

## *Entertainment Network v Super Cassette Industries: Compulsory Licensing in the Copyright Demystified*

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Compulsory licences are exceptions to the exclusive rights of the copyright holders. If monopolistic conduct or exclusionary conduct of the licensor is observed, then it will create anti-competition in the market and kill potential. If these copyright holders by the exercise of their right refuse to communicate or withhold their work from public then it will affect public interest. India is a developing country, her economic, social and educational developments have to be accelerated and not retarded. Public interest cannot be put on stake just for the profit of one person. The Supreme Court's decision in *Entertainment Network (India) Ltd v Super Cassette Industries Ltd*<sup>1</sup> can be rendered as an epoch-making case in the field of intellectual property. The case became all the more important as it involved wide ranging issues like interpretation of Section 31 of the Copyright Act and the purposive interpretation placed on it treading on a thin line balancing the public interest with commercial interest. The radio industry in India is one of the booming sectors. Out of 139 music companies around 69 are private radio stations.<sup>2</sup> This paper reviews and critiques the decision in the case alongwith the law prevailing in other countries. This paper makes two important contributions bringing aspect of compulsory licences to the fore and providing step by step discussion on the above judgment. The paper also highlights anxiety of the industry and further suggests the way out of this.

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*'Intellectual Property has the shelf life of a banana.'*<sup>3</sup>

This quote aptly sets the background for controversies surrounding IPRs. Initially there was no protection for the intellectual property rights (IPR). Later owners' right over the creations were accepted and they were granted certain rights. These laws provided a protection to the owners under different categories and names like patents, industrial designs, copyrights, trademarks etc.<sup>4</sup> However, occasionally the IPR owners used to engage in 'exclusionary conduct' towards innovators and potential competitors on markets which are secondary to and dependant upon an IPR protected industrial standard or *de facto* monopoly. This anti-competitive conduct could manifest itself in the form of 'refusal to deal' or 'refusal to licence'. To counter this behaviour many measures have developed over time and one of such measures is 'compulsory licensing' which can be seen as a potent tool for mitigating the rigours of 'abuse of dominant position by arbitrary refusal to deal or

licence', thereby rectifying market failure. This concept of compulsory licensing in copyright is derived from patent law, where the owner is forced to face the competition in market, similarly in copyright law; the copyright holder is subjected to equitable remuneration.<sup>5</sup> There are two main reasons for introducing non-voluntary licences: (i) where the users of certain works have access to these works on terms which are known in advance and it is not practicable for them to locate right owner each time and obtain an individual licence from him; (ii) to avoid creation of monopoly for user of certain copyrights at the expense of all other users. However criticism can be attributed to the moral rights of the author and his economic rights.

The application of the compulsory licensing provisions in the copyright has been a bone of contention and various courts have kept on passing contradictory judgments. This lacuna came to be finally settled in *Entertainment Network (India) Ltd v Super Cassettes Industries*.<sup>1</sup> This comment analyses dicta in the case in the light of its effect on the music companies

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and powers of the Copyright Board. The comment would also draw a comparison with the law prevailing in the United States and the European Union.

### **Circumstances Leading to the Present Case: A Background Study**

Although much water has flown after this case, this case still holds a dominant position and the law laid down still holds good especially the principles laid down therein. Grant of copyright in India is governed by the Copyright Act 1957. Being governed by statutory law no copyright can exist in any work except as provided in the Section 16 of the Copyright Act. This makes it clear that under the present law, copyright is a creation of the statute and there is no such thing recognized as a common law copyright. This being stated, the authors analysed the events that led to the present case being filed.

Super Cassettes Industry Limited (SCIL) is one of the leading music companies engaged in the recording of songs and acquiring of rights in the songs created by others. Entertainment Network Industry Limited (ENIL) is a FM radio broadcaster which broadcasts under the name 'Radio Mirchi'. Bennett Coleman & Co Ltd is the holding company of Super Cassettes. The appellant, ENIL is running radio stations in 12 cities and is a member of the copyright society, Phonographic Performance Ltd (PPL).

In this case two petitions came to be clubbed.<sup>6</sup> ENIL being one of the appellants was denied licence to broadcast musical works of owners of copyright that resulted in the issue of compulsory licensing.<sup>7</sup> The case involved an in-depth analysis of Section 31 of the Indian Copyright Act, 1957 which enumerates the procedure for the issuance of a 'compulsory licence' to republish copyrighted works, which are withheld from the public.<sup>8</sup>

The second appellant, PPL, an association of phonogram producers registered with the Government of India as a Copyright Society in 1996 is engaged in administering the broadcasting/telecasting along with public performance rights on behalf of 'all members' of the music companies.

The issue arose when the appellant (ENIL) was playing the songs in which the respondent (SCIL) had copyright under the mistaken impression that respondent was a member of PPL. A suit was filed in the Delhi High Court restraining the appellant from playing the songs belonging to the respondent. Consequent to this several broadcasters including the appellant filed petition for grant of compulsory

licence to the Copyright Board under Section 31 (1)(b)<sup>9</sup> of the Act. The Board allowed the same and fixed the royalties to be paid. Appeals were filed against this order of the Board to the Bombay High Court, which remitted the matter back to the Copyright Board for reconsideration.

The appellant filed an application before the Copyright Board at Delhi for the grant of compulsory licence under Section 31(1)(b) of the Act. The respondent contended in Bombay High Court that they were not given suitable opportunity for the presentation of the evidence. This was tagged along with the various other appeals in the same court. The respondent filed appeals in the Delhi High Court as well which referred the matter back to the Copyright Board after taking an undertaking from the appellant that the songs would not be broadcast. The decision of the Bombay High Court<sup>6</sup> opined that in terms of Section 31 of the Act, grant of compulsory licence on reasonable remuneration is permissible; the Delhi High Court<sup>6</sup> held otherwise.

An appeal was preferred against the decision of the Delhi High Court in the Supreme Court. The bench comprising of S B Sinha and Lokeshwar Singh Panta, J J formulated the following issues in the case:

- Whether the Copyright Board has jurisdiction under Section 31(1)(b) of the Copyright Act, 1957 to direct the owner of a copyright in any Indian work or a registered copyright society to issue compulsory licences to broadcast such works, where such work is available to the public through radio broadcast?
- Whether in any event such a compulsory licence can be issued to more than one complainant in the light of Section 31(2)<sup>10</sup>?
- What would be the relevant considerations which the Copyright Board must keep in view while deciding on;
  - (a) Whether to issue a compulsory licence to a particular person; and
  - (b) What are the terms on which the compulsory licence may be issued, including the compensation?

The appellants argued that the word 'or' used between clauses (a) and (b) of sub section (1) of Section 31 should be read disjunctively. It was argued that the term 'such work' occurring in the clauses (a) and (b) operate in different fields and as such song broadcasting cannot be compared with publication in print media. The sub section (2) should be confined to clause (a) alone otherwise it would lead to anomaly.

The respondents argued that importance should be given to the copyright protection. The rights should be dealt within the four corners of the statute. It was argued that Section 31 must be given literal meaning. The literal interpretation would mean that the Board can exercise its power provided there is a refusal for publication or the work has been withheld from the public. Both the interests need to be considered, that is (i) the interest of the copyright owners and (ii) the interest of the general public. It was argued that the narrow commercial interests of the broadcasters should not be given preference under Section 31 of the Act.

The arguments advanced in this paper have been segmented into two parts; firstly, that the Court has incorrectly applied the concept of public interest; secondly, there has been wrongful purposive interpretation of Article 31(2).

#### **The Public Interest Angle**

The meaning of public interest has been scrutinized greatly by Indian Courts.<sup>11</sup> Though there is no concrete definition of the term 'public interest'<sup>12</sup>; therefore, reliance has been placed on the definitions provided for by Black's Law Dictionary as 'Something in which the public, the community at large, has some pecuniary interest or some interest by which their legal rights or liabilities are affected.....',<sup>13</sup>

Prior to examining the ruling in Entertainment Networks, one may consider the findings of the Bombay High Court in *Phonographic Performance Ltd v Music Broadcast (P) Ltd*<sup>6</sup>, which rightly concluded that:

- (a) Under Section 31(1)(b) grounds to seek compulsory licence should fall outside the ambit of Section 31(2) of the Act. The relief stipulated under Section 31(2) should only be restricted to Section 31(1)(a); and,
- (b) Section 31(1)(b) of the Act includes broadcasting of sound records which are already available to the public. Therefore, since the general public is not deprived of their right to enjoyment, the issue of grant of compulsory licence in relation to Section 31(2) does not arise.

However, whilst entertaining the complaints of those who wish to 'communicate to the public'<sup>14</sup> copyrighted works; the right of the copyright holders should not be disregarded. In the present case, ENIL broadcasted copyrighted work owned by SCIL without paying any royalty. Section 11 of the Act

provides for the constitution of the Copyright Board as well as defines its functions. In this case the Supreme Court has expanded its power and added another function; that is, to determine the amount of royalty to be paid to a party who wants to obtain the copyrighted work. Therefore, the amount of royalty which each broadcaster is entitled to pay is to be determined by the Board.

The court concluded that compulsory licensing does exist in Australia, China, Japan and UK. A balance has to be struck between the rights of the owner and the right of the public to access the work. As regards the powers of the Copyright Board, following observation of the court is noteworthy:

'...the provisions relating to grant of licence by owners of copyright and compulsory licences operate in different fields.'<sup>1</sup>

Section 31 uses the words 'or' between the clauses. Then question was whether it was supposed to be read disjunctively or conjunctively. The court concluded that it has to be read disjunctively. The court sought to interpret the meaning of the word refusal used in Section 31 of the Act. The court attributed meaning of the word to the context in which it is used. It came to determine what exactly is meant by the communication to the public. The court gives a very wide meaning to the same. The court notes:

'The very fact that refusal to allow communication on terms which the complainant considers reasonable have been used by the Parliament indicate that unreasonable terms would amount to refusal.'<sup>1</sup>

The court refuting the arguments noted that 'The Board acting as a statutory authority can exercise its power from time to time. It is therefore not correct to contend that having regard to the provisions of subsection (2) of Section 31, compulsory licence can be granted only to one and not to more than one broadcaster.'

Section 31(1)(b) in fact does not create an entitlement in favour of an individual broadcaster. The right is to approach the Board when it considers that the terms of offer for grant of licence are unreasonable. The court further noted that principles of natural justice have to be complied with. The court finally agreed with the decision of the Bombay High Court and criticized the Board for not giving opportunity to produce witnesses by one of the parties. The court also remitted the matter again to the Board.

### **The Purposive Interpretation made is not Justified**

The Supreme Court has applied purposive interpretation to Section 31 of the Act rather than a literal one. The principle is that the concept of purposive interpretation<sup>15</sup> is applied only when a literal interpretation would result in an anomaly or absurdity.<sup>16</sup>

The court deliberated on the question that if the right of an author/society is so pervasive, is it necessary to construe the provisions under Section 31 of the Act having regard to the International Covenants and the laws operating in other countries? The court answered the same in affirmative. It was observed that interpretation of a statute cannot remain static. The court noted as follows:

‘Different canons and principles are to be applied having regard to the purport and object of the 1952 Act. What is essential therefore is to see that the expanding area in which the copyright will have a role to play is covered. While India is a signatory to the International Covenants, the law should have been amended in terms thereof. Only because laws have not been amended, the same would not by itself mean that the purport and object of the Act would be allowed to be defeated. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in the societal conditions *vis-a-vis* the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.’

A general rule of interpretation is that a statute should always be read as a whole.<sup>17</sup> On a literal reading of the Section 31(1)(a) of the Act, a compulsory licence can be issued when the ‘work’ is withheld from the public or when there is an unreasonable restriction on the right of the broadcasters on account of communication to the public as per Section 31(1)(b) of the Act.

Whilst applying the ‘purposive’ approach, the court completely ignored the standpoint taken. In *Phonographic Performance Ltd v Music Broadcast (P) Ltd*<sup>6</sup>; Deshmukh J opined that operation of Section 31(2) should be restricted to Section 31(1)(a). Sinha J in the present case has partly come to a similar deduction but even then has read Section 31(1) and Section 31(2) bereft of each other.

If the grant of more than one licence satisfies the public interest test within the realm of Section 31(2) then granting multiple licences can be justified. However, for purely commercial and economical benefit, a licence cannot be obtained under Section 31(2).

Moreover, Sinha J should have deliberated that if a literal interpretation of Section 31 was made, the broadcasters would have no remedy under copyright law if the owners denied a licence to them. It is this factor that forced the Delhi High Court to interpret the word ‘may’ in Section 31 and the Bombay High Court<sup>6</sup> to adopt an interpretation separating the Act of the broadcast as different from that of other ‘communication to the public’. Therefore, instead of making arbitrary claims about purposive interpretation, the Supreme Court should have advised for an amendment for tackling such issues; thereby straightening the law. The interpretation made places a compulsion on the copyright owners to share their work which goes against the very nature of a copyright.

### **Comparative Analysis: An International Perspective**

Evolution of compulsory licensing can be traced back to Berne Convention in which a three-step test for the determination of compulsory licensing was introduced in Article 9(2) of the Convention.<sup>18</sup> Subsequently this Convention led to Stockholm Conference and Paris Act. After decolonisation developing countries including India demanded compulsory licensing so that bulk knowledge and research can be made easily accessible for the development of the country.<sup>19</sup> These demands were rejected; however India in her domestic legislation introduced another provision of remuneration in addition to three-step test. In India, if the refusal of work is unreasonable and suitable remuneration has been given then compulsory licence can be granted but this only satisfies the third test of the Berne Convention.<sup>20</sup> Thus provisions of Berne Convention are quite restrictive in approach.

Demands of India did not go in vain and an appendix was added to Berne Convention by the Paris Act, 1971 which was the result of Stockholm revision, it was meant for special treatment to developing countries so that they can introduce compulsory licence provisions in the law for foreign works.<sup>21</sup> Similarly, Article 13 of the TRIPS Agreement reiterates the provisions of Article 9(2) of the Berne Convention. Specifically Article 11 bis (2) of the Berne Convention generally permits national legislation to determine the conditions under which the broadcasting and related

rights granted by Article 11bis (1) may be exercised. Section 31(1)(b) of Indian Copyright Act is in consonance with Article 11 bis (2) of the Berne Convention and deals with the grant of compulsory copyright when the work is refused to be communicated to public by broadcasting unreasonably.

#### The American Approach

In *Hartford-Empire Co v United States*<sup>22</sup>, the court clearly articulated that the owner of the copyright is not in a position of a quasi trustee for the public. He has no obligation to use it or either grant it for use. However, certain exceptions have been recognized on the same. The essential facility doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.<sup>23</sup>

In *Lorain Journal Co v United States*<sup>24</sup>, the Supreme Court observed that where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility. The federal circuit in *Intergraph Corp v Intel Corp*<sup>25</sup> trimmed the ambit of 'essential facilities' doctrine by holding that only when the facility owner and the user compete in a downstream market that requires access to the facility, will the doctrine apply.

A perusal of the above decisions makes it amply clear that in US, apart from mere 'ownership' of an IPR, some additional exclusionary conduct is essential for the grant of compulsory and involuntary licence.

#### The European Union Approach

The relevant provision is Article 82 of the EC competitive law which regulates undertakings which have been found to occupy positions of dominant market power. It has been interpreted to prohibit anti-competitive or 'exclusionary' abuses such as refusal to supply without justification. In *AB Volvo v Erik Veng (UK) Ltd*<sup>26</sup>, the ECJ noted that no obligation is imposed upon the proprietor of protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot itself constitute an abuse of a dominant position.

In a more recent case of *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*<sup>27</sup>, the court

reasserted that the three cumulative criteria must be met for a refusal to be regarded as abusive:

- The undertaking which requested the licence must intend to offer new products or services not offered by the owner of copyright and for which there is a potential consumer demand.
- The refusal cannot be objectively justified.
- The refusal must be such as to exclude competition on a secondary market.

#### Curtailed of the Owner's Power of Copyright

The court has referred to the word publication but has failed to specify whether it has the same meaning as the publication of a print material has. It is submitted that it should be specified whether there is a separate standard for the broadcast of songs.<sup>28</sup>

One of the views that have been put forth is that the decision has given more teeth to the Copyright Board for deciding royalty rates.<sup>29</sup> It is argued that if rates are to be decided by the Copyright Board, then there is no need for the music industry to enter into negotiations for the fixation of rates. This would definitely lead to intense lobbying by the music companies in the Copyright Board. In the same vein, the Supreme Court has left the fixation of 'appropriate royalty rates'<sup>1</sup> to the Board. This is problematic because once the Board comes to a decision; the scope to negotiate commercial terms amongst the stakeholders becomes limited. One cannot dispute the fact that the Board being a statutory authority is subject to judicial review but one can state that excessive power has been given to the Board; thus, increasing the possibility of pecuniary or personal bias. Moreover, the judgment itself was making space for lobbying thereby mutilating the general interest of the public. An important point to be noted is that the issue of compelling public interest which does not apply when the basic issue is more inclined towards the commercial interest of parties.<sup>30</sup>

The only place where the issue of public interest *prima facie* comes in is when there is a threat of creation of monopoly.<sup>1</sup> It is a norm that public interest is subject to the facts and circumstances of each case; however, over here the applicability of the principle is highly inaccurate and against the freedom to enter into agreements.

The question that arises is whether the ownership is illusory. Are we reverting to the price and supply control regime qua the sound recording rights where the owner loses his rights to choose the buyer and the price he wants to charge? We are moving towards the

market driven economy in which market forces are permitted to play their role for the determination of demand and supply? In such a situation the landmark judgment appears to be acting contrary to the policy that has been adopted. The judgments have definitely equated music rights to other goods available in the market which is *per se* wrong.

The judgment has been wrongly inspired by the concept of monopoly. Even if assuming for a moment that it is a monopoly, it is worth mentioning that the contractual powers of even the monopolistic establishment in respect of its dealing with the customers/buyers/purchasers were not taken away under the MRTP Act. If the legislature in its wisdom decided not to place such restrictions even on monopolistic organizations what propelled the court to place the same on music companies is a matter for deliberation.

If the court has been influenced by various international conventions that India has signed<sup>31</sup>, does that mean the object of the Act itself would be allowed to be defeated. However, the court should have realized that interpretation of the domestic law by use of international convention so as to make them more meaningful and incorporating the terms of domestic law stands on two different footings.

#### **Curtailement of Owner's Power**

Moreover, the ruling of the Supreme Court seems to give exclusive power to the Board under the guise of public interest if the parties cannot come to an agreement regarding the amount. Section 31(1)(b) uses the word 'may' by virtue of which the Delhi High Court<sup>6</sup> gave the Board undue power to grant licences to whomever it may deem fit. The issue of granting the Board exclusive jurisdiction to grant licences is problematic even though the High Court did state the need to prove the 'valid grounds' for granting the same. A major glitch pertaining to this is granting licences to more than one broadcaster. In this light, two major issues have been left unaddressed by the Court. Firstly, the 'valid grounds' for ascertaining whether the party seeking the licence is doing so in *public interest* or not under Section 31(2) of the Act have not been defined and secondly; the means of ascertaining the 'appropriate royalty' have not been laid down.

To emphasize on this issue, the Supreme Court should have illustriously used foreign judgments. For instance, the case of *Associated Music v Debs Memorial Radio Fund*<sup>32</sup> states that while providing copyright owners with a licence to broadcast their copyrighted work, public broadcasters should not get

favoured treatment; i.e., it should be taken into consideration that there intent is not solely commercial in nature. An evident problem which can be attributed to multiple licences by applying the above case is to gauge whether granting more than one licence is in general interest of the public<sup>33</sup> and not merely in furtherance of the commercial interests of the broadcaster. Therefore, it is imperative that Section 31(2) and Section 31(1) are read together. While subjecting Section 31(2) to Section 31(1) , it is necessary that the grant of multiple licences satisfies the grounds of reasonableness which have not been defined by the Court in this case. For instance, to give a concrete definition to the 'valid grounds' the case of *IMS Health v NDC Health*<sup>34</sup> could have been put to use. In this case, ECJ laid down 'exceptional circumstances'<sup>35</sup> where there could be a refusal to grant a compulsory licence. Though this was a negative test; a positive test could have been laid down by the Indian courts. This could have been done by listing the reasonable grounds where the grant of licence would be construed in public interest and more than one licence can be granted. The *IMS Health* case gave the owner of an intellectual property the status of a dominant undertaking<sup>36</sup> and stated that on refusal by the owner, the question of issuing a compulsory licence does not arise. However, in the *Entertainment Networks* case, the Supreme Court has excessively curtailed the power of the copyright owner as the Board has the discretionary power to issue licences to as many broadcasters it deems to be in public interest.

#### **Decision of the Copyright Board**

As the Hon'ble Supreme Court remitted the matter to the Board, the Copyright Board has settled this dilemma in *Music Broadcast Pvt Ltd v Phonographic Performance Ltd.*<sup>37</sup> On 25th August 2010, the Copyright Board put an end to the nine-year saga of compulsory licensing dispute between the radio stations and collecting society, in the matter of *Music Broadcast Private Ltd (MBPL) v Phonographic Performance Limited (PPL)* and other connected applications [Case Nos 1, 2 and 6 of 2002 along with other cases. A number of witnesses along with expert witnesses were examined by the Board giving the trial a flavour of court room trial. The Board arrived at the magical figure of 2% of net advertising revenue as the compulsory licensing rate.

The Board was quite liberal in approach and upheld in favour of granting compulsory licences under section 31 (1)(b). The Board opined that if the

communication of the work to the public has been refused and such refusal is unreasonable, then in such cases compulsory licences can be granted. Ruling of the Board put more emphasis on 'public interest' as the same can be found in various Indian laws, specifically Constitution of India which says that India is a social welfare state and the interest of public is supreme. Government of India itself through its policy wanted to develop FM radio for the purpose of social development by which information, education, entertainment etc. could be transmitted to far off places. Now it is an established fact that FM radio owes a duty towards nation building and hence compulsory licence cannot be denied to it with less amount of royalty. Music industry argued that such broadcasting hampers their sale of music CDs, I-PODS etc. but the Board said instead of harming FM radio is trying to popularize music and eventually it will boost the sales of music industry.

By interpreting Section 31(1)(b), the Board also tried to distinguish broadcasting through radio and TV channels. Radio is 'free on air' and does not charge anything from its subscribers but on the other hand TV channel charge exorbitant amount from its viewers. Thus for such *pro bono* initiatives radio should be exempted from high royalties. The Board held that keeping in mind the fact the radio service providers, though private commercial ventures, worked within the social development plan of the government, the only reasonable licence fee model was wherein the music providers charge a fixed percentage of the net advertisement revenue. In fact the Board reasoned that this would generate far more income for music providers as more broadcasters would be willing to come into the foray throughout the country which would generate further income. Based on the reasoning provided above, the Board developed a set of terms and conditions under which it directed the Registrar of Copyrights to grant licences to the complainants based on a revenue sharing model wherein 2% of the net advertisement earnings of each FM radio station would be set apart to pay the music providers.

Although the judgment is definitely a positive development for the FM radio industry, there still remains the question of whether it will help serve the very purpose on which the judgment hinged – that of public interest. The average city dweller will definitely be able to get his regular dose of 'top music' on his way to work, but it remains to be seen as to whether it would really help incentivise greater expansion of the

private radio industry in tribal or remote areas wherein the revenue earned is likely to be less.

#### **Litigation on the Order of the Copyright Board**

Super Cassettes preferred a Writ Petition No.6255 of 2010(ref.38), questioning the order passed by the Copyright Board dated 25 August 2010. On 15 September 2010, the Delhi High Court passed an interim order to the effect that the order dated 25 August 2010, passed by the Board would not be relied upon by any of the Respondents or any other party for a compulsory licence against Super Cassettes.

Despite the aforesaid order of the Delhi High Court dated 15 September 2010, MBPL filed an application for compulsory licence under Section 31(1) (b) of the Copyright Act, relying solely on the rates fixed by the Copyright Board for PPL by its order dated 25 August 2010. Other eight broadcasters also filed applications for compulsory licence against Super Cassettes, relying solely on the order of the Copyright Board dated 25 August 2010. Super Cassettes responded to the said offer made by MBPL on the same terms as were prevalent under the expired voluntary licence agreement.

The said proposal made by Super Cassettes was rejected by MBPL, while other broadcasters continued to broadcast the work of Super Cassettes on existing mutually agreed terms which were different from the terms set out in the order of the Copyright Board dated 25 August 2010. By its order dated 28 March 2011, the Copyright Board dismissed the application for interim relief filed by MBPL holding that it did not have the power to grant any interim compulsory licence.

MBPL thereafter preferred an appeal against the order dated 28 March 2011, before the Delhi High Court and by its judgment and order dated 1 September 2011 in R.F.A.No.250 of 2011 and C.M.No.8977 of 2011, the High Court reversed the finding of the Copyright Board upon holding that even while the grant of compulsory licence under Section 31 of the Copyright Act was under consideration, an interim compulsory licence could be granted.

It was further held by the High Court that where the controversy concerns only the quantum of licence fee, an interim protection should be granted and even though Super Cassettes was not a party to the order of the Copyright Board dated 25 August 2010, it is similarly placed as PPL, which was bound by the order passed by the Board on 25 August 2010. Accordingly, it was

appropriate that Super Cassettes should also receive 2% of the net advertisement revenue as licence fee in the interim period for broadcasting of its sound recordings.

Against this order of the High Court Super Cassettes filed an appeal in the Hon'ble Supreme Court.<sup>39</sup> The sole question for consideration before the Hon'ble Supreme Court was whether on a complaint made to the Copyright Board under Section 31 of the Copyright Act, 1957; the said Board under Clause (b) of Sub-Section (1) can pass an interim order in the pending complaint.

It was submitted in the Court that being a creature of statute, the Copyright Board could only exercise such powers as were expressly vested in it by the statute and that the power to grant an interim compulsory licence not having been vested with the Board, it could not exercise such substantive power, which it did not possess. It was further submitted that by making an interim arrangement and granting an interim compulsory licence to the respondent, the High Court had conferred upon itself a jurisdiction which the Copyright Board and, consequently, the High Court did not possess under Section 31 of the Copyright Act.

The Hon'ble Court noted in Para 39 that a Tribunal is a creature of Statute and can exercise only such powers as are vested in it by the Statute. Before allowing the appeal the Court noted that such incidental powers could at best be said to exist in order to preserve the status-quo, but not to alter the same, as will no doubt happen, if an interim compulsory licence is granted. If the legislature had intended that the Copyright Board should have powers to grant mandatory injunction at the interim stage, it would have vested the Board with such authority. The submission made that there is no bar to grant such interim relief in Section 31 has to be rejected since the presence of a power cannot be inferred from the absence thereof in the Statute itself.

### **Copyright Amendment Act, 2012: A Failed Attempt**

After a long wait and a lot of controversy the Copyright Amendment Act, 2012 has been enacted. Two specific Sections viz. 31 C and 31 D have been added to the Copyright Act that specifically addresses the issues of licensing. Numerous changes have been made to the provisions dealing with compulsory licensing and new provisions have been added with respect to statutory licensing. The salient points of these provisions have been discussed hereinafter.

Section 31C of the amended Act deals with statutory licence for cover versions. In the unamended Act, Section 52 (1) (j) provided an exception from infringement, in relation to the cover version, if the cover versions were made in accordance with the conditions specified in the said Section. The 2012 Amendment has deleted the said Section and added a new Section 31C, which provide for granting a statutory licence to make cover versions. Clause (4) is worth noting which provides that one royalty in respect of cover version shall be paid for a minimum of fifty thousand copies of each work during each calendar year in which copies of it are made. However, the Copyright Board may, by general order, fix a lower minimum in respect of works in a particular language or dialect having regard to the potential circulation of such works. This is important as the Copyright Board has been given power to fix the royalty rates. Further proviso to Clause (5) further strengthens the power of the Copyright Board stating that the owner of the copyright may file a complaint before the Copyright Board if the owner has not been paid in full for any cover version purporting to be made in pursuance of this section. The proviso further provides that if the Copyright Board is, prima facie, satisfied that the complaint is genuine, it may pass an order *ex parte* directing the person making the cover version to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty. Thus it is amply clear that the power to issue *ex parte* orders have been expressly conferred on the Copyright Board.

Section 31 D of the amended Act provides for statutory licence for broadcasting of literary and musical works and sound recording. The Amendment has introduced the concept of 'statutory licence' in relation to published works. The amendment states that any broadcasting organization, that proposes to communicate a published work to the public by way of broadcast (including television and radio) or a performance of any published musical/lyrical work and sound recording, may do so by giving prior notice of its intention to the owners of the rights. Such prior notice has to state the duration and territorial coverage of the broadcast and pay royalties for each work at the rate and the manner fixed by Copyright Board. The rates fixed for television broadcasting should be different from that fixed for radio broadcasting. In

fixing the manner and the rate of royalty, the Copyright Board may require broadcasting organization to pay an advance to the owners of rights. No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights. The names of the author and the principal performer will have to be announced with the broadcast (unless communicated by way of the performance itself). Records and books of accounts will have to be maintained by the broadcasting organizations and reports will be required to be given to the owners of the rights. The owners are also granted audit rights against the broadcasting organizations.

The Copyright Board has been given the power to decide royalty rates. However it is not clear on what principles the Copyright Board may fix royalties for statutory licence; whether the Board will invite suggestions from stakeholders or separate rates will be fixed for different territorial areas or whether royalty rates will vary depending upon the nature of the work. Further there is no express mechanism provided to challenge the rates fixed by the Board for statutory licences. It seems probable that if the royalties fixed by the Copyright Board, are more favourable than the Tariff Scheme issued by the Copyright Societies (given more powers under the amended Act), the broadcasters may opt for the same. This is likely to reduce lengthy negotiations and/or litigation with the right holders/copyright societies. Under Section 31, the Copyright Board while considering the application for compulsory licensing is required to form an opinion whether the applicant for compulsory licensing is qualified to do so. It has not been clarified as to what is meant by 'qualified to do so'.

Further in Section 31 under the amended Act for the words 'licence to the complainant' the words 'licence to such person or persons who, in the opinion of the Copyright Board, is or are qualified to do so' shall be substituted. The criteria have not been laid down. It seems that instead of clearing the clouds, the amendments have opened Pandora's Box as this would lead to further litigation.

Thus it remains that the amendments have remained rather ambiguous and have failed to clear the mist surrounding the aspects of compulsory licensing. It also remains to be seen how the Copyright Board would decide the royalty rates and what are the factors

that would play role in that. The amendment Act fails miserably to pin point the conditions under which compulsory licensing can be done.

### **Conclusion**

The jurisprudence in the EU and US both suggest that under exceedingly limited circumstances, compulsory licensing can be an appropriate remedy in antitrust cases. It is abundantly clear that such licences are not to be issued routinely and should be applied cautiously and within a limited ambit. Compulsory licensing has served the purpose rectifying the market failure, which is the quintessence of competition policy. The narrow and well defined application has at the same time ensured that an efficacious and delicate balance is maintained between innovation and competition. Judgments in these jurisdictions laid down that at any cost competition in the market should not be eliminated and the refusal should not be unjustified. If these conditions are not fulfilled then the Board will award compulsory licence. However the same has not been replicated in India, as it appears from the case at hand decided by the Supreme Court of India. Court explicitly decided that Copyright Board has suitable jurisdiction to hear such matter.

As a general rule, the licences are granted under very narrow circumstances and timely restrictions.<sup>40</sup> The Act provides for granting a compulsory licence to a complainant who benefits the public at large to its maximum. The discretion granted to the Board in determining the grant of licence to appropriate candidates without any explicit definition of valid grounds is illogical. If the Board is given the power to choose the number of complainants satisfying the relevant consideration test and then grant licences, such discretion would be unfettered in nature.

Thus, it can be concluded that the Supreme Court has failed to do justice to compulsory licensing and has belittled the whole issue rather than coming up with a significant analysis and interpretation. Sinha J has provided tangential reasoning for most of the judgment. However, this case shall definitely go down as one of the most debated cases in the field of copyright.

The law of the land is to be respected. But the question remains whether the Hon'ble Court was competent enough to legislate on the same. That still remains a debatable issue. Naturally the question arises whether the proposition laid down in case of

broadcasting of sound recordings will also hold good for broadcasting of the programmes by television channels. This judgment opens a watch gate for similar industries which might have to bear the brunt at a later stage. Fortunately, the anxiety of the industry has somewhat reduced when the judgment of the Board came, which clearly distinguished between broadcastings through television channels and radio. The Board laid down that if the requisites of Section 31 (1)(b) are fulfilled, there is no problem in granting compulsory licence.

However one important thing to be noted is that the Copyright Board and thereafter the Hon'ble Supreme Court (May 2012)(ref.39) held that interim compulsory licence cannot be granted. This shows a marked shift in the attitude of the judiciary. As can be seen from the decision in the 2008 case, the apex court was inclined to grant compulsory licence and minimum conditions were to be imposed in granting of the same. However, the same Court in 2012 construed the provisions of the Copyright Act strictly to hold that no interim compulsory licences can be granted by the Copyright Board. This step is an action in the right direction and would assure the Music Companies that compulsory licensing provisions would not be allowed to be misused giving them some peace of mind. Strict interpretation of the provisions would serve the public interest by promoting the growth of music companies and thus encouraging innovations and investment in this filed. It could only be speculated that in further rounds of litigation, the court strengthens its footing as taken in the 2012 decision and do justice to the Copyright Act provisions. It also remains to be seen as to what would be the impact of the Copyright (Amendment) Act, 2012 on the decision of the Court.

## References

- 1 *Entertainment Network v Super Cassettes Industries*, 2008(37) PTC 353 (SC), Para 71, 78,84,89-91.
- 2 [www.pplindia.org/index1.asp](http://www.pplindia.org/index1.asp) (16 October 2012).
- 3 Bill Gates quotes(American Entrepreneur and Founder of Microsoft Co, b.1955), [http://thinkexist.com/quotes/with/keyword/intellectual\\_property/](http://thinkexist.com/quotes/with/keyword/intellectual_property/) (25 September 2012).
- 4 [www.legalservicesindia.com/articles/impip.htm](http://www.legalservicesindia.com/articles/impip.htm) (25 March 2012).
- 5 Stewart & Sandison, *International Copyright and Neighbouring Rights* (Butterworths, New Delhi), 1989, p. 83.
- 6 *Super Cassettes Industries Ltd v Entertainment Network (India) Ltd.* (2004) 29 PTC 8 (Del) and *Phonographic Performance Ltd v Music Broadcast (P) Ltd*, (2004) 29 PTC 282 (Bom)
- 7 Article 11bis of the Berne Convention.
- 8 Das J K, *Intellectual Property Rights* (Kamal Law House, Delhi), 2008, p. 187.
- 9 Section 31 of the Act before 2012 amendment: Compulsory licence in works with held from public - (1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work— has refused to re-publish or allow the re-publication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable, the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant licence to the complainant to re-publish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of Copyright Board, on payment of such fee as may be prescribed. Explanation.- In this sub- section, the expression' Indian work includes-(i)an artistic work, the author of which is a citizen of India; and (ii)a cinematograph film or a record made or manufactured in India. (2) Where two or more persons have made a complaint under sub-section (1), the licence shall be granted to the complainant who in the opinion of the Copyright Board would best serve the interests of the general public.
- 10 Subsection (2) has been now omitted by the Copyright Amendment Act, 2012.
- 11 Jain D C, *The Phantom of Public Interest*, Supreme Court Cases (Journal Section), 3 (1986) 30.
- 12 *Janata Dal v H S Chowdhary and Ors.* AIR 1993 SC 892, paras 11, 12 and *Holicow Pictures Pvt Ltd v Prem Chandra Mishra and Ors.* AIR 2008 SC 913, paras 51,52.
- 13 Garner Bryan A, *Black's Law Dictionary*, (West Publishing, Delhi), 1990, p. 1266.
- 14 Section 31(1)(b) of the Copyright Act, 1957.
- 15 Barak Aharon, *Purposive Intepretation In Law* (Universal Law Publishing Co Pvt Ltd, Delhi), 2007, p. 88.
- 16 *New India Assurance v Nusli Wadia* (2008) 3 SCC 279; paras 51- 54.
- 17 *Pentiah v Veeramallappa*, AIR 1961 SC 1105; paras 8-10.
- 18 The Berlin Act 1908 introduced for the first time, the possibility of member countries to apply a compulsory license (Article 13/2); Stewart & Sandison, *International Copyright and Neighbouring Rights* (Butterworths, Delhi), 1989, pp. 105, 106. Paragraph 2 of Article 13 of the Berlin Act (1908) of the Berne Convention reads: Reservations and conditions relating to the application of this article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.

- Anyhow, it is the Brussels Act, 1948 that provided for equitable remuneration to be fixed by competent authority in the absence of mutually agreed terms. See article 13 (2) of the Brussels Act 1948.
- 19 Records of the Intellectual Property Conference of Stockholm (1967).
  - 20 Paragraphs 71 and 80 of the Records of the Intellectual Property Conference of Stockholm (1967).
  - 21 The House Report on the Berne Convention Implementation Act of 1988 (1988).
  - 22 *Hartford-Empire Co v United States*, 323 US 386 (1945).
  - 23 *First articulated in United States v Terminal Railroad Ass'n*, 224 U.S. 383 (1912).
  - 24 *Lorain Journal Co v United States*, 342 US 143, 146-49 (1951).
  - 25 *Intergraph Corp v Intel Corp*, 195 F.3d 1346 (Fed. Cir. 1999).
  - 26 *AB Volvo v Erik Veng (UK) Ltd* [1988] EUECJ C-238/87.
  - 27 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C418/01) [2004] E.C.R. I-5039 (ECJ (5th Chamber)).
  - 28 Narayanan P S, *Intellectual Property Law* (Gogia Law Agency, Hyderabad), 2005, p.310.
  - 29 Goorha Pallavi, SC ruling gives more teeth to Copyright Board for deciding on royalty rates, <[http://www.exchange4media.com/e4m/radio/radionews.asp\\_section\\_id=7&news\\_id=31072&tag=25980](http://www.exchange4media.com/e4m/radio/radionews.asp_section_id=7&news_id=31072&tag=25980)>, (26 March 2012).
  - 30 *Eastern Book Company v D B Modak* (2008) 1 SCC 1, para 15
  - 31 India is a signatory to various International conventions, such as, Berne Convention, Rome Convention, etc. as would appear from the International Copyright Order, 1999 issued by the Central Government. The International Conventions provide for compulsory license. Whereas U.K., Australia, Singapore, U.S.A. have framed laws for grant of compulsory license and also constituted Tribunals for the purpose of overseeing the tariff for licensing, stricto sensu the Indian Act does not say so.
  - 32 *Associated Music v Debs Memorial Radio Fund*, 141 F. 2d 852 [1994]
  - 33 Section 31(2) of the Indian Copyright Act, 1957.
  - 34 *IMS Health v NDC Health* [2002] 5 C.M.L.R. 1 (ECJ)
  - 35 *Radio Telefis Eireann (RTE) & Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill Case)* [1995] All E.R. (EC) 416 (ECJ), para 6.
  - 36 *Carew and Company Ltd v Union of India* (1975) 2 SCC 791, Para 5.
  - 37 Decision came on 25th August, 2010.
  - 38 The case is still pending in the High Court.
  - 39 *Super Cassettes Industries Ltd v Music Broadcast Pvt Ltd* [Civil Appeal Nos.4196-4197 of 2012 arising out of SLP(C) Nos.26581- 26582 of 2011]. The judgment came on 4th May 2012.
  - 40 Timm Neu, Bollywood is Coming!: Copyright and film industry issues regarding, international film co-productions involving India, *San Diego International Law Review*, 8(1)(2006) 123.