed salary from the visa sponsor and are paid a large portion of the fee that the talent management company charges on behalf of the foreign national as compensation for their work. Foreign nationals who are unable to establish when applying for their visa, that they will receive the minimum salary equivalent to $ 25,000 are granted stay in India for three months within which they should gain enough contracts or confirmation that they will receive the minimum salary. Foreign nationals who are unable to comply with this requirement are required to leave the country. This sometimes results in the exploitation of lesser-known artists.

It is important to note that all remuneration paid to foreign nationals is subject to withholding tax and India's social security payments under The Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

Talent management companies, which are service providers, are liable to pay service tax to the government. This burden is often passed on to the contracted foreign national, who now face the burden of agency charges, income tax, as well as service tax. But the entertainment industry being what it is, and the remuneration being high for successful artists, foreign nationals are generally not complaining.

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CASE NOTES

By Aseem Chawla, Shamik Saha, Priyanka Mongia

Supreme Court Removes Gender Barrier that Prohibited Women from Working as Bollywood Make-Up Artists

The Supreme Court of India in *Charu Khurana vs. Union of India* (2015 [1] SCC 192), ruled that a woman make-up artist cannot be barred from practicing as a "make-up artist" and strongly criticized this decades-old practice by the Cine Costume Make-up Artists and Hair Dressers Association ("CCMAA") as gender-biased in violation of statutory and constitutional provisions.

The petitioner, Charu Khurana, a Hollywood-trained Make-up Artist and Hair Stylist, applied for membership in the CCMAA as a "Make-up Artist and Hair Stylist." The CCMAA rejected her application on two grounds, including the fact that CCMAA membership as a "Make-up Artist" is limited to men. Khurana was told that she could apply only as a "Hair Dresser" as that would be available to her as a woman. She was told to delete from her application any reference to "Make-up Artist." Khurana was also fined ₹26,500 ($400) fine, for having worked as a Make-up Artist and Hair Dresser without prior approval from the CCMAA. Khurana appealed the CCMAA's decision to its parent body, the Federation of Western India Cine Employees ("FWICE"). CCMAA argued that the practice of limiting licenses to practice as Make-up Artists to men was not discriminatory as the specialty of Hair Dresser was open to women. Women therefore had equal opportunities with men in the field of make-up and hairdressing.

FWICE overruled the CCMAA and recommended that Khurana be licensed as a Make-up Artist and Hair Dresser and that pending the processing of her application she be permitted to work in that capacity in films, television serials, music albums and advertising films. When the CCMAA declined to accept FWICE's recommendation, Khurana filed a writ petition before the Supreme Court under Article 32 of the Constitution of India. (Article 32 empowers the Court to issue writs against the executive branch, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari* for the enforcement of constitutionally guaranteed rights.)

The Court found it had jurisdiction here because Article 39A requires the State to ensure that the legal system promotes justice, on a basis of equal opportunity. Given the CCMAA was registered with the Registrar of Trade Unions (as required by law) and given further that the Registrar had wrongly accepted the CCMAA's discriminatory by-laws (discussed below), the Court had the power to issue a writ against the Union of India (of which the Registrar is a part) to require it to promote justice on the basis of equal opportunity.

Khurana alleged that Clause 4 (Membership) and Clause 6 (Admission of New Members) of CCMAA's by-laws were discriminatory because they barred women from working as Make-up Artists. Khurana also alleged that this discriminatory policy was enforced by the practice of harassing women in the workplace who managed to work as a make-up artist without the CCMAA's approval.

The Court held that the CCMAA's by-laws were discriminatory against women and ordered that the impugned clauses be expunged and that Khurana and

her co-petitioner make-up artists be registered in that capacity within four weeks of its order.

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Madras High Court Holds There Is No Copyright In A Live Broadcast

The issue in *Commissioner of Income Tax-IV v. Delhi Race Club (1940) Ltd.* (2015 [273] CTR Del [503]) was whether payment made by the Delhi Race Club for broadcasting rights of live horse races from at acing clubs was a royalty liable to taxation subject to withholding at source. The Delhi Race Club was engaged in the business of conducting horse races and derived income from betting fees, commissions and entry fees. The Club also paid other race clubs for the right to broadcast their races.

During assessment proceedings the Assessing Officer ruled that the amounts paid to other clubs for the right to broadcast their races was a royalty for transfer of a copyright under sections 40(a)(ia) and 194J of the Income Tax Act, 1961 and was subject to tax withholding at source. The Commissioner of Income Tax (Appeals) upheld the Assessing Officer's ruling. The Delhi Race Club appealed to the Income Tax Appellate Tribunal ("ITAT") which reversed the Commissioner and held that the payment made for live telecast of horse races is not income by way of royalty for a transfer of copyright and, therefore, is not subject to withholding at source (known in India as "tax deducted at source").

The Revenue Department appealed ITAT's ruling to High Court of Delhi, which, based on the language of the Income Tax Act, framed the issue as being whether payment for live telecasts of horse racing is a payment for transfer of a "copyright" or "scientific work." If so, the payment would be taxable and subject to withholding. The Delhi Race Club argued that the right to broadcast or telecast is different from a copyright, and payment for live telecasts was not a payment for transfer of any copyright. The Club argued that a broadcast or telecast is not copyrightable work because, except for labor, skill and capital, it does not have any underlying creativity and because it shows a performance meant for public viewing. Accordingly, a payment made for a live telecast cannot be said to be a payment for transfer of a copyright.

Applying rules of statutory interpretation, the Court held that in clause (v) of Section 9(1)(vi) of the Income Tax Act, the phrase "the transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work" Parliament intended to mean "the transfer of all rights in respect of any copyright in literary, artistic or scientific work. The Court reasoned that rules of statutory interpretations permitted it to depart from the rule of literal interpretation because a literal interpretation would render the statute meaningless. The word "copyright" cannot be said to be a type of work as would be a literary, artistic or scientific work. Copyright exists only as it applies to a work. Before any words are read to repair an omission in the act, it should be possible to state with certainty that the inserted words would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the bill was passed into law.

The Court held that live television coverage of any event is a communication of visual images to the public and falls within the definition of "broadcast," a word that is not mentioned in the section discussing transfer of copyright. That apart, it was noted that section 13 of the Copyright Act, 1957, does not contemplate broadcast as a work in which "copyright" exists. Under the section, copyright exists only in literary, dramatic, musical and artistic work, cinematograph films and sound recordings. Similarly, under section 14 of the Copyright Act, "copyright" means the exclusive right

to reproduce, issue copies, translate, or adapt a workwhich is already existing.

The Court cited it earlier decision in ESPN Star *Sports v. Global Broadcast News Ltd.*, 2008 (38) PTC 477, where it observed that the language of the Copyright Act, 1957 expressed a clear legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights.

Accordingly, the Court held that as payments made by the Delhi Race Club to other race clubs for the right to broadcast their live races were not copyright-related royalties, the Club had no duty to withhold taxes on those payments.

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Delhi High Court Recognizes A Cause of Action of Infringement of "Personality Rights"

In *Shivaji Rao Gaikwad vs. Varsha Productions* (2015 [2] CTC 113), plaintiff, Rajnikanth, a famous and acclaimed actor of long-standing in the Indian film industry, mostly in Tamil language films ("Tollywood"), filed suit for a permanent injunction restraining the defendant Varsha Film Productions from using his name, image, caricature or style of delivering dialogue, in the Varsha Productions 2015 Hindi language comedy film spoofing his film hero persona titled *Mai Hoon Rajnikanth* ("*I am Rajnikanth*"). The Madras High Court issued an interim injunction restraining Varsha from releasing the film pending a decision on the application for a permanent injunction.

Rajnikanth's suit for a permanent injunction was based on three grounds: infringement of copyright, infiltration of Rajnikanth's personality rights by such unauthorized use, and misrepresentation and deception in the minds of public leading to passing off. Rajnikanth asked that Varsha be ordered to remove all references, press releases, videos, posters, advertisements, content, publicity materials containing his name, image, caricature, and style of delivering dialogue from all websites, television channels, radio channels, newspapers and, or other modes of advertisement in any other modes of electronic and, or print media with respect to the film.

He also asked for compensation and punitive damages of ₹2,500,000 ($42,000 based on the currency exchange rate, or roughly $103,000 based on purchasing power parity) for the unauthorized use of his name, image, caricature, style of delivering dialogues, and for the costs of the suit Rajnikanth contended that he did not want gross commercialization of his name and reputation, as a consequence of which he had deliberately chosen not to authorize any biopic featuring him or create any work based upon him or his personality. Rajnikanth further alleged that, based on various press releases, videos, web articles, posters and information from other sources, it was evident in *Mai Hoon Rajnikanth* that it exploited his superhero image not to speak of the fact that the movie also had scenes of an immoral nature. Varsha never obtained his consent or permission, either written or oral, to use his name, caricature, image, or style of delivering dialogue as depicted in the film.

Varsha argued that the film was neither a biopic nor based on any event of Rajnikanth's life. Varsha also denied putting the plaintiff's image, caricature, style of delivering dialogues, film sequence, song, tune in the film. Varsha contended that the only reference to Rajnikanth was in the title *Main Hoon Rajinikanth*, which is a common, non-copyrightable name which just happens to be the first name of the protagonist in the movie.

Relying on Section 17 of the Copyright Act,1957, Varsha also countered that only the first owner of a name can claim copyright and be entitled to a license of copyright. But in this case, there was no evidence of when the name "Rajinikanth" came into being, or who first thought of it, which demonstrates that the name

has long been in public domain. Moreover, the name "Rajinikanth' has been used in different movies on several occasions. Varsha denied that the movie had scenes depicting the character in immoral situations. Varsha also contended that a "Personality Right" is not recognized under any law in India.

In granting the permanent injunction, the Court observed that although "personality right" is not defined under any law in India, the Courts have recognized it. The Court explained that "personality right" vests on those persons who, like Rajnikanth, have attained celebrity status—a fact that Varsha did not dispute. The celebrity, as here, must be identifiable from the unauthorized use. Moreover, infringement of personality right requires no proof of falsity, confusion, or deception, especially when the celebrity is identifiable. The fact that the name Rajnikanth is a common name, thus, is not a defense if, as here, this particular Rajnikanth is a celebrity recognizable in the movie.

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UPCOMING SECTION EVENTS

India Committee's Bi-Annual India Conference

New Delhi — February 17 - 19, 2016

Convened by the ABA Section of International Law, India Committee, with the generous support of the Society of Indian Law Firms.

Hyatt Regency, New Delhi
(*Follow the next issue of this newsletter for details*)

2015 Asia Forum - Beijing

Beijing, China
November 16 - 17, 2015

2015 Fall Meeting

Montreal, Canada
October 20 - 24, 2015

SUBMISSION REQUESTS

Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee's jurisdiction. These submissions are then compiled as respective committee's Year-in-Review articles and typically published in the Spring Issue of the Section's award-winning quarterly scholarly journal, The International Lawyer. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee's Year-in-Review by emailing the Co-Chairs and requesting submission guidelines.

India Law News

India Law News is looking for articles and recent Indian case notes on significant legal or business developments in India that would be of interest to international practitioners. The Fall/Winter 2015 issue of *India Law News* will carry a special focus on *Alternative Dispute Resolution*. Please read the Author Guidelines available on the India Committee website. Please note that, ***India Law News does not publish any footnotes, bibliographies or lengthy citations.*** Citations, if deemed by the author to be absolutely essential, may be hyperlinked to an existing web page. Submissions will be accepted and published at the sole discretion of the Editorial Board.

INDIA COMMITTEE

The India Committee is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-U.S. relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the U.S., as well as other countries, in an effort to support the global Rule of Law.

BECOME A MEMBER!

Membership in the India Committee is free to all members of ABA International. If you are not an ABA International member, you may become one by signing up on the ABA website. We encourage active participation in the Committee's activities and welcome your interest in joining the Steering Committee. If you are interested, please send an email to the Co-Chairs. You may also participate by volunteering for any of the Committee's projects, including editing a future issue of the *India Law News*.

Membership in the India Committee will enable you to participate in an online "members only" listserv to exchange news, views or comments regarding any legal or business developments in or concerning India that may be of interest to Committee members.

We hope you will consider joining the India Committee!

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