

2011 ComplR 0079 (CCI)*

a

COMPETITION COMMISSION OF INDIA

FICCI, New Delhi

v.

United Producers/Distributors Forum, Mumbai and Ors.

b

CASE NO. 01 OF 2009

DECIDED ON: 25.05.2011

Coram

c

Dhanendra Kumar, Chairman; H.C. Gupta, R. Prasad, P.N. Parashar, Dr. Geeta Gouri, Anurag Goel, M.L. Tayal (Members)

d

Formation of Cartels — Controlling and fixing market one of the essential factors — Supply of films to multiplex owners controlled — Presence of conflict of revenue sharing ratio between Informant and OP's — Violation of Section 3(3)(a), 3(3)(b), 3(3)(c) of the Competition Act, 2002 — Did the opposite parties enter into any agreement or indulge in any cartel like conduct that was in contravention of Section 3 of the Act — OP operated in a market environment that was extremely conducive to cartelisation and that their conduct, showcased same — Boycott of multiplexes by the OP was as blatant an act of limiting or controlling of production or distribution — Presence of concerted behaviour from the OP's evident from the report of the DG.

e

Anti-competitive behaviour — Notice issued By OP to abstain from releasing films — Presence of agreement — Contrary to Section 3 of the Competition Act, 2002 — Joint Venture efficiency pleaded — Evident, film producers and distributors formed an association — Gain more profits — Collective decision not to release films to multiplexes proved from letters and notices issued — OP by entering into the impugned agreement have contravened the provisions of Section 3(1) read with Section (3)(a) and (b) of the Act and also caused appreciable adverse effect on competition in India in terms of Section 19(3) of the Act.

f

g

Intellectual Property Rights — Violation of Copyright asserted — Sections 14 of the Copyright Act, 1957 — Act acknowledges copyright owners' rights and excludes these from the purview of Section 3(3) of the Competition Act — Replies of OP's based on Copyright — Assertions not accepted — Here, neither any question of infringement nor did the question of imposing reasonable conditions to protect such right arose — Plea of copyright rejected — Seeking to release films in multiplexes, were only facilitating the rights of the producers/distributors under the Copyright Act — Secretary was directed to issue notices accordingly — Penalty imposed.

h

* MANU/CO/0018/2011

Case Précis

Informant FICCI-Multiplex Association of India alleged that the Respondents namely United Producers/Distributors Forum (hereinafter, referred to as UPDF), The Association of Motion Pictures and TV Programme Producers (hereinafter, referred to as AMPTPP) and the Film and Television Producers Guild of India Ltd. (hereinafter, referred to as FTPLGI) were behaving like cartel. a

It was further alleged that UPDF had instructed all producers and distributors including those who were not the members of UPDF, not to release any new film to the members of the Informant for the purposes of exhibition at the multiplexes operated by the members of the Informant. b

It had been alleged that the notice was sent to the members by UPDF because of the conflict between the producers/distributors and the members of the Informant on Revenue sharing ratio. It was alleged that the average sharing ratio was 40 per cent to 44 per cent which was paid to the producer/distributor by the multiplex industry but in early 2009 the producers/distributors started demanding unreasonable sharing ratio. c

Several negotiations were carried out but none was futile. It was alleged by the Informant that the members of the UPDF who were competitors controlling almost 100 per cent of the market for production and distribution of Hindi pictures in multiplexes in India (relevant market) were clearly acting in concert to fix prices in infringement of Section 3(3)(a) of the Act, and also limiting/controlling supply by refusing to release Hindi films for exhibition in multiplexes to members of the Informant hence violating Section 3(3)(b). It was further alleged that UPDF and its members have collectively boycotted the multiplex cinema operators in violation of Section 3(3)(c) of the Act. d

The Informant filed copies of agreements between certain multiplex operators and producers/distributors and in the meeting of the Commission it was informed that UPDF have called off their strike and have resumed supply of films to multiplex operators, therefore, the interim relief sought by the Informant was not pressed further. However the Commission was of the opinion that there existed a *prima facie* case of infringement of provisions of the Act and directed the Director General to investigate into the matter. e

The DG submitted that there was cartel like behaviour and anti competitive activities by the OP's. Thereafter the DG was further asked to enquire with regard to the points raised by the Commission. Thus, the D-G concluded that the contravention of the provisions of Section 3(3) of the Act as the OP's came together on a common platform, by raising the bogey of survival and indulged in concerted action after talking to each other openly under media glare and took joint decision not to supply films to the multiplex owners with a view to garner higher Revenue for themselves. f

Parties were sent copies of the report and opportunity was given to raise objections. The main violators stated that a feature film is a subject matter of copyright and Section 14 of the Copyright Act, 1957 permits the owner of copyright to exploit such copyright in a manner as he deems fit. It was also urged that the Act acknowledges the copyright owners' rights and excludes these from the purview of Section 3(3) of the Act. Section 3(5) of the Act by using *non obstante* Clause in the opening part shuts out any investigation by the Commission in a situation where the copyright owner exercises his right. A cumulative reading of all these provisions made it clear that copyright is a statutory right subject to the provisions of the Copyright Act, 1957. It is, therefore, abundantly clear that a protectable Copyright comes to vest in a cinematograph film on its completion which is said to take place when the visual portion and audible portion are synchronised. g
h
i

a The Commission held that a protectable copyright comes to vest in cinematograph film on its completion but it is also not in dispute that the Act in Section 3(5) provides that nothing contained in Section 3 shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him, *inter alia*, the Copyright Act, 1957. In the present case, neither any question of infringement of rights of producers/distributors conferred under the Copyright Act, 1957 arose nor did the question of imposing reasonable conditions to protect such right arise.

b In the light of the evidence gathered it was clear that the producers/distributors acted in concert to determine Revenue sharing ratio with multiplex owners and to this end they also limited/controlled supply of films to multiplex owners. Such a conduct on their part squarely fell within the mischief of Section 3(3)(a) and (b) of the Act and any plea based on copyright was wholly misplaced. Moreover, it was observed that multiplex owners were not in any manner infringing the rights of the producers/distributors under the Copyright Act, 1957. On the contrary, the multiplex owners, by seeking to release films in multiplexes, were only facilitating the rights of the producers/distributors under the Copyright Act, 1957.

c Commission after considering cumulative effect of all the mitigating factors was of the opinion that ends of justice would be met if a penalty of Rs. 1,00,000 (Rupees One Lac only) was imposed upon each of the opposite parties under Section 27(b) of the Act in addition to cease and desist order under Section 27(a) of the Act. The same was ordered accordingly.

Cases referred to

- e* *Entertainment Network (India) Limited. v. Super Cassette Industries Ltd.*, MANU/SC/2179/2008: 2008 (5) O.K. 719: 2008 (4) ALD 47 (SC): 2008 (5) BomCR 719: JT 2008 (7) SC 11: MIPR 2008 (2) 129: 2008 (37) PTC 353 (SC): 2008 (9) SCALE 69 (discussed) [p. 0113, para 23.18 f]
- f* *Indian Performing Right Society Ltd. v. Eastern Indian Motion Picture Association* MANU/SC/0220/1977: (1977) 2 SCC 820: AIR 1977 SC 1443: [1977] 3 SCR 206 (discussed) [p. 0095, para 6.6 d]
- Microfibres Inc. v. Girdhar & Co.* MANU/DE/0647/2009: MIPR 2009 (2) 229: 2009 (40) PTC 519 (Del) (discussed) [p. 0113, para 23.17 e]
- Otter tail Power Co v. the United States*, 410 U.S. 366 (1973) (discussed) [p. 0114, para 23.20 d]
- g* *The Gramophone Company of India Ltd. v. Super Cassette Industries Ltd.* MANU/DE/1801/2010: MIPR 2010 (2) 349 (discussed) [p. 0113, para 23.16 b]
- Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (discussed) [p. 01114, para 23.22 f]
- United States v. Microsoft* [38 1998 WL 614485 (DDC Sept 14th, 1998) (discussed) [p. 0114, para 23.19 c]
- h* *Warner Bros. Entertainment Inc. v. Santosh V.G* MANU/DE/0406/2009: MIPR 2009 (2) 175 (mentioned) [p. 0095, para 6.4 c]

Legislations referred to

- i* **Code of Civil Procedure, 1908, Order V, Rule 2** [p. 0106, para 18.3 a]
- Companies Act, 1956, Section 617** [p. 0109, para 23.3 h]
- Competition (Amendment) Act, 2007** [p. 0092, para 4.5 f]

Competition Act, 2002		
Section 2(b)	[p. 0097, para 10.2 e]	<i>a</i>
Section 2(c)	[p. 0105, para 17.5 e]	
Section 2(f)	[p. 0095, para 6.7 f]	
Section 2(h)	[p. 0109, para 23.3 f]	
Section 2(I)	[p. 0109, para 23.3 f]	
Section 3	[p. 0086, para 3.3 i]	<i>b</i>
Section 3(1)	[p. 0086, para 3.3 h]	
Section 3(3)	[p. 0086, para 3.2 g]	
Section 3(3)(a)	[p. 0085, para 2.7 b]	
Section 3(3)(b)	[p. 0085, para 2.8 b]	
Section 3(3)(c)	[p. 0085, para 2.8 b]	
Section 3(5)	[p. 0095, para 6.3 b]	<i>c</i>
Section 3(b)	[p. 0105, para 17.4 e]	
Sections 4 and 6	[p. 0097, para 10.3 f]	
Section 14	[p. 0094, para 6.2 g]	
Section 14(1)(c)	[p. 0112, para 23.15 i]	
Section 16	[p. 0113, para 23.16 b]	<i>d</i>
Section 19	[p. 0094, para 5.5 b]	
Section 19(1)	[p. 0083, para 2 i]	
Section 19(3)	[p. 0087, para 3.3 b]	
Section 27	[p. 0129, para 35 c]	
Section 27(a)	[p. 0129, para 34 b]	
Section 27(b)	[p. 0129, para 34 b]	<i>e</i>
Section 36(2)	[p. 0105, para 18.2 h]	
Section 36(3)	[p. 0106, para 18.2 a]	
Sections 43 and 45	[p. 0103, para 14.8 i]	
Constitution of India, 1950, Article 19(1)(g)	[p. 0105, para 17.4 g]	
Copyright Act, 1957		
Section 14	[p. 0101, para 13.1 a]	<i>f</i>
Section 31	[p. 0095, para 6.7 e]	
Section 13(1)(b)	[p. 0112, para 23.14 f]	
Section 16	[p. 0112, para 23.13 h]	
Essential Commodities Act, 1955	[p. 0093, para 4.12 g]	<i>g</i>
Indian Evidence Act, 1872	[p. 0099, para 10.13 c]	
MRTTP Act, 1969, Section 3	[p. 0117, para 23.40 a]	
Sale of Goods Act, 1930	[p. 0093, para 4.12 g]	

ORDER

**Dhanendra Kumar, Chairman; H.C. Gupta, R. Prasad, P.N. Parashar,
Dr. Geeta Gouri, Anurag Goel, M.L. Tayal (Members)**

Introductory

1. The Indian Film Industry is one of the oldest segments of Indian entertainment industry. Films constitute about 27 per cent of the entertainment industry in India.

a The film industry was given status of industry in the year 2000. In recent years, the Indian film industry has witnessed marked improvements on all fronts, *viz.* technology, themes, exhibitions, finances, marketing and business environment. Indian film industry is also getting corporatised. FDI in all film related activities such as film production, distribution, exhibition, marketing etc. is permitted up to 100 per cent for all companies under the automatic route. The combined Revenues of the Indian film industry, including box office and ancillary Revenues, are estimated *b* to have reached a figure of around Rs. 109.2 bn in the year 2009. The industry is estimated to grow at a compound annual growth rate of 9.1 per cent to reach \$3.4 bn (Rs. 168.6 bn) by 2013 due to factors such as the expansion of multiplex screens, enhanced penetration of home video and increase in the number of film based TV channels fuelling demand for film content. (Source: Report of FICCI – KPMG, 2009)

c 1.1 One of the major reasons for a large number of films being produced and released is stated to be the proliferation of quality film exhibition infrastructure through multiplexes since 2001. Development of multiplexes has in fact revived the lifestyle of theater going, which had taken a hit during the previous decade or more due to proliferation of TV channels and affordable home viewing apparatus such as VCD/DVD players and computers. Increased cinema attendance and gross box office collections, thus, improved the business economics across the film value chain. *d* Factors like rising consumerism, increase in disposable income, favourable demographics, lower penetration of multiplexes within the country and boom in retail sector throw up excellent opportunities for the multiplex sector in India. The multiplex business segment is, however, still in its nascent stage of growth. This is the reason multiplexes have mushroomed in many parts of the country over *e* the past few years.

e 1.2 Film production entities are becoming corporatised. In the recent past, forward integration of big producers into the business of distribution, especially into overseas markets has been noticed. Distributors have been marginalised because many producers are releasing films directly. With the film industry having more corporate players, the distribution game is changing. Producers are now dealing directly with *f* major multiplex companies for distribution deals, while other cinemas, which are largely single-screen theatres, are handled by individual distributors. Thus, the main development that has taken place in the Indian film industry is that film production units are turning into corporate entities and several film production companies are venturing and diversifying into the film distribution business. These companies can benefit from control over distribution surpluses. There is growing *g* commonality of interest among producers and distributors and clear and perceptible trend of integration of the business of film production and distribution.

g 1.3 Indian/Hindi film industry has entered a new phase of growth, integration, right sizing of all functions across the value chains and is heading towards further consolidation. Although there are limited number of production houses that have *h* the experience of managing all elements of value chains, integration of studio, production and distribution is now a growing trend.

Facts

i 2. The Informant FICCI-Multiplex Association of India (hereinafter, referred to as “the Informant”) had filed an information on 26th May, 2009 under Section 19(1) of the Competition Act, 2002 (hereinafter, referred to as “the Act”) through its advocates Luthra & Luthra Law Offices, 103, Ashoka Estate, 24, Barakhamba Road, New Delhi 110001.

2.1 It was alleged by the informant that the Respondents namely United Producers/ Distributors Forum (hereinafter, referred to as UPDF), The Association of Motion Pictures and TV Programme Producers (hereinafter, referred to as AMPTPP) and the Film and Television Producers Guild of India Ltd. (hereinafter, referred to as FTPGI) were behaving like cartel. It was alleged that UPDF is an association of film producers and distributors which includes both corporate houses and individuals independent film producers and distributors. The AMPTPP and FTPGI are the members of UPDF. It was further alleged that UPDF, AMPTPP and FTPGI produce and distribute almost 100 per cent of the Hindi Films produced/supplied/distributed in India and thereby exercise almost complete control over the Indian Film Industry.

2.2 It had been further alleged that UPDF vide their notice dated 27th March, 2009 had instructed all producers and distributors including those who are not the members of UPDF, not to release any new film to the members of the Informant for the purposes of exhibition at the multiplexes operated by the members of the Informant. It had been further informed that being aggrieved by the decision of UPDF various members have approached the informant and sought its assistance.

2.3 It had been alleged that the above notice was sent to the members by UPDF because of the conflict between the producers/distributors and the members of the informant on Revenue sharing ratio. It was informed that the Revenue sharing ratio is usually negotiated between individual producer and individual multiplex operator film by film. The above ratio varies from week to week and it is usually around 48 per cent in the first week, 38 per cent in the second week, 30 per cent in the third week and 25 per cent in the fourth and the subsequent weeks in Maharashtra. This ratio varies from state to state but follows similar pattern.

2.4 It was alleged that the average sharing ratio is 40 per cent to 44 per cent which usually paid to the producer/distributor by the multiplex industry. Incidentally, this ratio has increased from around 32 per cent since the inception of the multiplex industry in India. It had been alleged that in early 2009 the producers/distributors started demanding unreasonable sharing ratio of a flat rate of 50 per cent for all weeks and all types of films.

2.5 It had been alleged that several negotiations were attempted by the multiplex operators with the producers/distributors to persuade them to call off their strike and to arrive at an amicable resolution of the differences but to no avail. It had been alleged that during the continuance of the differences between the multiplex operators/producers/distributors several other producers/distributors organised themselves under the umbrella of UPDF. It was further alleged that the AMPTPP and FTPGI had issued notice dated 9th May, 2009 to their respective members to comply with the notice dated 27th March, 2009 issued by UPDF and not to release any film in multiplexes. In the above notice dated 9th May, 2009 a warning was given to the respective members that in case of failure to comply with the instruction given in the notice will lead to life time suspension/strict disciplinary action etc. against the concerned member.

2.6 It was alleged that the AMPTPP acted upon the notice dated 9th May, 2009 to its members and vide letter dated 8th May, 2009 had requested the Motion Pictures Association (MPA) and the Eastern India Motion Pictures Association (EIMPA) not to entertain the request filed by M/s People Pictures (A Member of AMPTPP) to release their Hindi film titled "99". M/s People Pictures had initially given an undertaking to the UPDF not to release "99" in multiplexes till the Revenue

a share ratio dispute resolved but M/s Motion Pictures decided to go ahead and release the film in multiplexes; this led the AMPTPP to take action against M/s. Motion Pictures.

b 2.7 It was alleged by the informant that the members of the UPDF who are competitors controlling almost 100 per cent of the market for production and distribution of Hindi pictures in multiplexes in India (relevant market) are clearly acting in concert to fix prices in infringement of Section 3(3)(a) of the act, and also limiting/controlling supply by refusing to release Hindi films for exhibition in multiplexes to members of the informant hence violating Section 3(3)(b). It was further alleged that UPDF and its members have collectively boycotted the multiplex cinema operators in violation of Section 3(3)(c) of the Act.

c 2.8 The Commission vide its order, dated 29th May, 2009 directed the Informant to appear before Commission on 9th June, 2009 and to produce certain other documents for supporting and corroborating the contents and substances of the information.

d 2.9 The Advocate on behalf of the informant appeared before the Commission and explained that the documents mentioned in Clauses (b), (c) and (d) of the Order dated 29th May, 2009 were not available with him and sought time to file the agreements between informant and the opposite parties.

e 2.10 On 18th June, 2009 the Informant filed copies of agreements between certain multiplex operators and producers/distributors. In the meeting of the Commission on 19th June, 2009, it was informed by the Counsel of the informant that UPDF have called off their strike and have resumed supply of films to multiplex operators with effect from 12th June, 2009 therefore, the interim relief sought by the informant was not pressed further. In the above meeting the informant was further directed to produce agreements and other documentary evidence pertaining to calling off the strike, including press reports, video clippings etc. within 10 days.

f 2.11 On 30th June, 2009 after hearing the Counsel of the informant and after going through the entire relevant material, the Commission was of the opinion that there exists a prima facie case of infringement of provisions of the Act and, therefore, directed the Director General to investigate into the matter and submit his report within 45 days of the receipt order.

g 2.12 The Director General vide his letter 4th August, 2009 requested the Commission for extension of time and after considering the application and reasons explained by the DG, the commission agreed to grant 45 days extension for the submission of the investigation report.

3. Report of Director-General (D-G)

h 3.1 Pursuant to the directions issued by the Commission, the D-G took up the investigation and gathered the facts from primary and secondary sources to examine the allegations. The D-G collected the evidence by recording statements of concerned persons and by sending questionnaire to the concerned parties. The evidences/facts gathered in the course of investigation were analysed by the D-G in the light of the information filed.

i 3.2 After completing the investigation, the D-G submitted his report on 25th September, 2009 to the Commission incorporating findings based on facts unearthed during the investigation. The same are summarised as under:

(i) Cartel like conduct

The producers and distributors most of who are members of two associations – AMPTPP and FTPGI decided collectively not to release films to multiplex owners during the period 4th April, 2009 to 12th June, 2009, till they could extract more favourable Revenue share from Multiplex owners. Multiplexes could release only some low budget movies during the period.

(ii) Persons involved

The producers and distributors formed an association by the name of United Producers and Distributors Forum for the purpose which also issued letters to the producers and distributors not to supply films to the multiplexes. Key persons involved on behalf of producers-distributors were Mukesh Bhatt, Manmohan Shetty of FTPGI, Ratan Jain of AMPTPP, Amir Khan, Shahrukh Khan, Karan Johar, Ramesh Sippy of BRA Enterprises, Yash Chopra and Sahdev Ghai of Yashraj group, Ronnie Screwvala, Sunil Wadhwa and Siddharth Roy Kapur of UTV, Sunil Lulla, Nandu Ahuja and Jyoti Deshpande of Eros Group, Aman Gill of Studio 18 and Sandeep Bhargava of Indian Films Company.

(iii) Evidence of cartel meetings

Producers and distributors held meetings and conferences on the issue and associations, individual producers-distributors also bore the expenses together for such meetings and conferences.

(iv) Instances of anti-competitive conduct

Letters were issued by associations – AMPTPP and FTPGI to the members with an appeal not to release films to multiplexes. These letters even carried threat of suspension/boycott. In case of release of Film “99”, AMPTPP issued letters to Motion Pictures Association and Eastern Motion Pictures Association not to entertain the application for the release of the film in their territories.

During the period 4th April, 2009 – 12th June, 2009, there was a collective decision not to release films to multiplexes. As a result, there was loss of Revenue to the multiplex owners and end-consumers also could not get the opportunity of watching films in multiplexes.”

(vi) Conclusion

Thus, the D-G concluded that the actions mentioned above were in nature of cartel like conduct by producers and distributors who were organised under the umbrella of UPDF. This was with a view to control the distribution and exhibition of films in multiplexes and to force the multiplexes into agreeing for higher Revenue ratio for members of UPDF. The D-G found this conduct to be in contravention of Section 3(3) of the Competition Act, 2002.

3.3 The Commission in its meeting held on 9th October, 2009 considered, *inter alia*, the report of the D-G and came to the conclusion that a further inquiry is necessary to obtain supplementary information/evidence on certain points and accordingly, the Commission directed the D-G to collect the same. The important points raised by the Commission were as follows:

- (i) What was the practice prior to the alleged agreement/understanding in relation to the profit sharing ratio between the producers/distributors and the multiplex owners?
- (ii) What is the specific period of the alleged contravention of Section 3 and in what manner?
- (iii) Whether the alleged violators limited or controlled the supply of Hindi films to the multiplex owners? If so, in what manner?

- a (iv) What were the specific activities of UPDF and other associations which amounted to cartel like behaviour?
- (v) What is the position after the settlement of dispute on the point relating to profit sharing ratio between the distributors/producers and the multiplex owners? What is the actual or potential impact of the settlement on other stakeholders?
- b (vi) What are the relevant factors, in view of the provisions of Section 19(3) of the Act to establish the appreciable adverse effect of the agreement/arrangements carried out by the alleged violators on the competition in the market?
- (vii) Who were the main violators in the alleged cartel like activities and in what manner?
- c 3.4 Pursuant to the aforesaid direction of the Commission, the D-G investigated into these points and a detailed supplementary report was submitted on 30th November, 2009 to the Commission. The major findings of the D-G are as under:

Prior practice in relation to the profit sharing ratio

- d 3.4.1 The Revenue sharing ratio, prior to this standoff between FMAI ad Producers/ Distributors, in favour of the producers/distributors, was as under:

Type of Films	Big Budgeted Films	Medium Budget Films	Low Budget Films
1 st Week	48%	45%	40%
2 nd Week	38%	35%	30%
3 rd Week	30%	30%	
4 th week and subsequent weeks	25-30%	25-30%	

- e
- f 3.4.2 This was the generally accepted ratio. However, producers/distributors of the large budget films, sometimes, negotiated different terms, based on the perception of the potential of the film. It was also noticed that different multiplexes gave different Revenue sharing ratios to the producers/distributors depending upon the potential of the film, expected performance, star cast, territory, location of multiplexes etc.

Specific period of violation

- g 3.4.2.1 After due deliberation by the UPDF on the issue and after taking a joint decision not to offer films to different multiplexes, the first notice was issued on 27th March, 2009. The notice gave directions to the member producers/distributors not to release films to multiplexes from 4th April, 2009 onwards. The standoff between the two sides continued till 9th June, 2009. Thus, from 4th April, 2009, till 12th June, 2009 (when "Kal Kisne Dekha" was released), no films were released by producers/distributors on account of their concerted action of not releasing films to the multiplexes. This created sufficient pressure on the multiplexes that were forced into a compromise. The new agreements, under the new Revenue sharing arrangement, were signed on 9th June, 2009, with some producers/distributors.
- h
- i 3.4.2.2 This was the period during which supply of films in multiplex theatres was drastically reduced but it cannot be said that cartel like behaviour, its impact on the market or Revenue sharing existed only for this period.

3.4.2.3 Therefore, it cannot be said that the cartel like conduct ended on 9th June, 2009. On the contrary, it very much continues. The fruits of the cartel like conduct actually began to accrue from 9th June, 2009, onwards after signing of the agreement with new Revenue sharing ratio. Thus, the cartel like conduct which began on 27th March, 2009 continues.

a

Limitation of supply of Hindi films to multiplexes

3.4.3 It must be noted that a cartel, working in secrecy, extracts a higher price with the threat of non-supply. There is always a punishment mechanism for those members of a cartel who do not follow the cartel mandate. In this case, the threat of non-supply was actually executed.

b

3.4.3.1 In the period of execution of the threat, the punishment mechanism was put in place for those who did not co-operate in limiting supply and, thereafter, a higher price of the product/services obtained. This higher price still continues in the form of new Revenue sharing pattern.

c

3.4.3.2 No big budget film was released during this period of concerted action by the producers/distributors under the aegis of UPDF to the multiplexes in spite of fact that many films were ready for release. During this period, not only UPDF but the other associations such as AMPTPP and FTPGI also issued directions to producers/distributors not to release the films to multiplex owners. The fact of limiting supply of films has been brought out in detail in the reports of the D-G. This limit in supply of films has also been confirmed in the statement of Shri Amir Khan of Amir Khan Productions, recorded on 23rd November, 2009.

d

3.4.3.3 The report of the D-G points out that it is not a case where some cartel has been discovered through investigation but the activity of the cartel had ceased by the time of discovery of the cartel. On the contrary, this is a case where concerted action of limiting the supplies of goods and services, a much higher price has been successfully extracted for all times to come. To that extent, it is a case where the members of UPDF did not actually gained during the period of non-supply but as a consequence to it when a higher price was enforced for future. Therefore, the period of violation cannot be said to have come to an end on 12th June, 2009. It can also be seen that there are two components of cartel like conduct in this case. The first one was the call for, and actual limiting of supply of films (this violation ended on 12th June, 2009) and the second was that of effecting higher prices by an agreement that came into existence on 9th June, 2009 as a result of the execution of threat of non-supply and this second component continues to be operative.

e

f

g

Instances of cartel like acts

3.4.4 The reports of the D-G give details of the meetings and discussions of different associations including those which were held to resolve the issue. It was because of the undisputable market power that the cartel of producers/distributors wielded that multiplexes could be forced into a compromise favourable to the UPDF members. Although UPDF itself and associations like AMPTPP and FTPGI connected to it were overtly trade associations, but their conduct was tantamount to cartel like behaviour where concerted action and decisions taken by such association of persons or enterprises attempt to limit supply or fix prices.

h

3.4.4.1 The report of the D-G pointed out that there are limitations within which trade association should work to keep themselves on the right side of the competition law. In this case, the conduct of UPDF went much beyond the leeway permitted to

i

a associations in their conduct. UPDF brought together direct competitors who exchanged analysis of the market conditions, and shared information in dealing with multiplex owners in "one to one" negotiations. By executing the threat of non-supply, they also extracted a higher price from the multiplexes.

b 3.4.4.2 The report of the D-G forcefully states that the conduct and concerted action of the producers/distributors—whether or not they were members of UPDF—was much more anti-competitive than the justified activities of any trade association. Experiences of cartels by competition authorities worldwide indicates that trade associations have provided a good camouflage vehicle for anti-competitive practices under associations or some specific groups of the associations. The report gives details of the meetings of UPDF at various times as well as the details of payments made by them for meetings were given. The details reveal how persons having huge stake in the industry and who were to benefit from any favourable arrangements for producers/distributors, came together and induced other smaller players to toe their line. The presence of the smaller players gave the entire conduct by UPDF a veneer of legitimacy in the form of trade association activities.

Impact of the cartel like conduct

d 3.4.5 As a result of the joint pressure generated by the members of UPDF, the Revenue sharing, in terms of the new settlement was fixed at 50 per cent, 42.5 per cent, 37.5 per cent and 30 per cent for the 1st, 2nd, 3rd and 4th week, respectively. It can be seen that the new Revenue sharing ratio in favour of producers/distributors has been enhanced by a minimum of 2 per cent from the first week and is also higher for the subsequent weeks.

e 3.4.5.1 This Revenue sharing ratio in favour of producer/distributors is also independent and irrespective of the potential or expected performance of the films, star cast, territory, location of the exhibition of the film. However, the ratio has to be enhanced by 2.5 per cent for the first and second weeks of exhibition if net collection of the film (computed as an aggregate of all the exhibition weeks) in all the multiplexes of the six national multiplex chains exceeds Rs. 17.50 crore. It means that the actual distribution ratio of the producer and distributor will, under these circumstances, be 52.5 per cent for the first week and 45 per cent, 37.50 per cent and 30 per cent for the 2nd, 3rd and 4th week respectively.

f 3.4.5.2 Furthermore, if a producer/distributor releases a film in such a way that the number of prints across the territory for exhibition of the film exceeds 500 in aggregate and the aggregate net collection for such a film, across all the national multiplex chains, is less than Rs. 10 core, the Multiplex owner shall be entitled to get a rebate in the Revenue sharing ratio. This will be 50 per cent, 40 per cent, 35 per cent and 30 per cent for 1st, 2nd, 3rd & 4th week, respectively.

g 3.4.5.3 The D-G has also observed that during the period of execution of the threat of non-supply, the loss to the multiplex owners was in many different ways including income from food and beverages stalls etc.

h 3.4.5.4 The D-G has noted that multiplex owners across the country have hiked ticket prices by 15-20 per cent depending on their location in September – October, 2009. This hike is reported to be the direct fall out of the enhanced Revenue which multiplexes have to share now with the producers/distributors. Thus the D-G has shown how the burden of enhanced Revenue ratio has been finally passed on to the multiplex cinema goers who are the ultimate consumers for the films.

Appreciable adverse effect on competition

3.4.6 The factors given in Section 19(3) of the Act, for determination of appreciable adverse effect on competition, have been discussed in detail in the report of the D-G. As has been shown in the report, out of the six factors mentioned therein, the first three relating to creation of entry barriers in the market for multiplexes have been indisputably violated. As regards the last three factors, there are no benefits to the consumer nor are there improvements in distribution of films or promotion of scientific, technical or economic development in the industry.

3.4.6.1 The D-G report has further pointed out that the conduct of persons indulging in cartel like behaviour is covered under Section 3(3) of the Act and, therefore, it is not even required to discuss the factors given under Section 19(3) as such because the behaviour of the alleged violators falls within "presumptive rule" contained in Section 3(3) of the Act.

Main violators

3.4.7 Name of these persons had been given in Annexure A of the report. These include, UTC Software Communication Ltd (represented by Ronnie Screwvala, Sidharth Roy Kapur), Studio-18 and Indian Film Company (represented by Sandeep Bhargava and Aman Gill), Eros Group (represented by Jyoti Deshpande, Sunil Lulla and Nandu Ahuja), Yash Chopra and Sahdev Ghai of Yashraj Films, Mukesh Bhatt of Vishesh Films, Ratan Jain of Venus Films, Manmohan Shetty –President of FTPGI, Ramesh G Sippy, Ramesh Taurani of Tips Industry, Karan Johar of Dharma Production, Ashutosh Gowariker, Rakesh Roshan, Vasu Bagnani, Ramesh Sippy, and Vidhu Vinod Chopra. Aamir Khan of Aamir Khan Productions and Shahrukh Khan of Red Chillies Entertainment, were also a part of the deliberations and the talks where the Revenue sharing formula was arrived at.

3.4.7.1 However, during the recording of the statement of Shri Aamir Khan of Aamir Khan Productions, he stated that he would prefer the earlier system where "one to one" negotiations ensured more competitive pricing. In his reply, through his legal Counsels, Shri Shahrukh Khan, Red Chillies Entertainment, has also stated that he had no reason to believe that there was anything illegal about the effort to get the grievances addressed collectively otherwise he would not have agreed to attend the meetings. It has also been submitted by Shri Shahrukh Khan, through his Counsel, that he attended the press conference on the request of the senior producers and distributors.

3.4.7.2 In the opinion given in the report of the D-G, these persons, though beneficiary of the high Revenue sharing ratio, were making efforts to distance themselves from the participation in the decisions taken but had gained from the exercise nonetheless.

General observations

3.4.8 The changes permeating the Hindi Film Industry have been brought out, in detail, in the report. The old model of the distributor-producer and single screen owner has completely changed with the expansion and corporatisation of the Hindi Film Industry. Multiple avenues for gains from films have emerged such as cable rights, satellite rights, song rights, caller tune rights etc. On account of massive corporatisation of the Hindi Film Industry, declaration of Film as Industry, availability of bank finances, the producer is no more wholly dependent on the distributor for finance at the time of making of the film. As a result of this, the old system in which

a distributor was one of the important stakeholders at the time of the release of the film has undergone a sea change. Now, in some cases, just a day before the release, the agreements for exhibition of the film has not yet been finalised. This was another reason why the execution of the threat of non-supply of the films to the multiplex owners could be successfully executed. The present structure of the Bollywood is such that there is almost complete vertical integration between producer and distributors. In the cases where the integration does not exist, there are close tie-ups b between the producers and distributors nearly amounting to vertical integration. The small distributor of yore with strength in a limited territory is no more.

c 3.4.8.1 In this present landscape of Bollywood, there are limited people who call the shots. Going by the releases, these limited people have cornered a bigger chunk of action for themselves. These are the people who actually orchestrated the call for boycott of multiplexes. These were the persons who stood to gain maximum and who actually gained maximum as a result of the standoff.

Conclusion of D-G report

d 3.5 Thus, the D-G concluded that the contravention of the provisions of Section 3(3) of the Act has been established in as much as the producers and distributors behaved in a cartel-like manner. They came together on a common platform, by raising the bogey of survival and indulged in concerted action after talking to each other openly under media glare and took joint decision not to supply films to the multiplex owners with a view to garner higher Revenue for themselves.

e 3.6 The Commission considered the supplementary report filed by the D-G along with the earlier report and entire material in its meeting held on 9th December, 2009. After examining the entire material and the reports of the D-G, the Commission decided that copies of the reports be sent to each of the concerned parties for offering their comments/objections. The Commission also decided to grant permission for inspection of the records to the concerned parties and also decided to accord opportunity of hearing to the parties as per the relevant Regulations.

f 3.7 Accordingly, the parties filed their replies/objections to the reports of the D-G and written submissions besides making oral arguments on various dates. However, despite service of the notice, UPDF did not file any response/reply hence, it was proceeded against *ex parte* vide the Commission's Order, dated 12th January 2010. Three other parties were also proceeded against *ex parte* by the Commission because they also did not file any response/reply despite the service of notice and various adjournments sought by them. They were, Shri Vasu Bagnani, Shri Vidhu Vinod g Chopra and Shri Sunil Wadhwa of UTV.

Gist of Replies/Objections/Submissions of Parties

4. Association of Motion Pictures and TV Programme Producers

h 4.1 M/s. Association of Motion Pictures and TV Programme Producers filed its reply vide its reply dated 19th February, 2010. It was stated by the AMTPP that D-G has erred to have considered the original complaint, contents of some surveys, economical background, reports, statements etc. without considering the factual situation and without proper investigation of the matter. It was further stated that i the Respondent association is governed by the provisions of Memorandum and Articles of Association adopted by it for the purpose of welfare of its member alone. The entire process of decision making is legal and democratic. The Respondent

Association (AMTPP), therefore, cannot be said to be having substantial control over its members unless the members are agreeable to various decisions of the Respondents and the committees framed for the purpose of decision making. It was further stated that membership of the Respondent association is voluntary.

4.2 It is pertinent to mention here that AMTPP in its reply has disclosed that no decision can be taken or implemented whatsoever by the Respondent if there is no consensus between the majority of the members hereto.

4.3 It was also stated that the Respondent association did not have any ulterior motives, gains or profits whatsoever for itself and all the acts performed or executed by the Respondent are for the welfare and in the interest of its members. In the above situation therefore, it cannot be said that the Respondent has unilaterally acted upon to cause breach of any provisions of the act. Furthermore, the Respondent cannot be deprived of his fundamental rights of negotiating his terms of business for benefit of his producer members, distributors, workers, consumers etc. such that the film and TV industry be benefited.

4.4 It was also stated by the AMTPP that the intention behind incorporation and formation of Respondents is for the benefit of entire film industry and not for creating any dominant forum/curtailing any supply, creating monopolies, restraining the healthy competition or creating such other situation which may lead to the exploitation of consumers or would harm the society at large.

4.5 The AMTPP also raised certain legal issues regarding the validity of the notice sent to him by the DG. The AMTPP raised a legal issue that they had not been given a proper opportunity of being heard as documents/copy of complaint/information was not supplied to them. Another legal issue raised by the Respondent (AMTPP) in its reply is that in the light of the amendment in the Competition Act a notice cannot be issued to the Respondent under the provisions prior to the amendment because the amendments became effective from 20th May 2009. It was also stated that the notice issued cannot be enforced as the same is not issued under the provisions of the Amended Act which stands to be enforced and implemented before the date of issuance of the notice and also because the information/complaint of the Petitioners are received by the Commission after implementation of Amended Act, 2007.

4.6 It was further stated by the AMTPP that they had not indulged in any cartel like behaviour by entering into any agreement for not supplying film prints to the exhibitor as alleged in the notice. It was also denied that Respondents are attempting to control the distribution of films to the disadvantage of the exhibitors and viewers in any manner.

4.7 It was further stated that the Respondent or its members have not booked any profits whatsoever and have been facing losses due to non-cooperation from the exhibitors especially from the Multiplexes.

4.8 The Respondent AMTPP stated that the procedure and rules laid down under the CPC were not followed by the D-G while taking out inferences and conclusions from the data available. It was further stated that the documents which were tendered and were annexed to the D-G report were not proved to be true and the authors of the said agreement were never examined to prove the validity of the said document. Thus the data and information gathered from trade magazines, business magazines or study papers cannot be construed as an evidence and hence the said reports have no evidential value in the eyes of law.

4.9 It was also denied that no films have been supplied/released to multiplexes since April 2009 on the basis of instructions of UPDF or the Respondent.

- a* 4.10 It was also stated that production, distribution and exhibition of films are correlated activities without transfer of ownership of intellectual property rights envisaged in the films and is exploited for the benefits of all the parties involved from investor to exhibitor and eventually the customers or the viewers. The producers of the film were normally financed by financial institutes, private investors, business partners which are backed by respective investment documents executed between the parties. The producers who were member of various associations are at utmost risk because they are not only involved in the process of film making/production but are also responsible for marketing, distribution and recoveries of the film for making good investments and for remitting the shares of the respective parties as per arrangement with such investors. Therefore, it becomes absolutely essential that correct and timely recoveries should be made from the film so that the producer is not left with losses despite of his hard work and maximum risk in the business.
- b*
- c* The Respondent states that the exhibitors and multiplexes play at minimum risk in the entire business because they are only liable towards the exhibition of films. The exhibitor apportions the recovery from the film in such a manner that the exhibitor first recoups his individual cost towards administration and exhibition of the film and thereafter recoups his share of profit and left over is then remitted to the producer and the distributor as the case may be. In the above scenario the exhibitor therefore,
- d* recoups his profits or investments/cost even before the breakeven point for the producer is achieved from the recoveries of the film. The exhibitors especially the members of MAI exhibits atleast three newly released films every week without considering the huge losses incurred by the producers from time to time because of unregulated and unorganised or well-planned strategies of distribution pattern for exhibition of the film. A majority of Revenue is earned by multiplexes from the food and beverages purchased by the spectator, after or during the exhibition of the film therefore, multiplexes are more interested in earning Revenue from sale of such commodities and not the film. In such a situation, it cannot be said that the consumers are deprived of the benefits of watching new films at the instance of the Respondents.
- e*
- f* 4.11 It was also stated that the producers are the owners of IPR envisaged in films created by the producer and cannot be compelled to supply or distribute his cinematographic films or any work envisaged therein irrespective of desire of general public towards the film. It is pertinent to note that the producers have the proprietary rights of the IPR in the films.
- g* 4.12 Lastly, film trade and business do not fall into the category of goods as specified in Sale of Goods Act or Essential Commodities Act therefore, no action should have been initiated against the Respondent.

Ratan Jain/Venus Records and Tapes Pvt. Ltd.

- h* 5. Mr. Ratan Jain of M/s. Venus Records and Tapes Pvt. Ltd. filed his reply which was received by the Commission on 8th March, 2010. It was stated in the reply that DG has erred to have considered the original complaint, contents of some surveys, economical background, reports, statements etc. without considering the factual situations and without proper investigation of the matter.

- i* 5.1 It was further submitted that Mr. Ratan Jain or his Company do not enjoy any monopoly in the market or a situation which is like a monopoly. It was also stated that his company has no ulterior motives, gains or profits whatsoever for his personal benefits and all acts performed or executed by him were towards duties and authority delegated to him on behalf of the members and in capacity of a President of AMTPP.

5.2 Mr. Rattan Jain further stated that several films were released during the period therefore, there is no question of contravention of Act whatsoever, and on this ground itself the petition/proceedings should be dismissed against him. a

5.3 It was further alleged that he had not been supplied with the copy of information and other material documents. It was also stated that the DG had acted beyond the provisions of CPC hence investigations made by him cannot be relied upon.

5.4 It was also stated that since the amended provisions of Section 19 came into force only on 20th May, 2009, the Commission was not empowered to issue notice for the acts done before that date. b

5.5 Mr. Rattan Jain also stated that he had not indulged in any cartel like behaviour. It was also stated that it would be incorrect to hold that there is prima facie case existing against him without referring to such relevant matters or without giving any opportunity to him prior to initiating such proceedings. c

5.6 Rattan Jain has also raised the issue regarding intellectual property rights and stated that production, distribution and exhibition of films are correlated activities without transfer of ownership of the intellectual property rights as envisaged in the films and is exploited for the benefit of all the parties involved from investors to exhibitors and eventually the customers or viewers. It is averred that the members of UPDF did not meet as a cartel but it was just an attempt to restructurings or managing the release of the films for benefit of all. It is also relevant to note that multiplexes as such cannot be treated in isolation to the individual exhibitors as no separate market can be analysed or exist for multiplexes. d

Aamir Hussain Khan/Amir Khan Production Pvt. Ltd. e

6. In the joint reply, it was submitted that Amir Khan Production Pvt. Ltd. (AKPPL) is a company incorporated under the Companies Act, 1956 and carries on business as a producer of feature films, advertisement films and related activities. It was further submitted that Mr. Aamir Hussain Khan is a leading film star in India and is a share holder and director of AKPPL. It is further submitted that Mr. Aamir Hussain Khan does not carry on business as producer of feature films individually in his individual capacity and, therefore, it is argued that the present case ought to be dismissed against them and it is further argued that this objection should be heard as a preliminary objection and decided before proceeding with the hearing of the matter on merits. f

6.1 It was submitted that a feature film is the subject matter of copyright under the Copyright Act, 1957 and Section 14 thereof permits the owner of copyright to exploit such copyright in a manner as he deems fit. g

6.2 It was further argued that it is entirely up to the copyright owner as to how to communicate his film to the public. No multiplex owner can demand that the film be released in its theatre let alone dictate the commercial terms on which such film must be released. It is also the discretion and right of the copyright owner to decide how many copies of the film to communicate to the public through theatre or multiplexes and a demand by a theatre or multiplex owner of a right to exhibit the film cannot be sustained. It is also urged that the Act acknowledges the copyright owners' rights and excludes these from the purview of Section 3(3) of the Act. Section 3(5) of the Act by using *non obstante* Clause in the opening part shuts out any investigation by the Commission in a situation where the copyright owner exercises his right. h
i

a 6.3 It is further argued that the aforesaid contention of the opposite parties has been recognised and accepted by the Commission in Case No. 25 of 2010, *Reliance Big Entertainment Ltd. v. Karnatka Film Chamber of Commerce*. In view of the above, it was sought to be argued that the reasoning of the D-G in Paragraph No. 3.4.17 of the Supplementary Report that even in respect of copyrighted material “there is a distinction between existence of a right and its exercise. During the exercise of a right if a prohibited trade practice is visible to the detriment of competition in the market or interest of consumer, it ought to be assailed under the competition law” is clearly erroneous on the face of it as it defeats the very purpose of the exception contained in Section 3(5) of the Act.

c 6.4 It was further submitted that as a copyright owner, a film producer can, at his sole discretion, determine the manner of communicating his film to the public. This includes commercial terms on which the film is permitted to be communicated to the public. To support this contention, reliance has been placed upon a decision of the Hon’ble High Court of Delhi in *Warner Bros. Entertainment Inc. v. Santosh V.G.* (MANU/DE/0406/2009).

d 6.5 It was further submitted that the Hon’ble Supreme Court of India in *Indian Performing Right Society Ltd. v. Eastern Indian Motion Picture Association*¹ (1977) 2 SCC 820 held that each feature film is nothing but a bundle of copyrights. It was pointed out that the D-G has failed to appreciate that a film, which is a bundle of copyrights, is not “goods” or “services” and is outside the scope of the Act.

e 6.6 It was also submitted that any action for the benefit of the multiplex owners to claim as a matter of right that the producers should exhibit the film through them will tantamount to compulsory licensing of the film. It was stated that the Copyright Act, 1957 provides for compulsory licensing by the Copyright Board in Section 31 thereof in the manner set out therein and therefore, if a film producer refuses to communicate its film to the public then an aggrieved party can invoke the machinery provided in Section 31 of the Copyright Act, 1957 as aforesaid. Since, alternative machinery is available, the Commission does not have the jurisdiction over such matter.

f 6.7 It was further pointed out that the D-G has erroneously held that multiplexes are consumers within the meaning of Section 2(f) of the Act. It was further submitted that the multiplexes are not consumers and are merely exhibitors of the films.

Shahrukh Khan/Red Chillies

g 7. Mr. Shahrukh Khan filed his reply through letter dated 8th January, 2010. It was submitted by Mr. Shahrukh Khan that there had been no situation where films of his company M/s. Red Chillies Entertainment Pvt. Ltd. had not been released to the multiplexes as a result of any directive or resolution. It was further stated that his last film namely “Billu Barber” was released on 13th February, 2009 in the theatres including multiplexes after individual, independent negotiations. It was further stated that M/s. Red Chillies Entertainment Pvt. Ltd. had not been the beneficiary of alleged anti competitive agreement at any stage during its currency.

h 7.1 It was also stated that when Mr. Shahrukh Khan attended the press conference on 7th April 2009, he was under the bona fide belief that there was nothing illegal about the effort to get the grievance of the film producers and distributors redressed collectively.

1 Ed.: MANU/SC/0220/1977: AIR 1977 SC 1443: [1977] 3 SCR 206

7.2 It was further submitted that he is not a member of UPDF and had not involved in any correspondence, information or violating of UPDF. It was also stated that the press conference was attended by him on 7th April, 2009, and the provisions of Competition Act have been made effective on 20th May, 2009, so the agreement or the collective decision allegedly illegally entered into was so entered into prior to the law being made effective. a

7.3 It was also mentioned that the cause of the grievance was eliminated on 12th June, 2009 when a compromise agreement had been reached out between the multiplexes and producers/distributors. It was further stated that the fact of increase in the ticket price cannot be rolled up in the investigation as the effect had been caused by an entirely different agreement. b

7.4 It was further stated that he never refused to release or stopped any of his production company's films from being released as a consequence of any alleged decision taken by the purported UPDF. It was further stated that he has not gained in any manner from the alleged cartel activity which in any event was only the effective, if at all, from 12th May, 2009 to 12th June, 2009. It was also stated that he has not contravened the provisions of Section 3(3) of the Act. c

Karan Johar/Dharma Productions Pvt. Ltd. d

8. Mr. Karan Johar had filed his reply vide letter dated 30th January, 2010. In his reply, he has denied all the allegations leveled against him in the report filed by the D-G.

8.1 It was also stated that him film Dostana was released in the month of November 2008, while Wake Up Sid and Kurbaan were scheduled to be released in October 2009 and November 2009, respectively. It was also stated that since all his films were under production, he was not in a position to release any film during the alleged period between 4th April 2009 and 12th June 2009. He further stated that he was not aware of any correspondence between the association of producers/distributors and multiplex owners. e

8.2 It was also stated that he is not in the business of distribution of films and had never entered into any agreement with multiplex owners with regard to Revenue sharing. It was stated that he attended the press conference on 7th April, 2009 at the request of the certain senior members of the Indian Film Industry and while addressing to the media he was merely acting in the capacity of the moderator. It was further stated that he was not a part of the any negotiations between the multiplex owners and distributors. f

8.3 It was stated by Mr. Karan Johar in his reply that multiplex owners had also organised themselves under the umbrella of informant. And MRTP Commission vide its order in IA No. 9 of 2007 in RTP Enquiry No. 3 of 2007 held the terms of MAI Agreement as restrictive trade practice. Therefore, as a result of the continued oppression of producers/distributors, by the multiplex owners, the producers/distributors decided to make collectively effort to get their grievances voiced. g

8.4 It was further stated that the producers/distributors were not able to approach the CCI in March 2009 as the relevant provisions of the Act were not in force at that time. It was also stated that Revenue sharing agreements cannot be per se considered to be having an appreciable adverse effect on competition because Revenue sharing agreements are bona fide response towards fair business environment. h

Manmohan Shetty of FTPGI

- a* 9. Shri Supran Sen, Secretary General of the FTPGI vide its brief reply dated 11th March, 2010 stated that he has already recorded his statement on behalf of the FTPGI and the President Shri Manmohan Shetty has nothing further to say now in the matter. It was also clarified that the reply is being sent on behalf of the President of FTPGI, *viz.* Shri Manmohan Shetty and the Secretary General of FTPGI, *viz.* Shri Supran Sen.

b

Ramesh Sippy

- c* 10. Shri Ramesh Sippy filed a very elaborate reply stating therein that the answering party is a member of AMPTPP and FTPGI for the last many years and further it was stated that he has been a Producer/Director of films for the last 40 years. It was further stated the present reply has been filed in his individual capacity. At the outset it was stated that a copy of the original complaint was not received by the answering party and accordingly it reserved its right to file a detailed reply on receipt thereof. All the allegations, statements, submissions, averments and conclusions arrived at by the D-G in his reports were denied and further it was submitted that the D-G erred in considering the original complaint, contents of some surveys, economical background, reports, statements etc. without considering other factual situations and without proper investigation of the matter.

d

- 10.1 It was urged that the D-G had failed to appreciate and understand the entire functioning of the Indian Film and TV Industry. Moreover, the DG failed to apply proper economic barometers while assessing and conducting the inquiry and investigation on the basis of wrongful and incorrect information given by the Informant.

e

10.2 It was submitted that no "agreement" as understood within the meaning of Section 2(b) of the Act was subsisting.

f

10.3 It was also submitted that the Act differentiates the concept of a "market" as mentioned in Section 3 of the Act from the "relevant market" as used in Sections 4 and 6 of the Act which allows the Commission to segment the market for product or service into a product market or a geographical market, or a combination of both. No such latitude is afforded to the Commission while examining anti-competitive agreements under Section 3 of the Act. In the case of anti-competitive agreements, an assessment of whether an agreement causes an Appreciable Adverse Effect on Competition (AAEC) must be made only with reference to the Indian market for the product/services as a whole and accordingly, an assessment for Hindi Motion Pictures that are exhibited in

g

Multiplexes shall not be sufficient to allow the prayers sought for by the Informant. Elaborating further it was submitted that sub-division of a market is unwarranted because Indian market for motion pictures as a whole should be analysed. Since, All India Films collectively constitute the market for motion pictures in India and consequently, an investigation into the alleged anticompetitive agreement must be based on an assessment of whether such an agreement has an appreciable adverse effect on the market for all such motion pictures made in India, and must not be limited to the market for Hindi Motion pictures made in Mumbai alone.

h

- i* 10.4 It was urged that a producer does not generally transfer the property or the title of his motion picture to a distributor and then to an exhibitor. The exhibitor merely gets a limited right to exhibit the motion picture and, therefore, as such there is no sale of motion picture that may be said to take place from the producers/distributors to the exhibitors.

10.5 Further, it was argued that the element of the agreement, as envisaged in Section 3(3)(a) of the Act, is that the agreement should be to determine prices. In the present case, as there is no sale of motion picture made by the producers/distributors to the exhibitors, it was erroneous on the part of the D-G to conclude that there is an agreement for determining purchase or sale prices. a

10.6 It was also averred that a Revenue sharing agreement between film producers/distributors cannot be equated to a price for a movie. A mere possibility that there is a certain degree of parallelism in the Revenue sharing agreement that different film producers/distributors may have with different multiplex operators, does not in itself lead to the conclusion that there is an agreement within the meaning of Section 3(3)(a) of the Act. b

10.7 Further, it was argued that there is no agreement to limit the supply of films within the meaning of Section 3(3)(b) of the Act as it pertains to an agreement which limits/controls the production, supply, markets, technical development, investment or provision of services. c

10.8 It was further asserted that the period from April, 2009 to June, 2009 (during which the agreement to limit the supply of films is alleged to have existed) overlapped with the Indian Premier League Twenty-Twenty ("IPL T.20") cricket tournament which was held between 19th April, 2009 and 24th May, 2009. Considering the huge viewership that the IPL T.20 tournament was likely to attract, the film producers/distributors were under the apprehension that most of the usual cinema viewers would be weaned away and that releasing their films during this period would not bring them sufficient Revenue. To buttress the point, it was submitted that the multiplex operators themselves admitted that releasing of films during the months of April to June, 2009 were stalled because of the IPL T.20 tournament. And accordingly, it was submitted that the finding of the D-G that the film producers/distributors were acting solely on the directions/notices issued by the UPDF and were thus in an agreement not to release films, is without due appreciation of the factors like the IPL cricket tournament etc., which influenced the release of films and to this extent the said finding of the D-G is erroneous. d

10.9 It was next submitted that the presumption contained in Section 3(3) of the Act is rebuttable and it is open to the parties to the alleged agreement to prove otherwise by adducing contrary evidence. Further, the D-G was required to have carried out an independent enquiry into whether there may exist factors which may result in a reversal of the presumption of AAEC with respect to the alleged agreement. It was submitted that the D-G in its report has not provided any evidence on the factors listed in Section 19(3) of the Act which may have a bearing on the final decision that the Commission may take with respect to the alleged agreement amongst the film producers/distributors. e

10.10 It was also pointed out that the producers/distributors of Hindi motion pictures have all along been affected by the strong cartelisation practices adopted by the multiplex operators under the umbrella of the MAI. It was stated that the multiplex operators by negotiating the Revenue sharing terms with individual producers/distributors through the MAI have been successful in increasing the Revenue sharing terms to their favour since the year 2006. In this context, attention was drawn to an RTP enquiry filed before the MRTPC by the producers/distributors of Hindi motion pictures complaining against the agreement entered into amongst the members of the MAI. f

a 10.11 It was next submitted that if the Commission were to hold that the alleged agreement amongst the producers/distributors indeed exists, then the alleged agreement has to be viewed in the nature of an efficiency enhancing joint venture as permissible under proviso to Section 3(3) of the Act.

b 10.12 Lastly, it was argued that in the event the Commission were to find that the alleged agreement amongst the producers/distributors indeed exists, such an agreement only seeks to impose reasonable conditions which are necessary for protecting the intellectual property rights of the film producers/distributors under Section 3(5) of the Act. This provision is in the nature of an exception to the general prohibition contained in Section 3(1) to Section 3(4) of the Act.

c 10.13 Objection was also taken to the admissibility of some video clippings as the same were not proved under the provisions of the Indian Evidence Act, 1872 and further the proper procedure under the Code of Civil Procedure, 1908 was not followed.

Yashraj Films Pvt. Ltd.

d 11. Reply on behalf of M/s. Yash Raj Films Pvt. Ltd. was filed vide reply dated 1st February, 2010. It was averred that DG had incorrectly imported the concept of relevant market in an assessment under Section 3 of the Act. It was stated that the relevant market is not the market of Hindi Motion Pictures made in Mumbai but with a reference to the Indian market of motion pictures as a whole. A significant number of motion pictures are also made in Kolkata, Andhra Pradesh, Tamil Nadu, Kerala and other Indian States. It was also stated that Section 3(1) of the Act does not recognise the concept of market other than Indian market and does not permit the sub division of Indian market into the market for motion pictures exhibited in multiplexes and those exhibited in single screen cinemas.

e 11.1 It was also stated by Mr. Yash Chopra in his reply that there is no agreement as defined under Section 2(b) of the Act. It was stated that a group of producers/distributors who have framed an association cannot be said to be a cartel like association. It was also stated that DG has not placed on record adequate evidence or analysed such evidence to prove that all the approximately 600 members of UPDF had in fact agreed with a common intention to enter into a cartel agreement. It was also stated that the DG should have adduced sufficient economic evidence to show that the members of UPDF were acting in pursuance of directions issued by UPDF.

f 11.2 It was also stated that there is no agreement to determine purchase or sale price as in the present case there is no sale of motion pictures made by producers to the exhibitors. It was also stated that the similar Revenue sharing agreement between producers/distributors and multiplex owners is purely a reflection of price parallelism typical of film industry.

g 11.3 It was also stated that there is no agreement to limit the supply of films as once the production of the film is complete its final release for exhibition remains the prerogative of the producers and is based on his own assessment of the right time to release the film with the objective of reaping of best possible Revenue. It was also stated by him that DG has failed to appreciate the fact that period from 4th April, 2009 to June 2009 overlapped with the Indian Premier League 20-20 Cricket Tournament which was held between 19th April, 2009 and 24th May, 2009. Considering the huge viewership IPL tournament was likely to attract, the film producers were under the apprehension that most of the cinema viewers will be weaned away and that releasing their films during that time will not reap them sufficient dividends.

11.4 It was also stated that there is no appreciable adverse effect on competition in India due to the alleged agreement. It was stated that there is no evidence to suggest that the alleged agreement may have resulted in the exit of the established film producers/distributors out of the market and there are no entry barrier for others to enter into the market. a

11.5 It was further submitted that the new Revenue sharing agreement allegedly agreed to between producers/distributors and the multiplex operators has the effect of depriving the multiplex operators of merely about 2 per cent of the Revenue generated by them and hence does not in itself indicate an appreciable adverse effect. b

11.6 It was also stated that the ticket price may be more immediately linked to the profit margin charged by the multiplex operators than the share in the Revenue due to producers/distributors. It was also stated that while the ticket prices have gone up, the share in Revenue of the producers/distributors has remained constant and in some instances even decreased. c

11.7 It was also submitted that the agreement seeks to increase efficiency in the production, distribution and supply of films and is, therefore, permissible under the Act.

11.8 It was also stated by Mr. Chopra in his reply that in the event of Commission were to find that the alleged agreement amongst the producers/distributors indeed exist, such an agreement only seeks to impose reasonable conditions, which are necessary for protecting the Intellectual property rights of the film producers/distributors. d

11.9 It was also stated that the alleged agreement, if any, ceased to exist the day each film producer/distributor entered into Revenue sharing arrangements with multiplex operators that were individually negotiated and entered into on a case by case, movie by movie basis. e

Sahdev Ghai

12. Counsel for Shri Ghai vide letter dated 10th February, 2010 submitted that Shri Ghai is only an employee of Yashraj Films Pvt. Ltd., and is serving as Head, Legal and accordingly, it was requested that both Shri Sahdev Ghai and M/s. Yashraj Films Pvt. Ltd. be treated as a single Respondent and not as separate parties. Accordingly, it was requested to treat the response filed by M/s. Yashraj Films Pvt. Ltd. as a response filed on behalf of both the company as well as Shri Ghai. The Commission vide its order, dated 16th February, 2010 considered the matter and decided to accept the request of the party and accordingly, the reply filed by the company was treated to be the reply of Shri Ghai and the contents thereof as recorded above may be read as well. f
g

UTV Software Communications Ltd./Ronnie Screwvala/Sidharth Roy Kapur

13. It was stated in the reply that UTV Software Communications Ltd. (UTV) carries on business as a producer and distributor of feature films and has produced and distributed various feature films that have met with significant critical commercial success in India and internationally. Mr. Ronnie Screwvala is the Chairman and Managing Director UTV whereas Mr. Sidharath Roy Kapur is employed by UTV as the Chief Executive Officer (CEO) of UTV Motion Pictures being a division of UTV. It was further stated that Mr. Kapur is not a director of UTV. Mr. Screwvala and Mr. Kapur do not carry on business as producers or distributors of feature films individually and, therefore, the present information ought to be dismissed *qua* them. h
i

a 13.1 It was submitted that a feature film is a subject matter of copyright and Section 14 of the Copyright Act, 1957 permits the owner of copyright to exploit such copyright in a manner as he deems fit and thus, it was urged that it is entirely up to the copyright owner as to how to communicate his film to the public. No multiplex owner can demand that the film be released in its theatre, let alone dictate the commercial terms on which such film must be released. It was also submitted that the Act acknowledges the rights of copyright owners and excludes them from the purview of the Act. The *non obstante* Clause contained in the opening part of Section 3(5) of the Act shuts out any investigation by the Commission in a situation where the copyright owner exercises his right.

b
c
d 13.2 Reliance was placed upon an order passed by the Commission in *Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce*, Case No. 25 of 2010 whereby, the KFCC was restrained from taking any action (direct or indirect) to prevent any exhibitor from exhibiting the film "Raavan" or "Ravanaan" in the State of Karnataka if such exhibitors are willing and desirous to exhibit these films. Thus, it was sought to be urged that the Commission has already accepted the contention that the owner of the copyright has exclusive and unhindered right to exploit copyright without any restrictions or limitations, and accordingly the Respondent has the right to screen its films in as many theatres as it wants. This necessarily means that the multiplex owners could not demand that any films be released in their multiplexes.

e 13.3 It was further argued before the Commission that as a copyright owner, a film producer can, at his sole discretion, determine the manner of communicating his film to the public. This includes commercial terms on which the film is permitted to be communicated to the public. In support of this contention, reliance has been placed upon a decision of Hon'ble High Court of Delhi in *Warner Bros. Entertainment Inc. v. Santosh V.G.* (MANU/DE/0406/2009).

f 13.4 Relying upon a decision of the Hon'ble Supreme Court of India in *Indian Performing Right Society Ltd. v. Eastern India Motion Pictures Association*,² (1977) 2 SCC 820, it was argued that a feature film is nothing but a bundle of copyrights and accordingly it was sought to be urged that a feature film not being "goods" or "services" is outside the scope of the Act.

g 13.5 An argument was also made that any action for the benefit of multiplex owners to claim as a matter of right that the producers should exhibit the film through them will tantamount to compulsory licensing of the film. It was submitted that the Copyright Act, 1957 provides for compulsory licensing by the Copyright Board under Section 31 thereof in the manner set out therein and, therefore, if a film producer refuses to communicate its film to the public then an aggrieved party can invoke the machinery provided thereunder. Since, alternative machinery is available, as aforesaid, there is no reason for invoking the provisions of Section 3 of the Act, nor will the Commission have jurisdiction over such a matter.

h 13.6 It was also argued that the opposite parties are within their right to impose reasonable conditions for protecting any of their rights which have been conferred upon them under the Copyright Act, 1957. Section 3(5) of the Act acknowledges the rights of copyright owners and excludes them from the purview of the other provisions of Section 3 thereof.

² Ed.: MANU/SC/0220/1977: AIR 1977 SC 1443; [1977] 3 SCR 206

13.7 Assailing the reports of the D-G, it was urged that the D-G erred in treating multiplexes as consumers within the meaning of Section 2(f) of the Act and further in holding that multiplex owners suffered huge losses because of the acts of the producers. They are not consumers. They are merely distribution outlets. There is no concept in law that a person having an outlet can demand from a manufacturer or service provider that such manufacturers' goods or service providers' services must be distributed from his outlet. It is always a result of qualification criteria and agreement on commercial terms that results in a distribution outlet selling goods or services.

13.8 It was also stated by the opposite parties that they did not have any films to release during the period. Allegations of limiting or restricting supply of films in market during March 2009 to June 2009 were denied and attention was drawn to the statement made by Mr. Kapur in the Office of the D-G in this regard. It was alleged by the opposite parties that the D-G has completely ignored the said statement which was relevant to throw light on the factual position in the matter.

13.9 A grievance was also made that despite various requests, a copy of the information was not supplied or disclosed to the opposite parties which is clearly in violation of the principles of natural justice as the opposite parties have been deprived of an opportunity to deal with the complaint made against them.

13.10 It has also been submitted that the disputes between the multiplex owners and producers of Hindi feature films were resolved in or about June 2009, and thereafter, agreements are being signed between each individual producer for their respective films with each individual multiplex, and films are being released through multiplexes by Hindi film producers, and hence the present case has become academic as no grievance remains to be investigated or to be proceeded further.

13.11 Reference was also made to a complaint filed by some film producers before the MRTPC under the MRTP Act, 1969, viz. RTPE No. 3 of 2007 against the Multiplex Association of India (MAI) wherein, a temporary injunction was granted by the Commission against the MAI finding MAI agreement as *prima facie* restrictive and against the public interest.

13.12 It was denied that UPDF was an association of distributors and producers who by agreement amongst themselves limited and controlled the distribution of films. It was further denied that the opposite parties or other producers were acting in concert to fix sale prices of the tickets to the consumer in violation of Section 3(3)(a) of the Act.

13.13 Objection has also been taken to the reliance by the D-G on press reports and literature gathered from the internet as the same, it is argued, cannot be said to be authentic for findings and observations against the producers/distributors. It has been further submitted that the D-G has relied upon the information submitted by the multiplex owners without carrying out any independent enquiry or verification.

13.14 The opposite parties also sought to rely upon the contentions made by them in Writ Petition No. 526 of 2010 filed by them in the Bombay High Court and affidavit in rejoinder dated 27th April, 2010 filed by Mr. Siddharth Roy Kapur in that petition and it was submitted that the same may be treated as part of this reply.

Sunil Arjan Lulla

14.1 Shri Lulla in his reply denied all the statements and allegations made against him and termed the reports of the D-G as misconceived on facts and in law and it

- a was stated therein that no case is made out against him for violation of Section 3 of the Act as alleged or otherwise. At the outset, it was submitted that Shri Lulla does not produce or distribute Hindi films in India or abroad in his personal capacity. It was submitted that acts/omissions as alleged cannot be treated as a violation of Section 3 of the Act as Section 3 of the Act was notified by the Central Government in the Official Gazette on 15th May, 2009 and came in force on 20th May, 2009.
- b 14.2 It was argued that the inquiry conducted by the Commission is on the basis of information filed under Section 19(1) of the Act by the informant. The gravamen of the Informant is the alleged notice dated 27th March, 2009 issued by the UPDF to all producers and distributors calling upon them not to exhibit the films at the multiplexes. It was argued that clearly the alleged notice was issued when Section 3 of the Act was not in force. Therefore, when the alleged notice was issued it was not violative of the Act. It was also alleged that the answering party was not a member of the UPDF and was not in any way associated with or responsible for the issuance of the alleged notice of 27th March, 2009.
- c 14.3 It was alleged that the recommendations of the D-G are based on incorrect and improper application of law and are, therefore, not worthy of acceptance.
- d 14.4 It was also argued that the films produced by a producer are the subject matter of the Copyright Act, 1957. As copyright holder, a producer/distributor enjoys various rights and protections thereunder. As such, it is right of the copyright owner to decide the mode of exploitation of his works and no person can claim a right that a film be released through his theatre. Attention was drawn to the provisions contained in Section 3(5) of the Act.
- e 14.5 Giving background of the dispute and mentioning the nature of Indian film industry and growth of multiplexes as a recent phenomenon, the answering party mentioned dispute between multiplex owners and Eros and resolution thereof. It was further pointed out that in the reports of the D-G, no specific role has been attributed to the answering party in the alleged cartel. It was further denied that the answering Opposite Party was one of the main violators in the alleged cartel like activities. It was denied that the Opposite Party was in any way associated in giving call of collective boycott. It was specifically denied that the answering Opposite Party participated in any of the meetings wherein, the alleged boycott call was given. It was submitted that the participation in the press conference of 7th April, 2009 does not in any even suggest that the answering Opposite Party gave a call of collective boycott.
- f 14.6 It was alleged that the purported evidence submitted by the D-G alongwith the reports is inadmissible as most of the findings are based on media reports, Articles etc. The findings of the D-G fail to establish as to how the alleged agreements or understanding between the members of UPDF/AMPTPP/FTPGI caused an appreciable adverse effect on competition in India. The agreement of 9th June, 2009 has various positive effects on the Indian Film Industry. The agreement promotes competition amongst the producers to produce good films.
- g 14.7 Attention was also drawn to the two major events which transpired during May and June, 2009, viz. IPL and Parliamentary elections due to which films were not released during this period.
- h 14.8 Submissions have also been made against the recommendations of the D-G for initiating action against the answering party under Sections 43 and 45 of the Act terming the same as clearly untenable and illegal.
- i

Nandu Ahuja/Jyoti Deshpande of Eros Group

15. At the outset, it was submitted that the reports are misconceived both on facts and in law and no case has been made out therein against the answering parties for violation of Section 3 of the Act. It was submitted that the answering Opposite Party Shri Nandu Ahuja does not produce or distribute Hindi films in India or abroad in his personal capacity and in these circumstances, no notice ought to have been issued by the Commission against him. It was also submitted that the answering Opposite Party Ms. Jyoti Deshpande does not produce or distribute Hindi films in India or abroad in her personal capacity and in these circumstances, no notice ought to have been issued by the Commission against her. In their respective replies, the answering parties have essentially repeated the averments and submissions made by Shri Sunil Arjan Lulla and, therefore, the same are not repeated herein for the sake of brevity and an appropriate reference thereto shall be made as and when required.

a

b

c

Aman Gill of Studio 18

16. Mr. Aman Gill had also filed his reply dated 11th February, 2010 and has given the position of profit sharing ratio since 2006 to 2009 (present position). It was also stated that Studio 18, A Division of Viacom 18 Media Pvt. Ltd. (Studio 18) is not a part of any alleged cartel. STUDIO 18 as a Distribution Agent of the Indian Film Company (Cyprus) Ltd. takes independent decisions based on its business acumen. The timing of release of each film is based on its independent negotiations with the MAI/individual multiplex owners. STUDIO 18 has not acted collusively/are not members of the Alleged Forum. There has been no communication between STUDIO 18 and other producers by way of e-mail or otherwise.

d

e

Sandeep Bahrgava of Indian Film Company (Cyprus) Limited (IFC)

17. In the reply, all the allegations and statements made in the reports of the D-G were denied. It was submitted that once a voluntary and legally binding agreement is executed, the parties are precluded from agitating on the reasonableness of the terms thereof in any forum. Thus, it was argued, the MAI and/or its members cannot blow hot and cold in the same breath. It was further stated that the answering party is not a part of any alleged forum. IFC takes independent decisions based on its business acumen. The timing of release of each film is based on its independent negotiations with the MAI/individual multiplex owners. IFC has not acted collusively and are not members of the alleged forum. There has been no communication between IFC and other producers by way of e-mail or otherwise. It was asserted that films were being released both in the multiplexes as well as in the single screen theatres all throughout and, therefore, it was submitted that the allegations of any agreement entered into by the producers for not supplying the film prints to the exhibitors and of an attempt to control the distribution of the films to the disadvantage of the exhibitors and viewers are incorrect.

f

g

h

17.1 It was also submitted that it is in the interest of the film distributors to plan the film releases and the distribution strategy in a manner where the film is given the appropriate release and is exhibited to the widest possible audience for each film. No Revenue sharing arrangement had been arrived at between the FTPGI and the AMPTPP and the multiplex owners. The answering party has further submitted that he has not received any resolutions or directives from the FTPGI and AMPTPP

i

a for not releasing any films in multiplexes. It was submitted that the answering party has never exchanged any communication or correspondence with the FTPGI and the AMPTPP regarding any such issues.

b 17.2 It was further pointed out that there is a difference that exists in a situation of cartel which points to collusive behaviour and price parallelism. Various international judicial precedents have clarified that mere price parallelism shall not be an evidence of collusive behaviour and accordingly, it is sought to be urged that the act of producers of not releasing films to multiplex owners may not be sufficient to hold that such refusal to distribute is a collusive practice. Each producer has independently taken such a decision to delay the release of films due to the IPL and other such prevalent factors. The act of not releasing films to multiplex owners was a strategic move to protect Revenues. It was also pointed out that no disciplinary actions or any kind of suspension orders were ever passed against any film distributors. Distinction was sought to be drawn between illegal practice of price cartelisation and a legitimate economic and business behaviour in responding to a situation in which a given competitor is placed in a price leadership position.

c 17.3 Referring to the provisions of the Constitution, it was argued that Article 19(1)(g) confers the right to practice any profession, or to carry on any occupation, trade or business upon every citizen of India and it was argued that any unwanted fetters on this right should be deprecated in the strongest terms.

d 17.4 Referring to the provisions of the Act, it was argued that there is no agreement amongst the producers/distributors as defined in Section 3(b) of the Act and a distinction was drawn between legitimate cooperation and illegitimate collusion. Further, it was argued that there is no cartel amongst the producers/distributors as defined in Section 2(c) of the Act. It was pointed out that individual multiplex owners constituted MAI and entered into the MAI Agreement to negotiate with individual producers. Consequently, the alleged forum was constituted as a representative body of individual producers/distributors to raise collectively the concerns against the MAI.

f **Ramesh Taurani of Tips Industries Limited**

g 18. At the outset, it was stated that the answering party has not received a copy of the complaint filed by the informant and hence it reserved its right to file detailed reply on receipt thereof. All the allegations, submissions, averments and conclusions derived by D-G in his report were denied. It was further stated that the D-G erred in considering the original information, contents of some surveys, economical background, reports, statements etc. without considering the factual situation and without proper investigation of the matter.

h 18.1 It was submitted that the D-G has failed to appreciate the true and correct intention behind the formulation of Section 3(3) of the Act and has misinterpreted the same causing an incorrect and improper report against the answering party.

18.2 It was submitted that the answering party has not refrained from supply of any film and had no film for release during the period of the matter as alleged. It was further submitted that as per Section 36(2) of the Act, the Commission shall have for the purpose of discharging its functions under the said Act, the same powers as are vested in a Civil Court under the CPC, 1908 while trying a suit.

i Accordingly, it was argued that while conducting any inquiry/investigation, the Commission is bound to follow CPC, 1908 and in particular, the provisions contained

in Order V, Rule 2 of the CPC, 1908. It was further alleged that the Commission has not exercised its powers under Section 36(3) of the Act to call upon such experts from the field of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of the current enquiry. It was further urged that without giving an opportunity to the answering party prior to initiating such proceeding the Commission has erred in deciding that there exists a *prima facie* case against the answering party and the same needs investigation by the D-G.

Ashtosh Gowariker of Ashtosh Gowariker Productions Pvt. Ltd.

19. It was submitted that the answering party is not member of any of the organisations, viz. UPDF/AMPTPP/FTPGI and further it is stated that it is not involved in any activity that could be described as cartel or opposed to the Act. Pointing to the reports of the D-G, it has been highlighted that they do not anywhere conclude about the answering party in any manner having been involved in formation of any cartel or engaged in any action in violation of the Act or any applicable law.

19.1 It was further reiterated that it has never restricted or attempted to restrict the release of films to the general public and it has nothing to do with the alleged notice issued allegedly by the AMPTPP/FTPGI. No observation can be found or any finding noticed in the reports of the D-G. It was specifically argued that it has no association with UPDF/AMPTPP/FTPGI.

19.2 It was argued that during the period complained of, no release was scheduled of anything being produced under the banner of the answering party and hence no question of the answering party depriving the multiplex owners of their rights as stated in the reports to exhibit any films arises.

Rakesh Roshan of Film Craft Productions India Pvt. Ltd.

20. Reply was filed by Mr. Rakesh Roshan of Film Craft Productions India Pvt. Ltd. vide its letter dated 13th February, 2010. It was stated by Mr. Rakesh Roshan that as per information given to him by his association, i.e. The Film & Television Producers Guild of India Ltd., that the said United Producers & Distributors Forum (UPDF) was temporarily formed for the purpose of making collective and joint representation by the film producers and distributors in the matter relating to the multiplexes. This UPDF is neither an association nor any trade body – has neither any constitution nor any Memorandum or Articles of Association – it has neither any membership nor any bank account. In fact as said with a view to redressing their grievances and make representation from a common platform the producers and distributors instantly chose the said name.

20.1 It was also stated that UPDF is not the association of enterprises as construed by the Commission. The said UPDF was never involved in fixing the price for the sale of the rights of the movies. It was merely an association of persons collectively functioning to counter the bargaining position of association of multiplex owners and to restore the competitive condition in the market. It was further stated that the producer of the film has the exclusive authority to dispose of or deal with the rights of the movie, these rights are never given by any association to any other party. As such to assume that this UPDF was formed to market the rights of the movies is unfounded and baseless.

a 20.2 It was further stated that the 3 sectors of the film industry namely production, distribution and exhibition are the integral part of Motion Pictures Ltd. and under no circumstances any one sector can think of harming the other.

20.3 It was further stated that UPDF never indulged in any unhealthy practices or indulged in limiting/controlling the supply of films or refused to supply films for release in multiplexes.

b 20.4 It was also stated that the UPDF had a bona fide intention of arriving at a fair and equitable settlement whereby, a uniform Revenue sharing system with the multiplexes could be put in practice for the maximum benefit of all concerned. The arrangement between the UPDF and Multiplex Owners Association was nothing but an efficiency enhancing agreement to release the movies with more efficient terms for the benefit of consumers.

c **Ramesh Sippy of Motion Picture and Television Programme Producers Ltd.**

d 21. Mr. Ramesh Sippy has also filed his reply on behalf of Motion Picture and Television Programme Producers Ltd. vide his reply dated nil. In his reply, he has raised certain issues like not receiving of original complaint etc. It was further stated that at the outset he denied all the allegations, statements, submissions, averment and conclusions arrived by DG in both his report and he said that the same has no legal sanction and cannot be relied upon for the purpose of deciding this matter. It was further stated that he does not enjoy any monopoly whatsoever in the market nor in a situation which is like a monopoly.

e 21.1 It was further stated by Mr. Ramesh Sippy that the Respondent had no individual ulterior motives, gains or profits whatsoever for personal benefit and all the acts performed or executed by them were towards duties and under authority delegated on behalf of the members. It was further stated by him that several films were released during this period as alleged by the Informant, therefore, there is no question of the contravention of the Competition Act.

f 21.2 It was further stated by Mr. Ramesh Sippy that without prejudice to other contentions of non-existence of the alleged anti competitive agreement, assuming, that the agreement may exist:

- g (a) It was necessary in order to restore the competitive conditions in the market which were distorted because of the unfair Revenue sharing terms which were being dictated by the MAI;
- (b) It was in the nature of an efficiency enhancing joint venture agreement as understood under the proviso to Section 3(3) of the Competition Act, or is permissible under Section 3(5) of the Act as being an agreement necessary for the protection of the intellectual property rights of the film producers/distributors under the Copyright Act, 1957.

h 21.3 It was further contended by Mr. Ramesh Sippy that Indian market for motion pictures as a whole should be analysed and not as a segment. All films produced in various regions and in various regional languages collectively constituted the market for motion pictures in India. Consequently, an investigation into the alleged anti-competitive agreement must be based on an assessment of whether such an agreement has an appreciable adverse effect on the market for all such motion pictures made in India, and must not be limited to the market for Hindi motion pictures made in Mumbai alone.

i

21.4 It was further stated that sub-dividing or segmentation of market for want of prosecution cannot be justified specially when Section 3(1) of the Competition Act does not recognise the concept of a "market" other than the "Indian market". A newly originated phenomenon in India consisting of only 850 multiplexes cannot be referred as a relevant market, especially when multiplexes account for only about 7 per cent of such screens. It should be clear from the Supplementary Report that Single screen cinemas account for over 40 per cent of all Revenues. And the fact that the current contribution of single screens is marginally less than that of multiplex screens in value terms, suffice to show that Multiplexes are having a rather dominant situation in the market and have instead themselves acted in cartel against the producers/distributors.

21.5 It was further stated by him that there are several producers and distributors of motion pictures in Indian film industry. There are 643 large and small producers out of which only half are fully active. This being the case, it is unlikely that degree of concentration on the side of producers/distributors be significant enough to create conditions conducive for cartelisation. Bulk of multiplex screens in India is owned by 4 to 5 large players. This makes the market for movie exhibition in multiplexes highly concentrated in few hands, and therefore, the condition that the buying side of the market be un-concentrated in order to facilitate a possible cartel in the selling side (in this case amongst the producers and distributors) is not fulfilled. Films are unlike commodities or other services. Each film is different from the other, and therefore, it is implausible to say that there is a certain demand for particular film. It is not possible for any film producer to enter the market and start producing motion pictures in anticipation of demand for that motion picture. The success of the film and how much Revenue it generates for producers/distributors is linked more immediately to the story line, star cast, music etc. in the film. This means that price competition in the industry takes a back seat and what makes a difference is the quality of film produced and not the price at which it is released for viewership.

21.6 It was further stated that there is no agreement to determine purchase or sale price required under Section 3(3) of the Act. It was further stated that DG has failed to establish the existence of any such agreement by adducing economic or non-economic evidence. In the present case, DG has failed to appreciate the nature of the market in the film industry. It was further stated that the producer does not generally transfer the property or the title of his motion picture to a distributor or to exhibitor. The exhibitor merely gets a limited right to exhibit the motion picture and, therefore, as such there is no sale of motion picture that may be said to have taken place from the producer/distributor to the exhibitor.

21.7 It was further stated that in the present case, the mere possibility that there is a certain degree of parallelism in the Revenue sharing arrangement that difference film producer/distributors may have with different multiplex operators, does not in itself lead to conclusions that there is an agreement within the meaning of Section 3(3)(a) of the Act.

21.8 It was further stated that the period from April 2009 to June 2009 (during which the agreement to limit the supply of films is alleged to have existed) overlapped with the Indian Premier League Twenty-Twenty ("IPL T.20") cricket tournament which was held between 19th April, 2009 to 24th May, 2009. Considering the huge viewership that the IPL T.20 tournament was likely to attract, the film producers/distributors were under the apprehension that most of the usual cinema viewers would be weaned away and that releasing their films during this period would not bring them sufficient Revenues.

Points for Determination

- a* 22. From the foregoing, the following point arises for determination:
Did the opposite parties enter into any agreement or indulge in any cartel like conduct that was in contravention of Section 3 of the Act?

Examination of the conduct of OP

- b* 23. At the outset, it is pertinent to reproduce the provisions relating to anti-competitive agreements given the Competition Act, 2002:

Anti-competitive agreements

- c* 3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in Sub-section (1) shall be void.

- d* 23.1 Thus, for any conduct or act to fall foul of the provisions of Section 3 of the Competition Act, there has to exist an "agreement" between "enterprises" or "persons", which causes appreciable adverse effect on competition (AAEC) within India.

23.2 The Act defines "agreement" in Section 2(b) as follows:

"agreement" includes any arrangement or understanding or action in concert:

- e* (i) whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

Further, "enterprise" is defined in Section 2(h) as under:

- f* "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of Articles or goods, or the provision of services, of any kind,.....

"Person" is defined in Section 2(I) of the Act as below:

(I) "person" includes:

- g* (i) an individual;
(ii) a Hindu undivided family;
(iii) a company;
(iv) a firm;
(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- h* (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956);
(vii) any body corporate incorporated by or under the laws of a country outside India;
- i* (viii) a co-operative society registered under any law relating to co-operative societies;
(ix) a local authority;

- (x) every artificial juridical person, not falling within any of the preceding Sub-clauses.

23.3 In the above context, the D-G gave a clear finding that certain film producers and distributors formed an association by the name of United Producers and Distributors Forum (UPDF) for the purpose of extracting better Revenue sharing ratios from multiplexes and also issued letters to their members exhorting them not to supply films to the multiplexes. Neither the fact that an association of producers and distributors called UPDF exists has been negated nor the issuance of such prohibitory letters to its members have been disproved. UPDF had issued a notice dated 27th March, 2009 in which it had instructed all producers and distributors including those who are not the members of UPDF, not to release any new film to the members of the informant for the purposes of exhibition at the multiplexes operated by the members of the informant. Subsequently, AMPTPP and FTPGI (both members of UPDF) had issued notice dated 9th May, 2009 to their respective members to comply with the notice dated 27th March, 2009 issued by UPDF not to release any film in multiplexes. In the above notice, dated 9th May, 2009 a warning was given to the respective members that in case of failure to comply with the instruction given in the notice will lead to life time suspension/strict disciplinary action etc. against the concerned member.

During the period 4th April, 2009 – 12th June, 2009, there was a collective decision not to release films to multiplexes with a view to pressurise multiplexes into accepting the new terms of Revenue sharing. Eventually, this tactics bore results that the OP were hoping for. All these facts have been amply brought in the report of the D-G, as mentioned in Paras 3.1 to 3.7 supra. Nothing in the submissions of members of the OP has been able to successfully contradict this position.

23.4 The members of OP, viz. producers and distributors, all qualify as “enterprise” within the definition of Section 2(h) of the Act. Similarly, the joint decision-making reflected in the stand they took towards multiplexes and in the letters issued by UPDF or its members are incontrovertible instances of “agreement” as defined in Section 2(b) of the Act. Thus, the two essential ingredients of provisions of anti-competitive agreements have been established beyond doubt.

23.5 As regards existence of AAEC, the scheme of the Act envisages two situations:

- (a) where the agreement is of the most pernicious nature (such as price-fixing or market-sharing), including cartels, as mentioned under Section 3(3), AAEC is presumed and
- (b) in less pernicious agreements, such as those mentioned under Section 3(4), AAEC has to seen with reference to factors given under Section 19(3) of the Act.

23.6 In the instant case, the D-G has given very clear and cogent findings on how the OP has behaved as a cartel. The findings of the D-G in this regard are discussed in Para 3.4 above. The report of the D-G has very succinctly and aptly identified some quintessential aspects of a cartel that have been found to exist in this case. These include:

- (i) Ability of the producers/distributors to control release of films.
- (ii) Pre-meditated and calculated joint stand taken by the producers/distributors in their face-off with the multiplexes.
- (iii) Convenient existence of forum for cartel-forming in the guise of active associations of producers/distributors.

- a (iv) Geographical concentration of the film industry in Mumbai, enabling intense and regular interaction necessary for cartels.
- (v) Policing of the cartel "agreement" and ability of punishing any violators of the cartel agreement as evidenced from letters written with impunity to members.
- (vi) Open threats of dire consequences to intimidate members who may not be too willing to abide by the cartel agreement.
- b (vii) Complete ownership and control of their films by the producers/distributors gave them a commanding position to dictate terms.

c 23.7 Thus, there is overwhelming justification in the report of the D-G to support the conclusion that the OP operated in a market environment that is extremely conducive to cartelisation and that their conduct, in fact, showcased some of the classic behaviour pattern of cartels. None of those findings have been effectively assailed and demolished by any of the OP. This Commission has also given due consideration to the material from public domain relied upon by the D-G in his investigations. Analysis of economic data or of any industry is a matter of expertise and the D-G has relied upon indisputable expertise available in public domain today. In any case, more than anything, this case hinges not on semantics about the structure of film industry in India, its history or its unique problems but on the evidence of d pernicious and blatant cartel like conduct by some of the industry players. No arguments have been extended by OP that negates the conclusion of the D-G that they behaved as a cartel. It is worthwhile at this point to look at the definition of a cartel given in Section 2(c) of the Competition Act, 2002:

e "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

f 23.8 The boycott of multiplexes by the OP was as blatant an act of limiting or controlling of production, distribution etc. of films as can be. Similarly, their joint stand on fixing the Revenue ratio was unarguably an example of joint price-fixing. Neither, the fact of the boycott nor the joint efforts to fix the Revenue ratio have been disproved or even effectively contradicted. The weak argument given by them that their joint action was in response to cartel-like conduct of multiplex owners themselves carries little weight before this Commission as it is an established principle of law that one wrong does not justify another. Lastly, the argument taken by some Respondents that the D-G has erred by not considering the relevant market as the all India market for films exhibited g both in single-screen and multi-screen cinemas is completely irrelevant. For establishing cartel like conduct, action in concert or joint decisions taken, the investigation does not have to define any relevant market. Existence of cartel like conduct is sufficient to attract the mischief of Section 3(3) of the Act.

h 23.9 This Commission, therefore, sees no justification in not treating the OP as cartel within the context of Section 3(3) of the Act. Having arrived at this conclusion, their conduct is to be presumed to cause AAEC. However, since presumptions are rebuttable, this order shall deal with that issue at a later stage when factors of AAEC given under Section 19(3) are also examined in detail.

Evaluation of justifications given by the Respondents

i 23.10 Before that, it is the right place to deal with three specific arguments taken by some of the Respondents in their submissions to justify their conduct. These can be summarised as below:

- (i) Movies being a bundle of copyrights, the producers/distributors enjoyed the shelter afforded by Section 3(5) of the Act. a
- (ii) The association formed by the OP was justified on the ground of joint venture efficiencies.
- (iii) "Collective bargaining" was an acceptable practice.

These arguments are dealt with hereunder.

Intellectual property right b

23.11 A plea has been raised by the opposite parties that a feature film is subject matter of copyright under the Copyright Act, 1957 and Section 14 thereof permits the owner of copyright to exploit such copyright in a manner as he deems fit. It is further argued that it is entirely up to the copyright owner as to how to communicate his film to the public. It is further argued that no multiplex owner can demand that the film be released in a theatre let alone dictate the commercial terms on which such film must be released. It is further urged that it is discretion and right of the copyright owner to decide as to how many copies of the films to communicate to the public through theatre or multiplexes and a demand by a theatre or multiplex owner of a right to exhibit the film cannot be sustained. c

23.12 In this regard, attention has been drawn to the provisions contained in Section 3(5) of the Act which through the use of *non obstante* Clause excludes such rights from the purview of the Act and accordingly the opposite parties are within their rights to impose reasonable conditions for protecting any of the rights which have been conferred upon them under the Copyright Act, 1957. d

23.13 It may be noted that Section 2(f) of the Copyright Act, 1957 states that "cinematograph film" means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films. e

23.14 Section 13(1)(b) of the Copyright Act, 1957 further provides that subject to the provisions of this Section and the other provisions of this Act, copyright subsists in cinematograph films. According to Section 14 of the Copyright Act, 1957, "copyright" means the exclusive right subject to the provisions of the Copyright Act, 1957 to do or authorise the doing of anything (in the case of cinematograph films) to make a copy of the film, including a photograph of any image forming part thereof; to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions and to communicate the film to the public. Further, Section 16 of the Copyright Act, 1957 lays down that no person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or any other law for the time being in force, but nothing in this Section shall be constructed as abrogating any right or jurisdiction to restrain a breach of trust or confidence. f

Thus, cumulative reading of all these provisions makes it clear that copyright is a statutory right subject to the provisions of the Copyright Act, 1957. It is not an absolute right. g

23.15 It is, therefore, abundantly clear that a protectable Copyright (comprising a bundle of exclusive rights mentioned in Section 14(1)(c) of the Act) comes to vest in h

a a cinematograph film on its completion which is said to take place when the visual portion and audible portion are synchronised.

23.16 In *The Gramophone Company of India Ltd. v. Super Cassette Industries Ltd.*³ (Decided on 1st July, 2010) MANU/DE/1801/2010, the Delhi High Court observed:

b At the outset, Section 16 of the Act may be noticed. Section 16 provides that no copyright can be acquired in respect of any work except in accordance with the provisions of the Act. Therefore, copyright is a statutory right. Only those rights which the copyright Act creates; to the extent it creates, and; subject to the limitations that the Act imposes, vest in the owner of the copyright in the work, whether it is a primary work such as a literary, dramatic or musical work, or a derivative work such as a sound recording or cinematograph film. No right, which the copyright Act does not expressly create can be inferred or claimed under the said Act.

c It further observed:

d The rights conferred by Section 14 are "subject to the provisions of this Act". Therefore, Section 14 has to be read in the light of, and subject to the other provisions of the Act. It is seen that the copyright in derivative works viz. cinematograph film and sound recordings are limited right when compared to the rights in primary works viz. literary, dramatic or musical works.

23.17 In *Microfibres Inc. v. Girdhar & Co.*⁴ RFA(OS) No. 25/2006(DB), decided on 28th May, 2009, the Delhi High Court held as follows:

e The legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure Article

23.18 The following observations of the Supreme Court in the case of *Entertainment Network (India) Limited. v. Super Cassette Industries Ltd.*⁵ 2008(5) O.K. 719 are also apposite:

f When the owner of a copyright or the copyright society exercises monopoly in it, then the bargaining power of an owner of a copyright and the proposed license may not be same. When an offer is made by an owner of a copyright for grant of license, the same may not have anything to do with any term or condition which is wholly alien or foreign therefore. An unreasonable demand if acceded to, becomes an unconstitutional contract which for all intent and purport may amount to refusal to allow communication to the public work recorded in sound recording....

g The word "public" must be read to mean public of all parts of India and not only a particular part thereof. If any other meaning is assigned, the terms "on terms which the complainant considers reasonable" would lose all significance. The very fact that refusal to allow communication on terms which the Complainant considers reasonable have been used by the Parliament indicate that unreasonable

3 Ed.: MANU/DE/1801/2010

4 Ed.: MANU/DE/0647/2009: MIPR 2009 (2) 229: 2009 (40) PTC 519 (Del)

5 Ed.: MANU/SC/2179/2008: 2008 (4) ALD 47 (SC): 2008 (5) BomCR 719: JT 2008 (7) SC 11: MIPR 2008 (2) 129: 2008 (37) PTC 353 (SC): 2008 (9) SCALE 69

terms would amount to refusal. It is in that sense the expression "has refused" cannot be given a meaning of outright rejection or denial by the Copyright owner...
 What would be reasonable for one may not be held to be reasonable for the other. The principle can be determined in a given situation. We wish the statute would have been clear and explicit. But only because it is not, the Courts cannot fold its hands and express its helplessness.

a

This scheme shows that a copyright owner has complete freedom to enjoy the fruits of his labour by earning an agreed fee or royalty through the issuance of licenses. Hence, the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right, to repeat, is not absolute. It is subject to right of others to obtain compulsory license as also the terms on which such license can be granted....

b

23.19 In *United States v. Microsoft* 38 (1998) WL 614485 (DDC 14th September, 1998), quoted in *Hove Kamp et al.* 2005, p. 36, the district Court held that "copyright does not give its holder immunity from laws of general applicability, including the antitrust laws."

c

23.20 In *Otter Tail Power Co v. The United States*, 410 U.S. 366 (1973), the US Supreme Court ruled that a dominant firm that controls an infrastructure or an asset that other companies need to make use of in order to compete has the obligation to make the facility available on non-discriminatory terms.

d

23.21 The decision of the ECJ of 6th April, 1995 in *Magill (Radio Telefils Eireann) (RTE) and Independent Television Publications Ltd. (ITP)*, established an important precedent in relation to refusal to deal in the context of intellectual property rights. The Court held:

The Appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the Appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under Heading (b) of the second paragraph of Article 82 of the Treaty (Para 54).

e

f

23.22 The US Supreme Court declared in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) that "the immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

23.23 It is further canvassed that any action for the benefit of multiplex owners to claim as a matter of right that the producers should exhibit the film through them will tantamount to compulsory licensing of the film and, therefore, the Commission would not have the jurisdiction over such issues.

g

23.24 It is further submitted by the opposite parties that as a copyright owner, a film producer can, at his sole discretion, determine the manner of communicating his film to the public and this includes commercial terms on which the film is permitted to be communicated to the public. It is also stated that this is an internationally recognised principle of copyright law. To support this contention reliance has been placed upon the following observations of the Hon'ble Delhi High Court in *Warner Bros. Entertainment Inc. v. Santosh V.G.* (MANU/DE/0406/2009):

h

Just as the owner of real property, or a material object is entitled to legitimately assert his domain over it, and protect it from unfair appropriation by another, the intellectual property owner is, by these laws, enabled to protect unwarranted

i

- a exploitation or unauthorised use of what are his property rights..... There is no public interest in insisting that such copies should be permitted, on the ground that the cinematograph films are not made available in the country. If that is the position, the Defendant is always free to negotiate the terms of a license, in such of the films as are not available, for the purpose of their publication or performance in India.
- b 23.25 Reliance has also been placed upon a decision of Hon'ble Supreme Court of India in the case of *Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association* (1977) 2 SCC 820 wherein, it was held that each feature film is nothing but a bundle of copyrights.
- c 23.26 The Commission has bestowed its thoughtful consideration on the issue and has very carefully examined the material available on record as also the legal submissions made before it.
- d 23.27 It is no doubt true, as held by the Supreme Court of India in the *Indian Performing Right Society* case (supra), that a protectable copyright comes to vest in cinematograph film on its completion which is said to take place when the visual portion and audible portions are synchronised. It is also not in dispute that the Act in Section 3(5) provides that nothing contained in Section 3 shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him, *inter alia*, the Copyright Act, 1957.
- e 23.28 In the present case, neither any question of infringement of rights of producers/distributors conferred under the Copyright Act, 1957 arises nor does the question of imposing reasonable conditions to protect such right arise. In the light of the facts of the case and the evidence gathered during the course of the investigation, it is clear that the producers/distributors acted in concert to determine Revenue sharing ratio with multiplex owners and to this end they also limited/controlled supply of films to multiplex owners. Such a conduct on their part squarely falls within the mischief of Section 3(3)(a) and (b) of the Act and any plea based on copyright is wholly misplaced and has to be rejected.
- f 23.29 It may be observed that multiplex owners are not in any manner infringing the rights of the producers/distributors under the Copyright Act, 1957. On the contrary, the multiplex owners, by seeking to release films in multiplexes, are only facilitating the rights of the producers/distributors under the Copyright Act, 1957. As multiplex owners have not infringed or threatened to infringe the rights of producers/distributors under the Copyright Act, 1957 in any manner, the plea of the producers/distributors based on Section 3(5) of the Act is thoroughly untenable in law for the reasons stated above.
- g 23.30 It may be mentioned that the intellectual property laws do not have any absolute overriding effect on the competition law. The extent of *non obstante* Clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement. It further enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights.
- h 23.31 Moreover, the producers/distributors have failed to produce any evidence to show the impugned act as a reasonable condition to protect their right under the Copyright Act, 1957. It has come in the reports of the D-G that as a result of the action of the producers/distributors the price of tickets of multiplex theatres was increased
- i

which, ultimately, are to be borne by the “common man”. In such a scenario, it is wholly preposterous on the part of the producers/distributors to invoke the plea based on the rights protected under the provisions of the Copyright Act, 1957 by taking recourse to the overriding effect of such law under Section 3(5) of the Act. a

23.32 It is also important to notice that the Act was enacted, keeping in view the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on the competition, to promote and sustain competition in market, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India. And, therefore, it is incumbent upon the Commission to protect the interests of the consumers under the provisions of the Act. b

23.33 For the same reason, the plea of the opposite parties that any direction of the Commission for release of films in multiplexes shall tantamount to compulsory licensing of the film is also baseless and is rejected. c

Joint venture efficiencies

23.34 As regards the argument of joint venture efficiencies as justification of cartel like conduct, this Commission discusses the issue as under. d

23.35 A plea has been raised by the OP by arguing that the impugned agreement is efficiency enhancing joint ventures and the same is exempted from the applicability of the competition law. Reference has been made to proviso appended to Section 3(3) of the Act which states that nothing contained in Sub-section (3) of Section 3 shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. e

23.36 At the outset, it may be stated that the exemption granted to such efficiency increasing agreement is limited in as much as it exempts such agreements from the purview of the presumption in-built in Section 3(3) of the Act with respect to appreciable adverse effect on competition. It is not a blanket exemption from the entire provisions of Section 3 of the Act. Besides, the producers/distributors have failed to show as to how the impugned agreement increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. f

23.37 On the contrary, the alleged agreement controlled/limited the supply of films to the multiplexes besides, increasing the price of tickets as mentioned above. In the circumstances, the contention of the Opposite Party based on the proviso to Section 3(3) of the Act is wholly misplaced and has to be rejected. g

Collective bargaining

23.38 Coming now to the concept of “collective bargaining” as a justification for the conduct of the OP, we examine the contention of the OP in detail. h

23.39 It has been contended by some of the Opposite Party that the Act indirectly recognises/gives effect to the concept of “collective bargaining” against an organised and/or dominant business partner. It is argued that Section 19(3) of the Act requires the Commission to consider the interest of consumers while assessing whether an agreement may be justified on the grounds of greater public or consumer interest. It is, therefore, sought to be argued that if it is necessary to resort to “collective bargaining” against a dominant player in order to safeguard consumer interest, the Commission should consider the positive effects arising from such agreements. i

a 23.40 To support this plea, attention has been drawn to the provisions of Section 3 of the MRTTP Act, 1969. It is argued that these provisions provided exclusion for "collective bargaining" through trade associations' agreements from scrutiny for this reason.

b 23.41 Reference has also been made to foreign jurisdictions such as Australia which recognise such limited right to "collective bargaining" as may be necessary to restore competitive conditions against a dominant player. In this regard, attention has been drawn to a decision, viz. *VFF Chicken Meat Growers Boycott Authorization* case.

c 23.42 It has been further submitted that the D-G has ignored the fact of existence of a cartel amongst the multiplex operators in the form of Multiplex Association of India (MAI) which has been imposing unfair Revenue sharing terms on the film producers and distributors. It has been further submitted that the D-G has erred in making the inference from the affidavit filed by the MAI before the MRTTPC that the Revenue sharing arrangement proposed by the MAI was not given effect to. It is, thus, submitted that the Commission must consider the functions of the MAI and the role played by MAI in stipulating the Revenue share arrangement between producers and exhibitors. Further, it is urged that the Commission must consider that UPDF was created as a forum to safeguard the interest of individual film producers/distributors and to counter balance the unfair terms dictated by the MAI.

d 23.43 It is further averred that, after having erred in taking note of the existence of the MAI cartel and the case before the MRTTPC, the D-G thereafter erroneously cites the decision of the Australian Competition Tribunal in the case of *VFF Chicken Meat Growers Boycott Authorization* (supra). It was submitted that contrary to the findings of the D-G, the decision of the Australian Competition Tribunal, in fact, recognises the applicability of the concept of "collective bargaining" which is to be permitted after an assessment of its possible pro-and anti-competitive effects.

e 23.44 It has been strenuously canvassed before the Commission that in the facts of *VFF Chicken Meat Growers Boycott Authorisation* case (supra), The Australian Competition and Consumer Commission authorised the Victorian Farmers Federation (VFF) to collectively bargain the terms and conditions, including growing fees, of their broiler chicken growing contracts. Further, it is urged that subsequently the Australian Competition Tribunal disallowed the right to collectively bargain, but they nevertheless acknowledged that it was a right and it was to be analysed in each case.

f 23.45 We have very carefully considered the submissions made by the opposite parties on the point of "collective bargaining" by the trade associations through agreements.

g 23.46 The plea of collective bargaining by the producers/distributors on the grounds of greater public or consumer interest, to say the least, is devoid of any substance. On the facts of the present case, as brought out by the D-G in his reports, it is abundantly clear that the new negotiated Revenue sharing arrangement has given substantial enhanced Revenue sharing to the producers/distributors which is permanent in nature. As has been further brought out in the reports, this burden has finally been passed on to the ultimate consumers who are final multiplex cinema goers for watching the films, i.e. "the common man".

h 23.47 In the facts and circumstances of the present case and in the light of the evidence collected by the D-G during the course of the investigation, the agreement entered into by the producers/distributors is contrary to public/consumer interest as shown above. The opposite parties have failed to produce any material which brings out "the positive effects" arising from such agreements.

i

23.48 Collective bargaining may not be *per se* bad in law and may be resorted to for legitimate purposes in accordance with law. However, when the trade associations enter into agreements, as in the present case, in the garb of collective bargaining which are anti-competitive in nature, then no competition watchdog can countenance such act/agreement. Resultantly, the plea of collective bargaining, in the facts of the present case, is without any merit and the same is directed to be dismissed.

Appreciable adverse effect on competition

23.49 Having dealt with the main arguments of the OP in justification of their conduct in rebuttal of the presumption of AAEC, we must now examine this aspect of the case in detail.

23.50 In this connection, reference may be made to the provisions contained in Section 3(1) of the Act which states that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Further, Sub-section (3) of Section 3 of the Act contains a rule of presumption of appreciable adverse effect on competition (AAEC) with respect to certain activities by way of agreements contained therein.

23.51 It provides that any agreement entered into between enterprises or associations of enterprises or persons or association or persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons including cartels engaged in identical or similar trade of goods or provision of services which:

- (a) directly or indirectly determines purchases or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services or number of customers in the market or any other similar way;
- (d) directly or indirectly results in bid rigging or collusive bidding; shall be presumed to have an appreciable adverse effect on competition.

23.51.1 Section 19(3) of the Act delineates the factors which are required to be considered by the Commission while determining whether an agreement has an appreciable adverse effect on competition under Section 3 of the Act and the same are reproduced below:

- (a) creating barriers to new entrants in the market;
- (b) driving existing competitors out of the market;
- (c) foreclosure of competition by hindering entry into the market;
- (d) accrual of benefits to consumer;
- (e) improvements in production or distribution of goods or provision of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

23.51.2 It may be observed that with reference to the horizontal agreements specified in Section 3(3) of the Act, the rule of presumption of AAEC contained therein shall apply. In fact, this rule of presumption shifts the onus on the Opposite Party to rebut the said presumption by adducing evidence and in that context, the factors mentioned above may be considered by the Commission. Moreover, if a horizontal agreement is

a not covered by Section 3(3) of the Act, even then the factors contained in Section 19(3) may be relevant and can be considered.

b 23.52 In the present case, it has come in the reports of the D-G that the members of the UPDF, AMPTPP and FTPGI who control almost 100 per cent of the market for the production and distribution of Hindi Motion Pictures which are exhibited in Multiplexes in India were acting in concert to fix sales prices by fixing the Revenue share ratio in violation of Section 3(3)(a) of the Act. Besides, the D-G has also returned a finding that the UPDF, AMPTPP and FTPGI and their members were also limiting/controlling supply by refusing to release Hindi Motion Pictures for exhibition in multiplexes in violation of Section 3(3)(b) of the Act.

c 23.53 As discussed earlier, once an agreement is covered within the presumptive rule contained in Section 3(3) of the Act, a presumption as to AAEC has to be raised by the Commission and the factors mentioned in Section 19(3) of the Act need not be gone into by the Commission while drawing the aforesaid presumption with respect to the agreements mentioned in Section 3(3) of the Act. In the present case, as has been noted above, the agreement entered into by the opposite parties is covered within the mischief of Clauses (a) and (b) of Section 3(3) of the Act, and hence, it was incumbent upon the opposite parties to adduce evidence to rebut the aforesaid d presumptions which they have miserably failed in the present case. The presumption contained in Section 3(3) of the Act is rebuttable and the opposite parties may produce evidence to controvert the presumption contained therein. No such effort has been done by the opposite parties in the present case and no such evidence has been brought on record which may controvert the statutory presumption.

e 23.54 In any event, the D-G has taken pains to examine all the factors mentioned in Section 19(3) of the Act and has given his findings thereon and has reached the conclusion that the action of the producers/distributors neither benefited the consumers nor ushered in any improvement in the provision of goods or services. On the contrary, the producers/distributors with their collective market power attempted to ensure that multiplex owners did not get the business of film exhibition till they f agreed to the proposal of enhanced Revenue share. Thus, the D-G has also considered the factors enumerated in Section 19(3) of the Act to buttress his findings that conduct and action of producers/distributors were anti-competitive within the meaning of Section 3(3) of the Act. The report states that discusses in detail the factors given in Section 19(3) of the Act, for determination of appreciable adverse effect on competition. As has been shown in the report, out of the six factors, (a) to (c) are aggravating factors g basically relating to creating barriers in business and the cartel members have tried to do exactly that. The remaining factors (d) to (f) are ameliorating factors but there is no room for the persons indulging in cartel like conduct in this case to hide behind the last three factors as there are no benefits to the consumer or improvement in production, distribution etc. or technological improvements.

h 23.55 In fact, the consumers have been adversely affected in this case. As noted by the D-G in his report, in this case, multiplexes fall within the definition of "consumer" given in the Act. Clearly, they have suffered by the conduct of boycott by OP. Moreover, the D-G report goes at great length to show how the end consumer or common viewer of movies has also been adversely affected in terms of rising ticket prices. The D-G in his supplementary report examined the actual/potential impact of the settlement of disputes on the point relating to Revenue sharing ratio between the i producers/distributors and multiplex owners on other stakeholders. It is noted therein that multiplex owners across the country have hiked ticket prices by

15-20 per cent depending on their location in September – October, 2009. This hike is reported to be the direct fall out of the enhanced Revenue which multiplexes have to share now with the producers/distributors. a

23.56 The D-G in his reports has documented the effect of the new Revenue sharing agreement between the producers/distributors and the multiplex owners on the price of tickets. It is manifest that the prices of tickets have increased as detailed above. The opposite parties have failed to rebut the evidence collected by the D-G. Except making bald denials by the opposite parties, no worthwhile document has been produced before the Commission to substantiate the plea. Accordingly, it is held that the agreement of 9th June, 2009 has resulted into the increase of price of tickets and has worked to the detriment of the consumers. b

24. In the circumstances, the Commission holds that the opposite parties by entering into the impugned agreement have contravened the provisions of Section 3(1) read with Section (3)(a) and (b) of the Act and also caused appreciable adverse effect on competition in India in terms of Section 19(3) of the Act. c

25. Coming now to the question raised by the OP that the impugned agreement, being prior to the notification of Section 3 of the Act, it would not be actionable. On this, this Commission observes that not only the effect of the cartel continues but the cartel members continue to reap the benefits of their conduct. d

25.1 It has come in the reports of the D-G that from 4th April, 2009 to 12th June, 2009, the producers/distributors through their coordinated action of collective boycott decided not to release films to multiplexes. This has been found to be confirmed by the replies given by Fun, Fame, Cinemax and PVR group of multiplexes. The notice dated 27th March, 2009 issued by UPDF contained directions to the producers/distributors not to release films from 4th April, 2009 onwards. The agreements under new Revenue sharing arrangement were signed on 9th June, 2009 with some producers/distributors and a major film, viz. Kal Kisne Dekha of Vasu Bhagnani and Reliance Big Pictures was released on 12th June, 2009 after the new Revenue sharing formula was formalised. e

25.2 It has been noted by the D-G that this was the period during which supply of films in multiplex theatres were drastically reduced but it is not necessarily the period of violation of the cartel like behaviour. It is further noted by the D-G that in this case, the threat of non-supply was actually executed. In the period of execution of the threat, the punishment mechanism was put in place for those who did not cooperate in limiting supply and, thereafter, a higher price of the product/services obtained. This higher price still continues and, therefore, the D-G has concluded that it cannot be said that the cartel like conduct ended on 9th June, 2009 and it continues even thereafter. As a matter of fact, records the D-G, the fruits of the cartel like conduct actually began to accrue from 9th June, 2009 onwards after signing of the agreement with new Revenue sharing ration. The D-G, therefore, concluded that the cartel like conduct which began on 27th March, 2009 continues. f
g

25.3 This Commission agrees with the above observation of the D-G with respect to the continuing effect of the cartel. A cartel need not necessarily meet every day or do something daily to be said to exist. Even a single series of meetings or concerted action with the clear intent to limiting output or fixing prices is sufficient condition for a cartel. As long as the reigning prices and market conditions exist due to the actions of the cartel, the cartel itself would be considered to be continuing. Resultantly, it is held that the duration of the cartel like activity, for the purposes of the Act, started from 20th May, 2009 and is still continuing. h
i

a 26. Having concluded that the OP parties indulged in cartel-conduct in violation of Section 3(3) of the Act and also that their conduct also caused AAEC in terms of Section 19(3), it would be appropriate to identify the parties to the cartel.

b 26.1 The main violators of the cartel like activity were the big production/distribution houses who are playing key roles in the Hindi Film Market in their capacity as producers as well as distributors. These persons used the banner of AMPTPP/FTPGI to further their cause of extracting higher Revenue share from the multiplex owners. They also formed an association under the name of UPDF towards this end. The entities/persons, who have greater stakes in film industry and who are engaged in production-cum-distribution business, were instrumental in mobilising the film community for furthering their cause. Apart from the names mentioned in Annexure A of the report of the D-G dated 24th September, 2009 read with the supplementary report dated 27th November, 2009, the following enterprises are specifically held in violation of provisions of Section 3 of the Act.

c (i) UTV Software Communications Ltd.—The key person of this group involved in the activity of collective boycott of multiplexes and fixing a standard Revenue sharing formula was Ronnie Screwvala, CEO of UTV Software Communications Ltd. He was also present in the press conference on 7th April, 2009 sharing dais with Yash Chopra, Mukesh Bhatt, Aamir Khan, Shahrukh Khan, Jyoti Deshpande, Sandeep Bhargava and Ramesh Sippy. The key person involved in organizing talks and negotiations on behalf of UTV group was Siddharth Roy Kapur, CEO of UTV Motion Pictures.

d (ii) Eros Group—Key persons involved in the process of taking coordinated actions together with other producers-directors were Sunil Lulla and Jyoti Deshpande, directors of Eros International plc and Nandu Ahuja working in Eros International Media Private Ltd. These persons were present in the conferences and meetings of producers/distributors and were actively associated with others in giving call of collective boycott.

e (iii) Studio-18 – Sandeep Bhargava, CEO of Studio-18 and Indian Films Company who participated in the meetings and conferences and acted actively towards collective boycott of multiplexes. Aman Gill, director of distribution wing of Studio-18 also attended the negotiations.

f (iv) Yash Chopra of Yash Raj Films Private Ltd.—Shri Yash Chopra was present in meeting at Club Andheri on 16th March, 2009 and meeting at Hotel JW Mariot on 7th April, 2009. He shared dais with others in the conferences and meetings with other producers/distributors. Sahdev Ghai, Vice-President of Distribution from this group was actively involved during the period of boycott.

g (v) Mukesh Bhatt of Vishesh Films Private Ltd.—Shri Mukesh Bhatt issued directives to producers/distributors under the banner of UPDF on 27th March, 2009 not to release films to multiplexes. He also acted as convenor of UPDF and acted as chief person who organised producers/distributors and openly announced the intention of collective boycott of multiplexes in press conferences and meetings.

h (vi) Ratan Jain of Venus Films Private Ltd.—Shri Ratan Jain besides being director of Venus Films Private Ltd., is also serving as President of AMPTPP. Letters were issued under his signature not to release films to multiplexes in which threat of suspension/boycott was also given in case any producer/distributor defied the Orders of association. On the letter paid of AMPTPP, Secretary, Monica also issued letters with an appeal to cooperate and not release films.

i

- (vii) Ramesh Taurani of Tips Industries—Shri Taurani was active participant in the conferences and meetings of producers/distributors. a
- (viii) Ramesh G. Sippy—Name of Shri Sippy appears on the notice dated 27th March, 2009 alongwith Mukesh Bhatt asking producers/distributors not to release films. He also shared dais with producers/distributors on 16th March, 2009 at Club Andheri and on 7th April, 2009 at Hotel JW Marriot, Juhu, Mumbai. He is also president of Indian Motion Pictures Distribution Association. b
- (ix) Manmohan Shetty—He is President of FTPGI and has issued notice published on the website of Super Cinemas on 9th May, 2009 vide which the members of FTPGI were asked not to release films failing which they would have to face disciplinary action. c
- (x) Karan Johar of Dharma Productions—He was anchor of the press conference of 7th April, 2009. d
- (xi) Vasu Bhagnani of Puja Entertainment, Ramesh Sippy, Producer and Distributor of RS Entertainment, Ashutosh Gowariker of AG Private Ltd., Vidhu Vinod Chopra and Rakesh Roshan of Film Krafts Private Ltd.—These persons among producers/distributors who were involved in the whole process and who attended the press meetings and conferences. e

26.2 This Commission has also taken cognisance of the report of the D-G wherein it has been reported that “Some persons did not cooperate in course of inquiries like S/Shri Jyoti Deshpande, Nandu Ahuja and Sunuil Lulla of Eros group. They did not furnish the requisite details even when they were actively involved in the entire episode and even when the Eros Group had made payments for the press conference dated 7th April, 2009 organised at Hotel JW Marriot, Juhu, Mumbai.” f

26.3 In view of this reporting, this Commission deems it fit to direct the Secretary to initiate proceedings under Section 43 and Section 45 of the Act against the persons mentioned in the report of the D-G dated 24th September, 2009 read with the supplementary report dated 27th November, 2009 by issuing notice to them under appropriate regulation. g

26.4 Lastly, before passing appropriate orders against contravening parties referred to in Para 26.1 above under Section 27 of the Act, it is decided to issue notices to them in terms of regulation 48 of the Competition Commission of India (General) Regulations, 2009 to show cause within 15 days from the date of the receipt of the notice why penalty should not be imposed upon them. h

27. The Secretary was directed to issue notices accordingly. The matter was listed thereafter before the Commission for consideration of the replies filed by the answering opposite parties. i

Replies of the Opposite Parties to the Penalty Notice

28. Before dealing with the replies filed by the answering opposite parties to the Show Cause Notices issued to them under Regulation 48 of the Competition Commission of India (General) Regulations, 2009, a brief resume thereof is noted hereinunder. j

Association of Motion Pictures & T.V. Programme Producers (AMPTPP)/ Shri Ratan Jain

28.1 The opposite parties in their identical replies stated that multiplex owners were calling the shots and oppressing the producers at the time of the theatrical k

a releases of their films through various means such as lack of information on the number of shows, the number of screens and their locations, injudicious Revenue sharing deals invariably biased in favour of the multiplexes resulting in unnecessary stress and tension for the producers *vis-à-vis* release of their films, eventually leading to endorsement of terms and conditions favouring the multiplexes. It has been stated such authoritarian attitude can be deemed to be considered as cartelisation by the multiplex chain owners so as to force the producers/distributors to accept whatever terms were given to them.

b 28.2 It has also been reiterated that the Commission was not formed during the said period when the imbroglio between the producers/distributors and the multiplex owners had reached its peak and as such, many producers could not register a complaint with the Commission against the multiplexes. Reference has also been made to the RTP Enquiry (RTP Enquiry No. 3 of 2007) filed by some of the producers before the MRTTP Commission and it is stated that an injunction was granted in the said proceeding.

c 28.3 It has been further stated that the dispute referred to above between the producers/distributors and multiplexes was not about deciding ticket prices which would have impacted cinegoers, but it was about facilitating a smooth release of the forthcoming films by way of a just and fair sharing of theatrical Revenues of the films between the producers/distributors and the multiplex theatre owners and also to seek systematic statement of accounts at specific time intervals from the multiplex owners to the producers/distributors. Thus, it is sought to be canvassed that the said dispute arose due to a trade stand-off between the parties and in no way can any element of distortion of competition be read in the dispute.

d 28.4 It has also been averred that the dispute between the producers/distributors and the multiplex owners was for a very short period, *viz.* from 4th April, 2009 to 2nd June, 2009 when a mutually conciliatory arrangement was arrived at to resolve the dispute. It has been further stated that the producers/distributors also suffered financial losses by not releasing the films since their huge investments were blocked without interest. It has been contended that the above period was a slack period wherein most of the producers opted to withhold release of their films due to the fact that the IPL was scheduled during this period and also that this was the period of school/college examinations throughout the country. Accordingly, it has been suggested that this period was selected by the producers/distributors to resolve their dispute with the multiplex chain owners. As per reply, the producers/distributors were willing to settle the matter with minimum incurrence of loss, if any, by all concerned in the film production/distribution/exhibition chain.

e 28.5 Further, it has been stated that during the period of dispute about fifteen films were released as against 22 films during the corresponding period in the previous year, i.e. 2008.

f 28.6 Lastly, claiming compassion it has been pleaded that the Commission was formed at the fag end of dispute besides the occurrence being the first of its nature.

g 28.7 On these grounds, it has been prayed to the Commission that no penalty be imposed upon the answering party and the pleas raised in the reply, may be considered sympathetically.

The Film and Television Producers Guild of India Ltd./Shri Manmohan Shetty

i 28.8 It may be noted that though separate Show Cause Notices were issued to the Film and Television Producers Guild of India Ltd. and Shri Manmohan Shetty, only

one reply for the Film and Television Producers Guild of India Ltd. has been filed which has been signed by Shri Manmohan Shetty. In the reply, the answering Opposite Party has stated that the Commission was yet to be constituted when the crisis arose and hence, the producers/distributors could not approach the Commission for redressal of their grievances. It was reiterated that the dispute escalated due to the uncompromising stand of the Multiplexes Association and its members who had formed a cartel to sabotage the interest of producers/distributors. It was also stated that the producers/distributors, as a last recourse, approached the MRTTP Commission to seek resolution of the dispute and a reference was made to an order of injunction (I A No. 9 in RTP Enquiry No. 3 of 2007) passed by the MRTTP Commission against the restrictive trade practices followed by the multiplexes.

28.9 It was also stated that the issue involved was not related to fixation of ticket prices which would have directly affected cinema viewing public. It was further averred that the period of dispute (from 4th April, 2009 to 2nd June, 2009) was relatively short and thereafter the dispute was resolved through mutually accepted arrangement. It was also mentioned that the producers/distributors also suffered losses due to withholding of release of their films without earning any interest on their investments. It was also suggested that the time period of the dispute was barren since most of the producers did not release their films due to the IPL and the clash of dates with the school/college examinations. Hence, it is sought to be suggested that the producers/distributors decided to go for this period to settle the issue with the multiplexes as they wanted to ensure no/minimal loss to the concerned stakeholders in the film business chain. Further, it has been stated that the cinema viewing public was not denied their right to watch movies since around fifteen films were released during this period as opposed to twenty two films were released during the same period last year.

28.10 Finally, stating that the issue being the first such episode, it was prayed to the Commission to consider the matter accordingly. Pledging the bona fide desire to say on the side of the law, it was prayed by the answering Opposite Party that no penalty, should be imposed upon the producers under consideration.

Shri Shah Rukh Khan

28.11 In response to the Show Cause Notice to the answering Opposite Party, a reply has been filed by M/s. Red Chillies Entertainment Private Ltd., of which the answering Opposite Party is stated to be the Director. The answering Opposite Party, at the outset, requested for the reasons for the conclusion arrived at in the Show Cause Notice. It was stated that Mr. Shah Rukh Khan - Director of the answering company-attended meetings/press conferences on 16th March, 2009 and 7th April, 2009 at the request of film producers/distributors who were aggrieved by the conduct of the individual multiplexes regarding issues related to imbalanced Revenue sharing ratio implemented by multiplexes for films, unapproved deductions by the multiplexes from gross Revenue receipts and inordinate delays by multiplexes in making due payments to the producers/distributors. It was further stated that Mr. Shah Rukh Khan, being a public figure, attended the said meetings/press conferences only on the request of senior industry persons and purely in his personal capacity and the views and statements expressed by other persons at the said conference ought not to be interpreted as being an acceptance of the same by him.

28.12 It was further stated that neither the answering company nor Mr. Shah Rukh Khan were at any stage members of the forum known as the United Producers &

a Distributors Forum (UDPF), nor did the company ever sign any agreement at any stage with the multiplex owners/association. It is averred that the company was not involved in any correspondence etc. with UDPF. It was further stated that neither Mr. Shah Rukh Khan nor the company were part of the core members who allegedly negotiated between the producers/distributors and the multiplex owners.

b 28.13 It was stated that the last film released by the answering company was as far back as February, 2009 (the film "Billu") and it has never withheld the release of any film as a result of the dispute between the multiplex owners and film producers and distributors. Further, it was sought to be suggested that the company does not deal with the multiplexes directly as it licenses all the distribution and exploitation right of films to distributors preferably on lump-sum minimum guarantee basis, who then negotiate independently with the multiplexes. Thus, it has been submitted that the answering company never indulged in any activity which limited/controlled the supply of films in multiplex theatres or caused any adverse effect on competition or the market.

c 28.14 Further, it has been submitted that the provisions of the Act came into force only on 20th May, 2009 whereas, Mr. Shah Rukh attended the said press conference/meetings on 16th March, 2009 and 7th April, 2009. Thus, it is argued that he was rightly entitled to believe that there was nothing illegal about this act and the effort to get the grievance of the film producers and distributors redressed collectively, and in fact this action of his was not illegal under law.

d 28.15 Reiterating the plea further, it is argued that Mr. Shah Rukh Khan attended the meetings/press conference at the request of senior industry persons and purely in his personal capacity, which occurred at the time when the same was clearly not prohibited. It was further submitted that Mr. Shah Rukh Khan is a law abiding citizen and would have never attended the meetings/press conferences had he had any reasons to believe that the same were prohibited under the law.

e 28.16 The Opposite Party has also raised the plea based on principles of natural justice by alleging that by not affording to it opportunity to cross examine the individuals whose statements were recorded, the principles of natural justice have been violated. Further objection is taken on the ground that the DG fell in error by investigating into the effect of the alleged agreement on downstream cinema going market as neither the answering company nor any other producer/distributor or multiplex association was put on notice of this aspect of investigation.

f 28.17 It is also contended that the answering company has cooperated with the Commission during the proceedings. Lastly, it has been prayed that no penalty should be imposed upon the answering company.

Shri Ramesh Sippy/Shri Ramesh G. Sippy/Shri Yash Chopra/Shri Sehdev Ghai of M/s Yash Raj Films Pvt. Ltd.

g 28.18 These answering opposite parties have also taken the pleas which are similar to those raised by the AMPTPP, FTPGI and M/s. Red Chillies Entertainment Pvt. Ltd. and the same are, therefore, not repeated again since these have been noted in the earlier part of the Order.

Ronnie Screwvala & Siddharth Roy Kapur of M/s UTV Software Communications Ltd. (UTV)

h 28.19 A common reply has been filed by M/s UTV Software Communications Ltd. on behalf of the above named opposite parties.

28.20 Reiterating the replies and written submissions filed earlier by the M/s. UTV Software Communications Pvt. Ltd. before the Commission, it has been stated that Mr. Ronnie Screwvala and Mr. Siddharth Roy Kapur are not producers or distributors of films in their individual capacities as both of them are stated to be employees of UTV and act accordingly and not in their individual capacities.

a

28.21 It has been averred that UTV is a separate legal entity and UTV itself has not received any notice from the Commission.

b

28.22 Further, objection has been taken on the ground that the Commission has directly come to a conclusion that the actions of the answering parties have contravened the provision of Section 3 of the Act without any reasons or any detailed findings.

28.23 Rest of the pleas raised by the answering opposite parties are similar to those taken by the other opposite parties and noted above, *viz.* proceedings filed by the producers before the MRTTP Commission, the Act being a new legislation and hence implications were not clear etc. It has been also stated that the answering parties have not withheld any film for release by acting upon the alleged decisions. It has also been argued that there was no intent to adversely affect the consumers by raising ticket prices or otherwise.

c

28.24 For all these reasons, leniency has been prayed by praying to the Commission that no penalty be imposed. Alternatively, it has been prayed that a minimum penalty be imposed.

d

Shri Sunil Lulla/Shri Nandu Ahuja/Ms. Jyoti Deshpande

28.25 The answering opposite parties *vide* their letters of even date, i.e. 14th March, 2011 have sought a copy of the Order of the Commission arriving at a conclusion that the purported actions/decisions of the answering parties have contravened the provisions of Section 3 of the Act as also the decision on the preliminary issues/objections on jurisdictional points.

e

Shri Ramesh S. Taurani of M/s Tips Industries Limited

f

28.26 The answering Opposite Party has also raised the plea based on victimisation due to cartelisation and monopolistic approach of the multiplex chain owners; the dispute having arisen prior to constitution of the Commission etc. It has also been argued that the dispute between the producers/distributors and the multiplex owners was not in the nature of fixing of prices of tickets which would have affected the public. Rest of the pleas are similar to those which have been raised by the other opposite parties and the same have been noted in the earlier part of the Order.

g

Shri Vashu Bhagnani of M/s Puja Entertainment (India) Ltd.

28.27 The answering Opposite Party has taken the pleas similar to those which have been taken by the other opposite parties and the same have been noted in the early part of this order and therefore, those are not repeated.

h

Shri Ashutosh Gowariker of M/s Ashutosh Gowariker Productions Pvt. Ltd.

28.28 In response to the Show Cause Notice, reply has been filed by M/s. Ashutosh Gowariker Production Pvt. Ltd. In the reply, the Opposite Party has denied any contravention of Section 3 of the Act. It has been further stated that the answering

i

a Opposite Party is not involved in any manner in the alleged cartel of producers. It has also been averred that the notice under reply does not specify any reason/ findings of the Commission against the answering Opposite Party.

b 28.29 It has been further stated in the reply that the Opposite Party is not a member of United Producers/Distributors Forum (UPDF). It has been argued that the answering Opposite Party has never restricted or attempted to restrict the release of films to the general public through multiplexes. In the reply, ignorance has been pleaded about the alleged notice dated 27th March, 2009 issued by UPDF.

c 28.30 The Opposite Party has, however, admitted the presence of Shri Ashutosh Gowariker in one meeting held on 7th April, 2009 and the same is stated to be attended by various persons from the cinema industry. Further, a fine distinction is sought to be drawn between presence and participation and accordingly, it is sought to be urged before us that mere presence in a meeting cannot lead to an inference that the answering Opposite Party is part/member of any cartel or even to the existence of any such cartel.

d 28.31 It is further averred that during the period complained of, i.e. April to May 2009, no release of any film was scheduled and hence question of depriving Multiplex Association of its rights does not arise.

28.32 Based on the above, it has been submitted that the answering Opposite Party is not liable to suffer any penalty under the Act.

Shri Mukesh Bhatt

e 28.33 The Opposite Party in its reply has stated that the entire issue pertaining to multiplex chain was not borne out of any kind of cartelisation on the part of the producers/distributors fraternity but on the contrary the producers/distributors were victims of attitude of multiplexes.

f 28.34 Further, it has been stated that the answering Opposite Party was oblivious about the existence of the Commission. Accordingly, it has been prayed that a lenient view be taken.

Shri Vidhu Vinod Chopra

g 28.35 In reply to the Show Cause Notice issued to the above named Opposite Party, a reply has been filled on behalf of M/s. Vinod Chopra Films Private Limited wherein it has been admitted that it is member of the Film & Television Producers Guild of India (FTPGI) and as such its representatives attend the FTPGI meetings where several matters concerning the industry are discussed and debated including technological developments, sharing of industry best practices, hosting of international delegates and critical issues facing the industry from time to time. It has been further stated that during 2008-2009, one of the many issues discussed at the FTPGI meetings was that of cartelisation by the multiplex owners in their dealings h with producers and distributors whereby the multiplex owners, *inter alia*, were availing of their position to garner excessive Revenue share whereas the producers and distributors were emphasising the principal of fair play such that the Revenue was reasonably distributed between the production, distribution and exhibition chain. Reference has also been made to the injunction granted by the MRTP Commission against the cartelisation and exploitation by the multiplex owners. i Lastly, it has been stated that the dispute has been resolved amicably among the concerned parties.

Shri Rakesh Roshan

28.36 The answering Opposite Party *vide* its reply dated 26th March, 2011 signed by Shri Rakesh Roshan as Director M/s. Filmkraft Productions (India) Pvt. Ltd. to the Show Cause Notice has taken the pleas which are similar to those which have been taken by the other opposite parties and the same having been noted previously are not repeated herein.

a

Shri Aman Gill

28.37 In response to the Show Cause Notice issued to the above named party, a request was made *vide* letter dated 5th January, 2010 from M/s. Viacom 18 Media Private Limited requesting for extension of time for file the reply. Thus, the Commission considered the reply filed by M/s. Viacom 18 Media Private Limited to the Show Cause Notice dated 1st April, 2011 to be the reply filed by the above named Opposite Party wherein pleas similar to those which have been taken by the other Opposite Party have been raised.

b

c

Shri Aamir Khan/M/s Aamir Khan Production Pvt. Ltd.

28.38 In reply to the separate Show Cause Notices issued to the above parties, a common reply dated 31st March, 2011 has been filed wherein, it has been stated that Shri Aamir Khan is not a producer of films in his individual capacity. Shri Aamir Khan is stated to be the Director of M/s. Aamir Khan Production Pvt. Ltd. On this basis, the reply has been filed wherein objections similar to those which have been taken by the other opposite parties have been raised.

d

e

Shri Karan Johar

28.39 In response to the Show Cause Notice, the above named Opposite Party filed a reply signed by Shri Karan Johar as Director M/s. Dharma Production Pvt. Ltd. raising the similar pleas which have been taken by other opposite parties.

29. The Commission has carefully perused the replies of the answering parties filed before the Commission pursuant to the Show Cause Notices issued to them and has given them its thoughtful consideration.

f

30. It is seen from the replies that some of the opposite parties in their replies to the Show Cause Notices have reiterated their respective stand taken on the issue of contravention of Section 3 of the Act even though the scope of the Show Cause Notice was limited to the issue of imposition of penalty. Since, the Commission, after considering the contentions of the opposite parties on merit and after elaborate discussion, has already found that contravention of Section 3(3)(a) and 3(3)(b) of the Act has been established against the opposite parties, there is absolutely no need to deal with the same pleas of the parties again.

g

31. At the outset, it is made clear that though the Commission can have no sympathy with those parties which indulge in cartel-like behaviour, there are certain mitigating factors peculiar to the facts and circumstances of the present case which need some consideration before passing any order under Section 27 of the Act.

h

32. In the present case, the genesis of the dispute can be traced to the events which happened prior to the notification of Section 3 of the Act even though after notification of the Act, the same became clearly prohibited. However, after the notification of the relevant provisions of the Act, there cannot be any doubt that it is the bounden duty

i

a of the persons/enterprises to ensure that knowingly or unknowingly they do not infringe the provisions of the Act and to take necessary and concrete steps in order to maintain a competition compliance programme.

33. The Commission also cannot lose sight of the fact that the MRTP Commission passed an order of injunction against the multiplexes in RTP Enquiry No. 3/2007.

b 34. The Commission after considering cumulative effect of all the mitigating factors in the context of peculiar facts and circumstances of the instant case, is of the opinion that ends of justice would be met if a penalty of Rs. 1,00,000 (Rupees One Lac only) is imposed upon each of the opposite parties under Section 27(b) of the Act in addition to cease and desist order under Section 27(a) of the Act.

c 35. Accordingly, the Commission passes the following orders, under Section 27 of the Act, against all the 27 opposite parties:

(i) The opposite parties are directed to refrain from indulging in such anti-competitive practices in future and are further directed to file an undertaking to this effect within one month from the date of receipt of the Order.

d (ii) A penalty of Rs. 1 lac is also imposed on each of the 27 opposite parties. This penalty shall be paid by the opposite parties within one month from the date of receipt of the copy of this order.

36. Secretary is directed to send a copy of this order to the opposite parties for compliance immediately.