

Statutory Licensing of Copyrights in India-Scope Demarcated

written by Bhavani Navaneedhan | May 21, 2019

After

waking up Since the introduction of statutory licensing of copyrights in 2012 through an amendment to the Copyright Act 1957("the Act"), the provision has been attracting controversy and time

and again the scope of the provision and its constitutionality has been questioned. The recent tussle between Spotify and Warner Music Group has again

brought this provision to the forefront and has raised issues regarding its scope and applicability. In the current dispute Spotify is trying to make use of the statutory license provision granted under Section 31D of the Act and expand it to cover streaming of music on the internet. Spotify is relying on an

Office Memorandum issued by Central Government which expanded the scope of Section 31D to include broadcasting on the internet. However, Warner Music Group has filed suit to restrain Spotify from being able to play music from its

catalog on the streaming service. In the light of the dispute we seek to analyse the scope of the statutory license granted under the Act.

Interpretation

of the Statutory Provision:

Section 31D of the Act gives right to any broadcasting organisation desirous of communicating to the public literary, musical work or

sound recording that has been published already, to broadcast the work after giving prior notice indicating the duration and territorial scope of the broadcast. The organization shall pay royalties to the owner of the copyright at the rate fixed by the copyright board. Further, while stating the rates of royalty, this provision only talks about television and radio broadcast.

Over the years, the definition of "*broadcast*"^[1] has not changed and since the enactment of the Act in 1957 has been defined as "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 " In September 2016, the Indian Copyright Office issued a memorandum^[2]

expanding the definition of "broadcast" in 31D, stating that "the provisions of

section 31D are not restricted to radio and television broadcasting organizations only, but cover internet broadcasting organizations also."

However, the HRD Minister, at the time of passing the bill introducing section 31D in the Parliament in his speech had stated that:

"The Copyright Board, as a matter of law, under the statute will actually decide on the quantum of money that will be required to be paid by the TV companies to the music companies who have bought over those rights. Therefore, there was some debate as to whether it should be limited only to radio and TV should be kept out of it. But ultimately, we decided that

TV should be included in it."

From a reading of the above-mentioned speech it is explicit that the debate was about including TV broadcasters and the inclusion of internet broadcasters was never contemplated. Moreover the relevant rules^[3] of the Copyright Rules 2013 ("Rules") also prescribe the procedure for obtaining statutory license for radio and TV broadcasters and there is absolutely no mention of broadcasting through the internet. This interpretation is also used by the Bombay High Court in the case explained below in detail.

Recent

Judicial Ruling:

The Bombay High Court has put to rest the controversy raised by the Office Memorandum of the Central Government and clearly demarcated the scope of Section 31D of the Act and held that it covers only radio and TV broadcasting. The Judgment was passed on April 23rd 2019 in the dispute between *Tips Industries("Tips")* and *Wynk Music India Pvt Ltd^[4]("Wynk Music")*.

A detailed analysis of the case is necessary to understand the reasoning of the court.

Matrix of Facts:

Wynk Music is an online music streaming application which allowed its registered users upon payment of monthly rent, to listen to music directly online and download songs and store it in the application. Further, upon remitting one-time charge, the users could also permanently purchase the songs and store it in a device of their choice. It had entered into a license agreement with Tips for the streaming of the recordings of Tips on its application, once the license expired the parties tried to renew it but could not reach an agreement. Hence Wynk Music invoked Section 31D of the Act claiming that it was an internet broadcasting organization and can obtain statutory license by giving notice to the copyright owner being Tips and no separate license agreement is required. Wynk Music continued to store the recordings of Tips on its application leading to Tips filing suit for infringement of copyright.

Issues Involved:

- i) Whether the actions of Wynk Music infringe upon the exclusive rights of Tips as copyright owner of a sound recording granted under Section 14(1)(e)^[5] of the Act?
- ii) Whether the statutory license under Section 31D extends to broadcasting on the internet?

Contention of Parties:

Wynk Music claimed that its 'on demand streaming service', whereby public can listen to any songs of their choice from the application, and the same does not amount to 'commercial rental' or 'sale', and was 'broadcasting' covered under Section

31D, as it was simply 'communicating to the public'. It relied on the use of expression "any" broadcasting organization in the provision to contend that online streaming is also covered.

Tips opposed this by contending that Section 31D is available only to radio and TV broadcasting. Internet Broadcasting is not covered by the provision.

Analysis of the Court:

a. Intent of Legislature:

The court noted that Section 31-D acted as a statutory exception to the rule that a copyrighted work is the exclusive property of its owner, and should therefore be construed narrowly in "conformity with the specific intention for which it was enacted".

The court perused the reports of the Rajya Sabha Standing Committee, and the Statement of Objects and Reasons of the 2012 Amendment Act, and opined that the

Section was intended only to address radio and TV broadcasting. The Standing Committee understood 'broadcast' to mean radio and TV broadcast. The court held

that the absence of express words in Section 31-D providing for a Statutory License in respect of internet streaming and / or downloading, was a conscious

legislative decision and should be adhered to. In view of the above and in the absence of an express statutory provision including internet broadcasting within the purview of Section 31-D, its scope cannot be expanded to include the

same. Further, a review of the Rules 29

and 31 of the Rules also supported the view that Section 31-D is a statutory licensing regime meant only for 'radio' and 'television' broadcasting and not internet broadcasting. The court also

rejected the Office Memorandum issued by the Central Government by observing that Central Government did not have power to make such interpretations. The court held "The said Memorandum lacks a 'statutory flavour' and cannot prevail over interpretation which is drawn under the Act and the Rules. The interpretation of Section 31-D in the said memorandum is inconsistent with the

interpretation drawn by this Court and this Court is not bound by the said Memorandum".

b.

Online services amount to 'commercial rental' and 'sale':

The Court held that Wynk Music's download services amounted to 'commercial rental' and 'sale'. It observed that "the Defendants through their outright purchase / download services are enabling their subscribers to actually store electronic files of the Plaintiff's sound recordings on their devices. Storing the files of the Plaintiff's sound recordings in electronic medium by the Defendants is nothing but making of another sound recording embodying the Plaintiff's sound recording. This right is an exclusive right granted to the owner of the copyright in the sound recording under Section 14(1)(e)(i) of the Act and the Defendants cannot be allowed to continue the same without any permission or authorization of the Plaintiff". Wynk Music's services enabling their customers to permanently download sound recordings and have a permanent access to the same clearly

amounted to sale of sound recording violating the exclusive right of Tips to sell or offer for sale its sound recordings as provided in Section 14(1)(e)(ii)

of the Act. The Court also noted that the 'download' services were not covered

by the 'non-profit library or non-profit educational purpose' exception to the

definition of 'commercial rental' as per Section 2(fa) of the Act.

"the activities of the Defendants enabling their customers to download sound recordings and access them offline in lieu of a monthly subscription fee

clearly do not fall under the exclusions provided in the said definition of 'commercial rental' and would therefore amount to 'commercial rental'", observed the Court. Hence the court held that internet broadcasting is not contemplated under Section 31D of the Act.

Conclusion:

A balance needs to be achieved between public interest and interest of the copyright owners. The very purpose of granting copyright protection should not be defeated and statutory licenses should be interpreted in a narrow manner and their scope has to be limited to promote creativity and encourage artists, commercial exploitation and economy of the country. This decision confirms the Indian music industry's consistent stand that internet streaming services are not covered under Section 31D of the Act and thus throws light on the outcome of the dispute between Spotify and Warner Music Group.

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[1] Section

2(dd) of the Act

[2]

https://dipp.gov.in/sites/default/files/OM_CopyrightAct_05September2016.pdf

[3]

Rules 29, 30 and 31 contain the procedure for availing statutory license

[4] https://bombayhighcourt.nic.in/ordqrywebcoram_action.php

[5] Under this provision the owner of a sound recording has the right to make any other sound recording embodying it and to store it in electronic or other means. Further, the owner also has the right to sell or give on rent a copy of the sound recording.

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