



## ANALYSIS OF FAIR USE OF SOUND RECORDINGS IN MARRIAGES WITH REFERENCE TO SECTION 52(1) (ZA) OF COPYRIGHT ACT, 1957

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### ABSTRACT

*It is not the case that marriage ceremonies were never performed without music or sound recording. But with the advent of technology, sound recordings and Bollywood music are being used frequently now a day's. Use of music and sound recording have become 'expression' of not only the joy and happiness but also the social status. This is happening without even bothering about the fact that such 'expression' being 'original' might be already protected by the copyright law. Moreover, outsourcing the management of marriage ceremony from the event management companies has turned these personal ceremonies into a pomp and show. This conversion necessarily invites the objection from the owner of the copyright over such sound recordings. The reason is obvious that such commercial use is even without getting license of the owner of sound recording, let's not talk about sharing of the benefits with them. So, in the backdrop of these situations, the author has tried, in this article, to explore and discuss the scope and permissibility of using sound recordings in the marriage ceremonies with the help of leading Case laws.*

**Keywords:** Sound-recording, Public use, Copyright, Fair use, Copyright Society.

### Introduction

Recently, Delhi High court encountered an interesting suit wherein a 'Copyright Society' filed a case against an event management company for violation of copyright in music by playing copyright protected music without obtaining requisite licence.<sup>2</sup> The defendants contended that usage of sound recording in marriages was protected under Section 52(1) (za). The High Court was of the view that the matter was a significant legal issue and had large-scale implications for artists, societies and other stakeholders.<sup>3</sup> Therefore, it appointed an expert to

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<sup>2</sup> Phonographic Performance Ltd v. Lookpart Exhibition, CS (COMM) 188/2022 & 4772/2022.

<sup>3</sup> See Para No. 4 in Phonographic Performance Ltd v. Lookpart Exhibitions, CS (COMM) 188/2022 & 4772/2022.

look into the matter.<sup>4</sup>

However, the court did not get an opportunity to consider the expert recommendation as the case was amicably settled.<sup>5</sup> Nonetheless, this recent case has reignited the discussion regarding the fairness of section 52(1)(za) and the embargo surrounding its application in the Indian scenario. In order to have thorough analysis of the applicability of section 52(1)(za), an understanding and scope of applicability of section 52 of the Copyrights Act, 1957 is quintessential.

### **Section 52 of the Copyrights Act 1957**

The Copyrights Act 1957 provides protection to i) original, literary, dramatic, music and artistic work, ii) cinematography films iii) sound recordings.<sup>6</sup> Any infringement of a copyrighted work shall face civil, criminal and administrative proceedings.<sup>7</sup> However, under Section 52 of the act an umbrella has been provided under which various acts are held not to be copyright infringement as they are considered to be fair dealing.

This includes section 52(1)(za) which holds performance or communication to the public of literary, dramatic or music work in the course of any religious ceremony or an official ceremony by the government not to be infringement. This provision contains an *explanatory clause* which specifically includes marriage procession and other marriage related activity under ‘religious ceremony’. Thus, any music played during the baraat, haldi, reception or any other marriage related activity shall not be considered as a copyright infringement.

Even though the provision looks straight forward and free of ambiguity, it gives rise to various critical questions such as transmission of music to the ‘public’, monetisation of music work by an ‘event management and its justifiability etc., Now that we have understood the provision it is pertinent to note how the legislative intent regarding section 52(1) (za) has evolved.

### **Section 52(1)(za) and Its Jurisprudence**

With regard to the applicability of section 52(1)(za) the courts have been clear that the exemption is not to be taken for granted and the applicability of the provision shall be

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<sup>4</sup> Delhi High Court seeks Prof. Arul George Scaria’s opinion on use music in marriage ceremony, available at, <https://www.bananaip.com/ip-news-center/delhi-high-court-seeks-prof-arul-george-scarias-opinion-on-use-of-Music-in-marriage-ceremonies/> (Last visited on 11.37 AM 19th December 2022).

<sup>5</sup> See order dated 10th October 2022 in Phonographic Ltd v. Lookpart Exhibitions, CS (COMM) 188/2022 & 4772/2022.

<sup>6</sup> The Copyrights Act, 1957, s.13, No. 14, Acts of the parliament, 1957 (India).

<sup>7</sup> The Copyright Act, 1957, ss. 51, 62, No. 14, Acts of the Parliament, 1957 (India).

dependent upon the facts and circumstances of each case.<sup>8</sup> In the case of *Devendra Kumar Ramachandra Dwivedi*<sup>9</sup> the Gujarat High court rejected the contention of the plaintiff who was seeking an injunction against the action of the defendants who were claiming royalties for playing Garba and Dandiya in procession etc., In 2019, the copyright office released a notification stating ‘no licence is required for playing or utilisation of any sound recording in the course of religious ceremony including a marriage procession and other social festivities associated with a marriage.’<sup>10</sup> However, the notice was subsequently challenged and the Punjab and Haryana high court ruled that the executive (here in this case the Copyright Office) has no authority under the Copyright Act to clarify or interpret the applicability of the law through public notices.<sup>11</sup> The court’s decision was powered by the rationale that validating such notices would take away the right of a copyright owner to initiate proceedings for infringement of copyright.

Apart from a handful of High court judgements there is hardly any judgement, report or any legislative commentary that expands or clarifies the scope of use of sound recording in marriages. The courts have been keener to approach this provision on a fact-by-fact basis as setting up a broad umbrella of precedence may not essentially fit into all types of circumstances. Even though, the Delhi High court could not utilise the expert report in the case of *Phonographic Performance Ltd*, the report<sup>12</sup> is a relevant and probably the most exhaustive piece of reference upon the scope of section 52(1)(za).

### **Section 52(1)(za) vis-à-vis Public Performance**

One of the primary accusations against the exemption to usage of sound recording in marriages is that recordings played in the marriages amount to ‘public performance’ and thereby violates the rights of the copyright holder. Therefore, it becomes imperative to scrutinise the definition and ambit of ‘public performance’. The Copyright Act, 1957 does not define ‘Public Performance’ nor the term ‘Public’. The act only defines the term ‘Public use’.<sup>13</sup> The Indian Courts have largely referred to English Jurisprudence to determine the scope of the term ‘Public’. In the Case of *Garaware Plastic and Polyester Ltd*<sup>14</sup> Bombay HC referring to various

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<sup>8</sup> Devendra Kumar Ramachandra Dwivedi v. State of Gujarat and Ors, MANU/GJ/0440/2009.

<sup>9</sup> *Id.*

<sup>10</sup> Notice dated August 27th 2019, available at, [https://copyright.gov.in/Latest\\_Notice37.aspx](https://copyright.gov.in/Latest_Notice37.aspx)

<sup>11</sup> Novex Communication Pvt. Ltd v. UOI & Anr, CWP NO. 28758 of 2019.

<sup>12</sup> Phonographic Performance Ltd v. Lookpart exhibition CS( COMM) 188/2022 & 4772/2022 (Submission on behalf Dr. Arun George Scalia, the expert appointed under R. 31 of the Delhi High Court Intellectual Property rights division)

<sup>13</sup> The Copyright Act, 1957 s.2 (ff) No. 14, Acts of the Parliament, 1957 (India).

<sup>14</sup> Garaware Plastics & Polyester Ltd v. Telelink, AIR 1989, Bom 331.

case laws and commentaries highlighted three pathways to determine the scope of “public”- *the character of audience and whether it can be described as a private or domestic audience consisting of family members or members of the household, (2) whether the audience in relation to the owner of the copyright can be so considered and (3) whether permitting such performance would in any way whittle down the protection given to the author of a copyright under the Copyright Act resulting in the owner being deprived of monetary gains out of his intellectual property”.*

The Courts might have pronounced pathways to determine ‘public’ but also have cautioned that a specific definition would not be possible. The question of what is ‘public’ ought not to be considered in the abstract, and in isolation, but in the context of the definition of ‘infringement’ of a copyrighted work, under Section 51.<sup>15</sup>

Therefore, the question of whether section 52(1) (za) is and its entitlement leads to public performance of a copyrighted work is specific to each case and a general answer cannot be ideal. Dr. Arun Lal Scalia, the expert appointed by Delhi High Court suggests that *though many of the marriage related ceremonies and festivities in India are held in public spaces, access to those events is generally restricted to the family/ social circles of the partners in the marriage. Such ceremonies and festivities may therefore be considered by a Court as private events in public spaces.*

### **Section 52(1) (za) vis-à-vis monetisation**

In order to avail the benefit of section 52 of Copyrights Act, the person seeking exemption under the provision should not have used the copyrighted work for monetary purposes.<sup>16</sup> In case of marriages, the sound recordings are played by Event Planners, Disco-jockeys and other organisers who are paid for their services. Is this not a type of monetary gain via use of a copyrighted product? The defence of the said parties has always been that the organisers are being paid for their service of management and not specifically for playing the music. But, with the rise of event organisers and management groups, it is giving rise to teams that specifically handle music. Under the veil of Section 52(1) (za), the organisers are garnering monetary benefits from a copyrighted product. This leads to violation of privacy of the copyright holders.

### **Section 52(1) (za) vis-à-vis privacy of the Copyright holders-**

Marriage is one of the most important social institutions in the Indian socio-cultural context. It

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<sup>15</sup> IPRS v. Aditya Pandey, 2011 SCC Online Del 3113.

<sup>16</sup> India TV v. Yashraj Films, 2013 (53) PTC (Del). University of Oxford v. Rameshwari Photocopying Press, (2016) 16 DRJ (SN) 678.

is often viewed as “one of the sound social institutions to bring harmony and integration in social fabric”.<sup>17</sup> Marriage across the country may encompass various traditions and customs, however the use of music in the marriage remains constant. With the rapid rise of use of sound recordings in the marriage and marriage related ceremonies, the privacy of the copyright holder with regard to his work is at grave risk. Copyright holder has a right to choose who can spectate/witness/view his/her work. However, the risk of violation of the same looms large with increase in liberties utilised under section 52(1) (za).

### **Conclusion and Recommendations-**

Exemption of Copyright protection for religious purposes is not unique to India. Copyright Act of USA<sup>18</sup> as well as that of Singapore<sup>19</sup> exempt the use of copyrighted work for religious purposes. The International agreement and treaties also make way for countries discretion with regard to giving exemptions to copyright infringement.<sup>20</sup> The problem with regard to India lies not in the autonomy that the laws provide but the widespread cultural practices and ethos surrounding it and the presence of parasites who take use of the opportunity to plunder law. So, what’s a solution to this problem? Ideally, a precedent from the Supreme Court with regard to application of section 52(1) (za) might make things simpler. However, as Prof. Scaria, Hon. High Courts and this author pointed out it would not be possible to introduce a one thumb rule to all cases and the validity of ‘fair use of sound-recording in marriages’ have to be decided on a case-by-case basis. Even though it appears more cumbersome, complex and time-consuming introduction of one-rule to fit all would only further complicate this labyrinth and increase the myriad of legal dilemmas.

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<sup>17</sup> Valasamma Paul v. Cochin University, (1996) 3 SCC 545.

<sup>18</sup> The Copyrights Act, 17 U.S.C. s. 110 (3) (1976).

<sup>19</sup> The Copyrights Act, s. 42 (1987).

<sup>20</sup> Berne Convention & Article 13 of the TRIPS agreement.