

## IP Hotline

August 17, 2011

### NO ROYALTY TO BE PAID TO IPRS FOR BROADCASTING SONGS

The Bombay High Court in the case of *Music Broadcast Private Limited* (“**Plaintiff**”) -Vs- *Indian Performing Right Society Limited*<sup>1</sup> has held that the owner of copyright in relation to lyrical and musical works are not entitled to receive royalty/license fee for broadcasting of sound recording embodying such underlying (i.e. lyrical and musical) works.

Over the last few years there has been a spate of litigations initiated against the copyright societies<sup>2</sup> in India viz. Phonographic Performance Limited (“**PPL**”)<sup>3</sup> and Indian Performing Right Society Limited (“**IPRS**”)<sup>4</sup> for fixation of fees/royalties (“**Fees**”)<sup>5</sup> to be paid to them for broadcasting songs by FM radios.

The Plaintiff carries on the business of, *inter alia*, establishing, operating and maintaining FM radio broadcasting stations in various cities in India. The Plaintiff and some of the other operators have mooted the stand that payment of royalty to PPL for broadcasting the sound recordings is sufficient and no separate royalty should be paid to IPRS for broadcasting of the underlying works i.e. the lyrical and musical works (“**Underlying Works**”) as a part of the sound recordings. In a welcome relief to such parties especially the FM radio operators and similar licensees of the repertoire of the two copyright societies, the Bombay High Court has upheld this legal proposition in the present case thereby settling the debate that had inundated the industry for years and which had majorly affected the revenues and profitability of the FM radio stations.

#### FACTS:

Brief facts leading to present proceedings are as follows:

|                                  |  |
|----------------------------------|--|
| June 11, 2001                    | License Agreement (the “ <b>Agreement</b> ”) entered into between Plaintiff and IPRS pursuant to which IPRS granted the Plaintiff a non-exclusive license to perform (publicly) the Underlying Works for a term of ten years. Given that the Indian FM radio industry was, at that point of time developing, IPRS granted the Plaintiff a discount on the applicable fee which IPRS usually charges. |
| Between March 2003 to March 2005 | IPRS alleged breaches of the Agreement by Plaintiff and withdrew the discount. This was followed by discussions between the parties. IPRS subsequently stopped accepting the discounted fees from the Plaintiff. But the Plaintiff continued to deposit the amounts in a separate bank account. The Plaintiff contends that such amounts were later accepted by IPRS.                                |
| September 2005                   | Plaintiff applied for and obtained licenses to operate FM radio broadcasting stations at additional locations (such as Hyderabad, Jaipur and Chennai)  |

Under the FM licenses accorded to the Plaintiff it was required to roll-out services within a fixed time-frame; as such it reached an understanding with IPRS for broadcasting the Underlying Works on the newly launched FM radio stations. This understanding was recorded in the Plaintiff’s letter to IPRS (dated May 15, 2006). However, this was refuted by IPRS through their letter, dated May 19, 2006.

The Plaintiff then initiated proceedings in the Bombay High Court requesting a declaration that the Plaintiff is entitled to broadcast the Underlying Works on payment of fees to be decided by the Copyright Board. An ad-interim order was subsequently passed by the Bombay High Court on May 26, 2006 in the proceedings thereby allowing the Plaintiff to broadcast the Underlying Works upon payment of fixed fees of INR 666 per needle hour subject to the final decision of the court in these proceedings.

The Plaintiff, however, withdrew the said proceedings, and filed the present suit upon being advised that IPRS is not permitted, under law, to claim any Fees in relation to broadcast of sound recordings through FM radio stations.

#### ISSUES:

The Bombay High Court restricted itself to deciding the moot issue before it i.e. whether IPRS is entitled to claim and / or demand Fees from the Plaintiff in relation to the broadcasting, via FM radio stations of the sound recordings comprising of the Underlying Works? It further stated that the other issues raised by the parties in their submissions fell within the scope of the exclusive jurisdiction of the Copyright Board in accordance with Sections 19A(2) and 30A of the Copyright Act, 1957 (“**Act**”).

In our hotline we have dealt with the arguments led by both parties on this proposition of law and have summarized the order given by the Bombay High Court.

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**Arguments of the Plaintiff**

The Plaintiff submitted that IPRS was not entitled to interfere with the Plaintiff's broadcast of sound recordings comprising of the Underlying Works (through FM radio stations) for non-payment of Fees on the following grounds:

(i) Once the Underlying Works are incorporated in the sound recordings by music companies, a separate copyright subsists exclusively in relation to such sound recordings. Therefore, the producer of such sound recording is the author and owner of the entire copyright in such sound recording with an exclusive right to communicate the recording to the public<sup>6</sup> without interference from owners of the Underlying Works. Though the owner of copyright in the Underlying Works retains copyright in such Underlying Works, this right does not include the right to the sound recording and as such exploitation of sound recording does not amount to infringement of the Underlying Works.

(ii) The right of public performance of a Work is different from the right to communicate the sound recording in which such Underlying Works is incorporated;

Therefore IPRS can claim Fees only in respect of an independent public performance of the Underlying Works in its repertoire or in respect of communication of such Underlying Works otherwise than as a part of other copyrighted works viz. sound recordings or cinematograph films. In other words IPRS cannot claim Fees in respect of public broadcast of the Underlying Works as a part of sound recording;

The Plaintiff also contended that IPRS' right is restricted only in respect of any public performance of a musical or literary work which involves communicating to the public such works through live performances and **not as a part of a sound recording**.

**Arguments of IPRS**

IPRS vide its written statement denied all contentions of the Plaintiff.

(i) IPRS is a "no-profit no-loss" organization whose primary task was to collect Fees from users of music for onward distribution amongst its members and therefore, in contradistinction to PPL, IPRS has the right to collect Fees in case of any performance or communication to the public of the musical compositions and lyrics created by its members;

(ii) Broadcasting of sound recordings through FM radio stations without a valid license from IPRS infringes the rights of its members and therefore the Plaintiff should obtain all required licenses from IPRS and also pay the required Fees;

(iii) Plaintiff had voluntarily approached IPRS for a license to broadcast and therefore, at a later stage should not be allowed to go back and dispute IPRS's right to claim the Fees;

(iv) IPRS and its members had suffered considerable loss on account of the sales of music records having dropped by 33% (due to introduction of FM radio stations) and therefore the Plaintiff should pay the requisite fees to IPRS;

(v) As per Section 13(4) of the Act, the author of the Work remains at all times the owner of the copyright in such Underlying Works (despite such Underlying Works being embedded in a sound recording); therefore, there always exists two separate copyrights upon the making of a sound recording i.e. one in the sound recording itself and the other in the Underlying Works. Accordingly, any communication of a sound recording necessarily also involves the communication of the Underlying Works; this creates the necessity for the owner of the sound recording to obtain a license and Fees not only at the time of creating such sound recording but also at the time of communicating to the public by broadcast.

(vi) Given the fact that sound recordings are considered as derivative works (being derived from Underlying Works) the creators of such recordings should not be given precedence over authors of the underlying original Underlying Works;

(vii) A sound recording is only the medium i.e. the hardware (such as a compact disc, cassette or record) on which the recording is made and from which the specific sounds can be produced and therefore does not cover within its scope the specific sounds *per se*;

(viii) When any material (such as a compact disc, cassette or record) is sold or let out on hire by the owner of the sound recording the underlying works are not played/exploited as opposed to a scenario where the sound recording is communicated to the public which necessarily involves communication of the Underlying Works. Therefore, as per IPRS it has a right in the latter case to receive license fees / royalties.

There were several other arguments and citations were advanced by IPRSs to show how separate copyright subsists in relation to Underlying Works though embedded in a sound recording, entitling IPRS to receive separate Fees.

**JUDGMENT:**

The Bombay High Court opined that copyrights under the Act can only be claimed and protected to the extent provided for in the Act. It held that the Act recognizes sound recording (created by incorporating the Underlying Works) *as an independent class of copyrightable work*. There is no need for the owner of a sound recording to obtain a license and pay royalty or license fees to the owners of the Underlying Works prior to communicating such recordings to the public in exercise of the rights under Section 14(1)(a)(iii) of the Act. Therefore, IPRS is not entitled to claim any Fees from the Plaintiff for broadcasting sound recordings via FM radio stations.

However, the Bombay High Court ordered a stay on the judgment till October 31, 2011 in consideration of the consequences of the decision on other matters. The High Court based its order on the following observations:

(i) While accepting that Underlying Works by virtue of being original works enjoy wider protection under the Act than sound recordings (which are derivative works) the court also observed that this does not necessarily mean that the rights of an owner of a copyright in a sound recording are in any way inferior to the rights of an owner of a copyright in musical or literary works. Therefore, under Section 14 of the Act an owner of a copyright in a sound recording enjoys the same set of rights as any other copyright holder.

(ii) It further observed that in a sound recording the copyright exists in the particular recording of the musical and literary work transposed on any medium by a particular process and does not in any way obliterate the separate copyright existing in the underlying literary and artistic works.

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- (iii) It also established the exclusivity of rights in relation to sound recordings by placing reliance on the judgment of the Supreme Court in the case of *Indian Performing Rights Society Limited -Vs- Eastern Indian Motion Pictures Association*<sup>7</sup> and drawing an analogy between protection given to cinematograph films and sound recordings.
- (iv) The court refuted IPRS's contention that a copyright in a sound recording is in relation to the material / medium on which the sounds are recorded but rather as per Section 2(xx) of the Act exists in the specific sounds *per se*.
- (v) In addition, the court observed that the right to communicate the sound recording to the public entitles the owner of the copyright to make copies of such recording and also license further usage without requiring a fresh license and payment of license fees / royalty to the owner of the underlying work every time such communication is made. Therefore, the owners of the copyright in the underlying work cannot interfere with the exercise of such rights by the owner of the copyright in the sound recording *qua* such recording. The High Court also rejected the distinction drawn by IPRS in communicating the works via any material (such as a compact disc, cassette or record) and via broadcasting by stating that the only difference in both modes is that in the former case the actual playing of the sounds is delayed.
- (vi) Further, once the author of a lyrical or musical work authorizes a producer to create a sound recording incorporating his Underlying Works the producer of the recording is entitled to all rights, including the right to communicate to the public, this does not take away the right from the author of the Underlying Works to authorize a new sound recording, unless otherwise agreed in contract.

#### ANALYSIS:

This judgement appears, to be a departure from the norms prevailing in some of the other jurisdictions. For instance in the UK, the owners of underlying works are also entitled to collect royalties for broadcast.

Though this judgment appears to have settled the debate that has plagued the music industry in India for years, this is far from being the final view on this topic. We anticipate that the matter will be finally heard by the Supreme Court before this issue can be put to rest.

- Ankita Manav, Ranjana Adhikari & Gowree Gokhale

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1 Suit no. 2401 of 2006

2 PPL and IPRS are copyright societies created under Section 33 of the Copyrights Act, 1957

3 PPL administers the rights of the record companies which produce sound recordings and issues licenses for communicating the sound recordings (assigned to it by the record companies) to the public upon payment of applicable license fees / royalties

4 IPRS administers rights of lyricists and composers and issues licenses to perform publicly the Underlying Works assigned to it (either directly or through its network of affiliated foreign collecting societies)

5 Fees collected by either IPRS or PPL are subsequently distributed by them amongst their members, depending on the repertoire licensed

6 Under Section 14(1)(e) of the Act

7 1977 2 SCC 820

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