

## **Rights over sound recordings – Indian court gets criticized for getting the law right?**

**By Adarsh Ramanujan & Sayaree Basu Mallik**

Recently, the Bombay High Court, on 25<sup>th</sup> July 2011, in the case of *Music Broadcast Private Limited v. Indian Performing Right Society*, upheld the rights of the music companies over sound recordings, to the exclusion of the lyricists and composers whose works were the underlying materials for the sound recording. The decision seems to have generated some negative criticism,<sup>1</sup> though in the opinion of the authors, such criticism is quite unjustified.

The legal issues surrounding the rights of producers of films (and sound recordings) versus the rights of the authors in the underlying works (lyrics, musical composition) have been debated for some time now. Despite the matter having been seemingly settled by the Supreme Court in *IPR Society v EIMP Association*<sup>2</sup>, legal debate has continued. The Supreme Court in that case was dealing with the question of rights of lyricists and composer versus that of producers of cinematograph films. One may draw two independent and yet, related principles from the Supreme Court's decision, which is equally applicable to both cinematograph films and sound recordings:

- a. Firstly, while the lyricist and composer are entitled to copyright in respect of their work (literary and musical), the producer of the sound recording is entitled to copyright in respect of the sound recording.<sup>3</sup> Therefore, harmoniously construing these rights, the rights of the lyricists and composers in their work are extinguished only to the extent the lyrics and the composition are subsumed within the sound recording.<sup>4</sup> In other words, for instance, the lyricist or composer cannot interfere with the exclusive rights of the producer of the sound recording, which includes the right to communicate the sound recording to the public by way of radio transmission.<sup>5</sup> However, it is to be noted that this is applicable only if the

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<sup>1</sup> See, e.g., Shamnad Basheer, *Whither the Song of Justice*, available at <http://spicyipindia.blogspot.com/2011/07/whither-song-of-justice.html> (last visited on 29th July, 2011)

<sup>2</sup> MANU/SC/0220/1977; AIR 1977 SC 1443;

<sup>3</sup> This flows directly from Section 13(4) of the Copyright Act, 1957.

<sup>4</sup> MANU/SC/0220/1977, paras.16-17.

<sup>5</sup> Section 14(e)(iii) of the Copyright Act, 1957; see *IPR Society v EIMP Association*, MANU/SC/0220/1977, at para.16

producer of the sound recording has obtained the requisite license to, or transfer of, the right to make the sound recording from the lyricist or composer, since the lyricist or composer has the exclusive right to make a sound recording in respect of their works.<sup>6</sup>

Aside from the above, the lyricist / composer enjoys all the other rights with respect to their work, such as, for instance, the right to perform the work in public, whether for profit or otherwise, de hors the sound recording or cinematograph film.<sup>7</sup>

- b. Secondly, the producer of a sound recording can completely defeat the rights of the lyricist / composer, in accordance with Section 17, i.e., where the producer of the sound recording, rather than the lyricist / composer, becomes the first owner of the copyright. The Supreme Court held that under Section 17 (b), if the cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration to composing music or lyric for the purpose of making his cinematograph film, the producer of the film or sound recording, becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music, unless there is a contract to the contrary.<sup>8</sup>

At first glance, it would appear that the Supreme Court's interpretation of Section 17(b) seems patently incorrect. A bare perusal of the Section 17(b) would highlight that it governs the commissioning of a limited set of works – photographs, paintings / portrait / engraving, cinematograph films – and not with literary or musical works. However, what the Supreme Court effectively seems to have held is that if the lyric or music was composed for the first time as part of, and for the purpose of, making a cinematograph film, i.e., the creation of the lyric or music composition in question is intimately and integrally connected with the cinematograph film, then the producer of the film, rather than the lyricist or composer, is the first owner of the work under Section 17(b). This interpretation flows from

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<sup>6</sup> Section 14(a)(iv) of the Copyright Act, 1957; this is fortified by Section 13(3)(ii) of the the Copyright Act, 1957, which states that copyright shall not subsist in, *inter alia*, a sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in the literary, dramatic or musical work has been infringed.

<sup>7</sup> See *IPR Society v EIMP Association*, MANU/SC/0220/1977, at para.16.

<sup>8</sup> *IPR Society v EIMP Association*, MANU/SC/0220/1977, at para.18.

the logic that a cinematograph film is combination of multiple underlying works, where the various underlying works are seamlessly and indistinguishably weaved together.<sup>9</sup> This idea has now been legislatively ratified by way of an amendment to Section 2(f) in 1994, whereby a sound recording accompanying the visual images / recording has been expressly included within the definition of ‘cinematograph films’.

The Supreme Court further held that the same result is arrived at under Section 17(c), if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work<sup>10</sup>. Of course, it is doubtful whether in the current system of operations in the film industry, the work of a lyricist or a composer could be considered to have been created in the “course of employment” under a ‘contract of service’, considering that lyricists and composers create their works as persons in business on their own account.<sup>11</sup>

Needless to mention, if the producer of the sound recording is the owner of the copyright over the works of the lyricist and composer, he would not require any license from the lyricist / composer to make and exploit sound recordings. In most instances, the lyric or composition is created at the instance of, and for the purpose of, making a cinematograph film and hence, the producers become the first owner of the copyright over the lyric or composition. To this extent, the rights of the lyricist and composers<sup>12</sup> over their works, do not exist.

It follows from the above that *irrespective of whether the principle enunciated in (a) or (b) applies* in a given case, the lyricist / composer cannot interfere with the broadcast of sound recording that has been authorized by the producer of that sound recording, so long as the sound recording itself was not made without authorization from the lyricist / composer. Most of the existing legal debate, both in judicial and academic circles, is a result of an incorrect understanding of the above two principles. For instance, in *Radio Today Broadcasting Ltd v Indian Performing Rights Society* (2007 (34) PTC 174 (Cal)), the Hon’ble Calcutta High Court, in the course of disposing an interim application, was seized with the question of whether “Radio Today” would be obliged to pay royalty or licence fee to

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<sup>9</sup> See *IPR Society v EIMP Association*, MANU/SC/0220/1977, at para.17.

<sup>10</sup> *Id.* at para.16.

<sup>11</sup> See *Gee Pee Films v. Pratik Chowdhury*, MANU/WB/0335/2001, at paras.16, 18, 20 (the Hon’ble Calcutta High Court held that the composition of lyrics and music was not under a ‘contract of service’ in that case; the Hon’ble High Court, during the course of the judgment, referred to the case of *Market Investigations Ltd. v Minister of Social Security* (1969) 2 QB 173)

<sup>12</sup> Except “moral rights” under Section 57 of the Copyright Act, 1957

Indian Performing Rights Society (a society of lyricists and composers), if songs, whose lyrics were penned and music composed by the members of the society, are broadcast through the radio station, in addition to the licence fees paid to the producers (Phonographic Performance Limited, a society of producers). The Court ruled against “Radio Today” and held that unless it can be shown that the members of Indian Performing Rights Society had assigned their exclusive rights to the producers by way of an agreement, Indian Performing Rights Society is entitled to claim royalties from “Radio Today”. Although the Supreme Court’s decision in the *IPRS* case was cited in this case, one can clearly see the manner in which the Hon’ble High Court had completely misapplied the decision.

However, as per the judgment available currently on the internet,<sup>13</sup> the Bombay High Court in the opinion of the authors, seems to have correctly interpreted the position of law and held that as regards the radio transmission of sound recordings, it is the producers who have be paid royalties and not the lyricists and composers.<sup>14</sup> After all, Section 14(e)(iii), grants the producers of sound recordings, the exclusive right to communicate the sound recording to public or *authorize any other person* to do so. At the same time, Hon’ble Justice S J Vazifdar very rightly held that composers and lyricists do not lose all their rights when they allow their work to be recorded in the form of a sound recording;<sup>15</sup> the owners of the copyright in the underlying musical and literary works are allowed to make any other sound recording embodying the same underlying work, so long as such rights have not been transferred otherwise.

Thus Bombay High Court, therefore, seems to have enunciated the correct position of law, which squarely fits with the scheme of the Copyright Act, 1957 as well as the Supreme Court’s decision. Of course, the larger question is whether this position of law truly “serves the ends of justice” and recent controversies, including the pending Copyright Amendment Bill, 2010 stands evidence to the existence of a substantial body of opinion that holds the answer to this question to be in the negative.

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<sup>13</sup> *Music Broadcast Private Limited v. Indian Performing Right Society*, available at <http://indiankanoon.org/doc/1064366/> (last visited 29<sup>th</sup> July, 2011)

<sup>14</sup> *Id.* at paras.36-38, 84.

<sup>15</sup> *Id.* at para.37, 40-42