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STATUTORY LICENSING UNDER INDIAN COPYRIGHT LAW: AN ANALYSIS

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Abstract

Intellectual property of the creators and authors have always been recognised in India from time immemorial. India has formulated its laws in accordance with various international treaties such as Berne Convention for the Protection of Literary and Artistic works, The Rome Convention, The WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty etc. Statutory licensing is being considered as an efficient way to manage and internalise the broadcasting. The rights of the author has been become a primary concern so far it has been made effective. This paper's overarching aim is to analyse the section 31–D of Copyright Act, 1957. The main purpose is to know whether internet broadcasting will falls under the gambit of sub-clause (1) and (3) of the section 31–D of Copyright Act, 1957 or not? In order to achieve the aims and objective this paper various international convention and treaties such as Berne Convention for the Protection of Literary and Artistic Works, WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) will be comprehensively examined.

KEYWORDS

Intellectual property, copyright, statutory licensing, broadcasting rights, internet broadcasting

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INTRODUCTION

The Indian Copyright laws have helped make music industry flourish in this nation. Copyright laws protect creators and artists, allowing them to thrive by granting them exclusive rights and protections to their works. However, the law has not kept pace with the music industry to reflect changes in consumer preferences and technological developments. The current statutory scheme applies inconsistent rules that place certain technologies at a disadvantage and result in inequitable compensation variances for music creators. These inconsistencies have drawn criticism that music copyright and licensing laws are too difficult to comply with and do not adequately reward the artists and professionals responsible for creating American music. Over the past few years, the question whether the internet broadcasting will be included under statutory licensing or not? Has become a matter of discussion in Copyright Law. Recently, in the case of Tips Industries Ltd. v Wynk Music Ltd. The Bombay High Court held that the statutory licensing under section 31D of the Copyright Act only includes radio and television broadcast and excludes internet broadcasting. The purpose of this research paper is to examine the existing laws in India, International treaties, and statues of other nations to know whether interactive-services falls under the scope of statutory licencing under Copyright Law.

ORIGIN AND EVOLUTION OF RIGHT OF BROADCASTING

In the world of information and entertainment, the right to broadcast is become a great point of importance. It is the fourth of the author's exclusive rights to be acknowledged by the Berne Convention, the other three being those of translation, reproduction and public performance. The right "of authorising the communication of….works to the public by radio and television" was first recognised in the Rome revision (1928).[3] It was again revised in Brussels (1948) and the subject was more extensively reviewed, and the right has been broken down into various aspects in order to take account of various challenges posed by technological development and ways by which it might be exploited.

BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS

It is the oldest and most renowned treaty of all the international treaties assigned to the World Intellectual Property Organisation for the protection of literary and artistic works concluded in 1886. It has gained permanence and stability throughout the transforming circumstances. However, it has been revised approximately every twenty years to get adapted to political,

3 Art. 11bis, para (2), WIPO – Guide to the Berne Convention, p. 70.

economic and social changes.[4] This connotes that intent of the framers with respect to the treaty that it is not exhaustive in its nature and can be amended or revised as per the new technical and economic advancements. The Article 11bis(2) phrase 2[5] in tandem with Article 13(1)[6] of the Berne Convention avails remuneration by way of statutory rights instead of exclusive rights where it allows compulsory license to cease the exclusive character of the right, and fair remuneration for the material use of the authors work will be obtained by a statutory right.

The Article 11bis (1) (i) of the Berne Convention[7] lays down the definition of broadcasting, which entails 'communication to the public by means of wireless diffusion'. These words show that 'broadcasting' in this Article is considered as the form of 'communication to the public' and Berne convention is technically neutral within the category of 'wireless' diffusion, and new forms of broadcasting under Article 11bis(1)(i) of the Berne Convention includes terrestrial radio and television broadcasting–as widely accepted these days–satellite broadcasting and communication to the public in the meaning of copyright law as Berne Convention is a subject to change as per the new technical and economic developments.[8]

In cases of point-to-point and distribution satellites, the public is reached indirectly after an intermediate earth station. It can be drawn by this point that the broadcaster has the intention to transmit the broadcast to the public ultimately. Thus, the Article 11bis (1) (i) of the Berne Convention does not limit the communication to the 'direct' communication, technically neutral with respect to it.[9]

Article 11bis(1)(ii) of the Berne Convention[10] covers broadcasts by webcasting or fibre-optic cable under broad wording 'Communication to the public by wire' as it means broadcast by its re-diffusion by any physical facilities which enable the conduct of signal of the broadcast.

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4 Jörg Reinbothe and Silke Von Lewinski, THE WIPO TREATIES ON COPYRIGHT (A Commentary on the WCT, The WPPT, and the BTAP), 2nd ed. 2014, p. 3.

5 They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

6 Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority.

7 (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) The broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images.

8 Silke Von Lewinski, INTERNATIONAL COPYRIGHT LAW AND POLICY, p. 149.

9 Ibid, p. 150.

10 Any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one.

THE WIPO COPYRIGHT TREATY (WCT)

Article 8 of WCT[11] deals with the Right of Communication to the Public, which states that any communication to the public in the way of interactive transmissions of the works and objects, their broadcast through the internet or similar possible future networks should be a subject to an exclusive right of authorisation of authors.[12]

HISTORICAL BACKGROUND

The 'digital agenda' particularly including the online communication was first come into the discussions 1995 afterwards. At the fifth session of the committee, the proposal has been made by the US that recognition of the 'digital transmissions' should be considered for the effectiveness of the reproduction right under Article 9 of Berne Convention. According to the US proposal, the right of communication to the public covers the digital transmissions, when such transmissions wouldn't result in a copy at the remote site.[13]

Discussions at the Fifth and Sixth Sessions showed that the provisions of Broad agreement could be observed as the technology-neutral, and applicability of the reproduction right besides any other right might apply to digital transmission.[14] In order to specify that what rights (apart from the reproduction right) should cover digital transmission, the umbrella solution was adopted, the solution contained the following elements:[15] (i) the act of interactive transmission should be described in a neutral way, free from specific legal characterization; (ii)such a description should not be technology-specific and, at the same time, it should express the interactive nature of digital transmissions in the sense that it should go along with a clarification that a work or an object of related right is considered to be made available "to the public" also when the members of the public may access it at a time and at a place freely chosen by them; (iii) in respect of the legal characterization of the exclusive right – that is, in respect of the actual choice of the right or rights to be applied – sufficient freedom should be left to national

11 without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.
12 Art. 8, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO, p. 207.
13 Supra n. 4, pp. 125-126.
14 Ibid, p. 126.
15 Supra n. 10, pp. 208-129.

legislation; and, (iv) the gaps in the Berne Convention in the coverage of the relevant rights – the right of communication to the public and the right of distribution – should be eliminated.

Later on, during the seventh session, the European countries (EC) delegation has made a proposal extending communication right of the Berne convention where they have categorically mentioned that 'digital transmission' is a part of broad communication right for authors.[16] Further, EC delegation elaborated that the right covered 'making available' of the works to the public also. Eventually, the Article 10 Basic Proposal I 1996 reproduced the proposal made by the EC. This explanatory note has fragmented the right of the communication to the public and stated that purpose of the first part of the Article 10 Basic Proposal I was to supplement the existing provisions of the Berne Convention regarding the communication right. Therefore, any 'making available' of a work other than by distribution of copies to the public was supposed to be covered by 'communication' right on the broader sense.[17]

Regarding the second part of the article, it has been explained that the right will be equally applied insinuating to the making available of the work to the user, the mere provision of space server, communication connections, and routing of signals are irrelevant with respect to it. They have expressly specified the interactive communication as being covered by this right and emphasised the individual choice by users of place and time of access as the element connoting on-demand nature of access.[18]

At the time of Diplomatic conference, the expression of understanding has been made the US stating that right of making available as mentioned in Article 10 Basic Proposal I could be incorporated in national legislation by any exclusive right, and thus not compulsorily by the right of communication to the public.[19]

However, the Australian delegation offered three written amendment proposals:[20] (1) the proposal set out the right of 'making available' right remained syntactically depended on the communication to the public right, opposing the expression of considering the making available right as a separate from the communication right; (2) the technical changes are mainly required to make clarification or corrections, through the words 'by wire or wireless means' to qualify 'any communication to the public' rather than to qualify 'the making available to the public';

16 Supra n. 4, p. 126.
17 Ibid.
18 Ibid, p. 127.
19 Ibid.
20 Sam Ricketson and Jane C. Ginsburg, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS, Vol. I, 2nd ed. 2005, pp. 744-746.

(3) the Articles of the Berne Convention referred to in the 'without prejudice' clause were proposed to be Articles 11bis(1) and (2) rather than Article 11bis(1)(i), and Article 14(1)(ii) rather than Article 14(1)(i). The purpose of Australia behind to propose this technical amendment is to ensure that the new provision wouldn't prejudice the possibility of providing a non-voluntary license for the retransmission of broadcasts.

The concern has been taken into consideration by the second phrase of agreed statement[21] concerning Article 8 WCT, which means that the aim of the Article 8 of WCT is merely to clarify or complement the fragmentary set of provisions of Berne Convention concerning the exclusive right of communication to the public and nothing in this provision can prevent the contracting party from enforcing Article 11bis (2) Berne Convention.

THE ARTICLE 8 WCT: CONTENTS AND ITS PURPOSE

The full coverage of the notion of 'communication of the public' has been introduced and rationalised in the 1996 WIPO Copyright Treaty by establishing a synthesised protection for all protected works of authorship. The new conception of "right of making available to the public" has been also introduced in this treaty. This right can be interpreted as the communication of authors work to an individual over internet, where users can "access these works from a place and at a time individually chosen by them".[22] Significantly, the ambiguity regarding the scope of scope of the Berne Convention right of the communication to the public by wired or wireless transmissions. Under Article 8 WCT the conception of 'communication of the public' doesn't defined, but clarified and specified that public may be separated in place as well as time also.[23]

There are the two type of technologies for the 'communication to the public', in push technology the retransmitting entity selects the content and the timing of the communication by broadcast or wired transmissions to a passively receiving public addressed by article 11 and 11bis; allowing the public to choose among the pre-programmed communications and not a time individually chosen by them. Whereas in pull technologies interactive transmissions is allowed where public can access at their individually chosen place and time; the broad wording in article 11bis (1) (i)[24] and 11(1) (ii)[25] could actually cover the interactive transmissions. This

21 It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis (2).
22 Art. 8, WIPO Copyright Treaty, 1996.
23 Jane C. Ginsburg and Eduoard Treppoz, INTERNATIONAL COPYRIGHT LAW, pp. 314-315.
24 Any other means of wireless diffusion of signs, sounds and images.
25 Any communication to the public of the performance of their works.

have not been contemplated in Brussels 1948, but nothing in these articles has prohibited the on-demand transmissions as to the communication to the public. The intention of making clarification in Article 8 WCT was to fill the gap by specifying that 'public may be separated in place and time both'. This reflects the intention to provide for a technology-neutral right. Thus, it will include interactive transmissions.[26]

THE ROME CONVENTION OF 1961

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereafter called the Rome Convention) was settled on October 26, 1961, at the end of a Diplomatic Conference held in Rome. It came into force on May 18. 1964, twenty Contracting States. It has not yet been the object of any revision, and the States in question are bound by a single text which is reproduced in the present work.

Broadcasting organizations and broadcasts has not been defined under the Rome Convention. However, the term 'broadcasting' has been defined under Article 3(f) of the Rome Convention.[27] Remuneration for the secondary uses under Article 12 of the Rome Convention.[28] Unlike Article 7(1) (a) of the Rome Convention, It covers broadcasting and communication in respect of fixed performances for commercial purposes of such phonogram or reproduction thereof. It deals with "secondary uses" of phonograms. This expression is not to be found in the Convention but it is generally used to cover the use of records for communication to the public and for broadcasting.

Phonograms published for commercial purposes, contrary to the general approach taken in Article 19 of Rome Convention,[29] only the phonograms give right to remuneration but not audio-visual fixations. Although the Article 15 of Rome of Convention[30] says that a compulsory licences may be provided in contracting states domestic laws and regulations, enforcing some kind of limitations regarding to the protection of performers, producers of

26 Supra n. 23, p. 315.
27 "Broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds.
28 If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.
29 Supra n. 7, pp. 208-209; Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, Article 7 shall have no further application.
30 Any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

phonograms and broadcasting organisations till the extent to which they are compatible with the Convention.

THE WIPO PERFORMERS AND PHONOGRAMS TREATY (WPPT) PROVISIONS OF WPPT

The Article 15 of WPPT[31] is in respect of right to remuneration for broadcasting and communication to the public. The term broadcasting is here defined in the Article 2(f) of WPPT.[32]

COMPARISON WITH THE ROME CONVENTION AND THE TRIPS AGREEMENT

The rights provided for in Article 15 of the WPPT are of the same nature – although, as discussed below, not regulated exactly in the same way – as the so-called "Article 12 rights" under the Rome Convention. It is a common element of Article 12 of the Rome Convention and Article 15 of the WPPT that they apply to phonograms published for commercial purposes. The agreed statement quoted above – stating that "Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain" – does not extend the scope of the minimum obligation. It only clarifies in this respect what is valid also in respect of other provisions of the Treaty; namely, that they only provide for a minimum level of protection, and, therefore, Contracting Parties may grant more extensive rights to performers and producers of phonograms (or the same rights in a broader field).

HISTORICAL BACKGROUND

The First Session of the committee had The Memorandum of the International Bureau of WIPO for providing a possible new instrument called as exclusive right of communication to the public for performers and phonogram producers as a principle instrument.[33] Except in the case

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31 (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public; (2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration; (3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all; (4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

32 "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent.

33 Supra n. 5, p. 388.

of digital communication to the public, the contracting parties can limit this exclusive right to a right to equitable remuneration. However, later in the memorandum for the Third session the principle was again discussed, but with a specific terminology called as on-demand communication, in this session it was concluded that no exception should be allowed to the exclusive right.[34]

An exclusive communication and broadcasting right for performers and phonogram producers as a principle, the submission of the proposal by the European Countries and its member states for the Fourth Session of the Committee of Experts following the approach of the International Bureau of WIPO. Exclusive right in respect of interactive communication was supported by the US only for the phonogram producers, while mentioning the indirect relevance for the right of the performers.[35]

The proposals made by different delegation in the Discussions at the Fifth Session showed a broad agreement on the requirement to embrace on-demand and similar interactive services by an exclusive right of performers and phonogram producers.[36]

The Articles 12 and 19 Basic Proposal II 1996 contained separate but parallel provisions on a right to a single equitable remuneration for the direct and indirect use of commercial phonograms and productions thereof for broadcasting or any communication to the public.[37] Article 12(4) and 19(4) Basic Proposal II 1996[38] laid down an exception to the reservation possibilities of Articles 12(3) and 19(3) Basic Proposal II 1996 in favour of broadcasting or communication that can only be received on the basis of subscription and against payment of a fee. The notes justified Articles 12(4) and 19(4) Basic Proposal by the fact 'that in the context of such (subscription-based) services, fixed performances of performers are exploited directly for commercial gain'. As a result of the discussions mainly in the Sixth Sessions of the Committee of Experts, Basic Proposal II 1996 dealt with digital on-demand transmission in separate articles providing for an exclusive right of making available.[39]

34 Ibid, p. 389.
35 Ibid.
36 Ibid, p. 390.
37 Ibid.
38 See note 12.08 and 19.08, Basis Proposal II 1996; In paragraph (4) it is proposed that the possibility of making a reservation to the right of remuneration laid down in this Article would not apply to broadcasting and communication to the public by wire or wireless means which is offered to the public in the form of subscription based services. The reason for this proposal is that in the context of such services, fixed performances of performers are exploited directly for commercial gain.
39 Supra 3, p. 390; Articles 11 and 18 basic Proposal II 1996.

THE ARTICLE 15 WPPT: CONTENTS AND ITS PURPOSE

The Article 15 of WPPT is framed upon Article 12 of Rome Convention. The first paragraph of the article compels the Contracting parties to provide a remuneration for performers and producers of phonograms in respect of use of commercial phonograms for broadcasting and communication to the public. The third paragraph allows the similar reservation as the Article 16(3) of the Rome Convention that the provisions of Article 12 will not apply to them after depositing a notification the Director General of WIPO. The fourth paragraph states that if phonograms have been made available online, they will be considered as published for commercial purposes.

RIGHTS OF BROADCASTING ORGANISATIONS IN INDIA

Copyright is a right to copy, a property right given to the author for its original work (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural and architectural works; motion pictures and other audio-visual works; and sound recordings) secured in any tangible medium of expression, it gives the holder the exclusive right to reproduce, adapt, distribute, perform and display the work.[40] It is said to be infringed when someone without the permission of holder of copyright does anything, the exclusive right being granted upon the owner by the Copyright Act.[41]

The Section 31–D of the copyright act deals with the Statutory licence for broadcasting of literary and musical works and sound recording. The clause (1)[42] and (3)[43] of the Section 31–D of the copyright act provides for compulsory license in case of broadcasting of an unpublished work and the rate of royalties for broadcasting such work respectively.

CLAUSE (1) OF SECTION 31–D OF COPYRIGHT ACT: WORDING

The term 'broadcast' means communication to the public by any means of wired (includes rebroadcast) or wireless diffusion, irrespective of any one or more of the forms of signs, sounds or visual images.[44] It can be substantiated from the definition itself that broadcast is considered as a form of communication to the public. The way of communicating the works of a copyright

40 Bryan A. Garner, Black's Law Dictionary, 10th ed. 2014, p. 411.
41 N.S. Gopalakrishnan and T. G. Agitha, PRINCIPLES OF INTELLECTUAL PROPERTY, 2nd ed. 2014, p. 435.
42 any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.
43 The rates of royalties for radio broadcasting shall be different from television broadcasting and the [Appellate Board] shall fix separate rates for radio broadcasting and television broadcasting.
44 Section 2(dd), Copyright Act, 1957.

holder is wired or wireless diffusion, but it is technical neutral in its regards as it says by any means. It shows the intent of legislators that new forms of broadcasting under section 31D of Copyright Act includes terrestrial radio and television broadcasting–as widely accepted these days–satellite broadcasting and communication to the public in the meaning of copyright law, and it will include any similar type of similar way of broadcasting.

'Communication to the public by wireless diffusion' means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly. 'Communication to the public by wire' means broadcast by its re-diffusion by any physical facilities which enable the conduct of signal of the broadcast.[45] Communication here simply means reaching of authors work to the public by any means other than resulting it into a remote site.

In cases of point-to-point and distribution satellites, the public is reached indirectly after an intermediate earth station. It can be drawn by this point that the broadcaster has the intention to transmit the broadcast to the public ultimately. Thus, the Section 31–D of Copyright Act does not limit the communication to the 'direct' communication, and it is technically neutral with respect to it.[46]

CLAUSE (2) OF SECTION 31–D OF COPYRIGHT ACT: WORDING

The rate of royalties, which is to be paid to the performers and phonogram producers by specifically mentioning that the rates for radio broadcasting shall be different from television broadcasting. However, nowhere this clause limits this for radio and television broadcasting only.

CASE LAW

TIPS INDUSTRIES V WYNK MUSIC[47]

In its interim order in Tips Industries Ltd v Wynk Music Ltd and Anr, the Bombay High Court rejected an Internet music streaming service's claim that it was eligible for compulsory licensing of musical works and sound recordings under India's statutory regime for compulsory broadcast licences.[48] The judgment has wide ramifications for online music streaming services seeking to operate in India. The complexity of the applicability of the statutory licensing under

45 Section 2(ff), Copyright Act, 1957.
46 Supra n. 9, p. 150.
47 Tips Industries Ltd vs Wynk Ltd. And Anr on 2 May, 2019, visited on 20 Sep. 2019, available at https://www.livelaw.in/pdf_upload/pdf_upload-360750.pdf.
48 Ibid, p. 104.

the Copyright Act have been thoroughly discussed in this case. Yet, there is a need to discuss about whether the internet broadcasting falls under the gambit of statutory licensing or not?

BACKGROUND

The plaintiff is Tips Industries Ltd., a music label in India, which controls copyright over a 2600 sound recordings (repertoire). In 2016, this repository was licensed to the defendant, Wynk Music Ltd., an online music streaming service of the Airtel. The license get expired in 2017 after its expiry, attempts have been made by both the parties attempted to renegotiate licensing terms for allowing Wynk offer downloading and streaming of musical works owned by Tips. After this the Defendants (Wynk) refused to deactivate the tips repertoire and invoked Section 31D of the Copyright Act. In short, the Defendants claimed that they are a broadcasting organization and that they are entitled to a statutory license under Section 31-D of the Act to communicate the work to the public by way of broadcast of the Plaintiff's musical work and sound recordings.

QUESTION OF RELEVANCE

Whether the Defendants can invoke Section 31-D of the Act to exercise a Statutory License in respect of the Plaintiff's Repertoire for internet broadcasting?

There is no dispute about the fact that 'on demand streaming services' offered by the Defendants amounts to communicating of the sound recording to public. The grant of Statutory License under Section 31-D is only restricted to radio and television broadcasting organisations and the Defendants' on demand streaming services offered through internet as an "internet broadcasting organisation" do not fall within the purview of Section 31-D of the Act.[49]

Assuming that 'internet broadcasting' is covered within the provision of Section 31-D of the Act, Statutory License under the said Section 31-D can only be exercised upon fixation of the manner and rate of royalty by the Appellate Board. Seeking to claim benefit of Section 31-D, the Defendants have contended that they are a broadcasting organization and that they are communicating to the public by way of broadcast of the Plaintiff's Repertoire over internet.[50] Defendants submitted that they are an internet broadcasting organization and that they are entitled to a Statutory License under Section 31-D of the Act to broadcast over internet sound recordings including inter alia the Plaintiff's Repertoire. The Defendants relied upon Section 31- D (1) of the Act which bears a reference to "any" broadcasting organisation. It is submitted

49 Ibid, p. 47.
50 Supra n. 49.

that Section 31-D is plenary and all-encompassing in nature and thus covers in its purview 'any' broadcasting organisation.

The Ld. Senior Advocate for the Defendants then placed reliance upon the use of phrases "any means of wireless diffusion" and "any means of display or diffusion other than by issuing physical copies" found in Sections 2(dd) and 2(f) of the Act, respectively. He submitted that a bare reading of Section 31-D along with Sections 2(dd) and 2(f) clearly expresses that the legislative intent is that any broadcasting organization, which is broadcasting/communicating to the public by any means of display or diffusion including wireless and wired diffusion, is entitled to a Statutory License under Section 31-D of the Act.[51]

The Ld. Senior Advocate for the Defendants further submitted that the principle of contemporaneo expositio must be applied while interpreting Section 31-D of the Act. He submitted that a liberal construction of Section 31-D and the definition of broadcast under Section 2(dd) would breathe life into the statute. He submitted that Section 31-D(3) does not even purport to detract from or limit the scope of Section 2(f) when read with Section 31(D)(1) of the Act so as to limit Section 31-D of the Act only to radio and television broadcasting. He submitted that if such interpretation is permitted, it would be in direct conflict with Section 2(f) which allows broadcasts/communication to the public, by any means of display or diffusion.[52]

Although the defendant has also made certain other arguments in acquiesce to include the internet broadcasting under the gambit of statutory licensing but that doesn't hold any valid point in establishing interactive transmission as a part of section 31–D of Copyright Act. Therefore, relying the argument given on the behalf of defendant in the case of Tips v Wynk corollary to the International Treaties there another point of view can be established.

ANALYSIS

The Bombay High Court's judgment, written by Mr Justice SJ Katha Walla, was in respect of an interim injunction application, pending the disposal of the final suit. The court accepted Tips' claims of infringement, rejected Wynk's defences on all counts, and granted an interim injunction. The court assessed that Wynk's music streaming service covered three distinct aspects of the copyright for sound recordings.

51 Ibid, p. 48.
52 Ibid.

First, allowing users to cache and listen to songs offline was covered under the right to make another sound recording embodying the original sound recording under section 14(e) (i) of the Copyright Act. Secondly, allowing songs to be downloaded for a fee, or as part of a subscription service, amounted to the sale or commercial rental of the sound recording under section 14(e) (ii). Thirdly, the broadcasting or streaming services provided by Wynk amounted to 'communication to the public' under section 14(e) (iii).

The court held that Wynk's services of providing users the ability to download songs, either for a limited part of time as part of the subscription service, or permanently, by purchasing them, amounted to 'sales' or 'rentals' of the sound recordings, and infringed Tips' copyright under section 14(e)(i) and (ii). Moreover, the court held that Wynk could not invoke section 31 D in respect of such sales or rentals, since section 31 D is limited to the right under section 14(e) (iii), namely, the right of communication to the public. The court also rejected Wynk's defence that its downloading services amounted to 'personal use' or 'transient and incidental storage' of the works and, as such, would not amount to infringement under section 52 of the Copyright Act.

Next, the court examined Wynk's claim that it had validly invoked the statutory licensing scheme under section 31 D in respect of its online broadcasting service. First, the court held that the compulsory licensing scheme, it being in the nature of an exception to a copyright holder's freedom to contract, must be strictly interpreted. Applying the principle of strict interpretation to section 31 D, the court examined its legislative history as well as the language used in the statute and the rules thereunder, and held that the legislative intent was to clearly exclude the applicability of section 31D to Internet broadcasting. Further, the court held that Wynk could not rely upon the DIPP office memorandum, since it was merely an administrative order without any statutory force.

Finally, the court examined whether the statutory licence could be invoked without the prior fixation of royalty rates by the IPAB. The court first reiterated that the IPAB had no jurisdiction to fix royalty rates for Internet broadcasting, as the same falls outside the statutory scheme of section 31 D. Further, the court held that, in any event, the statutory scheme clearly indicates that the rate and method of payment of royalty to the copyright holder must be fixed prior to invoking the compulsory licence for any copyright work.

An interim injunction is granted if the court concludes that the plaintiff has a prima facie case, if the balance of convenience is in favour of the plaintiff, and if there would be irreparable

injury to the plaintiff in its absence. The Bombay High Court came to a prima facie conclusion that Wynk's reliance on section 31 D was void both on substantive as well as procedural grounds, and that its services amounted to infringement of Tips' copyright. The court also concluded that, since the entirety of the plaintiff's repertoire was being infringed, the balance of convenience was in Tips' favour, and the absence of an injunction would cause irreparable injury.

A CASE STUDY OF US

Recently, USA allowed for the statutory licensing of sound recordings for interactive-services, after Musical Works Modernization Act (HR1551, 2018) was passed, to streamline the licensing process for online music streaming.

The purpose was to update the existing music copyright laws by introducing a new compulsory licence method for mechanical works, updating the rate standards applicable to music licensing providing copyright royalties to pre-1972 artists, and ensuring that producers, mixers, and sound engineers are able to receive compensation for their creativity.

AVAILABILITY AND SCOPE OF COMPULSORY LICENSE CLAUSE

Clause (ii) in subparagraph (A) of paragraph (1) of section 115(a) Copyright Law of the United States[53] provides a new system under which broadcasting organisations may obtain a compulsory license for a nondramatic musical work. Under the latest wording of section 115(a)(1)[54], ''any other person'' can obtain compulsory license after a sound recording consisting of a musical work has been distributed to the public in the United States with the permission of the musical work copyright holder. The purpose of the new language is to eliminate any ambiguity or abstruseness under existing law as to whether a digital music provider may obtain a compulsory license when the digital music provider is the first person to distribute digital phono record deliveries of such musical work. The new wording of the section makes it very lucid that a digital music provider may obtain a compulsory license in those

53 The making of the phono records was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

54 When phono records of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phono records or digital phono record deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phono records of the work. A person may obtain a compulsory license only if his or her primary purpose in making phono records is to distribute them to the public for private use, including by means of a digital phono record delivery.

instances in which the digital music provider is the first person to make and distribute digital phono record deliveries of a sound recording embodying a musical work.[55]

ROYALTY PAYABLE UNDER COMPULSORY LICENSE

The amendments to subsection (c) of section 115 of United States Copyright Law alters the earlier rate of royalty payable standard Consistency with the current 115 compulsory license, subsection (c) (2) (A)[56] makes clear that voluntary licenses entered into between musical work copyright owners and digital music providers are given effect in lieu of the rates established for the blanket license.

Therefore, the introduction of amendment in the existing Copyright law of United states made the first substantial copyright legislation to come in force in decades accomplishes three main changes: first, The use of music by interactive/streaming services will now be paid under a regularized royalty arrangement; Second, Audio producers and engineers who participated in musical recordings will start to be paid when their recordings are played on online and satellite radio services; third, Digital services will have to pay for their use of songs recorded and released before 1972 (these recordings were not previously protected by copyright law).

PRINCIPLE OF CONTEMPORANEA EXPOSITO EST OPTIMA ET FORTISSMA IN LEGE

The interpretation of a statute should be done as it would have been at the time when it was passed. When the meaning is doubtful or suspicious prior usage or interpretation of the statute is the presumptive evidence of its meaning, when the statute has been enforced. A statute may have been interpreted in one way, but a wrong meaning could have been affixed to it for a long time then its immaterial and court have to give the correct meaning by interpreting it.[57]

The principle of this rule to is failure of the legislature to correct the practice by amendment. The rule is that an Act may be interpreted as per its actual words together with the practice existing at the time when the act was passed and not by the practice followed under it. If the

55 The first title of H.R. 1551, 'Music Modernization Act' concerning Section 115 of Title 17, p. 2, visited on 21 Sep. 2019, available at https://www.copyright.gov/legislation/mma_conference_report.pdf.

56 The royalty under a compulsory license shall be payable for every phono record made and distributed in accordance with the license.

57 Vepa P. Sarathi, INTERPRETATION OF STATUTES, 5th ed. 2010, p. 145.

prior interpretations are contradictory, the court will have to interpret the statute after considering the reasons given and then come to its own conclusion.[58]

In STO v. Budh Praksh[59], the respondent challenged the legality of the assessment done by the Income Tax Officer in respect to the contracts to sales tax. He stated that the Act, insofar as it imposed a tax on contracts was beyond the authority (ultra vires) of the power of the provincial legislature. He contended that there was only an agreement to sell, and a liability to be assessed on sales tax can arise only if there is sale completed. In response to this the Court said:

There having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell it would be proper to interpret the expression 'sale of goods' in entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title.

In The State Of Madras vs Gannon Dunkerley & Co. (Madras) Ltd.[60] the respondent has raised the issue before the High Court, that the power of the Madras legislature to impose a sales tax did not extend to imposing a tax on the value of materials used in works under Entry 48 in List II in schedule 7 of the Government of India Act, 1935, as there was no transaction of sale regarding those goods and the provisions introduced by the Madras General Sales Tax (Amendment) Act, 1947, authorising the imposition of such tax were beyond the authority (ultra vires), here the Supreme Court held:

The Court held that here the word 'sale' has wider implication as meaning the 'transaction of sale' in the sense of an agreement to sell, as one of the essential ingredients of sale. Sale would only result when it has resulted in the passing of property in the goods to the purchaser. Thus, sale of goods must not be construed in popular sense in Entry 48, but interpreted in its legal sense.

CONCLUDING REMARKS

The equilibrium is required to be achieved between the competing and conflicting interests of public and the copyright stakeholders. The main object of this paper is to preserve the very fundamental purpose of granting copyright protection to the authors along with safeguarding the interest of the consumers. The comprehensive study connotes that the broadcasting can be

58 Supra n. 57.
59 AIR 1954 SC 459: (1955) 1 SCR 243.
60 1958 AIR 560: 1959 SCR 379.

in two ways through push and pull technologies, the purpose in both the case is communication of the works to the public by any means of wired and wireless diffusion. The provisions of statutory licenses under copyright law encompasses 'any' broadcasting organisations which makes it available to any type of broadcasting and also it is technically neutral right in respect of new economic and technical advancements.

Therefore, the past history of statutory licencing for the interactive transmissions should not prejudice the judgment and the provisions of statutory licencing under copyright law should be interpreted in its legal sense as it was intended by the legislators which nowhere prohibits the statutory licensing of broadcasting by online streaming services. Indeed, this is a matter for greater legislative deliberation, and maybe it is time to make distinction between interactive and non-interactive online streaming like US to safeguard the purpose of audio streaming.

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