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ANALYZING BARGAINING POWER AND EXPLOITATION IN THE INDIAN MUSIC INDUSTRY: EXPLORING COPYRIGHT, LICENSING, AND ROYALTY PRACTICES

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ABSTRACT

The Indian music industry has undergone significant changes in the past decade, particularly after the implementation of the Copyright (Amendment) Act, 2012. However, despite its growth, the industry still lacks a well-defined structure due to imbalances in bargaining power and exploitative practices. This paper explores the dynamics of bargaining power in the Indian music industry by analyzing key events such as the lobbying efforts during the 2012 amendment, relevant case laws, and the observations made by the judiciary. It also examines the role of formal partner industries including radio, film, and television in royalty sharing. The paper calls for the establishment of a proper licensing mechanism, fair value negotiations, and improved transparency to protect the rights of copyright owners, authors, and communication platforms within the Indian music industry.

Keywords: copyright, music industry, bargaining power, licensing, royalties

Introduction:

The Indian music industry has undergone significant changes in the past decade, particularly after the implementation of the Copyright (Amendment) Act, 2012. However, despite its growth, the industry still lacks a well-defined structure due to imbalances in bargaining power and exploitative practices. This paper explores the dynamics of bargaining power in the Indian music industry by analyzing key events such as the lobbying efforts during the 2012 amendment, relevant case laws, and the observations made by the judiciary. It also examines the role of formal partner industries including radio, film, and television in royalty sharing.

The paper highlights the exploitation faced by artists, often stemming from their legal illiteracy and the misuse of bargaining power by major music companies. A case in point is the battle initiated by renowned music director A.R. Rahman in 2006. Rahman aimed to secure the rights

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of lyricists and composers by urging music companies to share publishing rights. His fight against the prevailing industry practices demonstrated the excessive bargaining power held by these companies. Although the 2012 amendment introduced changes to copyright law regarding royalty sharing, the situation has not improved significantly.

The Indian music market, much like its global counterparts, is predominantly controlled by large music companies such as Sony, T-series, Saregama, and Zee Music. This paper investigates the factors that have propelled these companies into their influential positions. While comprehensive market dynamics cannot be fully captured through literature surveys alone, the insights provided by industry experts contribute to understanding the nature of bargaining power in the industry.

Additionally, the malfunctioning of copyright societies, particularly the Indian Performing Right Society (IPRS), plays a significant role in the industry's challenges. IPRS, which should protect the rights of copyright authors, is dominated by representatives from major music companies. The paper explores the questionable practices and controversies surrounding IPRS, including its tripartite agreement with Public Performance Ltd. (PPL) and the Indian Music Industry (IMI), which prioritized the interests of music labels over authors and composers.

The presence of bargaining power is essential for the growth of any industry, including the music industry. However, the abuse of bargaining power can hinder industry development. Establishing fair and transparent practices in licensing, distribution, and royalty sharing is crucial for the industry's sustainability. The involvement of formal partner industries, such as radio, film, and television, in revenue sharing is also vital. The paper calls for the establishment of a proper licensing mechanism, fair value negotiations, and improved transparency to protect the rights of copyright owners, authors, and communication platforms within the Indian music industry.

2012 Amendment-Bargaining in the Music Market: History

Numerous instances within the industry are illustrative of the exercise of bargaining dynamics, whereby even esteemed music creators found themselves with little recourse but to acquiesce to the voluntary exploitation orchestrated by significant music conglomerates. These conglomerates often allocated a disproportionately meager share of proceeds to these creators in comparison to the substantial gains accrued from the utilization of works originating from these creators.

The initiation of a legal struggle by A.R. Rahman in 2006 epitomizes the pronounced exertion of bargaining leverage by prominent music conglomerates in India. In 2006, A.R. Rahman, acclaimed as the highest-paid music director in the Indian music domain, embarked on a campaign to compel music corporations to equitably distribute publishing rights to lyricists and

composers. This endeavour led him to withdraw from a substantial project at that time, "Om Shanti Om." Rahman's objective was to reshape the operational norms of the Indian music industry. A.R. Rahman said[2]:

> "I want to push for the copyright of composers and lyricists, even producers. I'm not saying that I want to be the sole proprietor of the songs I compose. But I want a share. There's nothing wrong with that. I can't run to music companies like T-Series and Sa Re Ga Ma every time I need to use my own song."

In response to inquiries about potential project losses, A.R. Rahman expressed his willingness to subsist on autonomous musical projects. As an established music director, the potential diminution of one income stream is not an overriding concern for him. This elucidates why other music directors, lyricists, and composers are less inclined to overtly challenge the inequitable contractual practices pervasive within the industry. This concern surfaced as one among several issues preceding the 2012 amendment, often concealed or not extensively discussed within the industry's landscape.

The ramifications of the 2012 amendment reverberated profoundly within the Bollywood sector, albeit for a limited period following its enactment. Diverging from prior revisions, the 2012 amendment incited a plethora of conspicuous public deliberations and discussions,[3] dominating the prime-time broadcasts of media and television channels. A salient subject of these deliberations pertained to the amendment itself. Evident from parliamentary dialogues, the amendment was promulgated with the primary intention of rectifying prevailing injustices, particularly concerning licensing, assignments, and the apportionment of royalties to creators of musical and sound recording works.

Central to these discussions was the vigorous lobbying efforts led by Javed Akhtar, a prominent lyricist and then Parliamentarian, aimed at foiling the exploitation of lyricists and composers. This lobbying was a focal point during parliamentary debates concerning the 2012 amendment. Notably, Akhtar's activism commenced prior to his election to the Rajya Sabha, during which he faced threats from various production houses and music labels who indicated a reluctance to engage in collaborative endeavors with him.[4]

Of paramount significance in Akhtar's discourse was the assertion of major music companies' acquisition of the Indian Performing Right Society (IPRS). In public forums and interviews, Akhtar extensively conveyed his reservations about how significant music corporations

[2] Aravind, "A.R.Rahman's protest!"*available at*: http://arrahmaniac.blogspot.com/2006/10/arrahmans-protest.html (Visited July 15, 2023).
[3] Subhash K Jha, "Stop Interfering, Aamir: Javed Akhtar" *Times of India*, Feb.16, 2010.
[4] Id.

surreptitiously gained control of IPRS both before and subsequent to the 2012 amendment.[5] He vehemently opposed the misuse of bargaining power by these entities, who influenced IPRS policy determinations to the detriment of lyricists and composers, leading to unpaid royalties.[6] Akhtar's perspective on this acquisition can be traced back to his contestation in 2004 when Saregama, a prominent Indian music label, legally challenged his election to the IPRS Board.[7] These music enterprises orchestrated industry dynamics in their favor, evident in their resistance to Akhtar's appointment to the Board of Indian Performing Right Society (IPRS). This opposition underscored their apprehension, given their awareness of Akhtar's insights into the intricate negotiations and exploitative practices by music corporations against the lyricists and composers community.

The absence of substantial political organization prior to Akhtar's lobbying endeavors was a chief contributing factor to this exploitation, in contrast to the more organized authorship industry in the European Union and the United States, where creators possess adept collective bargaining prowess. Various other factors also contributed to the impetus behind the 2012 amendment. The concerted exertion toward this amendment represents the most substantial demonstration of industry bargaining power to date, even though its efficacy waned within a few months post-amendment.

IPRS and its malfunctioning:

A comprehensive exploration of the industry's bargaining dynamics would be remiss without addressing the operations of copyright societies, specifically the Indian Performing Right Society (IPRS). The current composition of the IPRS Board of Directors serves as a noteworthy illustration. Among its 11 members, 6 are delegates representing prominent music entities such as Times Music, Saregama, T-Series, and Adithya Music, Sony Music, and Ultra distributors.[8] The conspicuous dominance of influential music corporations within the pivotal copyright society underscores a blatant truth – which the pursuit of an equitable and impartial industrial framework remains a distant aspiration for less influential stakeholders such as lyricists, composers, and directors.

Preceding the 2012 amendment, a sequence of occurrences at IPRS significantly informed the discourse surrounding the amendment. Originally established as a corporate entity

[5] Rahul Bhatia, "The Quiet Royalties Heist" *Open The Magazine*, 2011 *available at*: http://www.openthemagazine.com/article/art-culture/the-quiet-royalties-heist (Visited August 5, 2023).
[6] Aparna Joshi, "Spicyip" *Spicyip*, 2023 *available at*: http://spicyipindia.blogspot.com/2011/03/soundbox-carries-interview-with-javed.html (Visited August 2, 2023).
[7] Id.
[8] "Board Of Directors – IPRS," *iprs.org available at*: https://iprs.org/board-of-directors/ (Visited August 10, 2023).

encompassing film producers, authors, and composers, IPRS encountered setbacks when it entered into a tripartite agreement with Public Performance Ltd. (PPL) and the Indian Music Industry (IMI), then known as the Indian Phonographic Industry (IPI). This agreement marked a turning point, heralding challenges for IPRS and bearing implications that resonated throughout the discussions surrounding the 2012 amendment. The main objectives of the agreement are as follows (paras 1, 2, 3 and 5 of the MoU):

(i) *"IPRS should extend membership to music labels registered with PPL and IMI causing to derecognise and replace all film producers from its membership;*

(ii) *After extending membership to the music labels from PPL & IMI, IPRS would ensure that its future earnings would be distributed in the following ratio: 50% of all revenue would go to the 'music publisher' members of IPRS (in this case the music labels from PPL) while 30% of all revenue would go to composers and the remaining 20% would go to author members of IPRS, who are mainly lyricists and composers.*

(iii) *The 'Governing Council' of IPRS had to have equal representation from composers, lyricists and music labels since at the time of signing the MoU, the Governing Council had 6 composers, 6 lyricists and only 2 music label members."*

Furthermore, beyond the aforementioned conditions, IPRS was also obligated to make a self-deprecating declaration affirming its recognition that music labels possessed the performing and mechanical rights pertaining to all musical and literary compositions featured within sound recordings, which were under the ownership of these music labels. This declaration also indicated that allocating 50% of the proceeds to composers and authors was done with the intention of motivating and supporting them (as stated in paragraph 4 of the Memorandum of Understanding). This measure was executed subsequent to the unanimous approval of this Memorandum of Understanding by all of its members.

The potential enrolment of IPRS as a copyright society had the potential to spark another dispute. The higher-ranking officials within the Copyright Office displayed a considerable lack of attentiveness in the process of registering IPRS as a copyright society, and they even disregarded numerous warning signals brought to their attention by junior officers.[9] For example, the registrar of copyright ignored the fact that the membership to IPRS was not liked to 'ownership' but 'authorship' of a particular copyrighted work as against the Copyright (Amendment) Act, 1994 which required that all that IPRS should be in control of the owners

[9] Prashant Reddy, "The 'Numbers' continue to talk – PPL's Revenues from Mobile Ringtones has Zoomed up by 1857% in 6 years from Rs. 7 Crores to Rs. 137 Crores," *Spicyip* 12 February, 2011, *available at* http://spicyipindia.blogspot.com/2011/02/numbers-continueto-talk-ppls-revenues.html

of the copyrighted work it administers and not the authors.[10]

Another event of malfunctioning by IPRS was the baseless statements given as reply by IPRS in a petition filed by Universal Music Company against IPRS alleging mismanagement. A petition alleging mismanagement of a company before the Company Law Board (hereafter 'CLB') required the assent of at least 20% of the membership of the company, to be admitted.[11] Here, instead of strongly contesting the petition by seeking a dismissal of the petition, IPRS casually gave some statement replies without any motive to protect the interest of its majority members who were lyricist and composers and sought to defend the interests of the minority members who were the music labels.[12] One of such incriminating statements by IPRS went like this:

> *"It can thus be said that the said lyricists and/or composers do not hold any copyright or cannot be termed as the owners of copyright unless of course they have a contract to the contrary."*

They also submitted that:

> *"It was agreed that 50% of the income therefrom would go to the music publishers, 30% to the composer members and 20% to the author members (lyricists in this case) of the Respondent No. 1. The composers and authors were given the aforesaid share in the income not because they had a right to it but just to encourage them."*

The IPRS thus informed that whatever payments are made to the authors and composers are only in the form of *gratis* and they couldn't claim any royalty right. The CLB in this case directed to authenticate the Register of Owners/Members of IPRS.[13] Upon the release of the registry, it was observed that solely music enterprises were listed as the copyright holders for all the musical and literary works managed by IPRS.

After this, the 37th Annual General Meeting was convened and unsurprisingly, only the music companies were present for the meeting i.e. the representatives of (i) Saregama India Ltd. (ii) Tips Industries Ltd. (iii) Universal Music India Ltd. (iv) Venus Records and Tapes Ltd. (v) Sony Music Entertainment Ltd. (vi) Virgin India Ltd. (vii) Krunal Music Ltd and none of the lyricists or composers were present. In this general meeting, they changed the governing laws i.e. Memorandum of Understanding and Articles of Associations ensuring that membership was based only on ownership of copyrighted works and weighted voting rights to be based on the numbers of works owned.

After the 37th AGM, all the composers and lyricist were asked by the management at IPRS

[10] Section 35, *Copyright (Amendment) Act, 1994.*
[11] Section 399, *the Companies Act, 1956.*
[12] *Universal Music India Ltd. V. Indian Performing Right Society (IPRS)*, 1977 AIR 1443.
[13] *Supra note* 9.

controlled by music companies to sign a standard format letter requiring them to accept the 1993 MoU and that the music labels own all their works. Many like Akhtar refrained from signing but later agreed. Those who did not sign were prevented from earning annual royalties that they usually receive from IPRS.

The story of IPRS and the abuse of bargaining power is never ending. The above-mentioned reasons, among many others, were why people like Javed Akhtar strongly opposed the industrial structure and in house negotiations that finally led to the 2012 amendment. Despite the 2012 amendment, it is learnt that the industry is still struggling to uphold the rights of copyright authors.

Music Industry Post-2012 Amendment:

The amendment was passed by the legislature after much deliberations, primarily for the reason of it intended to be a 'pro-author' one. The amendment attempts to create a level playing field for the producers/owners and the authors of a literary/musical work/sound recording while negotiating and entering into contracts, thus defining their contractual relationships with each other. This amendment has given rise to a new era in the Indian media industry as the primary aim of it was to protect the rights of the authors of literary and musical works and to ensure that they receive royalties shared equally upon utilization of the work, from the owner of the work.[14] This amendment was whole-heartedly received by the producers as well as authors, initially, however, the oomph in receiving the amendment didn't last long. The industry stakeholders, though initially accepted the amendment as a welcoming one, later suggests that the industry is still facing issues specifically with reference to the sharing of royalty and superseding of rights under Sec.14 of the Act through contracts (though there are hardly any 'written agreements' while undertaking a work, however, absence of 'written agreement' does mean the presence of 'oral agreements'). Record labels and producers also allege that the amendment impedes or restricts free trade and is an impediment towards freedom of agreements according to dynamics in the market.[15]

Though the amendment was welcomed as a light of change in the industry by the composers' and authors' associations, however, the 227th Parliamentary Standing Committee Report (hereinafter 'report') states that there were huge oppositions towards the amendment particularly on the ground that free e in the market are hindered due to the amendment. Another opposing argument was from the broadcasters and media people contending that they won't be

[14] Section18, *Copyright Act, 1957.*

[15] Anand Nair, "Royalties And Rights Sharing In Film Industry In India Post Copyright Amendment Act 2012 – Impact On Contractual Freedom: A Comparative Study With The US And The UK Copyright Regimes," *WIPO Academy, University of Turin and ITC-ILO - Master of Laws in IP - Research Papers Collection* – (2012-2013).

able to make full use of the rights obtained through contracts even after payment of lump sum amounts to producers. The key highlight of the amendment was obviously the proviso under Sec.18 of the Act which mandates that the author has right to equal share of royalty upon utilization of work and that he cannot waive this right, whatsoever. The key issue highlighted by many is the restriction on freedom of contract.

During one of the conversations with a young music producer from Kannada music industry, it was learnt that most of the distributors and publishers prefer verbal contracts, of course to negate the situation of a documentary evidence in case of legal conflicts, and that big music companies purchase a song at once on a fixed amount and whatever the actual returns are, a share of it does not go the authors, as against Sec.18, in majority of cases. This is where bargaining plays a massive role in manipulating artists.

An illustrative incident pertains to the Competition Commission of India's imposition of a fine amounting to INR 2.83 crores[16] on T-series in 2014 for the exploitation of their dominant position through unjust business practices related to licensing Bollywood music to private FM radio stations. This fine equates to eight percent of Super Cassettes' (T-Series) mean turnover over three fiscal years starting from the 2008-09 financial period. This instance stands as evidence that the 2012 amendment failed to effectively enforce its objective of regulating equitable negotiations within the industry. Additionally, comparable interventions from bodies like CCI or other judicial entities are rarely witnessed within the sphere of the music industry. Numerous additional challenges, encompassing both legal and pragmatic aspects, confront the industry, significantly influencing the bargaining processes within it. These challenges consequently have a profound effect on the involved parties, particularly authors and owners. Several of these challenges are elaborated upon in the subsequent sections:

i. **Ambiguity in the language of Sec.18**

Sec.18 of the amendment is causing exasperation amongst the stakeholders.[17] While the

[16] "Competition Commission of India slaps Rs 2.83 crore fine on T-Series," *The Economic Times*, 1 October 2014.

[17] Section 18, *Copyright Act, 1957.*

"Assignment of copyright— (1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof:

Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void:

Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void."

proviso gives that the author has to be given an equal share of royalty, it doesn't specify which person/entity should pay the same. The natural upshot would be the person 'utilizing' the work because without 'utilization' the question of royalty doesn't come into the screen. However, the industrial practice has always been such that the assignees or licensees exploit this lacuna by emphasizing that they are not responsible for paying the royalties as per the statute. Additionally, the plight of the authors is such that they can neither waive off their rights due to the statute nor do they end up getting their share of royalties, eventually leading to the contract being void. But, since there is no provision of preemption in the proviso, it is also only right to be adamant that the assignees or licensee pay the royalties to the author, if they are the ones that finally utilizes the work.

While talking about the 'utilization of work,' there has been dispute as to defining 'utilization of work' in the court room, as mentioned by Adv. Manojna Yeluri, Media and Entertainment Lawyer, in one of her interviews, as to whether 'utilization' starts the moment the copyright owner licenses the work to a music label or when the label licenses it to a streaming platform or when the streaming platform sublicenses it, the concern definitely goes to the copyright authors being denied equal share of revenue. This lacuna also needs to be clarified by the legislature, as long as there is no opinion from the judiciary.

There are further ambiguities regarding the term 'equal share' of royalties under the proviso. While it is meant to share in 3 parts between the author of literary works, musical works and the owner of sound recording, contractually what happens is that, 50% of the revenue goes to the licensee and the remaining 50% is apportioned between the authors of literary and musical works. However, there is another trauma that the industry is facing in the context of online streaming, whereby, the current practice (almost accurate) of royalty sharing is such that after a reduction of around 30% as charges (Service, communication and other charges), the final share that the lyricists and the composer gets are approximately around 8% or even less.[18]

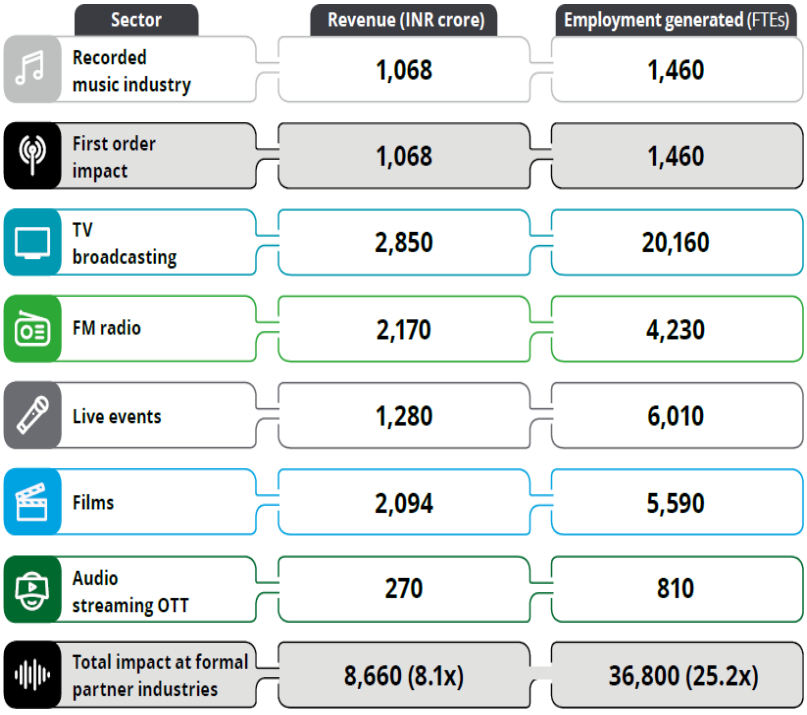
So, in order to address the industrial relations and the issues surrounding bargaining, it is worth-noting that such legal lacunae also need to be clarified, first.

ii. **Fair value negotiations and formal partner industries**

Even if the law clarifies itself on how Sec.18 should be read through, another issue that can still lead to an abuse of rights of authors and owners while bargaining or negotiations is the lack of clarity as to form a fair value for the 'works' licensed or appropriated. The increasing

[18] Akshaat Agarwal, "Who Gets Paid for the Music You Listen to?: Revamping Music and Copyright in India (Part I)," 2020, *SpicyIP, available at* https://spicyip.com/2020/12/who-gets-paid-for-music-revamp-music-copyright-india-part1.html

value gap is a threatening issue in the industry. As per the 2019 report by the IMI,[19] *"recorded music industry describes value gap as the growing mismatch between the value that some digital platforms (notably user upload services) extract from music and the revenue returned to the music community."* About 78% of the revenue of the recorded music industry comes from digital platforms.[20] In order to explain this value gap, the revenue accrued by each stakeholder, especially by the formal partner industries such as Television, Radio Film industry, Live Events and Audio streaming platforms, has to be identified, firstly. The transmission impact of the music industry on its partner industries is summarised in the table below.[21] Revenue of 8.1 times and employment of 25.2 times of the first order impact is estimated to be transmitted.[22]



This paper shall analyse in brief the interaction between the partner industries with the recorded music industry and explain the size of transactions that happen between them.

- Film Industry: Presently, approximately 70% of recorded music in India remains rooted in the realm of films, with the remaining 30% predominantly encompassing classical, devotional, folk, and independent genres. This trend is even more pronounced in the southern and eastern states of India, where around 90% of local music originates from

[19] IMI, "Economic impact of the recorded music industry in India," September 2019, *available at* https://indianmi.org/wp-content/uploads/2019/09/Economic-impact-of-music_Deloitte-IMI_Web.pdf.
[20] Id.
[21] IMI, "Economic impact of the recorded music industry in India", September 2019
[22] Id.

film contexts. Despite the Indian Film industry's substantial valuation of INR 19,100 crore, the music industry's worth stands modestly at INR 1,500 crore.[23] The Indian Music Industry (IMI) asserts that these disparities in value arise primarily due to gaps in statutory provisions concerning revenues, along with unnecessary regulatory interventions.

- Radio: Acknowledging the early stage of development of the private radio sector and its limited music accessibility, the Copyright Board of India, in 2010, issued a directive stipulating that radio stations should pay copyright owners a mandatory license fee of 2% based on their net advertising revenues. The order is as follows:[24]

> *"(a) 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station shall be set apart by each complainant for pro rata distribution of compensation to all music providers including the respondent herein in proportion to the music provided by the respective music providers and broadcast by the complainant. Complainant shall be deemed to be a music provider for the music provided by it or received by it free of cost and broadcast. For arriving at "net advertisement earnings", all Government and municipal taxes paid, if any, and commission paid towards the procurement of such advertisements to the extent of 15% of such advertisement earnings shall be excluded;*
>
> *....*
>
> *(h) The validity of the licence granted by the Registrar of Copyright shall come to end on 30th September, 2020."*

While conceding the nascence of the private radio industry existed back 12 years back, it is also pertinent to note that the private radio industry has outgrown the earlier situation and has matured in size, coverage and listenership.[25]

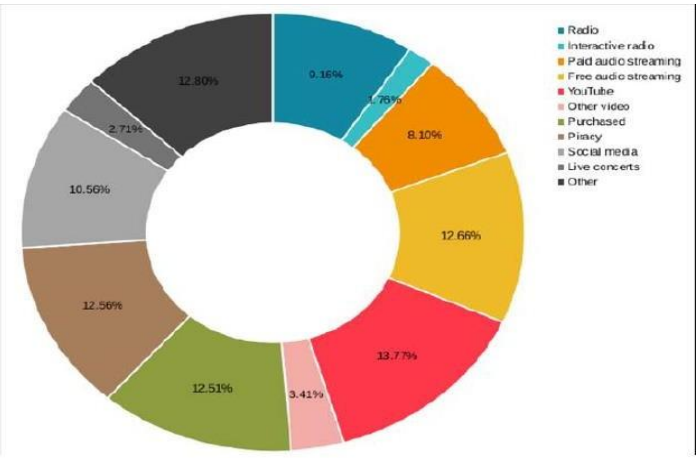
The private Broadcasters have revenues of Rs.3,100 cr. vis-à-vis the recorded music industry at Rs.1,277 cr.[26] This value gap needs to be addressed or else it is absolute injustice to the respective stakeholders. There are various theorems and ways for measuring the fair value of music as far as the radio industry is concerned. Audley and Boyer argue that the better way to measure the fair value of music in radio-play is by observing time shared between music and

[23] IMI Report, "Vision 2025: The Show Must Continue," *available at* https://indianmi.org/vision-2025-the-show-must-go-on/.
[24] Music Broadcast Pvt. Ltd v. Phonographic Performance Ltd and Ors. Case No. 1 of 2002, decided on 25 August 2010.
[25] Supra *note* 24.
[26] Supra *note* 24.

talk contents, whereby the competitive value of music contents can be deducted or through the revealed willingness to pay for music content.[27] The ratio between talk and music contents would be different on different days and hence it can be measured by the aggregate number of listeners. Then, this has to be compared to the relative expenditure on the two types of content, with the idea that music should have returns that are proportionate to its contributions towards earnings.[28] Economists find that this type of measurement of fair value is very feasible for India, but will require the radio industry to furnish data on the breakdown of expenditures, advertising revenue rates and ratio of music to talk content.[29]

Calculation of fair value through *Shapely value*[30] is yet another method where the surplus from music radio is shared using the Shapley sharing rule which removes the monopoly power held by the copyright holder by equating the payoff to the average value.[31]

The 'exposure and substitution effect' can be identified to draw how much value should be given to a music in radio industry. While "exposure effect" is where radio promotes musical content for listeners, "substitution effect" is where listeners have limited time and budgets, and listening to the radio reduces the sales of music.[32] If there is an exposure effect of radio, then it rate has to be kept lower than that determined through assuming no spillovers.[33]



The figure above[34] shows that the average share of total hours spent listening to the radio are

[27] Megha Patnaik, "Compulsory Licensing for Radio-play Of Music in India: Recent History and Economic Context," Review *of Economic Research on Copyright Issues,* vol. 17(1), 60-77, (2020).

[28] Id.

[29] Supra *note* 28.

[30] Watt, Richard, *Fair copyright remuneration: The case of music radio,* Review of Economic Research on Copyright Issues, 7(2); 21-37, (2010).

[31] Supra *note* 28.

[32] Liebowitz, Stan J., *The elusive symbiosis: The impact of radio on the record industry*, Review of Economic Research on Copyright Issues, 1(1): 93-118, (2004).

[33] Supra *note* 28.

[34] Source: Q17 of the IFPI Music Consumer Study, 2019. The figure shows the answers to the question "In a typical week, how many hours do you spend listening to music in the following ways?" Shares are assigned to each medium over the total number of hours for each listener. The sample was for all listeners out of 1357 survey respondents for India who listen to more than an hour of music per week and excluding those who report listening to over 70 hours of music in a

lower than those for purchased music, however the same changes when including other options to access music after payment such as live concerts, digital streaming etc. The measure for the exposure effect could be considered only after determining various media, and it is important to note that with the increase in the use of digital platforms, the exposure effect also changes. The legislature needs to identify the fact that, if the 2% revenue sharing system continues like this, the impact of much lower rate for statutory licensing could be so huge that the loss that the Indian music industry is and had been and will be suffering could not be accounted easily. It's high time this system be relooked.

Reports[35] already suggest that the stakeholders are tired of the statutory licensing provision under Sec.31 of the Act, due to which musical works and sound recording are purchased especially by digital streaming platforms underpriced or not proportionate to the actual streaming rate. So, to tackle the issue, fair value of work has to be identified through a proper equation or the same has to be given to the hands of the stakeholders to decide as per market demands. The latest report by IMI[36] suggests that,

> *"Let voluntary licensing determine the fair value of music and any specific subsidies that the government wants to provide can be transferred directly when radio companies have lost money in bidding for radio spectrum, instead of subsidizing them at the cost of the recorded music industry."*

- Television: According to the 2019 IMI report, musical content constitutes around 5-6% of the total television viewership.[37] This encompasses the audience engagement with music-oriented programs (including those not broadcast on music-specific channels), excluding reality-based shows where music serves as a central theme.[38]
- Music Festivals and Live Music Venues- The revenue share is approximately Rs.1280 crore approximately as of 2019.[39]

Audio streaming platforms- Audio Over-The-Top (OTT) platforms offer a variety of music streaming options to consumers. These platforms function on diverse business models, encompassing ad-supported free models, subscription-based models, hybrid models, and integration with telecommunications providers. Based on an analysis of prominent industry participants, it is estimated that the market size of the audio OTT streaming sector is

week.

[35] Supra *note* 20.

[36] IMI, "Vision 2022, Unlocking Fair Value to Stakeholders to Propel the Recorded Music Industry in India to the Top 10 Music Markets in the World', An initiative by the Indian Music Industry," (2022).

[37] Supra *note* 20.

[38] Supra *note* 20.

[39] Supra *note* 20.

approximately INR 270 crore.[40] Moreover, these platforms have contributed to the creation of approximately 810 Full-Time Equivalent employment opportunities.[41] Considering the continuous transformation of business and revenue structures within the Indian audio OTT sector, it is more effective to evaluate the impact of music at this juncture by appraising the sector's generated value. This assessment becomes evident through the significant valuations attributed to audio OTT companies. Noteworthy recent dealings, like Jio's procurement of Saavn and Tencent's investment in Gaana, have led to valuations surpassing ten times the companies' revenue.[42] By multiplying the INR 270 crore industry revenue by a factor of ten, one could argue that the industry has potentially generated a value of INR 2,700 crore. As a result, this proposition is put forth as an extra measure to encapsulate the economic impact of music within the audio OTT sector.

iii. Internet Broadcaster as 'broadcasters'?

In 2016 the Department for Promotion of Industry and Internal Trade (DPIIT) had issued a guideline emphasising that application of Sec.31D of the Copyright Act, 1957 (hereinafter 'Act') also extends to 'internet broadcaster' while seeking Statutory License. However, to the contrary, the Bombay High Court in 2017, in *Tips Industries v. Wynk Music Limited & Anr,*[43] held that Sec.31D does not extend to internet broadcasters. Even though, DPIIT had later sought to include the application of Sec.31D to 'each mode of broadcast,' by issuing Draft Copyright (Amendment) Rules, 2019, the same was not reflected in the Copyright Amendment Rules, 2021. However, it is also pertinent to note that rather an amending the Rules, an amendment in the Act is what the situation calls for. If it is assumed that s. 2(dd)[44] read with s. 2(ff)[45] supports the inclusion of "internet broadcasting, then 'any person/ entity (such as Facebook, YouTube, Spotify)' communicating to the general public through Internet can claim protection for reproduction right as a broadcaster under the Act. The existing legal mechanism in India doesn't define 'online streaming' which technically again includes various subsets like audio streaming, video streaming, podcasts etc. Soo the Act has to be revamped first to include

[40] Filings of Saavn and Gaana
[41] https://craft.co/; Deloitte analysis
[42] Deloitte-IMI, "Audio OTT Economy in India – Inflection point," (2019).
[43] Commercial Suit IP (L) No. 113 of 2018.
[44] Defines "broadcast" which means communication to the public— (i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, and includes a re-broadcast.
[45] Defines "communication to the public" which means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

'streaming rights' so as to define the extent of rights that a streaming service has and the ambit of legal relationship between a right holder, streaming platform, intermediaries and the end-user.

The industry is constantly evolving contributing a major share to the economic growth of the country. However, manipulations and malpractices are also increasing with the growth of the industry. The 2012 amendment to the Act does not address the impact of digitization and streaming culture on the continued economic rights for master producers, and whether their justifications still hold valid. This lacunae is unfairly misused in the industry during negotiations and the most affected are the authors who barely receive any royalty as specified under Sec.18.

During one of the interviews with an Executive Member of the board of IPRS, it was revealed that the copyright owners, mostly record labels, are forced to agree with the terms of agreement by the streaming platforms during negotiations regarding assignment/licensing of rights for streaming, primarily because of the sudden boom in digital streaming, especially post Covid-19. When asked about the revenue sharing, IPRS representative conceded that they have no way but to accept the financial statement sheet that they receive from these streaming platforms and divide the revenue among the stakeholders of the work. There is no over-looking mechanism to draw what really happens during streaming and the actual amount that they receive upon utilization of a musical work or sound recording.

The above are just a few of the issues regarding bargaining power. There are various other issues and nuances in the industry which directly or indirectly affect bargaining and negotiations for utilization of works, but the industry keeps to work on its own and rather prefer less legislative or judicial interference as can be seen from figures above.

Conclusion

Even though similar situations can be seen in other jurisdictions such as that of the USA and UK, they tackle the same with the principle of 'equity in remuneration' to authors, as they acknowledge the fact that a work becomes 'work' only with the natural thought/idea and labor of the author. Despite vacuum in deciding the contractual relationship and setting out minimum safeguard standards for authors in the US Copyright law, the reason for the smooth functioning of the media-entertainment industry can be drawn from the principle of collective-bargaining being followed in the industry. The media and entertainment industry in the USA functions on the basis of agreements between guilds (those organizations that represent the rights of artists as per the labor code of USA, in new media industries, motion picture, interactive, broadcast and cable industries). These collective bargaining agreements strictly contain provisions that decide the minimum payment rates, provide for residuals, rules relating to credit (attribution),

and to some extent - the ability to separate rights, e.g. to reserve certain rights in a work, as well as others.[46] These agreements mention only the minimum rates and leave open the option to negotiate and increase the rates by the authors so that they have an increased control over their intellectual commodity[47] (in the present context, musical works or sound recordings).

Further, to ensure that every worker of the entertainment industry becomes a part of such unions/guilds, the collective bargaining agreements mandate that such worker working for a producer should be or become a member of the respective guild. Also, it is interesting to note the industrial practice where employment agreements or such other agreements related to the creative industry strictly mentions that the respective contracts and its provisions shall be subject to the collective bargaining agreements applicable in such circumstances.[48]

It is suggested that the absence of such a system is a great deterrent in the effective enforcement of the 2012 amendment in India. The failure or lack of effective enforcement of the amendment is causing uproars among the stakeholders, particularly the authors/composers or literary or musical works and sound recordings and one among the major reason is their inability to negotiate freely as per market demands. Though the objective of the amendment was to ensure the sharing of equal revenues to the authors, they're still blinded from the amount actually accrued through the utilization of the work. Despite the existence of copyright societies (currently only two societies, IPRS and ISRA), and also the absence of one exclusively for the authors, the situation before 2012 has more or less not changed except with regard to the 'value' of revenue accounted.

The existence of collective bargaining in the Indian music industry can definitely help raise the voice of the authors more promptly. For that, more strong unions and associations should step in and integrate either with the copyright societies or with the publishers/record labels or both.

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[46] Supra *note* 16.
[47] Nikolaus Reber, *Film Copyright, Contracts and Profit Participation* 110 (Wiley_VCH, 2000).
[48] Donald C. Farber, *Entertainment Industry Contracts* Form 7-1 No. 13, (Lexis Nexis, 2018).