

## Composing the Right Tune for the Song of Justice

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*The objective of writing this paper is to focus on the unjust and unfair situation in the Bollywood Industry under the shadow of a decision of the Hon'ble Apex Court which effectively has emasculated the rights of music composers and lyricists. The paper discuss in detail the Supreme Court decision of 1977 in IPRS v. EMPA and then goes on to discuss the recent decisions of the Bombay, Delhi and Calcutta High Courts. The recent judgments have upheld the rights of the music companies over sound recordings, to the exclusion of the lyricists and composers whose works were the underlying materials for the sound recording. Therefore, through this paper the author has tried to bring out the loopholes in the current copyright scenario because the question in front of us is whether the current position of law today is truly serving the ends of justice. The answer is in negative and the pending Copyright Amendment Bill, 2010 stands evidence to the existence of a substantial body of opinion to the same.*

### Introduction

An artistic, literary or musical work is the brainchild of the author, the fruit of his labour and so, considered to be his property. So highly is it prized by all civilised nations that it is thought worthy of protection by national laws and international conventions.<sup>1</sup>

The copyright situation in India was always not very clear and according to the author, it is still not as simple as the taxation law in our country. The confusion with regard to the ownership rights till date exists and one of the reasons for which is the acute lack of knowledge and information amongst the user of Copyright material as well as the owners themselves.

The objective of the present paper is to focus on the rights of the music

composers, lyricists and scriptwriters whose works are incorporated into cinematograph films. The fact that the very creator gets a highly disproportionate return when compared with someone who merely packages, markets and commercialises is highly unjust and unfair to these people. "Inequity" is the one word to describe the present situation. Our country has seen the ill-fate of these creators despite their works have been minting large amount of money. The film producers get the entire copyrights signed from these artists for a meager lump-sum even though their works reap multiple times at the box office.

This paper emerged as a reaction to the failed attempts of the Indian Performing Right Society Limited (IPRS) to collect royalties on behalf of the music

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composers, lyrists of the works incorporated in the cinematographic films for the grant of licenses for performance in public of such works. The inclusion of works in a cinematographic film as well as in a sound recording has affected the rights of the creators of such works and as per the author, it has negatively affected their rights when analysed under the purview of the Copyright Act, 1957.

The first part deals with the various provisions of the Copyright Act, 1957 in respect of the rights of the creators of the underlying works in a cinematographic film. The provisions of the Copyright Act, 1957 in respect of a cinematograph film and sound recordings are not identical in view of the nature of the two works. However, what is important to note is the similar manner in which exclusivity of the rights are conferred by the Act to the producers who are the owners of the copyright in the underlying works in cinematograph films and sound recordings. The second parts deals in depth with the decision of the Hon'ble Supreme Court in 1977, *Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association and Ors.* (IPRS v. EIMPA) which has created confusion as to the interplay between creation and ownership of copyright in musical works and associated lyrics. The third part deals categorically with the recent decisions of the Kerala High Court, High Court of Delhi and High Court of judicature at Bombay in the matter of IPRS discussing the similar question of law as that discussed in the 1977 judgment. According to the author's view point even after three decades, our High Courts are blindly following the decision of the Apex Court holding it to be a good law. The paper thus aims to bring out the

loopholes in the decision of our judiciary and also suggest the need to overturn the decision in light of bringing fairness to these music composers and lyricists. The paper thus aims to bring out the loopholes in the decision of our judiciary and also suggest the need to overturn the decision in light of bringing fairness to these music composers and lyricists in part fifth.

### Provisions Involved

The entire debate over the rights of music composers and lyricist with regard to the performing rights in their musical compositions and literary works created by them involve certain provisions of the Copyright Act, 1957 which needs to be discussed in order to understand the decisions of our judiciary.

### Ownership

The most important question in front of us is as to who is the first owner of copyright in a musical work, etc. that underlie a cinematograph film? Let us look firstly at the interpretation clause of the act. According to Section 2(d) the Act<sup>2</sup> "author" in relation to musical work is the composer and in relation to a literary work it is the author of the work. Further, as per Section 2(ffa) of the Act<sup>3</sup> a "composer" in relation to a musical work, means the *person who composes the music* regardless of whether he records it any form of graphical notation.

Section 17 of the Act; however, limits the ownership rights in certain cases. It can be concluded that in general circumstances it is the composer who is the first owner of copyright and this can only be limited under the two situations given in Section 17(b) and (c) of the Act. In the context of musical works, i.e. for the music composed for a cinematographic film there can be two situations:

1 Chinnappa Reddy, J., *Gramophone Co. v. Birender Bahadur Pandey*, MANU/SC/0187/1984: AIR 1984 SC 667 at p. 676.

2 The Copyright Act, 1957, No. 14 of 1957, section 2(d) [hereinafter The Act].

- (1) Music Composed for a Film (by the author in the course of employment under a contract of service) – The most essential element to bring a case under the purview of Section 17(c) is to establish the master – servant relationship between the employer and the composer of the music. The wordings of the section is very clear to the fact that unless there is any agreement to the contrary the employer, who may be the film producer, becomes the first owner of copyright in the musical work. Thus, the music composer loses all the rights which effectively vests in the employer. Consequently, all the rights in relation to the musical works including the right to perform or communicate to the public also now vests with the employer.

It is significant to note that Section 17(c) does not limit itself to certain kinds of work but includes all types of “works”.<sup>4</sup>

- (2) Music composed for a film (by the author for valuable consideration under a contract for services) – The music composers rarely work as salaried employees of the film producers under an employment contract. Generally, the music composers compose music at the instance of the producers or any other person for a cinematographic film. Thus, the concept of “contract for services” arises.

However, the question arises as to whether such works will be covered under Section 17 (b) of the Act? The wording of Section 17(b) has been clear

enough to limit its ambit to cover ownership of copyright in specific works only. It includes photographs, portraits, paintings or engravings and cinematograph films. The scope of Section 17(b) is very limited which can be clearly pointed out as it excludes sculptures even though it is a type of artistic work as defined under Section 2(c). Therefore, a musical work, which is treated as a separate work under the Copyright Act, does not fall within the ambit of Section 17(b) of the Act, read with Section 13(4).<sup>5</sup>

It is therefore, obvious that Section 17(b) cannot operate in a manner to make the composer lose copyright over his musical work to the commissioner, who may or may not be the film producer, and it is wrong to assume that ownership of copyright in a musical work vests automatically with the commissioner/ film producer just because it has been made under a “contract for services”.

To take an analogy, the film producer may commission a script (literary work) under a contract for services, as the underlying story of the film. Literary works, like musical works, do not fall within the ambit of Section 17(b). The script writer will continue to have, among various other rights, the right to translate the script and authorise the making of another cinematograph film in such translated language, unless he specifically assigns these rights away to the commissioner/ film producer.

That is not to say however, that there cannot be a contract to the contrary between the film producer and music composer to vest first ownership of copyright in the musical work in the film producer. So if one has to answer as to whether there is a difference between Sub-sections (b) and (c) of Section 17, it can be said without doubt that they are fundamentally different in their scope.

<sup>3</sup> *Id.*, Section 2(ffa).

<sup>4</sup> The Act, *supra* note 2, Section 2(y).

<sup>5</sup> The Act, *supra* note 2, Section 13(4).

By virtue of Section 17(c) ownership automatically belong to the employer when created by the employee wherein as per Section 17(b) copyright in only certain specified works can automatically vest in the commissioner.

#### The defence of Section 52(1)(y)

One of the defences to copyright infringement under the Indian Copyright Act, 1957 is Section 52(1)(y).<sup>6</sup> In this case, the exhibition of the cinematograph film after the term of its copyright is over is not an infringement of the copyright in the literary, dramatic or musical work in question.<sup>7</sup> Therefore, what the above section essentially means is that, the right of “public performance” in musical works and any associated lyrics (literary works) as per Section 14(a)(iii) of the Act, will not be infringed even when the film is exhibited after the term of copyright in the film has expired.

The legislative intent behind the existence of such a defence under the Act is difficult to understand. The Act is not for the benefit of the film exhibitors but to balance the interest of the individual writer, composer or artist and the major industries which basically provide the investment required for the creation of such works.<sup>8</sup>

The operation of such a defence interferes with the normal exploitation of the work and unreasonably prejudices the copyright owner’s legitimate interests. In effect, the defence prevents him or his heirs from earning performing royalties even when films out of copyright, containing his musical works, are exhibited. This is a clear violation of Article 13 of the TRIPS Agreement<sup>9</sup> which

reads “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

#### Separate Copyrights

Section 13(4) of the Act<sup>10</sup> additionally clarifies that “the copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which the film ... or ... the sound recording is made”. Section 13(4) preserves the right of the lyricist or composer and therefore merely because a cinematograph film is taken and the owner becomes the author it does not take away the right of the lyricists and composers in their works.

For instance, if a script writer has permitted the making of an English movie based on his work will he lose all his rights to the producer of the English movie? According to the interpretation of the above provision he would still, unless specifically assigned, retain the right to, for example, authorise the making of another film based on his book, in a different language. The underlying work never dies or merges with the rights in the film, and the two continue to exist as separate works, each having their own specific rights and term of protection. Also, under Section 14(a), the owner of copyright in musical works has the right to reproduce it in any form (the mechanical right), to perform it in public, and to make any cinematograph film or sound recording in respect of the work.<sup>11</sup>

<sup>6</sup> The Act, *supra* note 2, Section 52(1)(y).

<sup>7</sup> P. Narayana, *Law Of Copyright And Industrial Designs* 205 (3rd ed. 2002).

<sup>8</sup> Copinger & Skone James, *Copyright*, ¶ 1.02 (14th ed. 1999)

<sup>9</sup> Agreement On Trade-Related Aspects Of Intellectual Property Rights, Article 13, 15th April, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter, TRIPS Agreement].

<sup>10</sup> The Act, *supra* note 2, Section 13(4).

<sup>11</sup> Nikhil Krishnamurthy, *The Statutory Mechanical License in India - Whose Version [of the Law] is Correct*, MIPR 2007 (1) A-115

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### Performing Right

The right of public performance in a musical/literary work is to be found in Article 11 of the Berne Convention.<sup>12</sup> Similarly, under the Copyright Act, 1957 the owner of copyright in a musical work has, *inter alia*, the exclusive rights to reproduce it in any material form, including storing it in any medium by electronic means and to perform the work in public, or communicate it to the public among other rights conferred on him by virtue of Section 14(a).

Under the provisions of the UK Copyright Act, 1911, which were made applicable to India in 1914,<sup>13</sup> copyright meant, *inter alia*, the right to perform the work in public and additionally, in the case of musical and literary works, to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed. It is therefore clear that when a record or film is played, the musical work recorded therein is “performed” and affects the exclusive

right of public performance of the composer, or owner of copyright, in such musical work.<sup>14</sup>

The word “performance” was defined under that Act<sup>15</sup> to mean any acoustic representation of a work, including a representation made by means of any mechanical instrument. A “plate” was defined to include any appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work, are made.<sup>16</sup>

Therefore, a musical work may be performed live in public through a live performance or the medium of a cinematograph film. It is in the economic interest of the authors of original works for their works to be performed in public, whether through live or recorded means, on account of the royalties earned from such public performances. It is a well-appreciated fact that through time immemorial artists have been performing their musical works and also that it helps to increase their sale of music through airing it over radio or by public performance.

While there is no clear definition of what amounts to a public performance, there is a body of case law which distinguishes a public performance from those of domestic nature. Common examples where musical works are “publicly” performed would include radio and TV broadcasts, theatrical exhibition of films

12 Berne Convention For The Protection Of Literary And Artistic Works, art. 11 (Paris Text 1971).

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:  
(i) the public performance of their works, including such public performance by any means or process;  
(ii) any communication to the public of the performance of their works.  
(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

13 P. Narayana, *supra* note 7 at 7.

14 Nikhil Krishnamurthy, *IPRS v. EIMPA Performing Right or Wrong?* MIPR 2007 (1) A-169.

15 The Copyright Act, 1911, 1 & 2 Geo. 5 c.46, Section 35 (1).

16 *Id.*



into which musical works have been incorporated, playing of music in nightclubs, aircraft, and so on.<sup>17</sup>

### The 1977 Decision

The Hon'ble Supreme Court of India had the occasion to determine the ownership over music which is composed for cinematograph film in the matter of *Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association and Ors.*<sup>18</sup>

The dispute had been first discussed in the Copyright Board and aggrieved by its judgment the EIMPA had appealed to the High Court of judicature at Calcutta. Further, dissatisfied with the decision of the High Court the IPRS had thus appealed to the Supreme Court. The present case discussed one of the most debatable issues in the Copyright scenario and addressed the following substantial question of law of general importance:

- Whether in view of the provisions of the Copyright Act, 1957, an existing and future right of music...composer, lyricist is capable of assignment.
- Whether the producer of a cinematograph film can defeat the same by engaging the same person.

### Facts of the Case

The IPRS had published a tariff laying down the fees, charges and royalties that it proposed to collect for the grant of licences for performance in public of works in respect of which it claimed to be an assignee of copyrights and to have authority to grant the aforesaid licences. A number of persons including various associations of producers of cinematograph films who claimed to be

the owners of such films including the sound track thereof and the Cinematograph Exhibitors Association of India filed objections in respect of the aforesaid tariff repudiating the claim of the IPRS that it had on behalf of its members authority to grant licences for performance in public of all existing and future musical works which are incorporated in the sound track of cinematograph films in which copyright may subsist in India or the right to collect in relation thereto any fees, charges or royalties.

### Contention of IPRS

The IPRS contended that the author (composer) of a literary or musical work has copyright which includes *inter alia* the exclusive right - (a) to perform the work in public and (b) to make any cinematograph film or a record in respect of the work. Therefore, the copyright in such work is infringed by any person if without a licence granted to him by the owner of the copyright, he makes a cinematograph film in respect of the work or performs the work in public by exhibiting the cinematograph film. If a person desires to exhibit in public a cinematograph film containing a musical work, he has to take the permission not only of the owner of the copyright in the cinematograph film but also the permission of the owner of the copyright in the literary or musical work which is incorporated in the cinematograph film as according to Section 13(4) of the Act. The copyright in a cinematograph film or a record does not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be the record is made.

17 *Garware Plastics v. Telelink*, MANU/MH/0274/1989: AIR 1989 Bom.331

It was held that showing a video film over cable TV Network to various subscribers amounts to broadcasting video films to the public. Therefore, the test to determine is to see whether permitting such performance would in any way whittle down the protection given to the author of a copyright work under the Copyright Act resulting in the owner being deprived of monetary gains out of intellectual property.

18 *IPRS v. EIMPA* MANU/SC/0220/1977: (1977) 2 SCC 820

They also emphasised that the provision of Section 17(b) of the Act has no application to a literary or musical work or the separate copyright therein and do not take away the copyright in a literary or musical work embodied in a cinematograph film. The author of a literary or musical work can cease to be its owner either by assignment or by relinquishment or if the composer composes the work in the course of his employment under a contract of service with an employer in which case, the employer becomes the owner of the copyright in the musical work.

#### **Contention of the EIPMA and Others**

The EIPMA relied on the definition of "cinematograph film" as under Section 2(f) of the Act which includes the sound track and contended that "cinematograph" is required to be construed to include any work produced by any process analogous to cinematography, the owner of the cinematograph film is the first owner of the copyright therein, including the right of the composer of the literary or musical work incorporated in the sound track of the film. Section 13(1)(b) confers copyright on a cinematograph film and Section 14(1)(c)(ii) confers on the owner of copyright the right to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of songs to be heard in public and since under Section 2(f) of the Act, cinematograph film includes its sound track, it is not necessary for the owner of the cinematograph film to secure the permission of the composer of the lyric or of the music incorporated in the sound track of a cinematograph film for exhibiting or causing the exhibition of the sound portion of the film in public or for causing the records of the sound track of the film to be heard in public.

The Act confers a separate copyright on a cinematograph film as a film so the producer can exercise both the rights conferred on him under Section 14(1)(c)(ii) of the Act and all that Section 13(4) of the Act (when applicable) provides and therefore the rights created by Section 14(1)(a) and (b) shall co-exist with those created by Section 14(1)(c) and (d) of the Act. Also Section 17(b) will be applicable if someone is commissioned to make any component part of a cinematograph film such as a lyric or musical work i.e. when such component of the film is made at the instance of a film producer for valuable consideration, the copyright for such component shall as well vest in the producer.

#### **Matter in the Copyright Board**

The Copyright Board expressed the view that in the absence of proof to the contrary, the composers of lyrics, and music retained the copyright in their musical, works incorporated in the sound track of cinematograph films provided such lyrical and musical works were printed or written and that they could assign the performing right in public to the IPRS. The Copyright Board further held that the tariff as published by the IPRS was reasonable and the IPRS had the right to grant licences for the public performance of music in the sound track of copyrighted Indian cinematograph films and it could collect fees, royalties and charges in respect of those films with effect from the date on which the tariff was published in the Gazette of India.<sup>19</sup>

#### **Matter in the High Court of Judicature at Calcutta**

The High Court held<sup>20</sup> that unless there is a contract to the contrary, a composer who composes a lyric or music for the first time for valuable consideration for a

<sup>19</sup> 1977 Decision, *supra* note 18, at ¶ 4.

<sup>20</sup> *Eastern Indian Motion Pictures Association and Ors v. Indian Performing Right Society Ltd.*, AIR 1974 Cal 257.

cinematograph film does not acquire any copyright either in respect of film or its sound track which he is capable of assigning and that under Proviso (b) to Section 17 of the Act, the owner of the film at whose instance, the composition is made, becomes the first owner of the copyright in the composition. It further held that the composer can claim a copyright in his work only if there is an express agreement between him and the owner of the cinematograph film reserving his copyright.

It also held that though Section 18 of the Act confers power to make a contract of assignment, the power can be exercised only when there is an existing or future right to be assigned and that in the circumstances of the present case, assignment, if any, of the copyright in any future work is of no effect.

#### Matter in the Hon'ble Supreme Court

According to the Hon'ble Apex Court, the solution to the second question was given in Proviso (b) and (c) to Section 17 of the Act.<sup>21</sup> The Bench answered the second question on the assumption that the musical compositions were commissioned works under Section 17(b).

Hon'ble Mr. Justice Jaswant Singh, in his judgment, held:

- (i) that the composer retains the right of performing the compositions in public otherwise than as part of the cinematograph film, and he cannot be restrained from doing so
- (ii) that the film producer who engages a composer for valuable consideration under Section 17(b), for creating a composition to incorporate in a film, becomes the first owner of copyright in the composition and no copyright subsists in the composer, unless there is a

contract to the contrary.

- (iii) the above result would also follow even if Proviso (c) to Section 17 is applied, i.e. if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work.

The Hon'ble Supreme Court held that though a conflict may at first sight seem to exist between Sections 13(4) and 14(1)(a)(iii) on the one hand and Section 14(1)(c)(ii) on the other, a close scrutiny and a harmonious and rational instead of a mechanical construction of the said provisions cannot but lead to the irresistible conclusion that once the author of a lyric or a musical work parts with a portion of his copyright by authorising a film producer to make a cinematograph film in respect of his work and thereby to have his work incorporated or recorded on the sound track of a cinematograph film, the latter acquires by virtue of Section 14(1)(c) of the Act on completion of the cinematograph film, a copyright which gives him the exclusive right *inter alia* of performing the work in public.

A crystal clear conclusion was drawn by the Court that the rights of a music composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in Provisos (b) and (c) of Section 17 of the Act.

Further, Hon'ble Mr. Justice Krishna Iyer in his footnote to the judgment of Hon'ble Mr. Justice Jaswant Singh observed that beyond exhibiting the film, if the producer plays the songs separately, he infringes the composer's copyright:

Anywhere, in a restaurant or aeroplane or radio station or cinema theatre, if a music is played, there comes into play the copyright of the composer or the Performing Arts Society.<sup>22</sup>

<sup>21</sup> 1977 Decision, *Infra* note 24, at ¶ 18.

<sup>22</sup> 1977 Decision, *supra* note 18, at ¶ 21.



The learned Judge did indeed think about the injustice that is being carried to the persons including musicians but held that it is for the parliament to enact on that point.

#### Observation from the 1977 Ruling

According to the author, the 1977 ruling given by the Supreme Court is an evident example of a bad interpretation of law by our judiciary. If one reads the entire judgment a few errors becomes immediately apparent:

Firstly, Both the Hon'ble Calcutta High Court and the Hon'ble Apex Court in the instant case proceeded to give their respective verdict on the assumption that the composers were engaged under contract for services however, according to the facts of the case it was stated by the producers that the composers were employed under contract of service. So if the relationship that existed between the producers and the composers were different then the judgment is *prima facie* wrong.

Secondly, the Courts interpreted the scope of works covered under Section 17(b) and Section 17(c) of the Act in a similar fashion but it did not take into account that their scope is fundamentally different. Section 17(b) is limited in scope and covers only certain works whereas, under Section 17(c) all types of works are covered.

Thirdly, the question arises as to the extension of the scope of Section 17(b) to the underlying musical works in a cinematographic film. The provision only reads "cinematograph films" and according to the author, it does not

include the underlying works. So, the decision of the Apex Court again seems fallible here and to add the cherry on top the Apex Court first drew a factual matrix pointing to the application of Section 17(c), i.e. that the composers were effectively an employee under a contract of service but then proceeded to decide under Section 17(b).

Fourthly, The Courts concluded that the film producers became the first owner of copyright in the musical works. So it means that the composers have zero rights in their composition even when the musical works were used outside the film. The film producer being the first owner automatically gets all the music publishing rights in the composition including the right to air such work over radio, the mechanical rights over the composition as well the synchronisation rights,<sup>23</sup> etc.

#### Recent Judicial Pronouncement

It's a huge surprise to the author that despite the efflux of more than three decades and a great deal of change in the copyright scenario as well as the technological advancement the 1977 decision given by the Hon'ble Supreme Court still is held to be a good law. This year saw three most surprising judicial pronouncements given by the High Courts of Kerala, Delhi and Bombay which answered the same question of law as discussed 34 years ago answering it in similar lines.

*Mathrubhumi Printing And Publishing v. The Indian Performing Rights Society*<sup>24</sup>

The substantial question of law before the Court was:

<sup>23</sup> P Narayana, *supra* note 7 at 99.

The right to record the music as part of the sound track in a film is known as 'the synchronisation right', because it is performed in synchronisation with the film. This right is included in the right to reproduce the work in any material form.

<sup>24</sup> Pronounced on 8th February, 2011, FAO No. 82 of 2009, In the High Court Of Kerala at Ernakulam. (For the sake of brevity will be used as "Kerala High Court decision")

Whether a cinematograph film from which a sound recording is taken out and broadcasted in FM Radio amounts to any breach of copyright of the composer, lyricists, etc.

The FM broadcasting company contended that by virtue of being a licensed broadcaster it communicates 'sound recordings' to the public by means of FM stations which is no longer a musical work. Therefore, once the owner of the sound recording permits the Plaintiff to broadcast the sound recording, the Defendant cannot complain that their copyright over musical work has been violated. They based their argument on the basis that the definition of cinematograph film under the Copyright Act takes in the sound recording also and when a cinematograph film is made after the right of lyricist or composer is purchased the producer of the cinematograph film, who is the author becomes the absolute owner of the entire work contained in the film.

IPRS on the other hand contended that by virtue of the provisions of the Copyright Act the right of the composer or the lyricist does not end and the owner of the movie does not become the copyright holder with respect to the extractions from the sound recording and broadcasting through FM Stations.

The Kerala High Court held that the law on the present matter is the authoritative pronouncement of the Supreme Court in the 1977 judgment and so concluded that in a cinematograph film which takes in sound recording as well, the owner or the producer of the film becomes the absolute owner unless there is a contract to the contrary with a composer or lyricist and there remains no right with the composer or lyricist for assignment and therefore even if an assignment is taken, it will not confer a right on IPRS.

*Music Broadcast Private Limited v. Indian Performing Right Society Limited*<sup>25</sup>

The substantial question of law before the Court was:

Whether IPRS is entitled to claim and/or demand royalty fees and/or license fees from the Plaintiff in respect of the sound recording comprising of musical and/or literary work broadcast by them at their Radio station.

The Plaintiff contended that once the lyrics and music are incorporated in the sound recordings, a new copyrightable work comes into existence viz. the sound recordings and therefore the producer or sound recorder is the author and owner of the entire copyright in the sound recording with an exclusive right under Section 14(1)(e) of the Act, *inter alia*, to communicate the sound recording to the public. The Defendant on the other hand contended that the Plaintiff is not entitled to broadcast the said sound recordings without obtaining a licence from the owners of the underlying musical and literary works therein, which are owned by its members. They based their argument on the existence of separate copyright expressly mentioned in Section 13(4). Upon the making of a sound recording there emerge and exist two sets of copyright – one in the sound recording itself and the other in the underlying musical or literary work so recorded. The communication of a sound recording of a literary or musical work involves therefore the communication not only of the sound recording but of the underlying work too.

The Court held that once the musical and literary works are subsumed in a cinematograph film or a sound recording, qua that cinematograph film or sound recording and as embodied in such recording, they do not have a separate existence. However, in all other respects,

25 Pronounced on 25<sup>th</sup> July, 2011, Suit No. 2401 of 2006, In the High Court of judicature at Bombay. (For the sake of brevity will be used as "Bombay High Court decision")

the separate existence even of the underlying works continues to subsist and can be exercised by the owners thereof. The Court also drew a corollary to the 1977 decision and held that although it was in respect of a cinematograph film but will be equally applicable in the case of a sound recording.

*The Indian Performing Right Society Ltd. v. Mr. Aditya Pandey And Anr.*<sup>26</sup>

The substantial question of law before the Court was:

The determination of the extent of the song writer's copyright, and whether it extends to excluding the communication to the public without authorisation, of the musical work embodied in it.

The Appellants contended that Section 13(1) stipulates that copyright subsists in *inter alia* original musical and artistic works and also in sound recordings which is clear on a joint reading of Section 13(4) and Section 14(a)(iii). Therefore, if a song writer allows his work to be embodied in a sound recording, secondary copyright forming the sound recording no doubt encompasses the copyright owner's to communicate the sound recording to the public by virtue of Section 14(e). However, this does not detract from the separate and independent right of the song writer whose copyright in the work and the concomitant right to authorise its communication to the public subsists, unless it is proved that such right has also been parted to the owner of the sound recording. The Defendants contended that once the song writer or creator of a musical work parts with his copyrights in the making of a film or a sound recording, that copyright is subsumed with the right directly flowing from Section 14(d) and (e), which entitle the copyright owner of the film or the copyright owner of the sound recording

to communicate the entire film or the entire sound recording, which includes either the entire song so recorded or a part thereof to the public.

The Court held that an interpretation consistent with the one indicated in the EIMPA judgment of 1977 is appropriate to adopt. The Court held that it cannot rely on the Plaintiff's argument stressing on the interpretation of Section 13(4). The musical or literary work, per se which is the subject matter of the copyright under Section 14(a) is not communicated or broadcast; nor is there a method of separating that element, while communicating the entire work, i.e. the sound recording, to the public. Therefore, it would be unjustified to say that when a sound recording is communicated to the public, or played, in the public, or broadcast, the musical and literary work is also communicated to the public, through the sound recording.

#### Observations

In the light of the judgments of the Bombay High Court in *Music Broadcast Pvt. Ltd. v. Indian Performing Right Society*, Delhi High Court in *Indian Performing Right Society v. Aditya Pandey* and Kerala High Court in *Mathrubhumi Printing and Publishing v. The Indian Performing Rights Society* it has become necessary to point out some important provisions of the Copyright Act 1957 which appear to have been missed completely from the analysis.

These judgments effectively say that IPRS does not have any right to collect royalty when recorded music is played in public or broadcasted on behalf of the music composers and lyricists. One of the questions framed for consideration was whether a song-writer's copyright extends to excluding the communication to the public without authorisation, of the musical work embodied in a sound recording.

<sup>26</sup> Pronounced on 28<sup>th</sup> July, 2011, CS(OS) 1185/2006 & I.A. Nos. 6486/2006, 6487/2006, 7027/2006, In the High Court of Delhi at New Delhi. (For the sake of brevity will be used as "Delhi High Court decision")

The Courts held that once a licence is obtained in respect of the sound recording for communicating the same to the public, a separate authorisation or license is not necessary from the owner of copyright in the musical/literary work. In reaching this conclusion, the High Court's rested its decisions on mainly three factors outlined below:

- Copyright in sound recordings was recognised under Indian Copyright Law post the 1994 amendments.
- The 1977 decision of the Supreme Court in *IPRS v. EIMPA*.
- When a sound recording is communicated to the public, the underlying musical or literary work is not communicated.

However, at this juncture the author would like to point out that the factors on which the Courts based their judgment is *per se* not correct and hence, the analysis of these factors become necessary. Therefore, it can be rightly said that the above judgments no doubt demonstrate a poor grasp of copyright law in our country as compared to the other developed copyright jurisdictions.

#### **Sound Recordings was Recognised under Indian Copyright Law, Post-1994 Amendments**

It is incredible that while the sound recording has been protected by copyright under Indian law, since the 1911 UK Act was extended in its application to India<sup>27</sup> and later called "record" under the 1957 Act,<sup>28</sup> the judgments finds without hesitation that sound recordings were accorded copyright protection only after the 1994 Amendments to the Copyright Act. This finding, if nothing else, causes the judgment to suffer from an incurable

defect and cannot be relied on as binding precedent.

Even the Supreme Court has recognised copyright in records in 1984.<sup>29</sup> The case concerned infringing copies of recordings in which the Gramophone Co. owned copyright which were being illegally imported. For a Court to come to the conclusion today that India only started recognising copyright in sound recordings post the 1994 Amendments is simply too shocking, let alone the rewriting of copyright law that has been done when it comes to the rights of owners of copyright in music and lyrics.

#### **The Ruling of the Supreme Court in *IPRS v. EIMPA* in 1977**

The author has in detail discussed the shortcomings of the Supreme Court's decision in its 1977 judgment. The relevant fact noticed by the Supreme Court was that authors and composers were under "contracts of service" with film producers. According to the author the Supreme Court while delivering the judgment could not interpret the concepts of "contract of service" and "contract for service" and thus, lead to a gross error in its judgment. Also, the Copyright Board as per the author came up with the accurate finding that in the absence of any contrary proof that any contract of service existed it is the composer who retained the rights.

It seems highly unlikely that music composers and lyric writers would have an employer-employee relationship with any one producer as they would be writing music for various films produced by various banners. If some of them did however, and there was no contract to the contrary, then the producer would own the underlying rights.

27 Act, 1911, *supra* note 20, section 19. Provision as to mechanical instruments. (1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works.....

28 Act, *supra* note 4, section 2 (w), omitted by Act 38 of 1994, Section 2 (w.e.f. 10th May, 1995)

29 *Gramophone Co. v. Birendra Bahadur Pandey*, MANU/SC/0187/1984: AIR 1984 SC 667

The Supreme Court for some baffling reason however proceeded to analyse the matter under Section 17(b) of the Act which deals with commissioned work. This is very significant because Section 17(b) only deals with certain kinds of artistic works and cinematograph films generally, whereas Section 17(c) (concerned with the employer-employee relationships) covers all works protected under copyright, including musical and literary works.

While analysing the recent judgments, it can be clearly pointed out that the judges have heavily relied on the 1977 decision holding it to be a good law. But what exactly is the criterion of deciding which is a good law. Is it merely that it has to be Supreme Court decision and just because a decision of the Hon'ble Supreme Court exists on a certain question of law our judiciary will be blinded by it.

**When a Sound Recording is Communicated to the Public, the Underlying Musical or Literary Work is not Communicated.**

The fact that author-composers always enjoyed a performing right and were entitled to receive royalty no matter how such music is communicated (whether live or recorded) is practically a cornerstone of music copyright law.<sup>30</sup>

According to the Courts emphasising on the judgment of the Delhi High Court, it was held that the copyright proprietor of a film, who happens to own the sound recording, can authorise the broadcast or communication to the public of the film including the sound recording part (as a composite work) without license from the author of the lyrics or the composer. The Act also unambiguously points to the film copyright content including the authorisation to communicate the work to the public which, according to the 1977 judgment, extends to permitting such

communication of the sound recording parts alongwith the cinematograph film, without separate license from the author of the musical work. It also unambiguously points to an identical right to the copyright owner of a sound recording to authorise the communication of the work to the public (i.e. of the sound recording).

So what the judgment basically means is that if the underlying right vests with some other person other than the author-composer, say the film producer or music label, this would simply mean that such producer or label is entitled to receive royalty when the underlying words and music are communicated either through exhibition/broadcast of films or recordings but not the author-composer?

**The Way Ahead – Unanswered Questions and Suggestions**

The objective of writing this paper was to focus on the unjust and unfair situation in the Bollywood Industry under the shadow of a decision of the Hon'ble Apex Court which effectively has emasculated the rights of music composers and lyricists.

Looking at the Statements and Object of Reasons of the Copyright Bill, 1955<sup>31</sup> which, at Clause 2(4) stated that:

A cinematograph film will have a separate copyright apart from its various components, namely story, music, etc. it can pointed out that it was never the intention of the framers of this Act to create unjust situation to these authors.

Also, if we place reliance on the notes on clauses appended to the 1955 Bill stated in explanation to Clause 13, which read as follows:

Clause 13 - This clause roughly corresponds to Section 1(1) of the UK Act and describes the works in which

30 ALCS Ltd., Independent Review of Intellectual Property (March, 2011), <http://www.ipo.gov.uk/ipreview-c4e-sub-alcs.pdf>

31 19<sup>th</sup> August, 1955



Copyright shall subsist. It provides that a separate copyright shall subsist in a Cinematograph film as distinct from its various component parts. Sub-clause 2(i) gives effect to the recommendation made in Article 2 of the Universal Copyright Convention, 1952 which provides that the works of nationals and residents of a Convention country wherever published should have protection of copyright. Sub-clause (4) makes it clear that the copyright in a cinematograph film shall not affect the separate copyright in each of its various component parts. It again becomes clear that cinematograph films have separate rights than the artistic, literary or dramatic works and hence even if these works are incorporated into a cinematograph film or a sound recording will not lead to the death of the rights of the author/composer of such works.

Copyright law provides to an owner a "bundle of property rights", which may be bundled together. These rights can co-exist being owned by many owners or by one owner as the case may be, subject to operation of law or contract between the parties involved.<sup>32</sup> In that light, it is submitted that by Section 13(1) of the Indian Copyright Act, 1957 copyright subsists in certain "works" namely—original literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) sound recordings. Further, Section 14 of the Act mandates certain exclusive rights in respect of the said works. Then why we need to exclude certain rights for the other rights to exist and why cannot these rights co-exist together.

A lot of unanswered question arise from such decision of our judiciary. The objective of Indian Performing Rights Society is to the administer the

performing rights as well as the mechanical rights of its members which are<sup>33</sup>:

- the right to perform the work in public;
- the right to communicate the work by broadcast;
- the right to communicate the broadcast of the work to the public by a loud speaker;
- the right to communicate the broadcast of the work to the public by any instrument;
- the right to make any record in respect of the work.

It protects the rights of the foreign copyright owners as well. So, if IPRS cannot collect royalties on behalf of foreign right owners, which has been decided by our judiciary the users of such work can be sued by these foreign copyright owners. Also, the question arises as to whether we have been successful in upholding the International obligation in such regard. According to the author there is a clear non-fulfillment of TRIPS agreement as well as the BERNE convention.

In the author's opinion the Copyright Board had held correctly that in the absence of proof to the contrary (as to the existence of a contract of service), the composers retained copyright.<sup>34</sup> However, if we are following the Court's judgment then if the creators want to retain their right in their works then they will have to work for "no valuable consideration". Copyright is generated by creation and not by ideas then how can ownership of a work be attributed to the one who has the idea and not its creator? It's a shame that we do not give back to the makers of such works the amount which they deserve. Firstly, as already discussed in the introductory part of the paper the plight of these artists

<sup>32</sup> Copinger & Skone, *supra* note 12 at 13

<sup>33</sup> The Indian Performing Rights Society Ltd., <http://www.iprs.org/FAQs.asp>

<sup>34</sup> 1977 Decision, *supra* note 24.

and secondly, we see exploitation of their rights.

Also, at this juncture I would like to point out the intention of the legislature while drafting the Copyright Act, 1957. Section 52(1)(y) of the Act states that a cinematograph film if exhibited after the expiry of its copyright will not infringe the underlying literary, dramatic or musical work recorded therein. Therefore, if the Act expressly mentions when the right of the Copyright holder will not be infringed it implies that it will be infringed in all other cases.

Since the past year, we have seen lyricist and composers fighting actively for their rights and raising voices against the social injustice towards them, prominent names among them are Mr. Javed Akhtar and Mr. A.R. Rahman.<sup>35</sup> The Copyright Amendment Bill, 2010 has inserted a new provision under Section 19(9) which reads "No assignment of the copyright in any work to make a cinematograph film or sound recording shall affect the right of the author of the work to claim royalties or any other consideration payable in case of utilisation of the work in any form other than as part of the cinematograph film or sound recording".<sup>36</sup> The present amendment introduces a laudable, revolutionary provision in favour of music composers and lyricists whose works are incorporated into cinematographic films. It states that notwithstanding any assignment of copyrights in works such

as music compositions and lyrics that have been incorporated into a film or sound recording, the authors of such underlying works shall continue to have a right to remuneration from any exploitation of the underlying works. However, there is a need to strengthen the proposed amendment such that most advantageous protection can be awarded to authors and composers.

It is rightly said that Copyright is about creativity. It is not to cater to the pockets of the funder of a work than the creator of such work. Therefore as per the author it is one of the wisest recommendations of the standing committee to make the film producers split the revenue in case of the work being exploited other than as part of the cinematograph film. However, this recommendation did indeed receive a strong reaction from the film producers. The Bollywood producers are now threatening to strike against this provision in the apprehension that that if this provision converts to law, they will be forced to shut down.<sup>37</sup>

When considering as to who to blame for such a situation – the Copyright Act, 1957 for an imbalanced approach or our judiciary for a gross interpretation of the Act. According to the author our judiciary wins hands down. At last it can be concluded that now the time has come when either the IPRS or the artists should refer the matter to a larger bench to overrule the obvious wrong decision of the Supreme Court of 1977.

35 Vickey Lalwani, *Rahman and Akhtar's Musical Mission*, Mumbai Mirror, 23<sup>rd</sup> February, 2010

36 Copyright Amendment Bill, 2010, <http://copyright.gov.in/Documents/CopyrightAmendmentBill2010.pdf>

37 Shamnad Basheer, Copyrighting a Wrong and Injecting Fairness into Bollywood, (27<sup>th</sup> December, 2010), <http://spicyipindia.blogspot.com/2010/12/copyrighting-wrong-and-infusing.html>