

Pay 'n' Play: Public Performance of Sound Recordings *vis-à-vis* Copyright Infringement

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Several public places such as restaurants, clubs, hotels, night clubs, airports, etc., play songs as background music to lighten up the ambience. These acts amount to communication of the copyrighted songs to the public or public performance. It is an essential right of the copyright owner or his assignee to control the public performance of his song. Hence, securing an appropriate licence on payment of necessary fees and performance rights is a prerequisite for such performance in public. But, many owners of such places, knowingly or out of ignorance indulge in playing songs without proper licence and recognition to the copyright owners of those songs.

This article aims at discussing what qualifies as public performance for the purpose of securing a licence and the incidents thereof arising out of such licence. Also, broadcast as an important form of communication to the public is discussed along with a brief overview of the activities undertaken by the copyright societies in this regard. Indeed, the copyright societies have done their bit in securing proper royalties for such public performance by issuing notices and filing suits in the interest of their members.

Keywords: Public performance, broadcasting, licensing, copyright society

Nowadays, visitors to various public places like restaurants, hotels, clubs, airports, malls, etc., in day-to-day life, are treated to the newest songs or any songs for that matter, which are played for entertainment of the general public or as music in the background. This has, in some way, become more than a necessity at those venues to have a musical milieu to prevent the place from falling into dumb silence, or chatterbox voiced or alternatively, noised by people.

But the issue to be determined here is whether the owners of copyright in those songs are compensated for such public performance of their songs or not. There is no doubt that it is an essential right of the owner of the copyright to control communication of the work to the public by licensing it to others and claiming royalties or licensing fees from them. However, what qualifies as public performance of a song and thus subject to licence from the copyright owner is subject to much speculation.

It turns out that music licensing is something that happens constantly, all around us. The music one listens to on the radio is licensed; what one hears in a

restaurant, is licensed too.¹ Hence, this article attempts to describe the term 'public performance'; when it amounts to copyright infringement; licensing of copyrighted works and the exemptions to copyright infringement. This article also takes into account, the amendments in provisions brought about by the recently passed Copyright Amendment Act, 2012, wherever relevant.

In most countries throughout the world, royalties are collected on the public performance of both a song and the sound recording. A public performance royalty is collected for the musical composition, that is, the lyrics and notes. A neighbouring right royalty for the sound recording can also be collected for the performance of the song.²

Copyright in Sound Recordings and Musical Works

Copyright subsists in a sound recording as established in Section 13 (1) of the Copyright Act, 1957 (also referred to as the Act). Sound recordings protect recorded sounds, both musical and non-musical and include recorded music, songs, audio books, sound effects, audio recordings of speeches and interviews, audio podcasts, soundtracks, etc. Musical works and

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sound recordings embodied in music are considered separate subject-matters under copyright. Thus, copyright in the recording of music is separate from copyright in the music. Copyright in the music vests with the composer whereas copyright in the music recorded vests with the producer of the sound recording. Where the song has not been written down and the composer who is also the performer, records the song, two copyrights come into existence simultaneously, one for the music and one for the sound recording.³

‘Musical work’ means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music. A musical work need not be written down to enjoy copyright protection [Section 2(p)].

‘Sound recording’ means a recording of sounds from which sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced [Section 2(xx)]. A phonogram and a CD-ROM are sound recordings.⁴

Radio broadcasts of sound recordings are protected by a separate category. For example when a song is played on the radio, that song is protected as a sound recording, but an additional and separate copyright is created in the broadcast. A recording of a radio broadcast would be protected as both a sound recording and a broadcast.

Sound recordings are protected regardless of their format, e.g. mp3 or audio file, CD, audio cassette or tape, vinyl record, reel to reel tapes, cartridges, etc. Copyright in sound recordings is generally owned by the ‘maker’ of the sound recording. The term ‘maker’ usually refers to the person who owns the equipment the recording was made on, such as the production company, studio, or record label. However, performers in the sound recording may also own copyright in the sound recording. Ownership also varies depending on factors such as employment and licensing agreements.⁵ Playing any sound recording in private is not copyright infringement in sound recording. It is only when the recording is caused to be heard in public, does it amount to infringement. This has been discussed in detail hereunder.

What is Public Performance under Copyright law?

A public performance is considered under many national laws to include any performance of a work at a place where public is or can be present; or at a place

not open to public, but where a substantial number of persons outside the normal circle of a family and close acquaintances are present. Public performance also includes performance by means of recordings. Thus a musical work is considered publicly performed when a sound recording of that work, or phonogram, is played over amplification equipment, for example in a discotheque, airplane, or shopping mall.⁶

Performing the Work in Public

Halsbury explains the meaning of ‘in public’ as follows: ‘The question whether a work is performed or a sound recording, film or television broadcast seen or heard in public is solely one of fact. In determining this question, the following considerations and tests have been applied: whether there has been admission of any portion of the public with or without payment to the injury of the author, i.e. to say, of the class of persons who would be likely to go to a performance if there was a performance at a public theatre for profit, or whether the performance was private or domestic, a matter of family or household concern only.’ Any performance which is not domestic or quasi-domestic will be regarded as in public even if only a few members of the public are present or that no charge for admission was made.⁷ Performances by teachers or pupils in general, are not performances in public.⁸ Performing a literary, dramatic or musical work in public without the consent of the copyright owner or without procuring licence of the work is an infringement of copyright in that work [Section 14(a)(iii) of the Copyright Act]. The expression ‘in public’ or ‘public’ is not defined in the Act. The public must mean the ‘general public’ and performance before a ‘closed group’ however large in numbers may not necessarily constitute performance in public.³

Any performance of Indian or even international music, in public places or commercial establishments such as hotels and resorts, restaurants, bars, pubs, discotheques, cruise liners, cinema halls, shops, offices, and so on, rendered without first having obtained a licence from the copyright owner or the respective copyright society (discussed later) constitutes an infringement of copyright under the Copyright Act, 1957.

It has been held that programmes of music and gramophone records played at a factory using loudspeakers for the benefit of the workers (no strangers present),⁹ and playing of records over loudspeaker more or less continuously in a record

shop to increase the shop owners' profit¹⁰ were performances in public. Similarly playing music on a loudspeaker in a private room adjoining a public restaurant in such a manner that the music was audible to the public in the restaurant was held as a performance in public and constituted infringement of copyright.¹¹

Switching on a radio in a public place is a separate performance in public different from that given by the original performer.¹² If a person by means of an installation, makes audible the performance in a private place to a larger number of persons other than the domestic circle, it amounts to infringement of copyright by performing the work in public.¹²

A performance may be 'in public' notwithstanding that it is given in a place not habitually used for dramatic entertainment.¹³ Persons who are responsible for broadcasting a performance and who grant licences that entitle listeners to perform the broadcast in public are liable for infringement as persons who have authorized a public performance¹⁴ and there are grounds for saying that in any case a broadcast to private listeners only is in public although the audience is not in one place.¹⁵

When does a 'Closed Group' become Public?

The courts in several countries have, in different cases, considered that a public performance occurred when music was being made available in individual hotel rooms, in radio shops for demonstration purposes and for patients in hospitals through so-called 'pillow radio'.¹⁶ Another issue has been whether a public performance occurs when music is played for entertainment in a club or such another more or less closed environment. In these cases a public performance is considered to take place when the membership of the association is in reality not limited and membership can be obtained rather easily as a pure formality upon the payment of a necessary fee. Generally speaking, public performance takes place when there exists a circle that is not entirely closed.¹⁶

In *Harms v Martans Club*⁷, the dispute arose out of the performance of a musical number at the Embassy Club in London before an audience of 150 members and 20 guests. It was a proprietary club run by the defendants who furnished entertainment on the premises and derived profits therefrom. Entertainment provided by the proprietors was made available on payment of necessary membership fee on joining the club and an annual subscription thereafter. Hence, membership was open to anyone who was prepared to

pay such substantial sums. Upon these facts, the Court of Appeal held that there had been a presentation 'in public' of the musical composition. A similar decision was reached in *Performing Rights Society v Hawthorn's Hotel*¹⁷ and *Jennings v Stephens*¹⁸, in relation to a performance of music in a hotel lounge and performance of a play by a dramatic society at a meeting of women's rural institute respectively.

In *Turner v Performing Rights Society*¹⁹ ('music while you work' case), the proprietors of a factory, to increase efficiency and output, relayed music from gramophone records to their 600 employees. The Court held it to be a performance in public.

The criteria for determining whether an audience is public or a closed group are²⁰:

- (1) Whether it can be described as a private or domestic audience consisting of family members of the household based on the character of the audience;
- (2) Whether the audience in relation to the owner of the copyright can be so considered; and
- (3) 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 his intellectual property.³

*Performing Right Society Ltd v Rangers R C Supporters Club*²¹ was a Scottish case, which was concerned with the question of whether the performance of music to an audience consisting of members of a social club and their guests was in public. The Court of Session held that it was, on the basis that the character of the audience was an important factor, that the relationship of the audience to the owner of the copyright, rather than the relationship of the audience to the performers was a primary consideration and that, if the audience was one which the owner of the copyright could fairly consider as part of public, then the performance was in public.

Communication to the Public and Broadcasting

Generally, an author of a work has the right to communicate his/her work to the public and such right includes the right to communicate through broadcast. It is therefore, understood that the author can then assign or license his broadcast rights to a broadcasting organization, which, may then convert the work into a signal and broadcast the same to public.²²

Section 2 of the Indian Copyright Act, 1957 defines what is communication to public.²³ A change was introduced by the Copyright (Amendment) Act, 2012 in the definition clause in 'communication to the public' [clause 2(ff) to add 'performance' to the work being communicated. This section also implies that communication to a single household is exempted and playing a sound recording for private use is not prohibited.

According to Section 2(dd) of the Act, broadcast is a form of communication to the public by wireless or wire diffusion. As per Section 14, owners of the copyright shall have the right of communication to the public. The right of broadcasting covers the transmission, for public reception, of sounds or of images and sounds, by wireless means, whether by radio, television, or satellite. When a work is communicated to the public, a signal is distributed by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. Cable transmission is an example of communication to public.²⁴

In a case decided by the Delhi High Court, *Super Cassette Industries v Nirulas Corner House (P) Ltd*²⁵, the *ratio decidendi* was: 'acts of a hotel proprietor, in making available to his guests a public performance by presentation of film or audio on the grounds that the guests were paying for the accommodation and the benefits with it without a license from the copyright owner amounted to infringement of copyright.'

Broadcasting right is treated as an independent subject-matter for copyright under the Act. Broadcasting authorities should, therefore, obtain a licence from the copyright owners for broadcasting the work since communication to the public by broadcast constitutes infringement of copyright.²⁶

Copyright Societies and Licensing

Public performance licence is a legal necessity under the Copyright Act, 1957 for playing music in any format: live performance or playing recorded sound tracks in any public place or commercial establishments. The royalty share, which the government receives by issuing the licence, goes to the music creators and publishers.²⁷ Playing music in public without a licence is an offence under Section 51 of Copyright Act, 1957 and attracts a heavy penalty extending upto Rs 2 lakhs fine or three years of imprisonment or both.

Alternatively, such licences can also be awarded by copyright societies, which are associations formed with the object of working for the interests of its members. For a radio station playing hundreds of songs in a day, it would be a grueling task to secure licences for each song from its respective copyright owner. Hence, these societies purport to simplify the process by granting licenses on behalf of the copyright owner as his/her assignee. The copyright owner/author assigns some of his economic rights to the copyright society(ies) by entrusting it/them to work in his/her benefit and sharing the royalty. Some of the registered copyright societies in India are Society for Copyright Regulation of Indian Producers for Film and Television (SCRIPT), The Indian Performing Right Society Limited (IPRS) and Phonographic Performance Limited (PPL).

Explaining the importance of such societies in the matter of *Federation of Hotels and Restaurants Association of India v Union of India and Ors*²⁸, the Delhi High Court observed that the owners of copyright are fully entitled to reap rewards of their creativity and genius. The copyright and performing societies are an amalgamation of conglomeration of individual/owners who are fully entitled to claim the highest premium for enjoyment of the fruit of their labour or intellect.²⁸ The court reaffirmed that the amendments carried out in the Copyright Act, 1957 are calculated to guarantee fair returns to the authors, composers or lyricists or sound recorders. There is no absolute, untrammelled or unbridled right existing or granted to public at large to enjoy fruits of such creation without payment in recompense of for payments, which the public may be willing to give.²⁸

The Role of Copyright Societies

A copyright society is a registered collective administration society. Such a society is formed by copyright owners. The minimum membership required for registration of a society is seven. Ordinarily, only one society is registered to do business in respect of the same class of work. A copyright society can issue or grant licences in respect of any work in which copyright subsists or in respect of any other right given by the Copyright Act.²⁹

A copyright society may:

- (1) Issue licences in respect of the rights administered by the society,
- (2) Collect fees in pursuance of such licences,

- (3) Distribute such fees among owners of copyright after deductions for the administrative expenses.³⁰

Copyright Societies and the Amendment Act, 2012

The Copyright (Amendment) Act, 2012 aims to completely restructure the working of and the eligibility criteria for membership in copyright societies by various amendments to Chapter VII of the Copyright Act, 1957. Sections 33 - 35 relate to the registration and functioning of the copyright society. Every copyright society already registered before the coming into force of the Amendment Act, 2012 shall get itself registered within one year from the date of commencement of the Amendment Act.

There are specific amendments to protect the interests of the authors. In Section 35, the phrase 'owners of rights' has been substituted with 'authors and other owners of rights'. This section has been amended to provide that every copyright society shall have a governing body with such number of persons elected from among the members of the society consisting of equal number of authors and owners of work for the purpose of administration of the society. Section 35(4) provides that all members of a copyright society shall enjoy equal membership rights and there shall be no discrimination between authors and owners of rights in the distribution of royalties.³¹

This is intended to significantly improve the prevailing situation in the film industry, in particular, for the authors of underlying works in films. These authors previously had a peculiar status in copyright societies such as the IPRS since all rights were considered to accrue to producers as a result of the 1977 IPRS case³², and a (mis)interpretation of the subsequent 1994 amendment to the Copyright Act.³³

Over the last few years there has been a spate of litigations initiated by and against the copyright societies viz., PPL³⁴ and IPRS³⁵ in India for fixation of fees/royalties³⁶ to be paid to them by FM radios for broadcasting songs.³⁷ In a case brought by IPRS Limited against Hello FM Radio (Malar Publications Limited), IPRS secured an injunction from the Delhi High Court against Hello FM Radio for broadcasting the songs without obtaining licences from them.³⁸ The court had 'restrained the defendants, their servants, agents, director, subsidiaries, and all others acting on their behalf from causing the broadcast or broadcasting/performing or communication to the public, literary and/or musical works of the plaintiff

society or those of the foreign sister societies of the plaintiff or broadcasting any works of the plaintiff by any means without obtaining a licence from the plaintiff, thereby amounting to infringement of the plaintiff society's performing rights and communication to the public rights in the same.' This order came as a warning to other similar establishments operating without a licence and violating copyright laws.

The Delhi High Court also had refused to restrain the IPRS and PPL from charging an 'exorbitant licence fee' in addition to the annual licence fee for playing sound recordings at special events organized by the hotels.³⁹ Challenging the functioning of IPRS and PPL, the Federation of Hotels and Restaurants Association of India (FHRAI) had sought a direction to prevent IPRS from charging any licence fee in excess of 15 per cent over and above the annual licence fee. Later, their challenge was also rejected by the Apex Court which dismissed as withdrawn the plea of the association that copyright societies, which perform functions as broadcasters of music throughout the country and abroad, were charging exorbitant rates for special events like the Christmas Eve, New Year's Eve and Valentine's Day, and the same should be quashed.

Also, there have been controversies regarding whether it is only the copyright owner who is entitled to issue licences and receive royalty or the composers or lyricists can also exercise their rights in those respects. The same is true for the copyright societies who are the copyright assignees of the copyright owners and authors/composers/lyricists thereof. Prior to the Copyright (Amendment) Act, 2012, the rights to receive royalties by such persons were not recognized. The Bombay High Court in the case of *Music Broadcast Private Limited v Indian Performing Right Society Limited*⁴⁰, held that the owners of copyright in relation to lyrical and musical works are not entitled to receive royalty/licence fee for broadcasting of sound recording embodying such underlying (i.e. lyrical and musical) works. Similar judgment was rendered by the Delhi High Court in the case of *Indian Performing Right Society Ltd v Aditya Pandey and Anr*⁴¹, holding that once a licence is obtained from the owner or someone authorized to give it (e.g., the copyright society), in respect of a sound recording for communicating it to the public including by broadcasting, a separate authorization or licence is not necessary from the copyright owner or author of the underlying musical and/or literary work.

But after the passing of the Amendment Act, 2012, the situation has changed and such rights to receive royalties have been given to the respective authors/composers/lyricists also. These amendments have been discussed in the following section.

Sound Track of a Cinematographic Film: Rights of Composer, Lyricist, and Producer

The right to record the music as a part of the sound track in a film is known as ‘the synchronization right’, because it is performed in synchronization with the film. This right is included in the right to reproduce the work in any material form.⁴²

The Copyright (Amendment) Act, 2012 makes special provisions for those whose work is used in films or sound recordings (e.g. lyricists or composers). Rights to royalties from such works, when used in media other than films or sound recordings, shall rest with the creator of the work and can only be assigned to heirs, or copyright societies which act in their interests. Another proviso to Section 18(1) provides that the author of a literary or musical work incorporated in a cinematographic film or sound recording shall not assign the right to receive royalties in any form other than as a part of the film or sound recording. Also, a new sub-section (9) to Section 19 has been added which provides that no assignment of copyright in any work to make a cinematographic film or sound recording shall affect the right of the author of the work to claim royalties in case of utilization of the work in any form other than as part of cinematographic film or sound recording.

Despite these amendments in the provisions, there are still issues that need resolution. For instance, consider a case where a producer has the right to assign the sound recordings in the film to the music companies, as the producer has entered into appropriate agreements with the authors and music composers. Writers, composers and owners/publishers of musical works who are members of IPRS, assign all the rights in their musical works to it. Similarly, music companies assign all their rights in sound recordings to PPL. Typically, there are three works in the song, namely the lyrics (literary works), the music (musical works) and the recording of the literary and musical works (the sound recording). As of today, suppose a person wants to broadcast or webcast a song of a Hindi film, one is required to obtain two licences: one from IPRS for the lyrics and the musical works, and from PPL for the sound

recording. This position has been affirmed by the Madras High Court in the case of *The Indian Performing Rights Society Limited v Branch Manager, The Muthoot Finance Pvt Ltd.*⁴³

The issue is that if the sound recording, which includes the musical and literary works, has already been assigned to PPL, the person should be able to obtain the license from PPL directly to broadcast the sound recording without approaching IPRS. PPL can internally have a mechanism to distribute the royalties to IPRS, if so required. An alternate and more effective approach, wherein the person approaches only IPRS for the rights in the musical and literary works may also hold good. The practice of obtaining two separate licences to broadcast only one song is a burden on the broadcaster, which results in added expenses and the same needs to be amended.⁴⁴

The Provision of Compulsory Licensing

Copyright licences may be either voluntarily entered into by the copyright owner (i.e. the licensor) or be imposed upon him. If the licence is not voluntarily given by the copyright owner, it is referred to as a non-voluntary licence, and may assume the form of either a compulsory licence or a statutory licence.⁴⁵

Many countries have provided for compulsory licences in their copyright legislation, particularly in those fields of copyright where modern technology has created new uses for works giving new rights which can only be effectively exercised by bulk licencing through a collecting society or under a compulsory licence system.⁴⁶

However, the subject of provision of compulsory licensing has been the subject of enormous litigation tackling the controversies between the broadcasting organizations such as FM Radios and the copyright societies or the copyright owners with regard to fixing of royalties/licensing fees, etc. The Copyright Amendment Act, 2012 has settled the law in this regard.

The new Section 31D under the Act deals with statutory licensing of the broadcast of literary works, musical works and sound recordings.⁴⁷ Under this section, a broadcasting organization, which desires to communicate to the public a published literary work, musical work or sound recording; may do so if the communication is by way of broadcast or by way of performance. The broadcasting organization is required to give prior notice to the copyright owner stating the duration and territorial extent of the broadcast. The names of the authors and principal

performers of the work must be announced with the broadcast. The broadcasting organization is proscribed from making any fresh alteration of any literary or musical work unless that alteration is (i) technically necessary for the purpose of broadcasting, or (ii) comprises only a shortening of the work for the convenience of the broadcast, or (iii) has been made with the consent of the copyright owner(s).

The broadcasting organization must pay royalties to the copyright owner in each work at the rate fixed by the Copyright Board, and the Copyright Board may require that these royalties be paid in advance. It is required to maintain records and books of account and to render to the copyright owners such reports and accounts in accordance with the rules associated with the Act. The broadcasting organization is also required to allow the copyright owner or his duly authorized agent/representative to inspect all records and books of account related to the broadcast.⁴⁵

The above amendment has been brought in to facilitate access of the works to the growing broadcasting industry. Prior to this amendment, access to copyright works by broadcasters was dependent on voluntary licensing. As a result unreasonable terms and conditions were being set by the copyright owners.³¹

Hence, one needs a licence and proper rights to perform the work in public. The following are some of the examples where one has to obtain rights:

- Playing songs at a radio station
- Playing background music at restaurants
- Using songs in commercials
- Making toys which plays a song when a child pushes a button
- Making a video production which includes a song as background music.⁴⁸

Certain Exceptions where Public Performance does not Constitute Copyright Infringement

Section 52 of the Copyright Act, 1957 enlists certain acts that while appearing as a violation of copyright, do not constitute infringement. Those acts of public performance of sound recordings and musical works, which do not constitute infringement are discussed below:

Non Fund Generating or for Benefit of Religious Institutions

The Act does exempt the use by way of performance of a literary, dramatic, or musical works by an amateur club or society to a non-paying

audience or for the benefit of religious institution [Section 52(1)(l)]. Thus, if funds are to be raised for a good cause by performing a work, then use of professionals to perform such work and the collection of fees from the audience would constitute a violation of copyright in the work. Secondly, the other the cause can only be related to the benefit of a religious institution, not a charitable one. Also, sound recordings are left out of the purview of the above section.⁴⁹

Playing Sound Recording in Certain Circumstances

Section 52(1)(k) makes another exception in respect of sound recordings in some circumstances. By virtue of this clause, copyright is not infringed by causing a recording to be heard in public by utilizing it-

- (i) in an enclosed room or hall meant for common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of amenities provided exclusively or mainly for residents therein; or
- (ii) as part of activities of a club or similar organization which is not established or conducted for profit.⁵⁰

Performance by Staff of Educational Institutions

The Section 52(1)(i) provides exception to copyright infringement if performance is made in the course of activities of an educational institution. This position was also elucidated by the Supreme Court of India in the matter of *Academy of General Education, Manipal v B Manini Mallya*.⁵¹ The dispute related to the infringement of the respondent's copyright by the appellant institute in a new form of 'Yakshagana' ballet. The SC held that: 'when a fair dealing is made, *inter alia*, of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or any other work, such dealing does not constitute an infringement of copyright. The appellant, being an educational institution, if the dance is performed within the meaning of provisions of Section 52(1)(i) of the Copyright Act, such performance does not amount to infringement of copyright. Further, if such dance performance is conducted before a non-paying audience by the appellant, which is an educational institution, the same would not constitute an infringement of copyright therein and an order of injunction cannot be made restraining such performance.'

Performance or Communication in the Course of a Religious Ceremony

Section 52(1)(za) makes an exception for performance in the course of a religious ceremony under certain conditions. According to this clause, the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any (i) *bona fide* religious ceremony, or (ii) official ceremony provided such official ceremony has been held by- (a) the Central Government, or (b) the State Government, or (c) local authority; does not constitute infringement.

It has been clarified in the explanation that religious ceremony would include a marriage procession and other social festivities associated with marriage.

But in the recent case of *Phonographic Performance Limited v State of Punjab through Secretary, Department of Home Affairs & Justice, Civil Secretariat and Ors*⁵², the Punjab and Haryana High Court observed: 'A sound reproduction by a DJ performing at such an event is surely a function that is connected to marriage. (But) It is not as if a DJ' performance amounts to conducting the marriage. Marriage is definitely different from the functions connected to the marriage and the tariff regime applies to performances at such functions even if it has a religious overtone.'

Also, the activity of cable TV operators of receiving signals on dish antenna and thereafter transmitting it by cables to viewers either at a cost or otherwise, amounts to copyright infringement.⁵³

Practical Factors Affecting Implementation of Public Performance Rights

No doubt the copyright law as it stands today, in its substantial part contains provisions which preclude the violation of these rights. But the trouble is with the actual implementation of these provisions. Following are the key challenges faced by the copyright owners and copyright societies in receiving rightful royalty and credit for use of their copyrighted works in communication to the public and certain suggested solutions.

Lack of Awareness

Most of the owners of such places are unaware of rights which exist in those songs and repeatedly indulge in public performance/broadcast of songs without obtaining proper licences from the respective copyright owners/societies. The copyright societies must take up initiatives to create mass awareness in this regard, although they have been doing their bit in terms of filing suits against such infringements.

Tracking Usage

The digital broadcasts generally include, if technically feasible, the information encoded in the sound recording that identifies the title of the recording and the featured recording artist; while this requirement helps to track usage of recordings via digital transmissions, it is not helpful in tracking their usage in terrestrial broadcasts or in non-broadcast situations such as public venues. So, certain mechanism needs to be drawn out for tracking infringement of copyright via these streams.

Requirement of Licences from Multiple Copyright Societies

For certain broadcasts, separate licences need to be obtained from multiple copyright societies. This cumbersome requirement should be abolished and a single blanket licence-like system established which can give the broadcaster all the rights which exist in the song.

Exceptions and Limitations

Any royalty scheme that covers a diverse array of users - small and large broadcasters, niche webcasters, major retail chains, and small mom and pop establishments - must be sensitive to the economic differences between these users. If the statutory or negotiated royalty rates under the expanded performance right are not responsive to the needs of nonprofit organizations and other small operators, these users will not be able to deliver performances to consumers, and consumers, in turn, will have fewer choices. For example, college radio stations should receive special accommodations under the royalty scheme.⁵⁴

Conclusion

Time and again, it has been reiterated that the main object of copyright law is to reward the author/owner of the copyright in the work for his creativity, simultaneously taking into consideration, demands of the public. In achieving this motive, statutory rights in this regard cannot be done away with, one such right being the right to public performance. It is one of the most essential rights of the copyright owner and can only be exercised by him.

There have been numerous instances of public performance of musical works and sound recordings, which are subject-matter of copyright, where prior licences have not been obtained from the respective copyright owners or the copyright societies. This amounts to copyright infringement and prejudices the rights of the owner of copyright.

Hence, it is important that people at large are informed and made aware about various instances where they are liable to take prior permission on payment of necessary licensing fee to broadcast the protected work of the copyright owners. Copyright societies can take the initiative that in turn will benefit both society, in general, and the performers, in particular. Also, there is a statutory provision for compulsory licence, which can be granted by the Copyright Board, in case the public is deprived of the copyrighted work under certain circumstances. Thus, by paying the appropriate fees, others can publicly play and broadcast protected work without compromising the rights of copyright owners.

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- 13 Sahni Ajay, *Lal's Commentary on the Copyright Act*, 1957, 4th edn (Delhi Law House, New Delhi), 2006, p. 422.
- 14 *Mellor v Australian Broadcasting Commission* (1940) AC 491.
- 15 *Messenger v British Broadcasting Co Ltd* (1927) 2 KB 543.
- 16 The Swedish Supreme Court made these holdings in three different cases, Henry Olsson, Selected court cases in the field of copyright, *WIPO National Workshop for Judges*, WIPO/IP/JU/Ryd/04/3 & WIPO/IP/JU/Ryd/04/4.
- 17 *Performing Rights Society v Hawthorn's Hotel* (1933) Ch 855.
- 18 *Jennings v Stephens* (1936) Ch 469 (CA).
- 19 *Turner v Performing Rights Society* (1943) Ch 167.
- 20 *Garware Plastics v Telelink* AIR 1989 Bom 331 at p. 336: It was held that showing a video film over a cable TV network to various subscribers amounts to broadcasting video films to the public. The entire audience taken together cannot be considered as members of a common household or as family members. They can only be viewed as a portion of the public. Decision affirmed by a DB in Appeal nos 165 and 179 of 1989 dated 4 June 1989. The DB held that showing a video film over a cable TV network amounts to broadcasting video films to the public; *Venkatesan v Deputy General Manager, Telecommunications* (1991) 1 LW 465 at p. 472.
- 21 *Performing Right Society Ltd v Rangers RC Supporters Club* (1975) RPC 626.
- 22 Sakhivel M, Is it broadcast or broadcasting?, *Journal of Intellectual Property Rights*, 16 (1) (2011) 23-24.
- 23 Section 2(ff): 'communication to the public' means making any performance or work 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.
- 24 http://www.wipo.int/freepublications/en/intproperty/909/wip o_pub_909.html#public_performance (25 May 2012).
- 25 *Super Cassette Industries v Nirulas Corner House (P) Ltd*, 2008 (37) PTC 237 (Del).
- 26 Narayanan P, *Copyright and Industrial Designs*, 2nd edn (Eastern Law House, Calcutta & New Delhi), 1995, p. 192.
- 27 <http://m.timesofindia.com/PDATOI/articleshow/12508867.cms> (25 May 2012).
- 28 *Federation of Hotels and restaurants Association of India v Union of India and Ors*, AIR, 2007, Delhi 137, para 6 & 16.
- 29 <http://copyright.gov.in/Documents/Copyright%20Societies.pdf> (21 May 2012).
- 30 <http://legalservicesindia.com/article/article/copyright-societies -417-1.html> (25 May 2012).
- 31 Thomas Zakir, Overview of changes to the Indian copyright law, *Journal of Intellectual Property Rights*, 17 (4) (2012) 324-334.
- 32 *Indian Performing Rights Society v Eastern India Motion Pictures Association*, AIR, 1977, SC 1443. In this case, the Supreme Court held that the composer of a lyric or musical work retains the right of performing it in public for profit otherwise than as a part of cinematograph film and he cannot be restrained from doing so. In other words, the author (composer) of a lyric or musical work who has authorized a cinematograph film producer to make a cinematograph film of his work and thereby permitted him to appropriate his work by incorporating or recording it on the sound track of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound track associated with the film by utilizing such sound track or from communicating or authorizing the communication of the film by radio diffusion, as Section 14(1)(c) of the Act expressly permits the owner of the copyright of a cinematograph film to do all these things. In such cases the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work. (para 3 of the judgment).

- 33 <http://copyright.lawmatters.in/2010/09/copyright-societies-and-copyright.html> (25 May 2012).
- 34 PPL administers the rights of record companies which produce sound recordings and issues licences for communicating the sound recordings (assigned to it by the record companies) to the public upon payment of applicable licence fees / royalty.
- 35 IPRS administers rights of lyricists and composers and issues licences to perform publicly the underlying works assigned to it (either directly or through its network of affiliated foreign collecting societies).
- 36 Fees collected by either IPRS or PPL are subsequently distributed by them amongst their members, depending on the repertoire licensed.
- 37 http://www.nishithdesai.com/New_Hotline/IP/iP%20LITIGATION%20HOTLINE_August1711.htm (26 May 2012).
- 38 *Indian Performing Rights Society Ltd v Hello FM- Malar Publications Ltd*, Delhi HC Order dated 15 November 2006.
- 39 *The Federation of Hotels and Restaurants in India (FHRAI) v Union of India & Ors.* 7 April 2011, WP(C) no 914-1040/2009 & CM No 17009/2008.
- 40 *Music Broadcast Private Limited v Indian Performing Right Society Limited*, Suit no 2401 of 2006; decided on 25 July 2011.
- 41 *Indian Performing Right Society Ltd v Aditya Pandey and Anr.*, 2011 (47) PTC 392 (Del).
- 42 Flint M F, *Guide to Copyright*, 2nd edn (LEXIS Pub, NY), 1984, p. 203, para 21.11.
- 43 *The Indian Performing Rights Society Limited v Branch Manager, The Muthoot Finance Pvt Ltd*, 2010 (42) PTC, 752 (Mad).
- 44 <http://www.nishithdesai.com/hollywood-bollywood/media-chap-5-E.htm#> (26 May 2012).
- 45 <http://copyright.lawmatters.in/2010/05/non-voluntary-copyright-licences.html> (27 May 2012).
- 46 Stewart Stephen M and Sandison Hamish, *International Copyright and Neighbouring Rights*, 2nd edn (Butterworths, London), 1993, p. 75.
- 47 It states: ‘ (1) Any broadcasting organization desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.’
- 48 <http://entertainment.howstuffworks.com/music-licensing2.htm> (28 May 2012).
- 49 <http://www.ijipl.com/vol2art10.pdf> (13 May 2012).
- 50 Singh Raghbir, *Iyengar’s Commentary on the Copyright Act*, 7th edn (Universal Law Publishing Co Pvt Ltd, New Delhi), 2010, p. 415.
- 51 *Academy of General Education, Manipal v B Manini Mallya*, 2009 (39) PTC 393 (SC).
- 52 *Phonographic Performance Limited v State of Punjab through Secretary, Department of Home Affairs & Justice, Civil Secretariat and Ors* (2011) 164 PLR 519.
- 53 *Video Master v Nishi Productions*, (1998) 2 Mah LJ 81 (Bom).
- 54 La France Mary, From whether to how: The challenge of implementing a full public performance right in sound recordings, *Harvard Journal of Sports & Entertainment Law*, 2 (2011) 221-263.