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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE JURISDICTION
COMMERCIAL APPEAL NO. 424 OF 2019
IN
COMM NOTICE OF MOTION NO. 72 OF 2019
IN
COMMERCIAL IP SUIT NO. 26 OF 2019
WITH
COMMERCIAL APPEAL NO. 425 OF 2019
IN
COMM NOTICE OF MOTION NO. 95 OF 2019
IN
COMMERCIAL IP SUIT NO. 70 OF 2019**

ARUN
RAMCHANDRA
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1. **WYNK LTD,**
Bharti Crescent, 1, Nelson Mandela
Road, Vasant Kunj, Phase – II, New
Delhi 110 070.
2. **BHARATI AIRTEL LTD,**
Bharti Crescent, 1, Nelson Mandela
Road, Vasant Kunj, Phase – II, New
Delhi 110 070.

...Appellants
(Orig. Defendants)

~ VERSUS ~

TIPS INDUSTRIES LTD,
601, Durga Chambers,
Linking road, Khar (West),
Mumbai 400 052

...Respondent
(Orig. Plaintiff)

APPEARANCES

FOR THE APPELLANTS

Dr Birendra Saraf, Senior

*Advocate, with Ankita
Singhania, Vanditta Malhotra
Hegde, Rishi Mody, Sandeep
Rebari & Sanjana K, i/b Singh
& Singh, Malhotra & Hegde.*

FOR RESPONDENT

Mr Ravi Kadam, Senior Advocate,
*with Rohan Kadam & Sanjay
Chadha.*

**CORAM : G.S.Patel &
Gauri Godse, JJ**

DATED : 20th October 2022

ORAL JUDGMENT (Per GS Patel J):-

1. This common order and judgment will dispose of both Appeals. The Defendants to the Commercial IP Suits are the Appellants. The challenge is to an elaborate and detailed judgment of 23rd April 2019 of SJ Kathawalla J in *Tips Industries Ltd v Wynk Music Ltd & Anr.*¹

1 2019 SCC OnLine Bom 13087.

2. It is true that the impugned judgment is an order made at an interlocutory stage because it came to be passed on two Interim Applications for interim relief filed by the original Plaintiff, Tips Industries Limited (“**Tips**”). Yet the impugned judgment is not, in our view, strictly speaking an interim or interlocutory order in the sense and to the extent that it temporarily puts parties in a certain position. The impugned order is, by our reckoning, and on any fair reading, an authoritative pronouncement on a question of law and of interpretation of certain provisions of the Copyright Act, 1957. Indeed, it may be fair to say that it is so far the only judicial decision on this branch of law. For this reason, we believe it would be inappropriate to approach the impugned judgment as we might do other interlocutory orders, i.e., by applying the well-settled principles of appellate non-interference as set out several decades ago in *Wander Ltd & Anr v Antox India Pvt Ltd*.² This is because the impugned judgment finally settles an interpretation of some portions of the statute. The assessment cannot, therefore, in our view simply be whether the view of the learned Single Judge was reasonably possible. Both sides have addressed us on the correctness of the interpretation adopted by Kathawalla J and it is that which we propose to take up in this judgment.

3. By the impugned order, Kathawalla J granted an injunction restraining the Appellants from exploiting Tips’s copyright in audio files through their streaming service. In his judgment, Kathawalla J framed what he called issues. These are not, strictly speaking, issues as might be struck in the suit; they are, for convenience, points for

2 1990 (Supp) SCC 727.

determination. There were six such, numbered (A) to (F). Issue (A) itself had three or four distinct components. As we shall shortly see, some of these issues are not pressed before us in Appeals.

4. First, a very brief description of the parties. Tips holds copyright in a very large repertoire of more than 25,000 sound recordings. The 1st Appellant, Wynk Limited (“**Wynk**”), owns and operates an online, i.e., internet-based service that carries its name. It is described as a ‘music streaming service’ and has a music downloading OTT (Over The Top) facility. It is accessible on any internet-enabled device. Wynk’s services, generally speaking (not specific to the Tips repertoire), include:

- (a) allowing users or subscribers on payment of a periodic fees or subscription to *download* electronic copies from Wynk so that these can be listened to in an offline mode when not connected to the internet.
- (b) allowing electronic copies of music to be *purchased* by users for a flat fee, such users being then able to keep these songs in perpetuity against this one-time payment. As a matter of record, this element of the service has been discontinued by Wynk in respect of the Tips repertoire.
- (c) Wynk also provides, and this is possibly the most contentious area, *an on-demand streaming service*. Wynk makes songs available to the public by streaming these online. They are accessible through any internet-enabled and connected device. Tips’s repertoire was originally licensed to Wynk by a copyright society,

Phonographic Performance Limited (“PPL”) under a written license Agreement dated 22nd August 2014. The license fee was Rs.1.31 crores annually. That Agreement ended sometime in August 2016.

5. Tips and Wynk went into negotiations, and Tips agreed to extend the license for a few months until October 2016 but insisted on a written agreement being executed between the parties. If this was not achieved by that time, Tips insisted that Wynk must discontinue using Tips’s repertoire for any purposes by 7th November 2016. Tips also insisted that Wynk should pay for usage during this extension period.

6. Negotiations continued from October 2016 until March 2017. Tips claims that sometime around the third week of March 2017, the parties agreed on a minimum guaranteed amount of Rs.4.5 crores towards Tips’s repertoire for a two-year term, with Rs. 2 crores payable for year one and Rs.2.5 crores for the second year. What remained was the execution of a formal document.

7. Wynk seriously disputes this. It says no such figure was ever agreed. The fee is, Wynk says, extortionate, and it said so by its email of 24th April 2017. At this, Tips by return email asked Wynk to deactivate its repertoire from the Wynk platform and on all services on the Wynk platform with effect from 1st May 2017. Then, by a letter of 5th May 2017, Tips demanded that Wynk cease and desist exploiting its repertoire from 10th May 2017. Tips says that Wynk did not comply with these demands.

8. Tips reiterated its stand by its letter of 30th May 2017. It said that Wynk had exploited its repertoire without a commercial arrangement for the last 10 months. Tips asked Wynk to reconsider the proposal on offer. Nothing came of these attempts at a commercial resolution of these disputes.

9. On 17th November 2017, Tips demanded royalty of Rs.2.83 crores against the exploitation of its copyright and directed Wynk to deactivate the entire Tips repertoire from the Wynk platform. Tips also demanded a report on the content consumed during the unlicensed period.

10. Wynk sent an email on 25th November 2017 asserting its rights as a 'broadcaster'. Now — and this is the heart of the controversy — Wynk invoked Section 31D of the Copyright Act 1957. Wynk accepted that the Copyright Board/Intellectual Property Appellate Board (then still in existence) had not yet fixed rates. Recognising this, Wynk agreed to pay Rs.10 lakhs as the first tranche of royalty. It seems to have decided (on its own, by all accounts) that royalty should be payable at 10 paise per stream and in the aggregate about Rs.1.41 crores for the period September 2016 to November 2017. Wynk sent a demand draft in this amount to Tips.

11. Tips rejected all these contentions by a letter of 26th November 2017. It returned a demand draft on 1st December 2017.

12. Wynk wrote to Tips on 8th December 2017 reasserting its stand and its invocation of Section 31D. It claimed that the amount of Rs.1.41 crores was based on Wynk's computation of market shares and conditions.

13. Tips refuted this entire case by its letter of 23rd January 2018 and specifically said that Wynk had no right to invoke Section 31D for its services.

14. Tips sued Wynk. It filed two suits. One suit relates to the downloading facility. The other relates to the on-demand streaming service. The 2nd Defendant to both suits is Wynk's holding company, Bharti Airtel.

15. Tips suits are actions in copyright infringement. Tips sought injunctions, perpetual and temporary, against Wynk from communicating the Tips repertoire to the public, from giving Tips repertoire songs for download, rent or on commercial rentals.

16. Before Kathawalla J, affidavits were filed. After an extended hearing, the learned single Judge rendered the impugned judgment.

17. Before we proceed to the merits of the controversy before us, we believe a closer look at the technology and services is required. A few things are apparent. Wynk does not provide services on a traditional radio or FM radio platform at all. Its services are entirely online, that is to say, internet-based. We will take the services as they exist generally in the industry(not as modified for the Tips

case). The word 'streaming' is undefined and is used somewhat loosely. We think it would be more accurate for the purposes of this discussion to distinguish between services that are offered online i.e., which are internet-based, and those are not internet-based. The reason for this is an additional layer of complication for there exist today many services that are internet-based but which are exactly identical to offline radio FM services. To explain this further, a traditional radio service plays music or other content. Listeners may tune in at any time. In a traditional FM broadcast (of the sort one might hear on a car radio or on a radio set), there is no question of recurring monthly subscription. One simply tunes in to the station of choice. The user has no control over the content. He or she must listen whatever is being played, including the somewhat annoying non-stop chatter of the radio jockeys and equally annoying but undoubtedly necessary advertisements. Online services sometimes do away with advertisements with a fee. Online radio, especially in the premium segment, also requires a fee (to eliminate those irritating advertisers) but the one thread common to all radio-type services is that the *user has no control over the content*. The user cannot go back to a previous song. The user cannot curate or put together a preferred playlist of choice. Some online radio-type services allow the user the choice of selecting a particular genre or sub-genre but even in that the user must listen to whatever is being played. We believe this distinction is important. It is not one that was made in the impugned judgment, but the distinction become clear and occupied a fair part of the discussion before us in appeal.

18. An online service such as Wynk, and which may be compared to many other services such as Ganna, Spotify, etc., give users a

much wider choice. Indeed, they give users the plenitude of choice. A user can select not only the kind of music that he or she prefers but also individual tracks. These can be put together in what is commonly called a playlist and the user may revisit that playlist as often he or she likes during the continuance of a subscription. The user can skip forward to preferred songs. The user can go back to other songs. Users can add and delete from their playlist. Users can share playlists. The content is sometimes also much wider because it can include audio books, podcasts and other audio material.

19. The distinguishing factor however between online radio-type services and online services such as Wynk is not whether they are 'streaming' or not. Technically, *both* might well be called streaming services. That expression only means that packets of data are being transmitted digitally over the internet and being reassembled at the destination for audio reproduction. The expression 'streaming' is not a point of distinction. The real distinction is whether a service does or does not give users a choice of what is being played and what is being heard. Internet FM radio is also streaming, but without the user-control of services such as Wynk, Spotify, etc.

20. Wynk's services are entirely of the internet-based non-radio kind. On the Wynk platform, playlists may be put together by the users/subscribers. There is no limit to the number of playlists or what can be added to each, or how often these may be played or replayed.

21. The outright sale of songs is often allowed by some services including Apple's iTunes for one-time fee. A purchaser may opt to purchase a single song or an entire album. This is then downloaded in the digital soft copy on the purchaser's computer and then may be played as often as the purchaser wants even if not connected to the internet.

22. While connected to the internet, services such as Wynk have an additional feature. Digital audio files being played are often downloaded to the user's device. This may be for either or both of two purposes. The first is purely technical and to facilitate a more seamless, lag-free, jitter-free listening experience where the downloaded data is being 'buffered'. This means that the playback lags a little behind what is being downloaded. Thus, if the internet speed is variable or erratic, the playback is not interrupted: the downloaded 'buffer' provides the data.

23. Another feature from such services (including Spotify) is to permit users to download the songs without purchasing them. This is to make available a song or an entire playlist for later listening in an entirely off-line mode. Usually, this facility is available only for an additional fee or to premium subscribers. What is important about this is that the download is not only encrypted, but is often squirrelled away in an extraordinarily difficult and hard to access obscure corner of the user's computer system, phone or device. The location of those files has puzzled many users. The format is one that is not readily recognizable (such the common MP3, AIFF, etc formats). It is not possible to copy these downloaded files to another

device or to extract them to a playable format — at least not without some very specialised and possibly illicit skills.

24. The other aspect is that these downloaded files for offline hearing cannot be accessed or heard outside of the app or the platform in question. Files downloaded offline on Spotify cannot be heard through the Wynk platform or vice-versa.

25. Very broadly stated, the issue is this. Wynk claims that Section 31D covers *all* kinds of dissemination that may be encompassed by the phrase “broadcast” or “communicating to the public.” Section 31D does not expressly say anything about the internet. It does not prohibit or forbid, even by necessary implication, internet-based services, whether these are internet-based radio-like or internet-based non-radio-like services.

26. Tips says otherwise. It maintains that the whole of Section 31D is limited and confined to *traditional* radio and television only. This the point in controversy.

27. There are allied issues that have been raised including whether the downloadable files meant for use by a subscriber constitute a commercial rental or not. We will address each of these.

28. Kathawalla J framed distinct questions for his decision. We have set these out below with a summary of his findings.

Issue	Question
ISSUE A	Whether the Defendants are infringing upon the Plaintiff's copyright within the Plaintiff's repertoire as

Issue	Question
Finding Para 31 of the SCC Report	provided for in Section 14(1)(e) of the Act? <i>"In view of the above, it is evident that the Defendants through their purchase feature and download feature, are enabling their customers to store physical files/electronic copies of the Plaintiff's Repertoire on their devices in abrogation of the exclusive rights granted to the Plaintiff under Section 14(1)(e) of the Act. However, it is the Defendants' case that they are internet broadcasters and Section 31D of the Act confers them with a statutory right to carry on their download business., which defence I have considered in the later part of this judgment."</i>
ISSUE A(i)	Whether the use of the Plaintiff's repertoire by the Defendant's customers be considered "fair use" under Section 52(1)(a)(i) of the Act?
Finding Para 42 of SCC report	<i>"I am of the opinion that the defence provided in Section 52(1) (a)(i) of the Act is not available to the Defendants at all."</i>
ISSUE A(ii)	Whether the storage of sound recordings upon the Defendants' customers' devices can be considered transient or incidental to the services provided by the Defendants, as provided in Section 52(1)(a)(b) of the Act?
Finding Para 47 of SCC Report	<i>"In my view, the provisions of Section 52(1)(b) are fairly straightforward. It is clear from the nature of the Defendants' activities that the offline storage either permanent or temporary of electronic copies of the sound recordings on the customer's devices is the primary selling point/unique object of the Defendants' business. The electronic storage of Plaintiff's sound recording on the platforms of the Defendants can neither be termed as 'transient' nor 'incidental'. The sound recordings may be stored on the customers' devices during the tenure of their subscription or as per their discretion, as the case may be. In such circumstances;, the storage of the sound recordings cannot be said to be incidental or transient to services of the Defendants. Further, it is evident that the provisions of this Section 52(1)(b) would generally apply in case of Internet Service Providers and not to the activities of the Defendants. Thus, I am of the opinion that the defence under Section 52(1)(b) of the Act is not available to the Defendants."</i>
ISSUE A(iii)	Whether the Defendants can invoke Section 31D of the Act to exercise a statutory license in respect of their download/purchase business?
Finding	<i>"... It is therefore evident that Section 31D contemplates communication to public by way of</i>

Issue	Question
Para 55 of SCC Report	<i>broadcast of sound recordings only, and not their commercial rental and/or sale."</i>
ISSUE B	Whether the Defendants can invoke Section 31D of the Act to exercise a statutory license in respect of the Plaintiff's repertoire for internet broadcasting?
Finding	<i>"To summarize the above:</i>
Para 93 of SCC Report	<i>a. The internet broadcasting organizations cannot enjoy the benefits of a Statutory License under Section 31D. The intention of the Legislature while enacting the amending legislation viz. the Copyright (Amendment) Act, 2012, was to restrict the grant of Statutory License under Section 31D to radio and television broadcasting organisations. The facts of the matter do not occasion the application of the doctrine of contemporaneo expositio.</i> <i>b. Prior determination of royalty rates is a necessary precondition for the exercise of rights in respect of a Statutory License under Section 31D. A holistic reading of the Act and the Rules, including Rules 29, 30 and 31 of the Rules, indicate the Legislature's intent to make fixation of royalty rates a mandatory step before grant of license under Section 31D."</i>
ISSUE C	Whether Rule 29 of the Copyright Rules, 2013 ("the Rules") and the third proviso thereto are invalid? Not pressed in appeal
ISSUE D	What is the bearing of the Government of India's Office Memorandum dated 5th September 2016 on the present matter? Not seriously canvassed in appeal.
ISSUE E	Whether pending the suit, the Defendants maybe permitted to use the Plaintiff's repertoire upon payment of deposit? Not seriously canvassed in appeal.
ISSUE F	Whether the Plaintiff is only interested in money and thus injunction should not be granted? Not seriously canvassed in appeal.

29. We have heard Dr Saraf and Ms Singhania for Wynk and Mr Kadam for Tips at quite considerable length. Dr Saraf has advanced

no arguments on Issue (C) and we do not think he was entirely serious about issues (D), (E) and (F).

30. For our purposes, the discussion has centred on Issue (A), Issue (A)(ii) and Issue (B). As regards Issue (A)(iii), the controversy is limited. It is not about the purchase option but only about the downloaded files whether for offline use or temporary caching.

31. Both sides have focused their attention on the ambit of Section 31D and, specifically, what it permits and what, according to Mr Kadam it prohibits.

32. A few Sections of the Copyright Act must be noted before we turn to other material. First, some definitions.

“2. Interpretation.—

(dd) “*broadcast*” means communication to the public—

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire,

and includes a re-broadcast.

(faa) “*commercial rental*” does not include the rental, lease or lending of a lawfully acquired copy of a computer programme, sound recording, visual recording or cinematograph film for non-profit purposes by a non-profit library or non-profit educational institution.

(ff) “*communication to the public*” means making any work or performance 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 or whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

(q) “*performance*”, in relation to performer’s right, means any visual or acoustic presentation made live by one or more performers

(xx) “*sound recording*” means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.

(y) “*work*” means any of the following works, namely:—

- (i) a literary, dramatic, musical or artistic work;
- (ii) a cinematograph film;
- (iii) a sound recording”

33. Nobody disputes that copyright vests by operation of statute. There is no copyright beyond that provided under the Copyright Act.³ Section 14 tells us the meaning of ‘copyright’ and it reads thus.

14. Meaning of copyright.—For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—

- (a) in the case of a literary, dramatic or musical work, not being a computer programme,—

3 Section 13.

- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
 - (ii) to issue copies of the work to the public not being copies already in circulation;
 - (iii) to perform the work in public, or communicate it to the public;
 - (iv) to make any cinematograph film or sound recording in respect of the work;
 - (v) to make any translation of the work;
 - (vi) to make any adaptation of the work;
 - (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);
- (b) in the case of a computer programme,—
- (i) to do any of the acts specified in clause (a);
 - (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.
- (c) in the case of an artistic work,—
- (i) to reproduce the work in any material form including— (A) the storing of it in any medium by electronic or other means; or (B) depiction in three-dimensions of a two-dimensional work; or (C) depiction in two-dimensions of a three-dimensional work;

- (ii) to communicate the work to the public;
 - (iii) to issue copies of the work to the public not being copies already in circulation;
 - (iv) to include the work in any cinematograph film;
 - (v) to make any adaptation of the work;
 - (vi) to do in relation to adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);
- (d) in the case of a cinematograph film, —
- (i) to make a copy of the film, including—
 - (A) a photograph of any image forming part thereof; or
 - (B) storing of it in any medium by electronic or other means;
 - (ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film;
 - (iii) to communicate the film to the public;
- (e) in the case of a sound recording, —**
- (i) to make any other sound recording embodying it including storing of it in any medium by electronic or other means;
 - (ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;
 - (iii) to communicate the sound recording to the public.**

(Emphasis added)

34. Section 18 deals with assignments of copyright while Section 19 tells us that every assignment must be in writing signed by the assignor or his duly authorised agent, in addition to other requirements. The owner of copyright may also relinquish this copyright under Article 21. Copyright vests for as long as permitted by the statute under Chapter V.

35. Then we come to Chapter VI, captioned ‘licenses’. This is to be carefully distinguished from *assignments*. Section 30 reads thus:

30. Licences by owners of copyright.—The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing by him or by his duly authorised agent:

Provided that in the case of a licence relating to copyright in any future work, the licence shall take effect only when the work comes into existence.

Explanation.— Where a person to whom a licence relating to copyright in any future work is granted under this section dies before the work comes into existence, his legal representatives shall, in the absence of any provision to the contrary in the licence, be entitled to the benefit of the licence.

36. Section 31 is an important provision. It was revised from its original framing. It reads thus:

31. Compulsory licence in works withheld from public.—

(1) If at any time during the term of copyright in any work which has been published or performed in public, a

complaint is made to the Appellate Board that the owner of copyright in the work—

- (a) has refused to republish or allow the republication 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
- (b) 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 Appellate 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 to the complainant a licence to republish 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 Appellate Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to such person or persons who, in the opinion of the Appellate Board, is or are qualified to do so in accordance with the directions of the Appellate Board, on payment of such fee as may be prescribed.

37. In 1983 there came to be introduced by means of amendment with effect from 9th August 1984, a provision for what was called a 'compulsory license' in Section 31-A. Another Section dealing with compulsorily licenses for the benefit of the disabled, Section 31-B

was inserted in 2012. This amendment also included Section 31-C, a 'statutory license' for cover versions. Finally, there was the contentions Section 31D. We are not really concerned with Section 31-B or Section 31-C except for a minor comparative purpose but Section 31 as it originally stood, Section 31-A and of course Section 31D are important. Sections 31-A and 31D read:

31A. Compulsory licence in unpublished or published works.—

(1) Where, in the case of any unpublished work or any work published or communicated to the public and the work is withheld from the public in India, the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found, any person may apply to the Commercial Court for a licence to publish or communicate to the public such work or a translation thereof in any language.

(2) Before making an application under sub-section (1), the applicant shall publish his proposal in one issue of a daily newspaper in the English language having circulation in the major part of the country and where the application is for the publication of a translation in any language, also in one issue of any daily newspaper in that language.

(3) Every such application shall be made in such form as may be prescribed and shall be accompanied with a copy of the advertisement issued under sub-section (2) and such fee as may be prescribed.

(4) Where an application is made to the Commercial Court under this section, it may, after holding such inquiry as may be prescribed, direct the Registrar of Copyrights to grant to the applicant a licence to publish the work or a translation thereof in the language mentioned in the application subject to the payment of such royalty and

subject to such other terms and conditions as the Commercial Court may determine, and thereupon the Registrar of Copyrights shall grant the licence to the applicant in accordance with the direction of the Commercial Court.

(5) Where a licence is granted under this section, the Registrar of Copyrights may, by order, direct the applicant to deposit the amount of the royalty determined by the Commercial Court in the public account of India or in any other account specified by the Commercial Court so as to enable the owner of the copyright or, as the case may be, his heirs, executors or the legal representatives to claim such royalty at any time.

(6) Without prejudice to the foregoing provisions of this section, in the case of a work referred to in subsection (1), if the original author is dead, the Central Government may, if it considers that the publication of the work is desirable in the national interest, require the heirs, executors or legal representatives of the author to publish such work within such period as may be specified by it.

(7) Where any work is not published within the period specified by the Central Government under subsection (6), the Commercial Court may, on an application made by any person for permission to publish the work and after hearing the parties concerned, permit such publication on payment of such royalty as the Commercial Court may, in the circumstances of such case, determine in the prescribed manner.

31D. Statutory licence for broadcasting of literary and musical works and sound recording.—

(1) Any broadcasting organisation 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.

(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Commercial Court.

(3) The rates of royalties for radio broadcasting shall be different from television broadcasting and the Commercial Court shall fix separate rates for radio broadcasting and television broadcasting.

(4) In fixing the manner and the rate of royalty under sub-section (2), the Commercial Court may require the broadcasting organisation to pay an advance to the owners of rights.

(5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.

(6) 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.

(7) The broadcasting organisation shall—

- (a) maintain such records and books of account, and render to the owners of rights such reports and accounts; and**
- (b) allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to**

such broadcast, in such manner as may be prescribed.

(8) Nothing in this section shall affect the operation of any licence issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012.

(Emphasis added)

38. Section 31D and other Sections suffered another amendment in 2021 with the abolition of many tribunals including the Intellectual Property Appellant Board. It is for this reason that we have the word Commercial Court in Section 31D.

39. Section 31D is to be read with the relevant Rules in Chapter VIII of the Copyright Rules 2013 (“**Rules**”). We reproduce Rules 29 to 31:

29. Notice for Communication to the Public of literary and musical works and sound recordings. —

(1) Any broadcasting organization desirous of communicating to the public by way of broadcast or by way of performance of a published literary or musical work and sound recording under sub-section (1) of section 31D shall give a notice of its intention to the owner of the copyright and to the Registrar of Copyrights before a period of five days in advance of such communication to the public and shall pay to the owner of the copyright, in the literary or musical work or sound recording or any combination thereof, the amount of royalties due at the rate fixed by the Board in this regard:

Provided that in case of communication to the public by way of broadcast or by way of performance of a newly published literary or musical work or sound recording or

any combination thereof, which has been published within the said period of five days of such communication and which do not form part of the scheduled programmes, the notice shall, be given before such communication to the public:

Provided further that in case of communication to the public by way of broadcast or by way of performance of any published literary or musical work and sound recording or any combination thereof, in unforeseen circumstances, the notice shall, be given within twenty-four hours of such communication to the public:

Provided also that any broadcasting organization shall give a notice under this Chapter only after the royalty to be paid is determined by the Board under rule 31 and published in the Official Gazette and in the website of the Copyright Office and the Board.

(2) Every such notice shall be in respect of works belonging to one owner only.

(3) Separate notices shall be given for communication to the public by way of radio broadcast or television broadcast or by way of performance of a literary or musical work and sound recording which has already been published.

(4) The notice under sub-rule (1) shall contain the following particulars, namely:—

- (a) Name of the channel;
- (b) Territorial coverage where communication to public by way of radio broadcast, television broadcast or performance under sub-rule (3) is to be made;
- (c) Details necessary to identify the work which is proposed to be communicated to the public by way of radio broadcast, television broadcast or

- performance under sub-rule (3);
- (d) Year of publication of such work, if any;
 - (e) Name, address and nationality of the owner of the copyright in such works;
 - (f) Names of authors and principal performers of such works;
 - (g) alterations, if any, which are proposed to be made for the communication to the public by way of **radio broadcast, television broadcast or performance** of the works, reasons thereof, and the evidence of consent of the owners of rights, if required, for making such alteration;
 - (h) **Mode of the proposed communication to the public, i.e., radio, television or performance;**
 - (i) Name, if any, of the programme in which the works are to be included;
 - (j) Details of time slots, duration and period of the programme in which the works are to be included;
 - (k) Details of the payment of royalties at the rates fixed by the Board [Commercial Court]; and
 - (l) Address of the place where the records and books of account are to be maintained for inspection by the owner of rights.

30. Maintaining of records. —

- (1) Records containing the details of the owners in respect of total number of works broadcast, the details of such works and the time slot, duration and period of the broadcast shall be maintained by the broadcasting organisation at its principal place of business and shall be open to inspection on prior notice by the owner of rights or

his duly authorized agent or representative in the works during business hours and may obtain copies of relevant extracts from such records at their cost. The broadcasting organization shall maintain separate records for radio broadcasting and television broadcasting.

(2) The broadcasting organisation shall maintain separate books of accounts for communication to public by way of broadcast containing such details as may be determined by the Board at the time of fixing the rate of royalty and render to the owners of rights such reports and accounts.

31. Manner of determining royalties. —

(1) The Board [Commercial Court] shall immediately after its constitution either *suo motu* or on receipt of a request from any interested person, give public notice of its intention to fix royalties for communication to the public of literary or musical works and sound recordings under section 31D and may invite suggestions for determining the same. Such notice shall be given separately for radio and television broadcasting.

(2) The notice under sub-rule (1) shall be published by the Board [Commercial Court] in the Official Gazette and shall be re-published in two daily news papers having circulation in the major part of the country and shall be posted on the website of the Copyright Office and the Board.

(3) Any owner of copyright or any broadcasting organisation or any other interested person may within thirty days from the date of publication of public notice under sub-rule (1) shall give suggestions with adequate evidence as to the rate of royalties to be fixed including different rates for different works and different formats.

(4) The Board [Commercial Court] shall after giving an

opportunity being heard to the persons who made relevant suggestions under sub-rule (3), consider such suggestions, as it deems fit.

(5) The Board [Commercial Court] shall within a period of two months from the last date of receipt of suggestions, determine separate rates of royalty to be paid to the owners of literary or musical work and sound recordings for **radio and television broadcasting** respectively.

(6) The Board [Commercial Court] shall determine the royalties payable to the owner of the copyright under sub-section (2) of section 31D for **radio and television broadcast separately**.

(7) The Board [Commercial Court] while determining royalty shall take into consideration the following factors, namely:-

- (a) time slot in which the broadcast takes place and different rates for different time slot including repeat broadcast;
 - (b) different rates for different class of works;
 - (c) different rates for different nature of use of work;
 - (d) the prevailing standards of royalties with regard to such works;
 - (e) the terms and conditions included in the Grant of Permission Agreement (GOPA) between Ministry of Information and Broadcasting and the broadcaster for Operating Frequency Modulation (FM) Radio Broadcasting Service; and
 - (f) such other matters as may be considered relevant by the Board [Commercial Court].
- (8) The Board [Commercial Court] while determining

the payment of royalties under sub-rule (5) shall take into consideration, the following factors, namely:-

- (a) works included in the scheduled programmes;
- (b) works newly published and not included in the scheduled programme;
- (c) works communicated to the public on unexpected circumstances; and
- (d) use of works in excess of the duration, different time slot or territorial coverage than mentioned in the notice.

(9) The Board [Commercial Court] may revise the rates of royalties periodically, at least once in a year keeping in view the provisions of these rules.

(Emphasis added)

40. To complete this survey of the statutory provisions, we must reproduce Sections 51 and 52 which deals with situations of copyright infringement they read thus:

51. When copyright infringed.—Copyright in a work shall be deemed to be infringed—

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—

- (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
- (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an

infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

- (b) when any person—
 - (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
 - (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
 - (iii) by way of trade exhibits in public, or
 - (iv) imports into India,

any infringing copies of the work:

Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation.—For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an “infringing copy”.

52. Certain acts not to be infringement of copyright.

—

- (1) The following acts shall not constitute an infringement of copyright, namely,—
 - (a) a fair dealing with any work, not being a computer programme, for the purposes of—
 - (i) private or personal use, including research;
 - (ii) criticism or review, whether of that

work or of any other work;

- (iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public.

Explanation.— The storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.

(aa) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy

—

- (i) in order to utilise the computer programme for the purpose for which it was supplied; or
- (ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied;

(ab) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available;

(ac) the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer

programme was supplied;

(ad) the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use;

(b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

(c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitation access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access;

(d) the reproduction of any work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding;

(e) the reproduction or publication of any work prepared by the Secretariat of a Legislature or, where the legislature consists of two Houses, by the

Secretariat of either House of the Legislature, exclusively for the use of the members of that Legislature;

(f) the reproduction of any work in a certified copy made or supplied in accordance with any law for the time being in force;

(g) the reading or recitation in public of reasonable extracts from a published literary or dramatic work;

(h) the publication in a collection, mainly composed of non-copyright matter, bona fide intended for instructional use, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for such use in which copyright subsists:

Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.

Explanation.— In the case of a work of joint authorship, references in this clause to passages from works shall include references to passages from works by any one or more of the authors of those passages or by any one or more of those authors in collaboration with any other person;

- (i) the reproduction of any work—
- (i) by a teacher or a pupil in the course of instruction; or
 - (ii) as part of the question to be answered in an examination; or
 - (iii) in answers to such questions;

(j) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recording if the audience is limited to such staff and students, the parents and guardians of the students and persons connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording;

(k) the causing of a recording to be heard in public by utilising it,—

(i) in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or

(ii) as part of the activities of a club or similar organisation which is not established or conducted for profit;

(l) the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;

(m) the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction;

(n) the storing of a work in any medium by electronic means by a non-commercial public library,

for preservation if the library already possesses a non-digital copy of the work;

(o) the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a non-commercial public library for the use of the library if such book is not available for sale in India;

(p) the reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access:

Provided that where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the provisions of this clause shall apply only if such reproduction is made at a time more than sixty years from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the identity of more authors than one is known from the death of such of those authors who dies last;

- (q) the reproduction or publication of—
- (i) any matter which has been published in any Official Gazette except an Act of a Legislature;
 - (ii) any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter;

- (iii) the report of any committee, commission, council, board or other like body appointed by the Government if such report has been laid on the Table of the Legislature, unless the reproduction or publication of such report is prohibited by the Government;
- (iv) any judgment or order of a court, tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court, the tribunal or other judicial authority, as the case maybe;
- (r) the production or publication of a translation in any Indian language of an Act of a Legislature and of any rules or orders made thereunder—
 - (v) if no translation of such Act or rules or orders in that language has been previously been produced or published by the Government; or
 - (vi) where a translation of such Act or rules or orders in that language has been produced or published by the Government, if the translation is not available for sale to the public:

Provided that such translation contains a statement at a prominent place to the effect that the translation has not been authorised or accepted as authentic by the Government;

- (s) the making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture;

(t) the making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under sub-clause (iii) of clause (c) of section 2, if such work is permanently situate in a public place or any premises to which the public has access;

(u) the inclusion in a cinematograph film of—

(i) any artistic work permanently situate in a public place or any premises to which the public has access; or

(ii) any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film;

(v) the use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any mould, cast, sketch, plan, model or study made by him for the purpose of the work:

Provided that he does not thereby repeat or imitate the main design of the work;

(w) the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device;

(x) the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed:

Provided that the original construction was made with the consent or licence of the owner of the copyright in such drawings and plans;

(y) in relation to a literary, dramatic, artistic or musical work recorded or reproduced in any cinematograph film, the exhibition of such film after the expiration of the term of copyright therein:

Provided that the provisions of sub-clause (ii) of clause (a), sub-clause (i) of clause (b) and clauses (d), (f), (g), (m) and (p) shall not apply as respects any act unless that act is accompanied by an acknowledgment—

(i) identifying the work by its title or other description; and

(ii) unless the work is anonymous or the author of the work has previously agreed or required that no acknowledgment of his name should be made, also identifying the author;

(z) the making of an ephemeral recording, by a broadcasting organisation using its own facilities for its own broadcast by a broadcasting organisation of a work which it has the right to broadcast; and the retention of such recording for archival purposes on the ground of its exceptional documentary character;

(za) 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 bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.

Explanation.— For the purpose of this clause, religious ceremony including a marriage procession and other social festivities associated with a marriage;

(zb) the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by—

- (i) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or
- (ii) any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons:

Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production:

Provided further that the organisation shall ensure that the copies of works in such accessible format are used only by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.

Explanation.— For the purposes of this sub-clause, “any organisation” includes an organisation registered under section 12A of the Income-tax Act, 1961 (43 of 1961) and working for the benefit of persons with disability or recognised under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection of Rights and full Participation) Act, 1995 (1 of 1996) or receiving grants from the Government for facilitating access to persons with disabilities or an educational institution or library or archives recognised by the Government;

(zc) the importation of copies of any literary or artistic work, such as labels, company logos or promotional or explanatory material, that is purely

incidental to other goods or products being imported lawfully.

(2) The provisions of sub-section (1) shall apply to the doing of any act in relation to the translation of a literary, dramatic or musical work or the adaptation of a literary, dramatic, musical or artistic work as they apply in relation to the work itself.

41. Dr Saraf for Wynk says that Section 31 of the Act was always an exception to the generality of other provisions of the Act, notably Sections 14⁴ and Section 17.⁵ Section 31(1) contemplated a situation whether the owner of copyright could be compelled to grant a license. This had to happen on a complaint. That complaint had to make out a case that the owner of the copyright had refused to republish or permit republication of the work or refused to allow its performance in public or by reason of such refusal had withheld it from the public. The second condition, in the alternate, was for the complainant to show that the copyright owner had refused to allow communication to the public by, broadcast of such work or in the case of a sound recording the work in the sound recording. Then the copyright owner had to be heard. The Board had to hold an enquiry. It had to decide compensation. In this way, a compulsory license would come into being. Dr Saraf says that Section 31D carries forward this public interest element. The owner of copyright does indeed enjoy exclusively for the term of that copyright. He is protected against infringement. He has certain rights under Section 14, and these are said in the statute itself to be exclusive to the owner/holder of copyright. Section 31 is an exception but that

4 “Meaning of copyright”.

5 “First owner of copyright”.

exception, Dr Sarf says is in the public interest. It is by no means an expropriation of the property, that is to say, the intellectual property of the owner/holder of copyright. It is merely a statutory restriction or limitation on that ownership. Although he does not say it, perhaps a vivid example, all too familiar to many of us in this Court, might be a Floor Space Index or FSI restriction on buildability on the owner of a plot of land. It is well settled in law that buildability is an inherent part of ownership. Every owner has the right to exploit the fruits of that property ownership to its fullest extent. But in town and country planning law, it is well settled that there may be restrictions imposed on the exercise of that right. This has never been held to be expropriation or the taking away of a right but merely a limitation on the fullness of its enjoyment; and it may be compensated in some form. We have understood Dr Saraf to place his case exactly in that fashion under Chapter VI relating to licenses under compulsion. This may be true of Section 31.

42. The parallel breaks down when we see that Section 31 requires a pre-qualifying or determinative act of *refusal* by the copyright owner to withhold copyright-protected material from publication, republication, or broadcast. It is only in that circumstance that the owner can be forced to yield a license to the complainant for that performance publication, republication broadcast, etc. This is not an across-the-board restriction. It is meant as a deterrent to what one might call ‘copyright hoarding’ — persons acquiring or holding copyright only to deprive the public from the enjoyment of those works. The Copyright Act’s aim is to permit a reward to the owner of copyright but not to encourage the

squirrelling into confines of copyright-protected intellectual property.

43. Dr Saraf maintains that Section 31D continues in this public interest vein because compulsory licenses were found to be cumbersome and insufficient. There is sufficient background material, in his submission, to establish that the intention was to not permit a monopolistic control over certain types of copyright protected work. He points out that Section 31D does not apply to all forms of copyright-protected works but is limited to *broadcasting* of literary and musical works and sound recordings. It permits a broadcasting organization which is desirous of communicating to the public by way of a broadcast or a performance, a literary or musical work and sound recording, provided this has already been published, to obtain a 'statutory' license. This is the statutory imperative against copyright-hoarding, in his submission.⁶

44. Dr Saraf's analysis of Section 31D runs like this. Section 31D contemplates prior notice. Certain particulars are to be specified. Section 31D has inbuilt restrictions: it is only in respect of a *broadcasting organization* that *desires to communicate to the public* by way of a *broadcast*. There is no concept of an enquiry under Section 31D or a case-to-case determination of royalty. There is no question of the license being executed by the Registrar. Advance payment is required. Putting it differently, no permission is required for a statutory license. A mere notice invoking the license, he submits, automatically creates the license in favour of the applicant. This, he

⁶ Section 31-A deals with a compulsory license in published or unpublished works.

says, is an important departure from the rest of Chapter VI. The rationale to this introduction, Dr Saraf submits, is not far to seek. By its very nature, copyright law is monopolistic. But what happened over time was that corporates took assignments of musical works, amassing to themselves copyright in a huge repertoire of sound recordings and music. Without licenses from these corporates, others could not play or perform or broadcast those works. These large organizations, such as the one represented by Mr Kadam, began to exercise a stranglehold over licenses for their copyright-protected repertoire. Everybody wanted access to those songs. The public wanted to listen to those songs. But these large organizations began to demand ever-increasing license fees. Apart from the financial implications to companies and services such as Wynk, the immediate result was the deprivation of the music if not to the public generally, then at least to the entire Wynk user-base, whether paid or unpaid. To put it at its most brutal: unless Wynk paid what Tips demanded, none of Wynk's users could listen to a single song from Tips's repertoire. That, Dr Saraf submits, was never the intent of copyright law. It amounts to illicit copyright-protected work hoarding and is as much a social menace as any other form of hoarding. Section 31D recognizes this and forces the copyright owner/hoarder to part with a license to that work immediately upon being given a notice.

45. He draws attention to the 227th Rajya Sabha Report on the Copyright Amendment Bill 2010 which was just prior to the introduction of Section 31D. Paragraphs 15.2 and 15.4 of that Report read thus:

“15.2 The Committee finds that the introduction of system of statutory licensing has been proposed so as to ensure that public has access to musical works over the FM radio networks and at the same time, the owner of copyright works is also not subject to any disadvantages. The Committee has been given to understand that this system would work in favour of users of copyright works who would then not be subject to lengthy, expensive and monopolistic negotiations by the owners of the work.

... ..

15.4 When asked to clarify their stand on the aforesaid reservations, the Department apprised the Committee that at present, the access to copyright works by broadcasters in the light of the new system of auction of licences for FM operators was dependant on voluntary licensing. **As a result, unreasonable terms and conditions were being set by the copyright societies and owners. This has also led to divergent views by the courts in interpreting the existing compulsory licensing provisions under section 31. There were litigations pending before various High Courts as well as the Copyright Board regarding the nature of licence and the rate of royalties to be paid when works particularly songs were used for broadcasting. Automatic licence or non-voluntary licence such as proposed statutory ensuring adequate return to the owner of works was the best solution to make access easy for broadcasting. The Committee is inclined to agree with the contention of the Department. Fast-growing industry like broadcasting industry needs to have hassle-free access to works. The Committee also notes that this provision is similar to that of statutory licensing for cover versions.”**

(Emphasis added)

46. He also makes the point that the unamended Copyright Act had a concept and definition of the expression '*radio diffusion*'. This was said to be the communication to the public by any means of *wireless diffusion* whether in the forms of sound or visual images or both. '*Wireless communication*' was defined in the Indian Wireless Telegraphy Act, 1933 to mean—

any transmission, omission or reception of signs, signals, writings, images and sounds, or intelligence of any nature by means of electricity, magnetism, radio waves or Hertzian waves without use of wires or other continuous electrical conductors between the transmitting and the receiving apparatus.

It is his submission that the definition of radio diffusion was the broadest possible. The next amendment in 1983 substituted 'radio diffusion' with the even more omnibus term '*broadcast*'. Further definitions were introduced including '*communication to the public*'. Read together, in his submission, '*radio diffusion*' is now expanded to the concept of '*broadcast*'. Read with concept of '*communicating to the public*', **any** means by which a sound recording is conveyed to the public is the potentially the subject matter of a Section 31D notice and a statutory license.

47. The medium matters not, says Dr Saraf. For, logically, it cannot. Once the Section uses the expressions '*broadcasting*' and '*communication to the public*', then *how* the broadcasting is achieved and *manner* of communication to the publication is immaterial. To say that Section 31D is limited to a particular medium is to confine

the Copyright Act to an older technology, possibly an outdated one.⁷ A broader view must be preferred, he submits, because that is logically the only way of future-proofing the Copyright Act. For this, the Mischief Rule of interpretation⁸ should be adopted, and the object should be ascertained from the history of the law.⁹

48. Dr Saraf place emphasizes on the decision of the Supreme Court in *Entertainment Network (India) Limited v Super Cassette Industries Limited*.¹⁰ There the Supreme Court had before it provisions relating to compulsory licenses. Dr Saraf emphasizes that statutory provisions must be read reasonably from the perspective of a legislature presumed to know existing conditions. Courts must strive for a purposive interpretation that gives full voice to the statutory intent, always avoiding an absurdity.

49. He also relies on two decisions of the Madras High Court in *South Indian Music Companies Association v Union of India & Anr*,¹¹ which discussed the validity of Section 31D. The Madras High Court said that Section 31D embodied a public policy. The concerns of the copyright owner were met with the provisions for payment of royalty and compensation. The purpose was to support the development and growth of private radio broadcasting and to ensure

7 *All Kerala Online Lottery Dealers Association v State of Kerala & Ors*, (2016) 2 SCC 161, paras 47 to 49; *State v SJ Choudhary*, (1996) 2 SCC 428, para 10.

8 *Heydon's case*, (1584) 76 ER 637.

9 *BR Enterprises v State of UP & Ors*, (1999) 9 SCC 700, paras 82 to 84.

10 (2018) 13 SCC 30.

11 2016 SCC Online Mad 1787.

that monopolies do not have stranglehold on public enjoyment of copyright-protected materials.

50. Dr Saraf is careful to point out that there is actually no meaningful distinction between online or internet-based radio and offline radio (i.e., via the usual AM/FM/SW/MW channels) apart from a few technical and physical differentiations. If there is also no meaningful distinction in the streaming element of online radio and online non-radio services (i.e., services like Wynk), then it is clear that Section 31D cannot be limited either by the method of dissemination nor by the nature of the service. All forms of broadcasting and all forms of communication to the public by whatever means possible are, in his submission, covered.

51. It is for this reason that he emphasizes the Madras High Court decision in *Next Radio Limited & Ors v Union of India & Ors*.¹² There the Court looked at the legislative intent of Section 31D and held that it was meant to strike a balance between copyright owners and the public.

52. While Dr Saraf endeavoured to take us to some of the compulsory licensing regimes in foreign jurisdictions, we do not see how this will be assistance in interpreting a domestic statute that is defined by its own words, language, and legislative history. That there are conventions and treaties underlying the Copyright Act and to which India is a party or a signatory is not in dispute. Nobody has attempted to draw our attention to a treaty or obligation suggesting

12 2022 SCC OnLine Mad 1758.

that a statutory licensing regime is mandated by some international convention or treaty. What Dr Saraf does submit yet again is that Section 31D is of the widest amplitude and Section 31D(1), the operative, opening and governing sub-section does not restrict itself to traditional radio and television as Mr Kadam would have it. If there were words of restriction to be found, Dr Saraf submits, they should logically have appeared either in the title of the Section or in sub-section (1).

53. As to the Rules, and we will return to Dr Saraf's arguments in this regard a little later once again, his primary submission being that the Rules cannot constrain the operation of the main portion of the statute.

54. The answer from Mr Kadam to this exposition is that Section 31D must be read not only as a whole and along with the Rules but must be construed for what it really is. Chapter VI of the Copyright Act and Section 31 in particular has been held by the Supreme Court in *Super Cassette Industries* to be a form of expropriation. Those are the words of the Supreme Court; the question is no longer *res integra*. It is true that the Supreme Court's observations were in the context of Section 31. But if at all, Section 31 is less stringent and less expropriatory than Section 31D. Section 31 had in-built checks and balances. Yet it was said by the Supreme Court to be a form of expropriation and not merely a restriction or a limitation on the enjoyment of rights. Section 31D is, from any perspective, an expropriation. To take the FSI example, what Section 31D does is that it literally confiscates part of the intellectual property 'plot' and

makes it available to the public for a fee over which the copyright/property owner has no control. The question is not of a 'restriction' but of a *forced* license, i.e., of the copyright holder being compelled to part with a license to his copyright-protected work.

55. If there is such a forced or statutorily compelled restriction, Mr Kadam submits, there are two immediate consequences. First, it is well-settled, that any such restriction must be strictly construed. There is no scope for an expansive or beneficial interpretation. Second, the only possible construction must be the narrowest possible: it must follow the least burden principle, i.e., the interpretation to be adopted must be the one that places the least burden on the person whose property is affected.

56. It is Mr Kadam's submission that once read with the necessary narrowness, the ambit of Section 31D becomes apparent. Section 31D (1) may not mention radio or television. Neither does the heading. But every Section and sub-section must be read equally each informing the other. He draws attention to Section 31D(3) and 31D(4). We reproduce them once again below:

31D. Statutory licence for broadcasting of literary and musical works and sound recording.—

(3) The rates of royalties for **radio broadcasting** shall be different from **television broadcasting** and the Commercial Court shall fix **separate rates** for **radio broadcasting** and **television broadcasting**.

(4) In fixing the manner and the rate of royalty under sub-section (2), the Commercial Court may require the

broadcasting organisation to pay an advance to the owners of rights.

(Emphasis added)

57. There is no mention here of any other form of broadcasting or communication to the public *except television and radio broadcasting*. There is a further clue in sub-section (2) which is to be read with sub-section (4) because even if these two sub-sections do not use the words 'radio' or 'television', they describe the nature of the activity, i.e., duration, territorial coverage etc, and these are peculiar and specific to radio and television. Mr Kadam points out that Section 31D(1) itself is made expressly subject to the other provisions of the Section.

58. Indeed, even in its notice, Wynk said of the territorial coverage that it was limited to three countries — India, Sri Lanka and Nepal — but did not say how this would be achieved. As to duration, it said that this would be 24x7x365. This is not the intent of sub-section (2).

59. If there was any doubt about this, Mr Kadam submits it is entirely put to an end by the Rules and particularly Chapter VIII. He agrees with Dr Saraf that the Rules cannot constrain the operation of the statute. But is equally undeniable, Mr Kadam submits, that where the Rules are not in conflict with the statute and have not been struck down, they must be read harmoniously. Specifically, the Rules must be read as giving voice and effect to the main statutory provision. Now Rule 29(1) and its third proviso create a first bar and

render Wynd's notice bad. No notice was tenable unless the royalty to be paid had first been determined.

60. But Rules 29(3) and (4) are the death-knell of the entirety of Wynd's argument. The requirement of a notice in Section 31D(2) is clear from Rule 29(1) and Rule 29(2). To explain: Section 31D(2) requires *prior* notice. Rule 29(1) amplifies what that notice must say. It is subject to three provisos. Rule 29(2) limits the notice to a single owner. Rule 29(3) requires separate notices for radio, television and performance. Rule 29(4) deals with the contents of the notice. The whole of Rule 29 therefore is directly relatable to and not in conflict with Section 31D(2).

61. In any case, Mr Kadam asks, how it is possible for a defendant in a suit to assail the vires of statutory rules or delegated legislation in this manner after he is *prima facie* found to be infringing? We believe Mr Kadam is correct in this regard.

62. A closer look at Rule 29(4) tells us that every single technical aspect is directed to and only to radio and television. We highlight the key elements.

(4) The notice under sub-rule (1) shall contain the following particulars, namely:—

- (a) Name of the channel;
- (b) Territorial coverage where communication to public by way of **radio broadcast, television broadcast or performance** under sub-rule (3) is to be made;
- (c) Details necessary to identify the work which is

proposed to be communicated to the public by way of **radio broadcast, television broadcast or performance** under sub-rule (3);

- (d) Year of publication of such work, if any;
- (e) Name, address and nationality of the owner of the copyright in such works;
- (f) Names of authors and principal performers of such works;
- (g) alterations, if any, which are proposed to be made for the communication to the public by way of **radio broadcast, television broadcast or performance** of the works, reasons thereof, and the evidence of consent of the owners of rights, if required, for making such alteration;
- (h) **Mode of the proposed communication to the public, i.e., radio, television or performance;**
- (i) Name, if any, of the programme in which the works are to be included;
- (j) Details of time slots, duration and period of the programme in which the works are to be included;
- (k) Details of the payment of royalties at the rates fixed by the Board; and
- (l) Address of the place where the records and books of account are to be maintained for inspection by the owner of rights.

(Emphasis added)

63. Then comes Rule 31 regarding the manner in which royalties are to be determined and here again there is a bifurcation of royalties

between radio and television. This we find repeated in Rule 31(5), Rule 31(6) and Rule 31(7).

64. It is also important, as Mr Kadam says, to bear in mind that at the time of the amendment introducing Section 31D, the internet and its facilities, features as also the services offered on it were very much in existence. The legislature must, he says, and we believe correctly, to have had these in mind when it formulated the relevant amendment. If despite this, Section 31D does not include the word *internet* but expressly limits itself to the word radio and television then, it is clear that that was the statutory intent.

65. Mr Kadam points out that Section 31D(1) specifically grants an entitlement but makes it subject to the provisions of Section 31D meaning the other sub-sections that follow sub-section (1). Thus Section 31D(1) does not control Section 31D(3). Another way of looking at this, he submits, again we think rightly, is that while Section 31D(1) is a general provision which states the over-all entitlement, Section 31D(3) is the specific clause that defines or circumscribes the areas in which Section 31D operates. Section 31D(1) is made subject to the other provisions and one of those other provisions is Section 31D(3).

66. Mr Kadam's submission is that even the Rajya Sabha Standing Committee Report had to its mind only the difficulties of radio stations which were being compelled to go without access to copyright-protected material. The statutory licencing scheme was not meant to allow commercial entities such as Wynk to tear away

from copyright owners copyright-protected works in this manner. It is mere accident or happenstance, Mr Kadam says, that Tips has a large collection of copyright-protected material. If what Wynk says is correct, it could follow exactly the same process against even an individual owner of copyright who may hold copyright in just a handful of musical works or even a solitary piece of music. It does not cease to be expropriation merely because Tips has a large repertoire. It does not gain a wider interpretation merely because Wynk happens to be an internet-based platform.

67. Mr Kadam's point at the end is that if it is construed as Dr Saraf would have us do, no party will ever need to enter into any kind of contract with any holder of copyright. He can simply take it. He can simply issue a notice. He can grab himself a licence based on some royalty fixed by the Court. This may be below market rates and this may be done totally against the will of the holder of copyright. Section 31D does not only operate against large entities hoarding a significant repertoire like Tips. On Dr Saraf's formulation, it could be applied against an individual as well thus resulting in catastrophic damage to the copyright interest and the commercial benefits statutorily available under Section 14 to the hoarder of that copyright.

68. On the question of 'copyright-hoarding', Mr Kadam says this is nothing but smoke and mirrors, a meaningless distraction at best. It cannot conceivably suit Tips's purpose to withhold licensing. Tips is a commercial enterprise. Its business *is* of licensing the

copyright protected works that it holds. It is not a ‘copyright-squatter’.

69. The other aspect of the matter is about the downloads. Since Wynk has stopped selling Tips’s repertoire directly, we need not concern ourselves with that. That is undoubtedly a commercial rental. But what of the downloads made for the purposes of the Wynk App whether for temporarily caching or for offline playback? Do these constitute ‘commercial rentals’ as defined under the Act? There is no law on the subject. Kathawalla J held that there is simply no other method of looking at the downloads. They are not retained to Wynk itself. Clearly, they are made available to Wynk’s subscribers and users for some consideration. That consideration may or may not be a fee. Paying subscribers/users may be the only one is entitled to downloads for later private use through the Wynk App. But cached downloads are also done by the Wynk App (this is not being disputed) automatically. This is by no means involuntary or beyond Wynk’s control. Any form of internet-based media transmission or broadcasting requires some form of caching. Data packet transmission and reassembly for final deployment (images, video, music, voice or even text) can be done in different ways. When this used in a *proprietary* format, it must fit the definition of a ‘commercial rental’. No one except a registered user of the Wynk service can usefully access, via the Wynk App, any cache created by that App for that App. Signing up or registering with Wynk is itself part of the consideration — the user is then part of Wynk’s user database. If this be so, then any form of caching as Kathawalla J held is a commercial rental.

70. The definition in the Copyright Act, one that was added and then amended in 2012 and 2021 respectively, tells us what is *not* a commercial rental. It does not include the rental, lease or lending of a lawfully acquired copy of a computer programme, sound recording, visual recording or cinematograph film for non-profit purposes by a non-profit library or a non-profit educational institution (one which receives government aid or is tax-exempt). Everything else that involves rental, lease or lending of the work is commercial rental. Wynk is no non-profit; far from it. It is allowing its users access to copyright-protected material inter alia via caching. This is ‘lending’; it cannot be anything else. If it is not exempted as being not-for-profit, then it is a commercial rental.

71. Although this was argued before Kathawalla J, it has never been argued before us that Wynk’s use of the Tips repertoire constitutes a fair dealing or fair use under Section 52(1)(a)(i) of the Copyright Act. We therefore, accept that Wynk does not challenge that finding.

72. We find these reasons given by Kathawalla J and canvassed before us by Mr Kadam to be compelling. We affirm the finding of Kathawalla J that statutory licenses under Section 31D are restricted to traditional non-internet based radio and television broadcasting and performances alone. Section 31D has no application to any internet-based offering. The broader interpretation commended by Dr Saraf cannot be harmonized with the explicit wording of the statute and the rules.

73. Second, we find that it is impermissible under the statute as it stands to give a notice until the rates are fixed. That was once the obligation of the Copyright Board. This is now a duty cast on the Commercial Court. Unless those rates are fixed, under third proviso to Rule 29(1), no such notice as is contemplated by Section 31D(2) can even be served or issued.

74. There are some minor points canvassed by Wynk in its notes of Written Submissions. We dispose these of quickly with a rapid analysis. These have not been seriously pressed during oral arguments. We have dealt with the arguments canvassed before us.

75. It is in these circumstances, and for these reasons that we believe that the order of Kathawalla J was a correct order on an interpretation of law. It was also the appropriate order on facts. We see no substance to these Appeals.

76. Taking a step back, we must note that these arguments from Dr Saraf about the benefits to the public and the public interest all pale into insignificance when we consider what is actually being done and by whom. Wynk is no charitable organization. It has an avowed commercial profit motive. It simply does not want to pay the license fees that Tips demands. It wants to be able to determine what fees Tips should receive and it seeks to do so unilaterally on some basis that it has conjured up for itself. It does so only to further its own business. There is no point in repeating that this is meant for the public. *Wynk is not a service that is available to the public.* It is available to those who sign up for Wynk: many are ‘members of the

public' but are not Wynk subscribers, paid or free. There is simply no public interest dimension to Wynk's private profit goals. Wynk has paid subscribers. It receives money from them (apart from other sources of funding). There is, therefore, no question of Wynk attempting to obtain a statutory licence for its private profit motives in this fashion. That is a perversion of the statutory intent. It was not what Section 31D was intended to achieve at all.

77. When the Appeals first came up, an order was passed on 25th June 2019 by a the Division Bench of which one us (GS Patel J) was a member. This stayed the injunction granted by the Kathawalla J on condition that Wynk would deposit in Court a sum of Rs 5 crores by 2nd July 2019. Wynk made that deposit. There was a stay. It continued to use Tips's repertoire. Mr Kadam submits that the most conservative calculation now puts Tips to a loss of more than Rs 12 crores. Ms Singhania for Wynk does not accept this figure. She has no instructions regarding a larger deposit nor on consenting to Tips making a withdrawal of the amount deposited either.

78. We cannot continue the order of 25th June 2019 since we are dismissing the Appeal. The amount will however remain deposited to the credit of the suits. Tips may file a suitable Interim Application for additional deposits or leave to withdraw the amount deposited, or both. Any such application will be decided on its merits.

79. But this is only in respect of the use made by Wynk of the Tips repertoire under this Court's order. That order not being continued, Wynk cannot use any part of the Tips repertoire.

80. We note Ms Singhania's instructions from her attorneys who have this internally noted that Wynk has stopped using all the Tips repertoire from September 2020. This is also stated on oath in the Interim Application (L) No. 8243 of 2020 in Commercial Appeal No. 424 of 2019. We accept this statement. We accept the further statement by Ms Singhania that Wynk will not resume use of the Tips repertoire without a further order of the Court.

81. The Appeals are disposed of. There will be no order as to costs.

82. Ms Singhania seeks a stay. But if the use has been discontinued by Wynk since September 2020, in October 2022 we do not see how we can stay the non-use. The request is rejected.

(Gauri Godse, J)

(G. S. Patel, J)