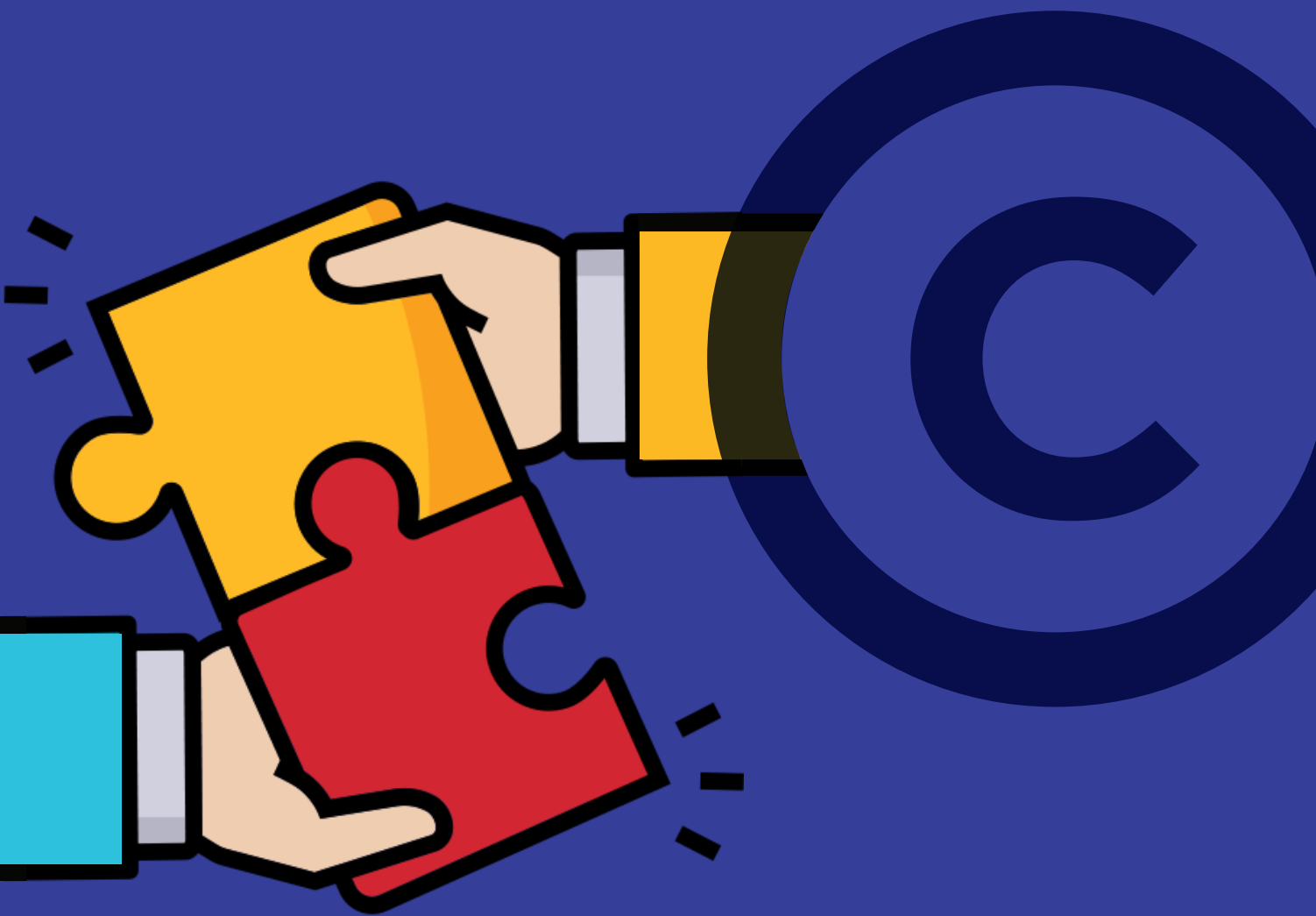


# COPYRIGHT 101

## CREATOR'S EDITION

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**A Handbook for  
Production Houses  
to collaborate with  
Online Curated  
Content Platforms.**

**The contents of this Handbook are for reference and educational purposes only. The same will not in any circumstances be deemed to be perceived as legal advice.**



# ABOUT



[www.creativefirst.film](http://www.creativefirst.film)

Creative First is a forum to highlight the vital role played by the media and entertainment industry in India to foster creativity, innovation, and culture, which in turn stimulates investment, jobs, and economic growth. Creative First provides quality commentary, research, and additional resources on the value of copyright and the promotion and protection of the creative industries.

Creative First is a forum to highlight the vital role played by the media and entertainment industry in

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Quite often one comes across Clients with cross border and multinational disputes area requiring legal advice and at such times there has always been a constant need to access colleagues around the world who specialize in such areas of Law. The concept and idea of the International Legal Alliance (ILA) germinated after much deliberation which led to the conclusion that there is a serious need of lawyers specializing in various sectors of law globally. ILA is a practice founded in Mumbai, India having a network of independent legal professionals from all over the world. ILA has been consistently delivering high quality and effective representations and results for our clients. ILA's network includes some of India's most respected Lawyers and Attorneys. We at ILA combine our international resources and sector expertise to work on cross-border transactions directly in the markets and regions important to our clients.

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सत्यमेव जयते



आज़ादी का  
अमृत महोत्सव

भारत सरकार  
वाणिज्य एवं उद्योग मंत्रालय  
(उद्योग संवर्धन एवं आंतरिक व्यापार विभाग)  
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GOVERNMENT OF INDIA  
MINISTRY OF COMMERCE & INDUSTRY  
(DEPTT. FOR PROMOTION OF INDUSTRY  
AND INTERNAL TRADE)  
VANIJYA BHAWAN, AKBAR ROAD, NEW DELHI-110001

May 01<sup>st</sup>, 2023

### FOREWORD

In the rapidly evolving landscape of media and entertainment, the relationship between production houses and online curated content (OCC) platforms has become crucial for the growth and success of both parties. However, this relationship is often complex and multi-layered, and it requires careful planning and structuring to ensure that the interests of all stakeholders are protected.

The Handbook, *Copyright 101 – Creators' Edition* is a useful resource for production houses to collaborate with OCC Platforms. It is a comprehensive guide that provides insights on different aspects of deal structuring, including the legal framework of copyright law. It highlights the various options available to production houses and emphasizes the different aspects that should be kept in mind while collaborating with OCC platforms.

The handbook is a valuable resource for the producers' community, especially for smaller and regional production houses who are stepping into this space and seeking legal guidance on the way forward. It is a work that will be of great use to anyone who is involved in the production and distribution of audio-visual content.

I must commend Creative First, MPA, FICCI and the International Legal Alliance for their remarkable effort in creating this handbook. I hope that this handbook will help the producers' community to navigate the complexities of the entertainment industry and enable them to build a successful and sustainable relationship with OCC platforms.

  
(Karan Thapar)



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# I. The legal relationship between Online Curated Content Platforms (OCC Platforms) and Production Houses

The consumption of internet-based content in India has been on a steady rise. The emergence of OCC Platforms such as Amazon Prime, Disney Plus Hotstar, Zee5, Lionsgate, Netflix, Hoichoi, Sun Nxt, Aha, Sony Liv, Voot, etc. has led to a growth in ideas, investments creating a dynamic landscape for content production and distribution.

Consumer behaviour based on factors such as affordable data prices, use of smartphones and exposure and consumption of international content primarily drives OCC Platforms and vice versa. Each OCC Platform aims to provide unique and compelling content based on this consumer behaviour to their viewers. As a result, production houses and OCC Platforms together, navigate new opportunities to create, license, assign, and curate content to be made available on such platforms. To succeed in this new digital era of content creation and distribution, Production Houses must be proactive in seeking out opportunities and forming strategic partnerships with OCC Platforms. OCC Platforms allow Production Houses to not only gain access to a wider audience and generate revenue from their Content but also allow them to nurture new creative ideas.

Due to the fact that content creation and production is a collaborative process that may require various creative minds collaborate for months/ years to create a film/ web-series/documentary. Copyright plays an important role at each stage of the content creation process. Therefore, to work effectively with an OCC Platform, it is important for the Production Houses to establish strong and clear contractual agreements that define the terms of their overall collaboration. These agreements include contracts such as development agreements, production agreements, non-disclosure agreements, assignment or license agreements, character licensing agreements, syndication agreements, etc. The importance of protection and enforcement of intellectual property rights has only gained traction in the Indian entertainment industry in the recent past and production houses/ producers and OCC platforms are now committing to the objective of dissemination and creation of Content with a secure legal and contractual framework.



**Production contracts enable the parties to smoothly and effectively produce content and establish a flow of intellectual property rights in and to the works in the content.**

**The relationship of a Production House with an OCC Platform maybe of four types:**

- i. Where the OCC Platform directly commissions the Production House to produce content through commissioning deals. Commissioning deals establish a clear-cut flow of transfer of intellectual property rights from the get go.
- ii. Where the Production House may license or syndicate existing content to an OCC Platform for distribution for a time frame and territory.
- iii. Where the Production House on the basis of the understanding with the OCC Platform creates content to then license to an OCC Platform for distribution.
- iv. Both OCC Platform and Production House join hands to co-produce the content wherein the intellectual property may be jointly owned.

## II. Copyright In Content Production

Copyright is the most important intellectual property right in relation to production and distribution of content. Copyright is a bundle of rights granted to the author of any literary work, dramatic work, musical work, artistic work, sound recording or cinematograph film (“**Works**”) as per the Copyright Act, 1957 (“Act”) and allows the owner of such Works to do certain acts and/or authorise others to do certain acts.

**Section 14 of the Copyright Act, gives an author/owner of the copyright in the Works the exclusive rights to do or authorize doing of certain acts such as:**

- i. to reproduce the Work in material form;
- ii. to store the Work in electronic or any other medium;
- iii. to issue copies of the Work to the public;
- iv. to perform or communicate the Work to the public;
- v. to make any cinematograph film or sound recording in respect of the Work;
- vi. to make any translation and adaptation of the Work.

### a. First owner of copyright:

Section 17 of Act, lays down provisions related to ownership of copyright. As per the Act, the author of a Work is the first owner of copyright, for instance, in case of a literary work, the writer is the author, in case of a musical work the composer is the author etc. The table provided below sets out the author for different classes of works<sup>1</sup>:

WORKS	AUTHOR
Literary or dramatic work	The person who creates/writes the work
Musical Work	Composer
Artistic work (other than photographs)	Artist
Photograph	Person taking the photograph
Cinematograph film and sound recording	Producer
Literary, dramatic, musical, or artistic work which is computer generated	The person who causes the work to be created.

However, in certain situations, ***the owner of a certain Work may not always be the first owner of such work***, provided nothing to the contrary is agreed in the agreement between the Parties. For instance, commissioning deals between OCC Platforms and Production Houses are mainly based on the foregoing principle. The commissioning deal results in absolute transfer of rights in favour of the OCC Platform, thus making the OCC Platform, the owner of copyright in the content. The content is produced/created for valuable consideration at the instance of the OCC Platform by the Production House. In a commissioning deal, the OCC Platform commissions the Production House to produce content, the Production House in turn commissions the contributors such as writer, director, lead artists, crew etc. and the rights flow from the contributors to the production house, which then assigns the rights to the OCC Platform.

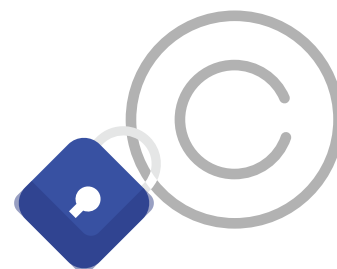
Similarly, when any Work is created in course of an author’s employment under a contract for service, the employer shall be the first owner of copyright unless otherwise agreed. All contributors engaged to render services for an audio-visual content are engaged by the Production House under a contract for services, for instance, when a producer engages a music composer to compose the music/ music score for an audio-visual content, the works developed by the music composer are assigned to the Production House under this contract

<sup>1</sup><https://creativefirst.film/wp-content/uploads/2021/04/YourIPYourFuture-Final-Handbook.pdf>

thereby making the Production House first owner of the copyright in the works this includes the master sound recording and in most cases even the scratch versions developed by the music composer in the process of creating the master sound recording. However, there may be instances where the music composer may stipulate in the contract that the music composer shall retain the rights to unapproved scratch versions of the music. If the parties agree to this stipulation, the Production House will be deemed to be the first owner all results and proceeds of the music composers' services, except for the unapproved scratch versions.

## b. Term of copyright:

Copyright protection does not exist in perpetuity. The Act prescribes a specific term for different classes of Works and upon the cessation of such term the copyright protection therein ends and the Works fall into public domain<sup>2</sup>.



### **In case of original literary, dramatic, musical, and artistic works -**

copyright subsists for the entire duration of the author's life time and continues to vest for 60 (sixty) years from the beginning of the calendar year following the authors death.

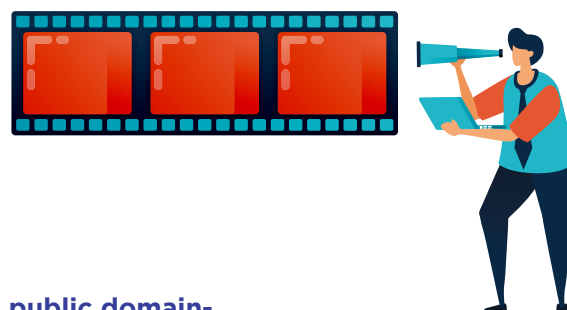
*Upon the death of the author and prior to the expiry of the copyright term of the work, the ownership of the work changes:* Ownership of copyrighted work is treated the same as other tangible property and can be passed on to an heir or a third-party vide a will, as the copyright owner desires. If the author dies intestate i.e., without a will, then the copyright is passed on to his heirs or legal representatives as a part of his/her estate and is divided amongst his/her legal heirs in accordance with the applicable law.

### **In case of cinematograph films and sound recordings -**

copyright subsists for 60 (sixty) years from the beginning of the calendar year following the year of first publication of the work.

## c. Works in Public Domain

Once a Work falls into the public domain, usage of such Work is unrestricted and does not amount to infringement. 'Public Domain' means that the copyright protection term of the work has expired and no one has copyright ownership on that work, essentially making the work unrestricted in terms of copyright.



### **There are two instances in which a Work may fall into public domain-**

- (1) upon expiry of the copyright term of the Work and;
- (2) when the author relinquishes the copyright in the Work.

It is imperative to note that in the event a Work has been co-authored by 2 or more individuals, such Works will fall into public domain 60 years after the death of the last surviving author.

### **Determining whether a Work is in Public Domain:**

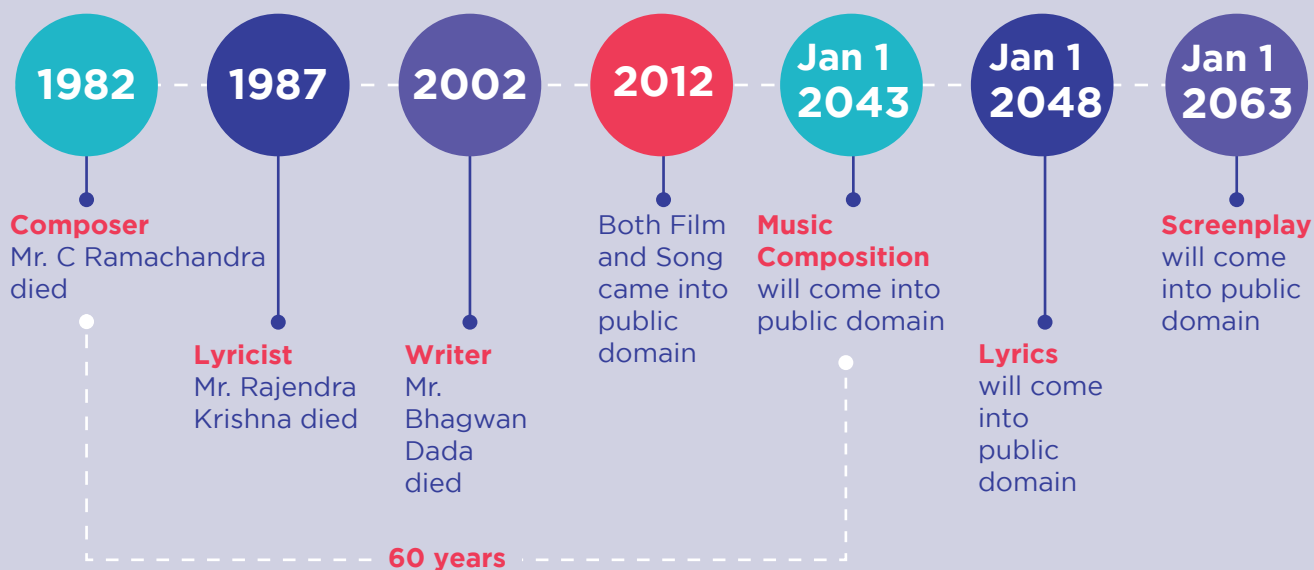
The copyright term of a cinematograph film and sound recording is 60 years from the beginning of the calendar year **following the year of first publication of the film**. However, the term of copyright for underlying works such as literary and musical works subsists for the entire duration of the lifetime of the author and continues for 60 years from the beginning of the calendar year following the year of the death of the author, making the copyright protection term of the underlying works longer than the cinematograph film/ sound recording itself. Therefore, even if a cinematograph film and/or sound recording fall in public domain, the underlying works which make up the cinematograph film and sound recording are still under copyright protection.

<sup>2</sup><https://copyright.gov.in/documents/copyrightrules1957.pdf>

**Illustration:**

**Film: Albela<sup>3</sup> | Song: O Beta Ji**

**Both Film and Song came into public domain in the year 2012.**



**Underlying Works:**

Lyrics: Lyricist Mr. Rajendra Krishna died in 1987; therefore, **lyrics will come into public domain in January 1st 2048.**

Composition: Music Composer Mr. C Ramachandra died in 1982; therefore, **music composition will come into public domain in January 1st 2043.**

Screenplay/ script: Writer Mr. Bhagwan Dada died in 2002; therefore, **screenplay will come into public domain in January 1st 2063.**

**Permissible Public Domain usage:**

USAGE	PUBLIC DOMAIN AND PERMISSIBILITY
Use clipping of the audio-visual which is in public domain on an as is basis	Yes
Recreating the song/ remixing the song	No, because although the sound recording is in public domain, the underlying works (lyrics and composition) are still protected and therefore, permission from owner of underlying works would be needed.
Actor singing the song in the film (without sync license)	No, because the underlying works (lyrics and composition) are still protected and therefore, permission from owner of underlying works would be needed.
Using only song without visual synched in background	No, because the underlying works (lyrics and composition) are still protected and therefore, permission from owner of underlying works would be needed.
Adaptation of the film	No, because the underlying works (screenplay/script) are still protected and therefore, permission from owner of underlying works would be needed.

<sup>3</sup> <https://creativefirst.film/wp-content/uploads/2021/04/YourIPYourFuture-Final-Handbook.pdf>

## d. Assignment and License of copyright:

**Assignment of copyright:** means transfer of ownership of the copyright in a certain work, either wholly or partially, for a limited period or for the entire term and for certain territories of the world or worldwide territory.

The Act, specifies the essentials of an Assignment, in the absence of which and assignment of copyright is invalid. The essentials of assignment are as follows:

- Assignment must be in writing. All production contracts usually contain an ownership clause- which extensively covers the assignment of rights;
- Must specify the consideration and royalty payable to the assignor;
- Section 19 (8) of the Act states that the assignment must not be contrary to the terms and conditions of the rights assigned to a copyright owner. This is why all production contracts/ assignment clauses require a waiver of this section.
- Must specify the term and territory for assignment. If the term is not specified, it is assumed to be a term of 5 years and if the territory is not specified it is assumed to be for the territory of India.

According to Section 19 (4) of the Act, if the assignee does not exercise the rights assigned to him within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment. A waiver of Section 19(4) in all production Contracts maybe considered, specifying that the rights shall not lapse if not exercised within one year from the date of assignment. For instance, two parties enter into a film assignment/ acquisition deal, where the first owner of the film (assignor) assigns all negative rights in the film to the assignee. In the absence of a waiver of section 19 (4) in this film assignment/ acquisition agreement, in the event the assignee, who has acquired the negative rights does not exploit the negative rights in the film for a period of 1 year from the date of assignment, for any reason, the rights so granted to the assignee will lapse and revert back to the assignor. A waiver of this section will however ensure that the rights granted to the assignee are granted in perpetuity without being subject to any reversion on account of non-exploitation of the same.

**License of Copyright:** While assignment may entail a complete transfer of all rights in the work, a license is a permission granted by the owner of the copyright to the licensee, for a limited purpose and for a limited term/ territory. As per section 30A of the Act, all the essential requirements of an assignment as specified under section 19 of the Act are also applicable to licensing with appropriate modifications as required.

For instance, a producer who has produced a complete film, may, exclusively license the film to an OCC Platform for distribution for a specified term/ duration and a specified territory. In such case, the producer retains the rights in the film as the first owner and the exploitation of the film by either party is subject to the terms and conditions of the exclusive license. This is why, certain shows/ films are available on one OCC Platform for a certain term and after the expiry of the term will be unavailable on the platform and/or why certain content available on Netflix USA will not be available for viewing on Netflix India.

Similarly, a different type of licence is granted in relation to musical works- which is called **a synchronization license**. A synchronization license allows the licensee to synchronize the sound recording of a song with the visuals of a film/ series/ any audio-visual content. Many advertisements/ TV commercials synchronize existing music with the visuals of the ad. For example, an advertisement for 'perk' featuring Alia Bhatt, uses the song 'Udd Gaye' by artist Ritviz through-out the advertisement<sup>4</sup>. Another example is the usage of the song 'Tera Mujhse Hai Pehle' by R.D Burman in the movie 'Jaane Tu Ya Jaane Na'. In the case of Jane Tu Ya Jane Na, the original song was used multiple times in the movie where the characters of the song sung/ recite the song. However, in the Perk advertisement mentioned above, the song Ud-Gaye has been used as-is, Again, the utilization and synchronization of music is subject to the terms and conditions agreed between the parties.

<sup>4</sup><https://www.youtube.com/watch?v=ezyzON3q7Mo>



## e. Adaptations and derivative works:

According to Section 2(a) of the Copyright Act, 1957, an 'adaptation' involves rearrangement or alteration of an original work. It also involves the conversion of a dramatic work into a non-dramatic work and literary or artistic work into a dramatic work by way of performance in public or otherwise. As per the Act, the owner of the copyright has the right to make and/or authorise the making of any adaptation of the original literary, dramatic, or musical work. An adaptation made without a license granted by the owner of the copyright or in contravention of the terms and conditions of the license would amount to copyright infringement.

Consumption of international content has given rise to remakes and adaptations of international content for regional markets. Recently, Netflix released a Hindi language drama-thriller titled 'Class' which has been adapted from the Spanish web-series 'Elite', Disney Plus Hotstar released 'The Night Manger' in Hindi which is a remake of the English series of the same title and the film 'Lal Singh Chadha' was the Indian adaptation of 'Forrest Gump'. This is also apparent in regional content development, where there has been a rise in adaptations and remakes in Hindi of several regional films and series, such as Kabir Singh, Drishyaam, Andhadhun etc. The Hindi film 'Haider' is an adaptation of the dramatic work Shakespeare's Hamlet. A book/novel may also be adapted into an audio-visual content, the biggest example being of the Harry Potter franchise or the Lord of the Rings trilogy. All the Harry Potter movies are an adaptation of each of the Harry Potter books written by J.K Rowling.

Similarly, music remixes are also an example of adaptation with regard to musical works, which involves alteration of original musical composition by adding and/or changing the composition's arrangement.

The term 'Derivative Work' is not defined in the Act. However, derivative work simply means any new work which is created based on an older work. For example, in case of a feature film, a prequel, sequel, a spin-off, animation, comic book etc. based on the film would be a derivative work.

## f. Copyright Infringement

Copyright infringement refers to the unauthorized usage of any Work, the exclusive right of which vests with the owner of the copyright. Violation of any terms and conditions of a license/ consent to use the Works also amounts to copyright infringement. For instance, using a sound recording of a third-party (copyright is owned by a third-party), without a license or consent or rightful authorization amounts to copyright infringement. Similarly, where one has been authorized/ licensed to utilise the sound-recording or a portion thereof subject to certain terms and conditions, but utilizes the sound recording circumventing such terms and conditions, such usage also amounts to copyright infringement. Copyright infringement amounts to loss of potential revenues of the copyright owner.

Copyright infringement also occurs with respect to movie scripts, screenplay and dialogues. For instance, the producers of a Bengali Film titled as 'Poran Jaye Joliya Rae', were accused of copying the story of the Bollywood movie Namaste London<sup>5</sup>.

### **Section 51 of the Act enumerates the general situations where copyright is deemed to be infringed, including:**

- i. usage of a Work without obtaining the permission of the copyright holder and thereby doing any act which only the copyright holder is authorised to do under the Act;
- ii. authorising/ permitting any place party to communicate, sell, distribute, or exhibit an infringing Work (unless the person so permitting was not aware or had no reason to believe that such permission will result in copyright infringement);
- iii. importing infringing copies of a Work;
- iv. reproduction of any Work without due authority from the copyright holder.

<sup>5</sup><https://indianexpress.com/article/cities/kolkata/high-court-bells-the-copycat-bans-blockbuster-poran-jay-joliya-re/>

An infringing copy includes reproduction of any Work (literary, dramatic, musical, or artistic work other than in the form of a cinematograph film), a copy of a cinematograph film made on any medium and in relation to sound recording means any other recording made comprising the earlier sound recording.

However, the following are certain specific instances where copyright is infringed in the process of film production and exploitation:

- i. At the development/ pre-production/ production and post production stage- it is pertinent to ensure that the script being developed is wholly original and does not include any infringing material and is not plagiarised. In the event the script being developed is based on a previously written script or book or film or any other third-party material, it is important to acquire the rights to such third-party material prior to the development of the Works. Similarly, one cannot develop a remake/ adaptation without obtaining the necessary remake/adaptation rights first. Inclusion of a third-party song in an audio-visual content without license would also amount to infringement.
- ii. While the foregoing depends on internal checks and balances to ensure that the content does not include any infringing material, at the exploitation stage, infringement may be external i.e., the content produced may be subject to infringement such as unauthorised reproduction, distribution piracy (physical and digital) etc. For example, if a broadcaster telecasts a feature film on its television channel without obtaining a license from the owner of copyright in the feature film (e.g., producer), the same would amount to infringement of the exclusive right of the owner to communicate the feature film to the public via the means of a broadcasting television channel<sup>6</sup>.

Copyright infringement is both a civil and criminal offence in India. In the event a producer/ production house is of the view that their copyright has been infringed by a third-party, they have remedies available under the Act. In such a case, it is advisable for the producer/ production house to seek legal advice from a legal advisor to ascertain whether the act amounts to copyright infringement under the law and then subsequently ascertain the way forward legally.

## **g. Exceptions to Copyright Infringement**

Section 52 of the Act provides an exhaustive list of acts which are exceptions to copyright infringement which acts would otherwise have been prohibited and would have amounted to infringement of copyright. Some of the acts provided in the list under Section 52 include, usage of Works for private or personal use, satire, criticism, review, news/ current affairs reporting, usage for educational purposes, usage in bonafide religious events, usage in wedding ceremonies etc.

## **h. Statutory Royalties and Copyright Societies**

‘Royalty’ is essentially a payment which the author of a Work/ underlying works is entitled to receive with each public performance and/or sale of the Works authored by him/her. For example, music composer is entitled to receive royalty when their original songs/ Works are played on the radio or television, performed at concerts, played at bars and restaurants, or consumed via any music streaming services. The Act was amended in 2012, to recognize that the authors of the musical and literary works whose works are included in a cinematograph film or sound recording shall be entitled to receive royalties from the utilization of their works in any form except when the cinematograph film is communicated to the public in a cinema hall.

The Act does not allow authors to waive and/or assign the right to receive royalty except in favour of their heirs or to a registered copyright society for collection and distribution of royalties. It further specifies that any agreement contrary to the foregoing shall be void.

Copyright societies are registered and formed (under Section 33 of the Act) for a specific class of work, and they deal with the task of conferring licenses for performance or communication related to any kind of literary, artistic, musical, or dramatic work, and collect Royalties in pursuance of the same. Copyright societies not only commercially manage the works of its members but also prevent third-party infringements and take legal action on behalf of the member.

<sup>6</sup>[https://iprmentlaw.com/wp-content/uploads/2021/04/Copyright-101\\_Handbook.pdf](https://iprmentlaw.com/wp-content/uploads/2021/04/Copyright-101_Handbook.pdf)

## Examples of registered copyright societies in India<sup>7</sup>:



### Indian Performing Rights Society (IPRS)

for musical composition and associated lyrics.



### Indian Singers Rights Association (ISRA)

for singers.

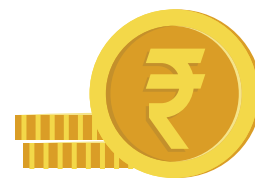


### Indian Reprographic Rights Organization (IRRO)

for reprographic rights in literary works.

Absence of such copyright societies would result in licensees/ users approaching the owners of works independently to seek licenses making it a time-consuming exercise to track each owner and negotiate license terms with them. Owners of works are entitled to collect their share of royalties from the copyright society which in turn would collect it from licensees/users of the copyright society's. Additionally, authors' share of royalties cannot be collected by owners of copyright (where they are assignees of the Author) as this is restricted under the Act. Such a role can however be fulfilled by the copyright society<sup>8</sup>.

Tariff Schemes for royalties are available on the websites of registered copyright societies and indicate the separate rates for: (i) categories of users; (ii) media of exploitation; (iii) exploitation by group, individual and the purpose of the usage; (iv) duration and territory of usage and; (v) any other factor deemed appropriate by the society. These Tariff Schemes are fixed in accordance with the guidelines issued by the courts or copyright board. Upon collection of royalty as per the Tariff Scheme, the copyright society shall distribute the royalty amongst the authors as per the distribution scheme.



## i. Moral rights and performer rights

Section 57 of the Act protects the 'moral rights' of authors. The moral right allows the author to control the non-economic usage of the Works and are provided under Section 38-B and Section 57 of the Act, which pertains to performers and authors respectively. For instance, moral rights are divided into two categories: (a) Right to Paternity i.e., the right to be called the author of the Works/ receive credit for the Work created and; (b) Right of Integrity i.e., right to prevent anyone from mutilating or destroying the integrity of the Work. However, failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the moral rights of the author<sup>9</sup>.

An author is inherently entitled to his/ her moral rights in law and they continue to vest with the author even after the author's death (unlike copyright, moral rights cannot be legally transferred or inherited). Under Indian jurisdiction, moral rights are also inalienable rights i.e., they can only be voluntarily waived to a certain extent.

A waiver of moral right however, allows the Producer to enjoy more creative liberties without the worry of violating an author's moral right.

For example, Javed Akhtar had sent a legal notice to Amaal and Armaan Malick alleging the infringement of his moral rights when they released song "Ghar se nikalte hi" used the "mukhda" of the original song which was composed by Bhushan Kumar, in 1996. Javed Akhtar contended (a) that the new version – by acknowledging only one lyricist – infringed his moral right of paternity and (b) that the new version infringed his right of integrity i.e., the right to prevent his work from being mutilated and distorted in a way that is prejudicial to his honour and reputation<sup>10</sup>

<sup>7</sup>[https://iprmentlaw.com/wp-content/uploads/2021/04/Copyright-101\\_Handbook.pdf](https://iprmentlaw.com/wp-content/uploads/2021/04/Copyright-101_Handbook.pdf)

<sup>8</sup>[https://iprmentlaw.com/wp-content/uploads/2021/04/Copyright-101\\_Handbook.pdf](https://iprmentlaw.com/wp-content/uploads/2021/04/Copyright-101_Handbook.pdf)

<sup>9</sup>[https://iprmentlaw.com/wp-content/uploads/2021/04/Copyright-101\\_Handbook.pdf](https://iprmentlaw.com/wp-content/uploads/2021/04/Copyright-101_Handbook.pdf)

<sup>10</sup><https://spicyip.com/2018/04/in-the-name-of-the-author-the-holy-mukhda-assessing-the-economics-of-moral-rights-part-i.html>

# III. STAGES OF FILM PRODUCTION AND CONTRACTS

## A. Development Stage

The development stage mainly consists of planning and conceptualising the script of the audio-visual content. The script may be based on a book, a true story or an original concept. The development stage includes bringing on board the writer(s), the director and showrunner to conceptualise the audio-visual content and its concept before the production begins.

Where the Production House is desirous of seeking investment from an OCC Platform, the development stage may also include pitching the concept/ first version of the script to the OCC Platform for green lighting and procuring a commissioning deal. Similarly, in case the Production House is seeking other means of investment, the development stage may also include joining hands with external investors and/or co-producers for such investment.

Therefore, the following contractual agreements maybe relevant during and/or prior to the development stage depending on the type of commercial understanding the Parties have agreed:

**a) Co-Production Agreement-** A Co-Production Agreement is an agreement between two or more production companies or between an OCC platform and a production house. This Agreement outlines each party's roles and responsibilities in producing content. The parties share the costs, resources, and risks associated with the project. A Co-Production Agreement can take various forms, such as one-party providing funding while the other curates and produces the content or both parties being equally responsible for funding and curation/development of the content. In many cases in a co-production agreement, the on-ground production may be outsourced to another production house as well and regions for exploitation may be divided as per mutual understanding between the Parties. The Intellectual Property Rights can be divided in a ratio agreed upon by the parties.

### **In a nutshell a Co-Production Agreement typically covers the following:**

- i. The respective contributions of each co-producer, such as funding, equipment, personnel, intellectual property, and creative input.
- ii. The allocation of ownership rights and distribution rights, including how revenues and profits will be shared.
- iii. The production schedule and timeline, including deadlines for completing different stages of production.
- iv. The budget and financial arrangements, including how costs will be shared and who will be responsible for managing the budget.
- v. The dispute resolution process, including how disagreements between the co-producers will be resolved. This may be either by
  - i. going to court by setting an exclusive jurisdiction- i.e., the matter/dispute can only be entertained by the courts mentioned in the agreement- for instance, if both parties reside/ operate out of in Mumbai, the courts of Mumbai would have exclusive jurisdiction and/or
  - ii. by arbitration/ conciliation- where the agreements sets out the terms for arbitration like the appointment of arbitrators, seat and venue of arbitration etc. The Parties to the contract can choose the method of dispute resolution desired.

**b) Development Agreement-** Before the OCC Platform decides whether or not to commission a deal but is interested in the concept/story pitch, the parties enter into a Development Agreement wherein the OCC Platform commissions the development of the content and ensures that any and all rights that arise from such content that so develops vests with them.

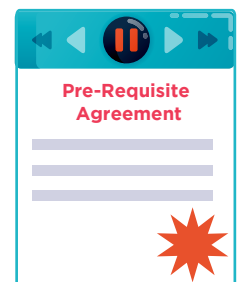
**c) Production Services Agreement-** After pitching the script/ pilot episode to an OCC Platform, the OCC Platform commissions the Production House to produce the audio-visual content at its instance. This Agreement defines the conditions under which the production house will create new content for an OCC Platform. The Agreement typically includes aspects such as the scope of work, budget, timelines, and deliverables. Under a Production Services Agreement, the production house acts as a service provider and receives a fixed percentage of the budget (typically below the line budget unless otherwise agreed) or an agreed lump sum amount. The OCC Platform retains complete ownership of the intellectual property rights.

**d) Licensing Agreement -** OCC Platforms and Production Houses sometimes enter into agreements for the production of content that has not yet been created. In these agreements, the parties agree on an initial investment amount, and based on this amount, the Production House will create and produce the content. Once the content is delivered, the remaining amount that was agreed upon will be paid to the Production House. As part of the agreement, the OCC Platform will receive an exclusive license for the content for a certain number of years and specific territories, which will be determined through commercial negotiations between the parties. The OCC Platform will also have exclusive rights to monetize the content during this period.

**e) Writer, Director, and Showrunner Agreements-** Engagement of the writer, director, and showrunner (if any) to determine the flow of production, engagement, and development of key elements etc. prior to commencement of pre-production and principal photography are entered into by the Production House.

**f) Execution of any other pre-requisite agreement-** In the event the audio-visual content is an adaptation of an existing work, it becomes pertinent for the Production House to execute appropriate agreements with the rights holder of such existing work, in order to have a clear transfer or rights in the existing work to enable the Production House to create the audio-visual content. The party desirous of creating the adapted audio-visual work may, depending on the nature of the existing work, enter into an assignment and/or license agreement with the rights holder of the existing work (“Rights Agreement”). The main elements of a Rights Agreements are as follows:

- The representation from the rights holder that it is the sole and exclusive owner of the intellectual property rights in the existing work and is further authorised to transfer the rights under this agreement;
- To establish the transfer of rights- exclusivity, type of works to be created, language of the work, any other holdback/ restriction, any exclusions thereof etc. For instance, if the audio-visual content being produced is an adaption of a book, the rights holder of the book may permit the producer to create a cinematographic film, podcast etc. based on the book, however may retain the rights to create a web-series.
- To establish the ownership of rights in the audio-visual content.
- To establish the revenues/ consideration for the assignment of rights.
- To establish the creative control in the audio-visual content. Although it is advisable to retain creative decisions rights pertaining to the audio-visual content with the producer, in some cases, the rights holder retain creative approval on all and/or certain elements.





## B. Pre-Production Stage

The pre-production stage essentially involves building on the material created during development stage to further create the final literary works- script, screenplay, dialogues etc. of the audio-visual content. It also includes planning the production schedule, allocation of the budget, on-boarding and engaging the lead cast and crew for the series, engagement of vendors, short-listing of locations etc. so as to prepare for the production stage. Therefore, the following agreements maybe required during and/or prior to commencement of the pre-production stage:

**a) Contributor Agreements-** Such agreements are executed with all the contributors, including but not limited to- artists/ actors, singers, song writers, director of photography (DOP), line producers, direction team, writing team, art director, production designer etc. who shall all render services towards the audio-visual content.

**Contributor Agreements are usually divided into two categories:**

- 1. Above The Line-** which includes without limitations, the lead cast of the audio-visual content, music composers, and the lead crew, like the DOP, Director; and
- 2. Below The Line-** which includes all other secondary cast and crew, vendors, technicians etc.

**b) NOC's, permissions, location releases-** It is extremely important to have the necessary authorizations and permissions prior to commencement of the principal photography. Therefore, all necessary permissions ought to be procured during this time. For instance, if the producer short-lists a location during recce, it is important for the producer to execute a location release form with the owner of the premises to establish the roles and responsibilities in relation to the usage of the location. No Objection Certificates also may be issued where the Production House requires a certain permission from another person or entity. For example, where in an audio-visual content a producer is using a trademark of a brand in passing/ as incidental usage- the producer may obtain an NOC from the brand for caution.

## C. Production: Principal Photography and Post Production

The principal photography period is the shooting period of the production schedule where the scenes are shot as per the script. Usually by this stage all contributor agreements in relation to all the service providers have been executed. However, the producer may wait until the end of principal photography period to execute agreements with certain post-production personnel such as editors, VFX etc. During the post-production period, the producer also begins to create a plan for distribution and exploitation of the audio-visual content.

During this period and/or the Pre-Production, the producer may also procure other licenses from third-parties, such as synchronization licenses for inclusion and synchronization of a sound-recording with the visuals of the audio-visual content, execute in-film brand placement/ promotion agreements with brands that the producers have tied-up with etc.

## D. Distribution Stage

Distribution is the final step in the content production process. In the absence of a Commissioning Deal from an OCC Platform, it becomes crucial for the producers of an audio-visual content to secure a lucrative distribution deal. Distribution of an audio-visual content includes its exploitation through various means on exploitation including without limitations, theatrical exploitation, satellite rights, cable rights, Internet rights, Pay TV, Free TV, airborne rights etc. Therefore, the following kind of agreements may be required during the Distribution Stage:

### a. Licensing Agreement

In a Licensing Agreement, the licensor (owner of the IP of the content) grants the licensee (user of the IP or in this case the Platform) the right to use or exploit the Content, subject to certain terms and conditions. These terms can vary widely depending on the type of content involved, the scope of the license, and the specific needs and requirements of the parties involved. There are two main types of Licensing Agreements: Exclusive and Non-Exclusive.



**Exclusive Licensing Agreement:** In an exclusive licensing agreement, the Licensor (owner) agrees not to grant any other licenses for the use of the content to anyone else, while the license remains in effect. This means that the Licensee has exclusive rights to use and exploit the IP during the term of the agreement. Exclusive licenses are often used when the Licensor wants to maintain tight control over the use of their content, or when the Licensee needs to have a guaranteed exclusive position in the market. For example, when a content is provided to Amazon Prime on an exclusive license basis, during the tenure of the Agreement, the Licensor cannot grant rights to other OCC Platforms such as Netflix, Hulu etc.

**Non-exclusive Licensing Agreement:** In a non-exclusive licensing agreement, the Licensor retains the right to grant licenses to other parties. Non-exclusive licenses are often used when the Licensor wants to maximize the potential use of their content across multiple markets or applications, or when the Licensee needs access to the content, but does not require exclusive rights.

## **b. Syndication Agreement**

Syndication Agreements are agreements between a content owner and a syndicator (or a broadcaster/platform), in which the syndicator is granted the right to distribute or broadcast the content to a wider audience or market. The content can include TV shows, movies, news programs, cartoons, sports events, or other types of media content.

Syndication Agreements allow content owners to monetize their content by reaching larger audiences through syndication or broadcasting. The syndicator, in turn, can benefit by acquiring content that is popular with their target audience, or by filling programming gaps in their schedule.

Syndication Agreements can take many different forms, depending on the specific needs and requirements of the parties involved. Typically, they include provisions that address the following:

- i. The scope of the syndication rights, including the duration of the agreement, the geographic area covered, and the types of media platforms or channels where the content will be syndicated or broadcasted.
- ii. The compensation to be paid to the content owner, which can include a combination of upfront fees, revenue sharing, or other financial arrangements.
- iii. The production and distribution obligations of the parties, including who will be responsible for creating and delivering the content, and who will be responsible for distributing and promoting it.
- iv. The intellectual property rights and ownership, including who owns the copyright, trademarks, or other IP related to the content.
- v. The warranties and representations made by each party, including promises to adhere to legal and regulatory requirements, and to avoid infringing on the rights of third parties.

## **c. Assignment Agreement**

In an Assignment Agreement for content the owner of certain content transfers ownership of that content to another party. The content can include various types of intellectual property such as scripts, screenplays, music, videos, films, web-series, documentary, or any other creative works. For instance, an artist/ music band may assign their entire music catalogue to a music label such as Sony Music/ TIPs/ T-Series in perpetuity in exchange of a lumpsum assignment fee.

The purpose of an assignment agreement for content is to transfer all rights and ownership of the content from the original owner to the assignee. The assignee then has the right to use, reproduce, distribute, and monetize the content in any way they see fit. In exchange for the transfer of ownership, the assignor is typically compensated with a one-time payment.

**Chain of Title:** Chain of title simply means determining the flow of rights in a particular work. When a work is assigned and acquired multiple times, the ownership title changes with every assignment and acquisition. Moreover, every deal may differ in the rights granted/ acquired. Therefore, determining the chain of title allows the producer to not only ascertain the flow of rights (i.e., who was the first owner/ producer and who do the rights vest with currently) but also to ascertain the rights which have been granted/ acquired in the chain of title. An extensive due

diligence exercise is carried out to determine the chain of title to ensure that the rights being acquired are assignable freely and the assignee is not acquiring rights with any encumbrances which may hinder its exploitation rights.

#### **d. Music Distribution Agreement-**

In some cases, especially larger production houses assign the music and audio rights (i.e., rights in the sound recording and the audio-visuals of the sound recording) to a music label. Music labels such as T-Series, TIPS, Saregama etc. usually buy and/or procure a license to exploit the music rights of an audio-visual content, especially films. Therefore, music distribution may be an assignment and/or a license and the exploitation thereof is subject to the terms and conditions agreed between the Parties.

### **E. Other Agreements**

**a. Synchronization License Agreement:** Synchronization licenses are procured for synchronization of an audio/ sound-recording with certain visuals to include in an audio-visual content. The license may include usage of the sound recording on an as-is basis and/or may permit a re-creation/ new rendition of the original sound-recording and then synchronization of the new rendition with the visuals of the audio-visual content. A synchronization license usually includes the following key elements:

- i. License Fee:** The fee paid to the licensor (copyright owner of the sound-recording) by the licensee (production house/ producer) in lieu of the rights granted;
- ii. Usage:** whether the sound recording will be used on an as-is basis or otherwise;
- iii. Usage in the audio-visual content:** (i) identifying the duration of the sound-recording which will be synched and; (ii) identifying the scene(s) in which the synched clip will be used.
- iv. Restrictions:** usage of the sound-recording is usually restricted to the terms of the license and promotions of the audio-visual content and expressly restricts any standalone usage of the sound-recording or the synched clip. Many other restrictions/ exclusions may be included by the Licensor on a case-to-case basis.
- v. Rights:** It is crucial to identify who the rights in the original sound-recording, the new rendition of the sound recording (if any), the synched clip etc. will vest in.

#### **b. In- Film Brand Placement Agreement:**

In-film branding is a big source of revenue for producers. It essentially entails “product placement” or “brand placement” in various scenes of the film/ series and creating an association between the film/series and the product/ brand. The In- Film Brand Placement Agreement generally sets-out the terms and conditions for such brand integration. Under this contract, the brand pays the producer a certain fee in lieu of such brand integration in the film/series and for further use of the content in brand promotions. Similar to the synchronization licenses, it is crucial to identify the exact manner, scene, duration etc. of such placement.

#### **c. Character Licensing Agreements:**

Characters are one of the most crucial literary elements of a book/ script. Strong and well written characters are the foundation of a good story. For instance, all the Disney characters or the entire Marvel and DC superheroes universe is based on intellectual property (IP).

Each literary character which is developed and written is protected by copyright; and in order to utilize a certain character, one must procure a license for such use. Character licensing started with Beatrix Potter, who authored a children’s book titled “The Tale of Peter Rabbit”. She eventually started selling dolls of the central character Peter Rabbit<sup>11</sup>.

Character Licensing Agreements are similar to IP license agreements.

<sup>11</sup><https://www.smithsonianmag.com/arts-culture/how-beatrix-poter-invented-character-merchandising-180961979/>