IJCLP

Indian Journal of Corporate Law and Policy

VOLUME I
ISSUE I

Website: ijclp.com
Contact: info.ijclp@gmail.com

THE QUANDARY OF INCORPORATING INTERNET BROADCASTERS INTO THE STATUTORY LICENSING REGIME

ABSTRACT [1]

With the judgment of Tips v. Wynk (2018)[2] and the release of an official Memorandum by the Department of Industrial Policy and Promotion (DIPP), a precarious situation regarding the incorporation of internet broadcasters into the statutory licensing regime emerged. According to the HC case of Tips v. Wynk, there is no intention of including internet broadcasters because there is a need for a balance between intellectual property rights owners and the public at large. The official memorandum, on the other hand, proposes the inclusion of internet broadcasting within statutory licensing.

The purpose of this paper is to present the idea of thinking about the non-inclusion of internet broadcasters with the help of the rationale provided by the HC judgement, as well as the implications of including them within the statutory regime of copyright. The fundamental issue is that copyright is a valuable asset for a creator, author, or owner. According to the philosophical justification, creation of various forms of intellectual property rights is the reward to creators for their hard work. And, the goal of intellectual property rights cannot be wholly abandoned, as with the passage of time, new technologies will crop up which make it impossible to include each and every technological advancement within the statutory regime. Lastly, the harmonious reading of Section 31D with the copyright rules (29-31), provides clarification on the contentious subject of the non-inclusion of internet broadcasters within the statutory licensing dimension.

[1] Akangsha Dogra, L.L.M (Business law)

[2] Tips Industries Ltd. v. Wynk Music Ltd. and Ors. (2019) Notice of Motion (L) No. 197 of 2018 in Commercial Suit IP (L) No. 114 of 2018.

I. INTRODUCTION

There is an interrelatedness between technological progress and IPR expansion. In the last decade, cyberspaces exponentially increased due to two symbiotic forces: technical progress in the capacity of multimedia and the leveraging of the large global marketplace. The line between conventional broadcasting and new media has become more blurred as a result of legislative and technological advancement, which some refer to as convergence.[3] The Internet is arguably the most famous example of this phenomenon.

Copyright is an asset for a creator, author, and owner. The object of intellectual property rights, according to the philosophical rationale is to incentivize developers for their hard work. It provides security of the expression of an idea, not the idea itself, which is part of the definition of copyright. The value of copyright law is presented by Prof. Dinkar's Hindi speech in an official debate in parliament for the ratification and approval of the Berne Convention. He supported the author, and the creator should have some source of income that is independent of state patronage.[4] The right obtained by a person to a work that is the product of his intellectual work is called his copyright. "The primary function of copyright law is to protect the fruits of a man's work, labour, skill or testing from annexation by other people."[5] When we take into account the meaning of IPR, it is considered as a bundle of exclusive rights. These elements of exclusivity are a significant reason for granting IPR. The 2012 amendment brings significant changes to the copyright regime, and one of the changes is carving an exception to this element of exclusivity in the form of licensing (statutory/compulsory).

This paper is divided into two parts. The first section of the dialogue led to the **incorporation of internet broadcasters within the context of the statutory licensing regime**. The second portion explores the **ramifications of the inclusion of internet broadcasting** organizations in Section 31D by taking an analytical approach to the technological developments. Some of the critical issues addressed in this term paper include

[3] Baoding Hsieh Fan, *When Channel Surfers Flip To The Web: Copyright Liability For Internet,* 52 FCBA.619(2000), at 620.
[4] RAJYA SABHA OFFICIAL DEBATES: HOME, https://rsdebate.nic.in/ (Last visited Nov.30, 2020).
[5] Sulamangalam R v. Meta Musicals and Ors., AIR 2000 Mad 454.

the contentious nature of administrative order, the meaning of broadcasting, and public communication in light of Tips v Wynk.[6]

The Section 31 D conundrum arises from the demand for the inclusion of internet broadcasters and communication with the public via the Internet, through the use of copyrighted work. That brings us to the first question, "**whether there is a requirement for inclusion of internet broadcasters in the light of the case of Tips v Wynk and the draft amendment rules 2019?"**

The amendments have introduced a new form of statutory license. Under the 2012 reforms, Section 31 C was introduced to allow statutory licenses for cover editions, and Section 31 D was inserted to provide for a statutory license to broadcast literary and musical works, and sound recordings. Any media organization that seeks to transmit written work to the public by means of a television broadcast or radio broadcast system, or any recorded music/radio output and sound recording, may do so by providing prior notice of this intention to the owners. Further, the Copyright Rules (Rule 29-31) clarify the method by which one can get a statutory license. Currently, it includes radio and television broadcasting only.

Where Section 31D has been adopted in accordance with the Berne Convention (Articles 11 and 13), the Rome Convention (Articles 15 and 10) and Article 9 (1) of the TRIPs Agreement, WCT and WPPT are commonly referred to as internet agreements, and the goal is to bridge the gaps in current norms and move forward with the technical developments considered during the 2012 Amendment. The WCT and the WPPT both discuss the challenges of evolving new technologies, in particular the dissemination of such products over digital networks such as the Internet.[7] In 2018, India acceded to the treaty. Following technical development, the treaty empowers the original owners. It acknowledges the moral rights of the performers for the first time & provides exclusive economic rights for them. Both treaties allow creators and right owners to use these mechanisms in terms of defence of Technological Protection Measures (TPMs) and Right Management of Knowledge Information (RMI) to secure their work and safeguard information effectively.

[6] Tips Industries Ltd. v. Wynk Music Ltd. and Ors. (2019) Notice of Motion (L) No. 197 of 2018 in Commercial Suit IP (L) No. 114 of 2018.

[7] THE ADVANTAGES OF ADHERENCE TO THE WIPO COPYRIGHT TREATY (WCT) AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY(WPPT), www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages_wct_wppt.pdf (Last visited Nov.30, 2020).

In addition to this issue, it is essential to note that the purpose of Section 31 D is to provide a portal for the growth of the broadcasting industry, thus taking into account the interests of the holders of intellectual property. Before this provision, though, it was only the principle of voluntary licenses that provided the copyright holder with more bargaining power.

Besides, Section 31D (3) notes explicitly that different rates for transmitting through radio and TV are set[8]. Taking section 31 of the Copyright Rules, 2013 Rules, it is possible to state that no other method of broadcasting is anticipated. At the time of the amendment, Parliament was aware of the technological changes and online media platforms, and an intentional decision was made of not to including internet television under the disputed clause.[9]The questions raised before the Rajya Sabha Parliamentary Standing Committee was limited to the 'radio' and 'television' specifically, which present that radio and television broadcasting were considered under the umbrella of Section 31-D. [10]

II. CONTENTIOUS NATURE OF ADMINISTRATIVE ORDER

The official Memorandum released by the Department of Industrial Policy and Promotion (DIPP) is against the own stance taken during the implementation of WCT and WPPT for Internet non-inclusion under 31D. According to the Court in Tips v White, the Department of Industrial Policy and Promotion interprets on behalf of the government. The meaning of Section 31D, drawn up under the Act, is contradictory to that of India. It does not appear that the said Memorandum derives its influence from any law. As previously stated, the Hon'ble Supreme Court in the case of Maharao Sahib Sri Bhim Singhji v Union of India and Ors.[11], held that the recommendations are purely advisory without any regulatory assistance. In addition, the Court ruled that executive activity and regulatory provisions are subject to the Rule of Law. It is also one of the explanations for the Office Memorandum being an unconstitutional action against Article 14 of the Indian Constitution. The conflict of opinion between the independent High Court and the lack of a Supreme Court decision on this subject is another justification for the provision under challenge. Furthermore, after the Tips v Wyke

[8] Section 31D (3) The rates of royalties for radio broadcasting shall be different from television broadcasting and the [24][Commercial Court] shall fix separate rates for radio broadcasting and television broadcasting.

[9] *supra* note 5.
[10] *Id.*
[11] Maharao Sahib Sri Bhim Singhji v Union Of India And Ors 1985 AIR 1650.

case, the Department for Promotion of Industry and Internal Trade ('DPIIT') responded by drafting the 2019 Copyright (Amendment) Regulations and proposing the incorporation of internet broadcasters under statutory licensing.

Intricacy attached to the meaning of 'broadcasting organization', 'broadcast' and 'communication to the public.'

The definition of the broadcast is provided under Section 2(dd)[12] under the copyright act. If this portion is reviewed, two elements are clearly stipulated, i.e., public communication and wired/wireless communication methods. It is difficult to grasp the meaning of broadcasting in isolation, and other factors must be considered, such as the definition of 'contact with the public.'[13] There is a disparity between the commercial rental/sale of sound recordings and the broadcasting of sound recordings. The distinction made by the Legislature between Sections 14 (1)(e)(ii) and 14 (1)(e)(iii) of the Act by the independent exercise of the rights therein clarifies that the exclusive right granted to the copyright owner sound recording under Section 14 (1)(e) (ii).[14] The bare text provides the meaning of the word 'broadcast' which would make it clear that the same is correct for communication to the public. Hence, by deduction, the right to commercially rent or to sell a sound recording is separate and distinct from the right to broadcast.[15] In comparison to the concept of a broadcast, the notion of communication with the public is relatively broader. Digital technologies blur the distinction between various types of copyrightable work. Therefore, the 2012 amendment modifies the meaning by incorporating or performing 'after, work' and expanding the concept of communication to the public concurrently or at individually selected places and times, which has significance for performers. As a result, the rights traditionally reserved for writers have been expanded. Thus, on-demand services (video on demand, music on demand), will be considered as

[12] Section 2(dd) "broadcast" 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.
[13] Section 2(ff) "communication to the public" 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.explanation.-For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public
[14] *supra* note 6, at 45.
[15] *Id*. at 47.

communication with the public.[16] The existing debate on inclusion involves a significant non-inclusion argument, which requires the discretion of the owner to choose the time and location for any contact. But when we consider the internet platform here, it depends solely on internet users. Therefore, the Internet cannot be included in the sense of broadcasting.

III. CONSTITUTIONAL VALIDITY OF SECTION 31 D

In South Indian Music Companies vs Union of India[17], the Madras High Court upheld the constitutional validity of Section 31D, stating that if Section 31D is challenged in violation of Article 19 (1) (g), the limitations are not appropriate. But the Court held that such a right is subject to the implicit restriction made explicit in Articles 19 (2) to 19 (6) of the Constitution. As mentioned above, "Sections 31 and 31D allow for a framework for dealing with the public interest in relation to the private interest.[18]" It has become a matter of public policy. It must be demonstrated that the rejection is based on Article 15(2) of the Rome Convention (for sound recordings) and Article 9(1) of the TRIPs Resolution. It was meant to encourage the development and growth of private radio broadcasting. The goal is also to strike at the monopoly to the detriment of the general public. In doing so, the laws still take account of the IP holder interests.

By upholding constitutional validity, it is evident that there is no intention of including Internet broadcasters as there is a need for balance. As mentioned above, Sections 31 and 31D allow for a framework for dealing with the public interest in relation to the private interest. It has become a matter of public policy which has an in-built function to take care of the owner's interests.

Internet Broadcasters within Section 31 D in the light of the case of "Tips v Wynk."[19]

The findings of the Bombay HC represented the bone of contention for not including digital channels within the scope of Section 31 D, taking into account the case of Tips v wynk. The findings in the sense of the challenged provision follow:

[16] Iftikhar Hussian Bhat, *Right of Communication to the Public in Digital Environment*, 2 IJESI (2013), at 13.
[17] South Indian Music Companies v. Union Of India w.p no. 6604 of 2015.
[18] *supra* note 5.
[19] *supra* note 5.

Invocation of section 31 D in Download /Purchase Business

The Court claimed that the Legislature's intention to exempt the commercial rental/sale of sound recordings from the scope of Section 31-D was obvious. Therefore, it is clear that Section 31-D contemplates communication to the public only, utilizing the broadcasting of sound recordings, and not by way of commercial rental and selling thereof. Besides, the quotes from the 227th report of the Rajya Sabha Parliamentary Standing Committee on Copyright also reinforce this understanding (Amendment)Bill, 2010 wherein it was observed that issuing physical copies or legitimate digital downloading music or video recording by the payment cannot be considered a communication to the public. Since the services offered by the Defendants (download/purchase feature) are like commercial lease and selling of sound recordings, they do not fall within the scope of Section 31-D of the Act, and it is prohibited for the Defendants to exercise a statutory license accordingly. [20]

Invoking statutory Licensing for internet broadcasting

This claim is linked to on-demand video entertainment services. The Court warned of the existence of 31 D's expropriation, which must be interpreted as an exception, taking into account the precise purpose. The joint reading of Rules 28 and 31 of the Rules supplements Section 31 D, which explicitly allows for broadcasting on radio and television and not on the Internet.[21]

Another question in the same line of Section 31 is Spotify, where they entered the Indian online streaming music market and claimed to apply for statutory licensing, but without fixing the condition of the royalty. As a result, the Court ordered Spotify to pay Rs. 6.5 crore and refrain from invoking the statutory license until the royalty is determined.[22]

It is also clarified by court findings by reading it with rational justification along with legislative intent for the non-inclusion in the regulatory licensing of internet broadcasters. Furthermore, well-founded logic is given in the judgment as mentioned earlier by the Bombay high court, which appreciates the harmonization of the competing interests of both the owners

[20] *Id.*
[21] *supra* note 6, at 69.
[22] Warner/Chappell Music Ltd v. Spotify Ab, Notice of Motion (L) no 514 pf 2019 in comip (L) no. 256 of 2019.

of the right to intellectual property and society as a whole. The implications of including Internet broadcasters is the next question that has arisen.

Now dealing with the next question "what are the implications for the incorporation of internet broadcasting organizations within Section 31 D having regard to technological advancement?"

One of the implications of inclusion could be evident in *Saregama Ltd vs The New Digital Media & Ors.*[23], where the Calcutta High Court mentioned Section 31 D, it only requires a monetary remedy for the holder of the intellectual property right rather than an injunction. As can be seen, where the claimant has rights to literary and musical works and sound recordings, the applicant is not entitled to an order of injunction on the basis of a clause including copyright in literary and musical works. Through its Office Memorandum, the Central Government has interpreted Section 31D of the Act, and the respondents relied on the Office Memorandum of 5 September 2016 to the effect that internet broadcasting was included. It fell under the scope of the formal licensing authority. Section 31D explicitly states that payments are to be paid to the author of the work in the way and at the amount set by the intellectual property appellate board[24]. As such, there can be no injunction for breach of copyright except in the case of monetary claims. However, this could circumvent the intent of intellectual property rights. Therefore, it puts us in a dilemma which has no proper remedy for copyright infringement.

The influence on the music label business could be another inference from the inclusion. The goal of the statutory license is defeated once more, removing a copyright owner's motivation to create original works and commercially exploit them to his liking, and placing constraints on an owner's right to refuse to exploit the ultimate goal of intellectual property, the right to agree to a reasonable royalty rate for his works, the right to choose a licensee, and the right to negotiate. This caused consternation among various music label companies. Hence, they are challenging the validity and raising their grievances with the music labels. It seems to be that the impugned provisions would impair the voluntary license agreements with the broadcasters. With the introduction of the contested provisions, these broadcasters would have

[23] Saregama Ltd v. The New Digital Media & Ors., C.S. No.310 of 2015.

[24]Section 31 D (2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the [Appellate Board].

no reason to enter into and/or proceed with voluntary license agreements, and they are eager to pursue statutory license agreements, which they consider to be more convenient.[25]

Another justification for statutory licencing is that it gives the Appellate Board limitless ability to issue a licence without the permission of the copyright holder, as well as to establish the conditions of the licence to be issued. The clause has raised the allegations for violations of Articles 14, 19 (1) g, and 300 g of Indian constitution.

Various grievances which were raised by music labels mentioned in the tips v wynk case gave reasons to question the inclusion of internet broadcasters within the statutory licensing regime.[26] The scepticism of various organizations like the South India Music Companies Association, Indian Music Industry, Phonographic Performance Ltd., Indian Performing Right Society Ltd. and RPG Enterprises about statutory licensing is on multiple grounds which is the crucial factor for non-inclusion.[27]

In the Rajya Sabha Parliamentary Standing Committee itself, it can be seen from the above-mentioned discussion that 'broadcast' under Section 31-D was restricted to either 'radio or television' broadcasting only. It is also not necessary to view section 31 D of the copyright act in a liberal way, since it would be detrimental to other sections of society and impede their ingenuity.

The abovementioned points as presented in tips v wynk Case, provides the consequences of the inclusion of internet broadcasters under the statutory regime. Also, it is therefore difficult to decide how many rights holders obtain literary and artistic works and sound recordings for formal copyright permissions, independent of the royalties fixed by the Appellate board for performances or radio or television transmissions. For musical compositions, for which internet providers settle payments and enter into arrangements with compilation societies that control the interests of thousands of composers and lyricists in millions of works, this state of opacity

[25] Anushree rauta, *Lahari Recording Company Challenges Section 31 (1)(b) and 31D of the Copyright Act before Supreme Cour*t, IPRMENTLAW (Dec. 5, 2020, 9:29 PM), https://tinyurl.com/cfyf9njs.
[26] *supra* note 6, at 70.
[27] As the copyright owner/author has been refused any say in the fixing of royalties, the current scheme of 'statutory licensing' of songs to broadcasters seems to be discriminating. The radio sector is risk-free and purely profit-oriented, and government concessions are already given. There is no accepted explanation for the music industry's risk of singling out music. Also, the television industry is long-established and does not require any assistance. However, with a clause of this type for the broadcasting sector, the television industry may also apply for concessional licenses for its programs. The number of works will be dramatically reduced; society will handle them by removing all those works where their rights have already been reserved by the author.

is far worse. The fact is that, at least at the outset of the Web 2.0 phase, some bodies were unable to guarantee the right and transparent use of their repertoire information and did not allow for a fine-grained distribution of revenue.[28]

The drawbacks of the inclusion of internet broadcasters in statutory licensing are the ease of reproduction and distribution of work to the detriment of the copyright holder. The central definition of copyright, digital media plasticity in the digital medium, users can easily alter, adapt, modify or exploit works and correct copyright infringement liability in the conventional copyright set-up and have cross-border operations. [29]

IV. CONCLUSION

The distinction between statutory licensing and compulsory licensing helps in understanding the non-inclusion of Internet broadcasters within the framework of section 31 D. The essence of copyright law must not lose sight. The decision in Tips v Wynk provides vital insight into the licensing regime, which is in accordance with technological evolution and the value of innovation. It is critical to resolve the ambiguity produced by the interpretation of the various HC and administrative order of the Copyright (Amendment) Law, 2019. Additionally, including the digital platform under the statutory licencing system would be detrimental and contrary to the legislative goal. Section 31D read with copyright rules (29-31) offers guidance on the disputed issue. After upholding the validity of the impugned provision, it is clear that it is for television and radio broadcasting and not for streaming services. Diversification of the scope of the statutory license for the broadcasting of literary and musical works and sound recordings is not required. Other points need to be considered. "Without government intervention, copyright owners should be permitted to grow this new market, and, preferably, all prices and terms should be negotiable. The owners also claim that a copyright license discourages private bargaining and prevents marketplace alternatives from emerging."[30]

*****

[28] Giuseppe Mazziotti, Data-*Driven Approach to Copyright In The Age Of Online Platforms*, EUI WORKING PAPER [2020], https://tinyurl.com/sxtm4umh.
[29] Alankrita Mathur, *A Reflection Upon the Digital Copyright Laws In India*, 25 JIPR (2020), at 8.
[30] Hsieh Fan, *supra* note2.